

## CHAPTER 12

# MECHANIC'S LIENS IN PENNSYLVANIA

## EXECUTIVE SUMMARY

### Distinctive Features of the Law in Pennsylvania

Pennsylvania has a fairly powerful mechanic's lien statute. The mechanic's lien has a high priority compared to many other liens on the property because it usually "relates back" to the time when work visibly commences. Generally, the mechanic's lien for new construction will have priority over all liens on the property, except an acquisition loan or construction loan. In addition, lien rights for new construction will also survive any foreclosure or sale of the property, except foreclosure on an acquisition loan or construction loan.

Owners of projects costing more than over one and a half million dollars (\$1,500,000) have the option of filing a Notice of Commencement of construction. If an owner files a Notice of Commencement, then all potential lien claimants that wish to preserve lien rights must file a Notice of Furnishing within 45 days after first supplying labor or material to the project.

The owner does not have an automatic "defense of payment" against mechanic's liens on commercial projects in Pennsylvania. However, in most owner-occupied residential projects, the owner will have a defense of payment to a subcontractor lien if the owner has paid the general contractor in full. Any owner can also protect itself from paying for the project twice by recording a copy of the general contract with the court before any work is performed on the project.

General contractors can waive lien rights for lower tier subcontractors by filing a "Stipulation Against Liens" on most residential projects and on all projects if the general contractor posts a payment bond.

In Pennsylvania, lien rights extend to general contractors, subcontractors and sub-subcontractors (contractors and suppliers who have a direct contract with subcontractors).

A notice of intent to lien to an owner is due 30 days before the Lien Claim is filed for subcontractors and sub-subcontractors. For all claimants, the Lien Claim must be filed in court within six months of the claimant's last work. Within one month after the initial claim filing, written notice of the filing of the lien must be served on the owner. An affidavit of service then must be filed with the court within 20 days after service of the written notice to the owner. After these requirements are met, however, no further action is necessary for two years. This usually means a contractor can inexpensively preserve rights.

### Deadline Summary

**Prefiling before Construction.** All potential lien claimants may need to file a Notice of Furnishing within 45 days after first supplying labor or material, if the project cost is over one and a half million dollars (\$1,500,000) and the owner has filed a Notice of Commencement.

#### **Lien Filing and/or Service after Labor or Materials Supplied.**

**Formal Notice**—All subcontractors and sub-subcontractors must serve a Formal Notice of their intention to file a lien on the owner at least 30 days before filing Lien Claim.

**Lien Claim**—All claimants must file a Lien Claim in the prothonotary's (court clerk's) office within six months of last work and serve notice of the lien claim on owner within one month after that. An affidavit of service then must be filed with the court within 20 days after service of the written notice on the owner.

**Enforcement.** All claimants must enforce by filing a lawsuit within two years of Lien Claim filing.

### Defense of Payment: Owner's Responsibility for Payment to Subcontractors

There is no automatic defense of payment for Pennsylvania commercial project owners. Even if the owner has paid the general contractor in full, the basic rule is that a subcontractor will be able to establish a lien and eventually foreclose on the property. The burden is on the owner to make sure that all subcontractors are paid.

Any owner can create a defense of payment by filing a copy of the general contract in the prothonotary's (clerk's) office before commencing construction or by giving the subcontractor written notice of the contract payment provisions.<sup>1</sup> This will limit each subcontractor to a pro rata share of money still owed the general contractor.<sup>2</sup>

In most owner-occupied residential projects, the owner will have an automatic defense of payment to a subcontractor lien. Any subcontractor lien will fail if the owner or tenant has paid the full contract price to the general contractor and the project was a single townhouse or a one- or two-dwelling unit residential building intended to be used as the residence of the owner or a tenant of the owner.<sup>3</sup>

## Remote Subcontractor and Supplier Liens

Mechanic's lien rights are restricted to the general contractor, the subcontractors and those with a direct contract with subcontractors.<sup>4</sup> Nobody below this level of sub-subcontractors has lien rights. This will leave some suppliers without lien rights, unless they deal directly with the owner, the general contractor or a subcontractor. A supplier to a supplier never has lien rights.<sup>5</sup>

## Priority

The general rule for liens is they are given priority in the order in which they are filed. The first in time filed in the land records will be the "first mortgage," with the first priority to any proceeds from a foreclosure or sale of the property. If another mortgage is filed in the land records later in time, it will be a "second mortgage." If the property is foreclosed, this second mortgage will not receive any proceeds until after the first mortgage has been paid in full.

There are very few exceptions to this "first in time, first in right" general rule. One exception is county real estate tax liens, which will always have priority over other liens no matter when they are filed. Another exception is mechanic's liens that are "inchoate," such as liens in Pennsylvania. The inchoate Pennsylvania mechanic's lien "relates back" to and exists from the moment labor or material is visibly supplied to the property, as long as the claimant eventually perfects the lien. Most liens recorded after work visibly began on the property will be inferior to the mechanic's lien. However, purchase money mortgages and open-ended construction loans will normally have priority over mechanic's liens.

Lenders can essentially "hold their place" by recording a construction loan that states a maximum future amount. If a construction loan is properly filed and at least 60% of the mortgage proceeds are intended for or used to pay construction costs, the lender can advance future funds up to the maximum amount of the construction loan without checking for visible commencement of work on the security property.<sup>6</sup> Mortgages held by construction lenders will usually be open ended. "Purchase money mortgages" are used to purchase property. A lender can advance funds to purchase property without checking for visible commencement of work on the security property.

With the exception of purchase money mortgages and construction loans, the Pennsylvania mechanic's lien has priority over all other liens filed with the court after the date of "visible commencement" of work on the property in the case of new construction.<sup>7</sup> When the improvement made is an alteration or repair, the lien is not inchoate and the priority of the mechanic's lien begins as of the date of the filing of the claim.<sup>8</sup>

## Sale or Foreclosure of Property

The priority of various liens on real property also determines whether or not the liens survive foreclosure or other sale of the property. Upon foreclosure by any lien holder, all inferior liens are eliminated. The inferior lien holders have no security interest in the property after foreclosure. When any lien holder forecloses on real property, all liens that are prior will survive the foreclosure. The foreclosure purchaser now owns the property "subject to" the prior liens.

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<sup>1</sup> 49 P.S. §1405.

<sup>2</sup> 49 P.S. §1405.

<sup>3</sup> 49 P.S. §1301(b).

<sup>4</sup> 42 P.S. §1201.

<sup>5</sup> 49 P.S. §1201(5); 49 P.S. §1301(a); 49 P.S. §1303(a).

<sup>6</sup> 42 Pa. C.S.A. §8143 and 42 Pa. C.S. §8143(b).

<sup>7</sup> 49 P.S. §1508(a); *Knoell v. Carey*, 291 Pa. 531, 140 A. 522 (1928).

<sup>8</sup> 49 P.S. §1508(b).

Since Pennsylvania mechanic's liens are inchoate and prior to many other liens, they survive some foreclosures and can actually be filed after foreclosure.<sup>9</sup> A lender could foreclose on a piece of real estate only to see a mechanic's lien filed after they have taken title. The mechanic's lien claimant must be certain to name the new property owner in the mechanic's lien, but lien rights otherwise still exist. Since purchase money mortgages and construction loans are superior to mechanic's liens, however, foreclosure on these types of mortgages would cut off lien rights.

Mechanic's lien rights for the construction of new improvements survive any other type of sale of the property. Any real estate purchaser must be aware that mechanic's liens, for labor and materials supplied to the prior owner, might be filed after they purchase the property. A Lien Claim for alterations or repairs is not as strong as a claim for new construction. If property is conveyed in good faith and for valuable consideration prior to filing a claim for alterations or repairs, the lien is lost.<sup>10</sup>

## Bankruptcy

The "automatic stay" of the United States Bankruptcy Code does not stay the perfection of the mechanic's lien claim for new construction. This is because the lien is inchoate. The claimant already had the lien, so the filing does not change anything and is not a preference. In fact, it is important to keep in mind that the Formal Notice of Intent *must* still be served on the owner and the Lien Claim must be filed within the normal time limits.

The bankruptcy of an owner or upstream contractor should delay enforcement of a mechanic's lien (by filing a lawsuit), however. It is not permissible to enforce a mechanic's lien without permission of the Bankruptcy Court, but the claimant is provided additional time later to enforce the mechanic's lien.

In the case of alteration or repair contracts in Pennsylvania, however, the claimant has no lien until the Lien Claim is filed, and filing a Lien Claim after a bankruptcy petition would violate the automatic stay.<sup>11</sup> In other words, a bankruptcy by the owner or an upstream contractor would probably eliminate lien rights for alteration or repair contracts.

## Tenant Work

A claimant who does tenant improvements can obtain a lien on the leasehold interest.<sup>12</sup> The end result would be a foreclosure on the leasehold. If the lease ends due to default or expiration, the lien will continue, at least as to fixtures, machinery or other similar properties.<sup>13</sup> Work for a tenant does not result in lien rights against the owner, however, unless the owner authorized the construction or improvements in writing.<sup>14</sup>

## Lien Waivers—GC Waiver of Sub Lien

Pennsylvania mechanic's lien law is somewhat unique in that some general contractors can waive a subcontractor's right to a mechanic's lien. Contractors can waive lien rights for lower tier subcontractors on most residential projects and on all projects if the general contractor posts a payment bond to cover the value of the labor and materials provided. Lien waivers by a general contractor are made by filing a "Stipulation Against Liens" (Stipulation), often referred to as a "Stip," with the prothonotary's office in the county where the project is located. The Stipulation must be in proper form and must be filed and properly indexed to be valid.

## NOTICE OF COMMENCEMENT & NOTICE OF FURNISHING

Pennsylvania is a "Notice to Owner" state for any project over one and a half million dollars (\$1,500,000), defined as a "Searchable Project." Pennsylvania has a central Internet-based State Construction Notices Directory for (1) Notices of Commencement; (2) Notices of Furnishing; (3) Notices of Completion; and, (4) Notices of Nonpayment at <https://apps.pa.gov/scnd>.

Owners, general contractors, lenders and title insurance companies, who were in favor of these revisions, will probably always post Notices of Commencement on Searchable Projects. This will lower the risk of mechanic's

<sup>9</sup> See section below, Priority.

<sup>10</sup> 49 P.S. §1303(c).

<sup>11</sup> *Northup v. Ben Thompson Enterprises*, 220 B.R. 855, 859 (Bankr. E.D. Pa. 1998); *In re Poloron Products*, 76 B.R. 383 (Bkrcty.M.D.Pa. 1987).

<sup>12</sup> 49 P.S. §1201(3).

<sup>13</sup> 49 P.S. §1509.

<sup>14</sup> 49 P.S. §1303(d); *Key Automotive Equipment Specialists, Inc. v. Abernethy*, 431 Pa. Super. 358 (1994).

liens. Lien claimants have at least one more administrative procedure and cost to preserve lien rights on construction projects over \$1,500,000 (Searchable Projects) and this will be one more opportunity to lose lien rights. However, lien claimants that do post a Notice of Furnishing on the Notices Directory are more likely to be paid and less likely to need Lien Claims or lawyers.

The Pennsylvania Department of General Services created the State Construction Notices Directory, to serve as a standardized statewide system for filing construction notices.

Construction projects over one and a half million dollars (\$1,500,000) are “Searchable Projects.”<sup>15</sup> This will apply to any new erection or construction, or the alteration or repair of an existing improvement. The defined cost minimum of \$1,500,000 will probably include all hard and soft “costs of construction.”<sup>16</sup> Owners of Searchable Projects have the option to file a “Notice of Commencement” with the Directory prior to the commencement of labor, work or the furnishing of materials.<sup>17</sup> If the Searchable Project owner files a Notice of Commencement, then any subcontractor or sub-subcontractor (potential lien claimant) must file a “Notice of Furnishing” with the Directory within 45 days after first performing work or services at the job site or providing materials to the job site.<sup>18</sup> Any potential lien claimant that fails to file a Notice of Furnishing forfeits the right to file a mechanic’s lien claim.<sup>19</sup> General contractors do not need to file a Notice of Furnishing to preserve lien rights.

In short, owners and general contractors will make use of the new Notice system in Pennsylvania. Subcontractors and suppliers must also engage in the new system if they wish to make sure they are paid for their labor or material after the new Notice system was initiated December 31, 2016.

## Notice of Commencement

The Notice of Commencement filed by the owner must include the following:<sup>20</sup>

1. Full name, address and email address of the contractor.
2. Full name and location of the searchable project.
3. The county in which the searchable project is located.
4. The legal description of the property, including tax identification number(s).
5. Full name, address and email address of the searchable project owner.
6. If applicable, the full name, address and email address of any surety providing performance and payment bonds and the bond numbers.
7. The unique identifying number assigned to the Notice of Commencement.
8. The number of the building permit for the searchable project.<sup>21</sup>

A contractor may act as agent for the Searchable Project owner to file a Notice of Commencement, if specifically authorized by contract and the owner assumes responsibility for the contractor’s actions. There will be an administrative fee to Searchable Project owners to file a Notice of Commencement.

The owner must also conspicuously post a copy of the Notice of Commencement at the site of the project before physical work commences, including the unique identifying number assigned to the Searchable Project. The owner must also take reasonable measures to ensure that the Notice of Commencement remains posted at the Searchable

<sup>15</sup> 49 P.S. §1201(17).

<sup>16</sup> 49 P.S. §1201(15) [“Costs of construction” means all costs, expenses and reimbursements pertaining to erection, construction, alteration, repair, mandated off-site improvements, government impact fees and other construction-related costs, including, but not limited to, costs, expenses and reimbursements in the nature of taxes, insurance, bonding, inspections, surveys, testing, permits, legal fees, architect fees, engineering fees, consulting fees, accounting fees, management fees, utility fees, tenant improvements, leasing commissions, payment of prior filed or recorded liens or mortgages, including mechanics liens, municipal claims, mortgage origination fees and commissions, finance costs, closing fees, recording fees, title insurance or escrow fees, or any similar or comparable costs, expenses or reimbursements related to an improvement made or intended to be made to the property. For purposes of this definition, reimbursement includes any such disbursements made to the borrower, any person acting for the benefit or on behalf of the borrower or to an affiliate of the borrower].

<sup>17</sup> 49 P.S. §1501.3(a)(1).

<sup>18</sup> 49 P.S. §1501.3(b)(1).

<sup>19</sup> 49 P.S. §1501.3(c).

<sup>20</sup> 49 P.S. §1501.3(a)(3).

<sup>21</sup> 49 P.S. §1501.5(f)(3). It is not clear whether a failure to include the building permit number invalidates the Notice of Commencement and means that there is no loss of lien rights to potential claimants.

Project site until completion.<sup>22</sup> The owner and the contractor must also make reasonable efforts to ensure that the Notice of Commencement is made part of contract documents provided to all subcontractors on the project.<sup>23</sup>

A potential lien claimant on a Searchable Project has no obligation to file a Notice of Furnishing and will not forfeit lien rights unless a Notice of Commencement has been filed and posted in accordance with the new 49 P.S. §1501.3(b).<sup>24</sup> Future court case law will have to tell us what rules are critical to a valid Notice of Commencement, whether factual errors or failure to include a building permit number are fatal and the extent of reasonable measures necessary to ensure that the Notice of Commencement remains posted at the site.

## Protections and Penalties

A contract for a Searchable Project must include written notice that failure to file a Notice of Furnishing will result in the loss of lien rights.<sup>25</sup> The notice must be as follows:

A subcontractor that fails to file a Notice of Furnishing on the Department of General Services publicly accessible Internet website as required by the act of August 24, 1963 (P.L. 1175, No. 497), known as the Mechanics' Lien Law of 1963, may forfeit the right to file a mechanics lien. It is unlawful for a searchable project owner, searchable project owner's agent, contractor or subcontractor to request, suggest, encourage or require that a subcontractor not file the required notice as required by the Mechanics' Lien Law of 1963.

This requirement may apply only to a "contract" with the general contractor, although the intent was probably to include it also in all sub-subcontracts.

It will be a second degree criminal misdemeanor for an owner, the owner's agent, a contractor, or a subcontractor to request, suggest, encourage or require that a subcontractor not file a Notice of Furnishing as a condition of entering into, continuing, receiving or maintaining a contract for work or furnishing materials on a Searchable Project.<sup>26</sup> If a subcontractor can prove it did not file a Notice of Furnishing as a direct result of such action, the subcontractor retains lien rights and may also obtain actual damages and attorney's fees.<sup>27</sup> Any person that "abuses" the Directory will be liable for the amount of actual damages or \$2,000, whichever is greater.<sup>28</sup> A person abuses the Directory if the person files a Notice in the Directory (1) without a good faith reason to do so, (2) with the intent to exact more payment than is due, and (3) to obtain an unjustified advantage or benefit.<sup>29</sup> These "prohibitions" in the code revisions are effective now, even though the revisions regarding notices will not be effective until the Directory is operational.<sup>30</sup>

## Notice of Furnishing

If the Searchable Project owner files a Notice of Commencement, then any potential lien claimant must file a "Notice of Furnishing" with the Directory within 45 days after first performing work or services at the job site or providing materials to the job site. Any potential lien claimant that fails to file a Notice of Furnishing forfeits the right to file a mechanic's lien claim. However, filing a Notice of Furnishing does not relieve the potential lien claimant of the need to file an actual Lien Claim or to comply with the other code requirements for preserving lien rights.

The Notice of Furnishing filed by a potential lien claimant must contain the following:<sup>31</sup>

1. A general description of the labor or materials furnished.
2. Full name and address of the person supplying the services or items (potential lien claimant).
3. Full name and address of the person that contracted for the services or items.

<sup>22</sup> 49 P.S. §1501.3(a)(4) [The term "reasonable measures" means the reposting of notice by the searchable project owner within 48 hours after becoming aware of or being notified verbally, in writing or by email that the notice is not posted].

<sup>23</sup> 49 P.S. §1501.3(a)(5).

<sup>24</sup> 49 P.S. §1501.3(b).

<sup>25</sup> 49 P.S. §1501.2.

<sup>26</sup> 49 P.S. §1501.6(a).

<sup>27</sup> 49 P.S. §1501.6(b) and (c).

<sup>28</sup> 49 P.S. §1501.6(d) and (e).

<sup>29</sup> It is not clear whether a person must be guilty of all three abusive activities or any of the three to be liable for damages.

<sup>30</sup> The Definitions in 49 P.S. §1201 and instructions for the creation of the Directory in 49 P.S. §1501.1 are also now in effect.

<sup>31</sup> 49 P.S. §1501.3(b).

4. A description sufficient to identify the Searchable Project, based on the description in the Notice of Commencement.
5. The name of the county in which the Searchable Project located.<sup>32</sup>
6. The tax identification number of each parcel included in the Searchable Project.
7. The number of the building permit for the Searchable Project.

The Notice of Furnishing must be substantially in the following form:

### Notice of Furnishing

To: (Name of searchable project owner)  
 (Address of searchable project owner)  
 (Notice of Commencement Number)

Please take notice that the undersigned is performing certain work or labor or furnishing certain materials to ..... (Name and address of other contracting party) in connection with the improvement to the real property located at ..... The labor, work or materials were performed or furnished first, or will be furnished first on ..... (date).

(Name and Address of Lien Claimant)  
 By  
 (Name and capacity of party signing for lien claimant)  
 (Address of Signing Party)  
 (Date)

It seems that a potential lien claimant must also include in the Notice of Furnishing the name of the county, the tax identification number of each parcel included in the Searchable Project and the number of the building permit, although this form does not include this information.<sup>33</sup>

### Notice of Completion

A Searchable Project owner has the option of also filing a “Notice of Completion” within 45 days of the actual completion of work on the project.<sup>34</sup> This Notice of Completion is optional and has no impact on the lien rights of potential lien claimants. The Notice of Completion will be transmitted via the Directory to all potential lien claimants who have filed Notices of Furnishing. The term “actual completion of work” means (1) the issuance of an occupancy permit and the acceptance of the work, accompanied by cessation of all work on the Searchable Project; or (2) the cessation of all work for 30 consecutive days, provided that work is not resumed under the same contract.<sup>35</sup> There is no apparent advantage to an owner in filing a Notice of Completion and it may actually incite potential lien claimants to file their Lien Claim.

### Notice of Nonpayment

A potential lien claimant also has the option of filing a “Notice of Nonpayment” for informational purposes only.<sup>36</sup> This Notice of Nonpayment is optional, apparently can be sent at any time payment has not been received, and also has no impact on the lien rights of potential lien claimants. However, filing a Notice of Nonpayment will probably increase the chances of payment to a potential lien claimant without a Lien Claim filing, especially if the owner has no defense of payment or stipulation against liens in place. Filing a Notice of Furnishing does not relieve the

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<sup>32</sup> 49 P.S. §1501.5(f).

<sup>33</sup> 49 P.S. §1501.5(f).

<sup>34</sup> 49 P.S. §1501.4(a).

<sup>35</sup> 49 P.S. §1501.4(c) [A Notice of Completion shall not be considered by a court in determining compliance with timing requirements under this Act or in determining the completion date for a timing purpose, including limitation periods or warranty obligations. The filing of a Notice of Completion is purely precatory (advisory) and is not dispositive of any relationship among the parties].

<sup>36</sup> 49 P.S. §1501.4(b).

potential lien claimant of the need to file a Lien Claim or to comply with the other code requirements for preserving lien rights.

### Request for Notices

Any person has the option of filing a request for notification of any Notice of Commencement, Notice of Furnishing, Notice of Completion, or Notice of Nonpayment filed.<sup>37</sup> Lenders and general contractors may want to do this, since they may not otherwise receive such notices. Any person that has filed a Notice of Commencement, Notice of Furnishing, or Notice of Completion should automatically receive any further notices filed.<sup>38</sup> However, any owner or potential lien claimant may want to also request further notices, to make sure they promptly receive all notices. Any person requesting further Notices must (1) provide an email address, mailing address or telefax number to which notification may be sent; and (2) be responsible for the accuracy of the email address, mailing address or telefax number.<sup>39</sup> A request for further Notices must probably also contain the name of the county where the Searchable Project is located, the tax ID number(s) of the property involved and the building permit number.<sup>40</sup>

### Practical Application and General Recommendations

A potential lien claimant on a Searchable Project has no obligation to file a Notice of Furnishing and will not forfeit lien rights unless a Notice of Commencement has been filed and posted in accordance with 49 P.S. §1501.3(b).<sup>41</sup> Future court case law will have to tell us what rules are critical to a valid Notice of Commencement, whether factual errors or failure to include a building permit number are fatal and the extent of reasonable measures necessary to ensure that the Notice of Commencement remains posted at the site.

It is up to anyone filing any type of Notice to make sure it has been accurately entered in the State Construction Notices Directory in accordance with the statute.<sup>42</sup> This probably means that owners and potential lien claimants bear the risk of administrative errors entering data in the Directory.

Owners, general contractors, lenders and title insurance companies will probably now always require Notices of Commencement on projects over \$1,500,000, in addition to recordation of general contracts in order to create a defense of payment against subcontractor liens and stipulations against lien when possible. Construction lenders and their title insurers will probably always require a Notice of Commencement as a condition of any loan. Owners filing a Notice of Commencement or Notice of Completion will pay the only fees to finance the State Construction Notices Directory. However, filing a Notice of Commencement will significantly reduce the threat of mechanic's liens filed on the project. Many potential lien claimants will simply fail to file Notices of Furnishings and forfeit their lien rights as a result. The potential lien claimants that do file Notices of Furnishings will provide owners, general contractors and lenders with a complete list of potential lien claimants from whom the owners, general contractors, lenders and title companies know they must obtain lien waivers as a condition of final payment.

Owners may authorize and require general contractors to file the Notice of Commencement, but owners must make sure that the authorization is in the general contract, along with an explicit assumption of responsibility for the general contractor's actions in filing the Notice of Commencement.<sup>43</sup> In any event all owners, lenders and general contractors will want to independently confirm that the Notice of Commencement has been accurately entered in the State Construction Notices Directory in accordance with the statute.<sup>44</sup> Even an error by the Directory administration may eliminate the protections from mechanic's liens.

Subcontractors and suppliers in Pennsylvania must check the State Construction Notices Directory for a Notice of Commencement before or soon after starting work. Subcontractors and suppliers should already be checking the local prothonotary (court clerk) offices for stipulations against liens before signing subcontracts, especially on residential projects. Checking the Directory for Notices of Commencement will be easier, since it can be done anywhere the Internet is available. We believe that the best practice will be for subcontractors and suppliers in

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<sup>37</sup> 49 P.S. §1501.5.

<sup>38</sup> 49 P.S. §1501.5(c).

<sup>39</sup> 49 P.S. §1501.5(b).

<sup>40</sup> 49 P.S. §1501.5(f).

<sup>41</sup> 49 P.S. §1501.3(b).

<sup>42</sup> 49 P.S. §1501.5(e).

<sup>43</sup> 49 P.S. §1501.3(a)(2).

<sup>44</sup> 49 P.S. §1501.5(e).

Pennsylvania to require or obtain copies of Notices of Commencement and the building permit in connection with signing a subcontract. The Notices of Commencement should be available on the Internet and should be included in all potential lien claimants' contract documents. The building permit number may not be on the Notice of Commencement and will be harder to get, but will be needed to file a Notice of Furnishing.

If a Notice of Commencement has been filed, subcontractors and suppliers in Pennsylvania must file a Notice of Furnishing. Otherwise they will be without mechanic's lien rights, an important security to obtain payment and protect against customer bankruptcy. Perhaps more important, filing a Notice of Furnishing will generally result in payment to subcontractors and suppliers in Pennsylvania, without the need to hire lawyers or file Lien Claims. Apparently, there will be no fee to potential lien claimants to file a Notice of Furnishing. Potential lien claimants should be able to file Notices of Furnishing or Nonpayment without legal assistance and must commit the resources to train personnel to perform this function.

## TIME LIMITS FOR THE LIEN CLAIM

### Completion of Project and Claimant's Last Work

The time limits to file the actual Lien Claim or to serve notice are based on the date of completion of the claimant's work, not from the date of completion of the entire project.<sup>45</sup> The work is complete when the claimant has performed the last of the labor or delivered the last of the materials required by the terms of the claimant's contract.<sup>46</sup>

### Supplying Additional Labor or Materials to Extend Time

Claimants cannot tack on additional material or labor to a contract for the purpose of extending the time to file a claim.<sup>47</sup> There is no strict test in Pennsylvania to determine whether mechanic's lien rights will be extended by supplying small amounts of labor or materials, especially punch list or repair work. The courts seem to use a case-by-case analysis to determine whether work was performed solely for the purpose of extending the time limitation or was provided to complete work provided by the contract. It is prudent to count deadlines from the last substantial new work. Warranty work and repair work may not extend the filing deadlines.<sup>48</sup> It can also be problematic if long periods of time pass without any work.

### Multiple Contracts—Deadlines for Open Account Suppliers

If a claimant has multiple contracts to supply labor and materials on a single project, the claimant can "consolidate" the contracts into a single claim.<sup>49</sup> In this situation, the work is completed when the last contract is completed.<sup>50</sup> This means that an open account supplier can generally count their deadline from their last delivery.<sup>51</sup> If long periods of time pass between deliveries, it is safest to count deadlines separately for each delivery and file accordingly.

## FORMAL NOTICE OF INTENT: ALL SUBCONTRACTORS

All subcontractors, regardless of the type of project, must give the owner Formal Notice of their intent to file a claim 30 days prior to filing a mechanic's lien claim.<sup>52</sup> This would include a claimant with a contract directly with the general contractor or a claimant with a contract with a subcontractor, who in turn had a contract directly with the general contractor.<sup>53</sup> These notice requirements will be strictly construed. If no notice is given, the lien will be stricken. However, substantial compliance is sufficient as to the form of the notice.<sup>54</sup>

<sup>45</sup> 49 P.S. §1502(a)(1).

<sup>46</sup> 49 P.S. §1201(8); *G.E.M. Building Contractors and Developers, Inc. v. Egidio's, Inc.*, 14 Pa. D. & C. 4th 609 (1992).

<sup>47</sup> *Felheim v. Perry Brewing Co.*, 63 Pa. Super. 561 (1961).

<sup>48</sup> *McKelvey v. Jarvis*, 87 Pa. 414 (1878).

<sup>49</sup> 49 P.S. §1306(a); *McCready-Redgers Co. v. Nenoff, et. al.* 39 A.2d 260 (Pa. 1944).

<sup>50</sup> 49 P.S. §1306(a).

<sup>51</sup> *Rome Elec. Co. v. R. & F. Const., Inc.*, 70 Pa. D. & C.2d 168 (1974).

<sup>52</sup> 49 P.S. §1501(B.1).

<sup>53</sup> 49 P.S. §1201(5).

<sup>54</sup> *L&W Supply Corp. v. Amin*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 672, 5-6 (Pa. County Ct. 2010, citing *Tesauro v. Baird*, 232 Pa. Super. 185, 335 A.2d 792, 796 (Pa. Super. 1975)).



## Form of Notice

The Formal Notice must include:

1. The name of the claimant,
2. The name of the person with whom the claimant contracted,
3. The amount claimed,
4. The general nature and character of labor or materials furnished,
5. The date of completion of claimant's work, and
6. A description of the property.

## Deadline for Notice

The Formal Notice must be given to the owner *at least* 30 days before the Lien Claim is actually filed with the court.<sup>55</sup> As discussed below, the actual Lien Claim must be filed within six months of the claimant's last work.<sup>56</sup> Accordingly, the Formal Notice should be given to the owner no later than approximately five months after completion of the subcontractor's work. It is impossible to give a Formal Notice too soon. Providing notice to an owner and the construction lender early will freeze money to the owner, general contractor and subcontractors. Filing the Formal Notice early will also allow the claimants to file the Lien Claim sooner, accelerating the entire process.

## Delivery of Notice

The Formal Notice can be served by first-class, registered or certified mail on the owner or the owner's agent.<sup>57</sup> The notice can also be served by the sheriff or a private process server.<sup>58</sup> If service cannot be made by any of these methods, then the claimant can "post" the notice on a conspicuous, public part of the project.<sup>59</sup> This will rarely be an acceptable method, since the preferred methods are usually available.

## LIEN CLAIM: ALL CLAIMANTS

All mechanic's lien claims must be filed in the prothonotary's office within six months of the claimant's last work.<sup>60</sup> A Lien Claim can be invalid if the prothonotary (clerk) fails to properly enter the Lien Claim in the judgment index as well as the mechanic's lien index.<sup>61</sup>

This is the first deadline for any "contractor claimant"—that is, a claimant who has a contract directly with the owner.<sup>62</sup>

## Form of Claim

The Lien Claim must state:

1. The name of the claimant and whether the claimant files as a contractor or a subcontractor.
2. The name and address of the owner or reputed owner.<sup>63</sup>
3. The date of completion of the claimant's work.<sup>64</sup>
4. If filed by a subcontractor, the name of the person with whom the claimant contracted<sup>65</sup> and the dates on which the Formal Notice was given.

<sup>55</sup> 49 P.S. §1501(B.1); *Green Hills Lumber Co. v. Williams*, 32 Pa. D. & C.2d 759 (1963).

<sup>56</sup> 49 P.S. §1502(a)(1); *Brant v. Hardick*, 60 Pa.Super. 507 (1915); *McCready-Redgers Co. v. Nenoff, et. al.*, 39 A.2d 260 (Pa. 1944).

<sup>57</sup> 49 P.S. §1501(d).

<sup>58</sup> 49 P.S. §1501(d).

<sup>59</sup> 49 P.S. §1501(d); *Clemleddy Construction, Inc. v. Yorston*, 2002 Pa.Super. 342, 810 A.2d 693 (2002).

<sup>60</sup> 49 P.S. §1502(a)(1); *Hamilton v. Means*, 155 Pa.Super. 245, 38 A.2d 528 (1944).

<sup>61</sup> 49 P.S. §1507; *Delmont Mech. Servs. v. Kenver Corp.*, 450 Pa. Super. 666, 674-75, 677 A.2d 1241, 1245-46 (Pa. Super. Ct. 1996).

<sup>62</sup> 49 P.S. §1201(4).

<sup>63</sup> *Delmont Mech. Servs. v. Kenver Corp.*, 450 Pa. Super. 666, 674, 677 A.2d 1241, 1245-46 (Pa. Super. Ct. 1996) [failure to correctly name the owner of the property is a fatal defect and renders the lien invalid].

<sup>64</sup> *Leeward Constr. v. SCP 2007-C27-093 LLC*, 5 Pa. D. & C.5th 377, 2008 Pa. Dist. & Cnty. Dec. LEXIS 138 (Pa. County Ct. 2008).

<sup>65</sup> *Leeward Constr. v. SCP 2007-C27-093 LLC*, 5 Pa. D. & C.5th 377, 2008 Pa. Dist. & Cnty. Dec. LEXIS 138 (Pa. County Ct. 2008).

5. A detailed statement of the kind and character of the labor and materials furnished and the prices charged for each.<sup>66</sup>

**or**

If the claim is filed by a contractor pursuant to a contract for an agreed sum, an identification of the contract and a general statement of the kind and character of the labor and materials furnished.

6. The amount claimed to be due.
7. A description of the improvement constructed and the property subject to the lien.<sup>67</sup>

Pennsylvania law requires strict compliance with the Mechanics' Lien Law and any question of interpretation should be resolved in favor of its strict, narrow construction. In order to obtain a valid Lien Claim, the contractor or subcontractor must strictly comply with the requirements of the Mechanics' Lien Law.<sup>68</sup>

However, substantial compliance is sufficient on these "contents of the claim" requirements. It is enough if the Lien Claim provides ample information to "point the way to successful inquiry."<sup>69</sup>

### Deadline for Claim

All claimants must file the Lien Claim with the prothonotary of the court within six months after the completion of the claimant's work.<sup>70</sup> The Lien Claim must be filed in the court for the county in which the improvement is located.<sup>71</sup>

### Delivery of Notice

Within one month after filing the Lien Claim, the claimant must serve written notice of such filing on the owner. The notice must state the court term and number and the date of filing the claim.<sup>72</sup> This notice *cannot be served by mail*. It must be served in the same manner as a lawsuit: by the sheriff.<sup>73</sup> If notice cannot be served, then the sheriff can post the notice on a conspicuous, public part of the improvement.<sup>74</sup> These notice requirements must be strictly observed, as failure to serve the notice will result in loss of the claim.<sup>75</sup>

### Affidavit of Service

Within 20 days after service of this notice on the owner, the claimant must file an affidavit of service or the acceptance of service in the prothonotary's office.<sup>76</sup> This affidavit must state the date and method of service.<sup>77</sup> Failure to file the affidavit or the acceptance of service within the time limit will result in losing the Lien Claim in its entirety.<sup>78</sup>

<sup>66</sup> *Wash. Eng'g & Constr. Co. v. Nitrochem L.L.C.*, 58 Pa. D. & C.4th 195, 2002 Pa. Dist. & Cnty. Dec. LEXIS 203, 8-9 (Pa. County Ct. 2002).

<sup>67</sup> 49 P.S. §1503.

<sup>68</sup> *Penstan Supply Div. of Hajoca Corp. v. Traditions of Am., L.P.*, 9 Pa. D. & C.5th 567, 568-69 (Pa. County Ct. 2010), citing *Delmont Mechanical Services, Inc. v. Kenver Corp.*, 450 Pa. Super. 666, 677 A.2d 1241, 1244 (Pa. Super. 1996); *Leeward Constr. v. SCP 2007-C27-093 LLC*, 5 Pa. D. & C.5th 377, 2008 Pa. Dist. & Cnty. Dec. LEXIS 138 (Pa. County Ct. 2008).

<sup>69</sup> *Commerce Bank/Harrisburg, N.A. v. Kessler*, 2012 PA Super 100, 46 A.3d 724, 734-35 (2012); *L&W Supply Corp. v. Amin*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 672, 5-6 (Pa. County Ct. 2010) [as to notice requirements], citing *Tesauro v. Baird*, 232 Pa. Super. 185, 335 A.2d 792, 796 (Pa. Super. 1975).

<sup>70</sup> 49 P.S. §1502(a)(1); *Houseworth v. Weyant, et. al.*, 78 Pa. D. & C. 211 (1952).

<sup>71</sup> 49 P.S. §1502(b).

<sup>72</sup> 49 P.S. §1502(a)(2); *J.H. Hommer Lumber Company, Inc. v. Dively*, 401 Pa. Super. 72 (1990).

<sup>73</sup> 49 P.S. §1502(c); *Clemleddy Construction, Inc. v. Yorston*, 2002 PA Super 342, 810 A.2d 693 (2002).

<sup>74</sup> 49 P.S. §1502(c).

<sup>75</sup> 49 P.S. §1502(a)(2).

<sup>76</sup> 49 P.S. §1502(a)(2); *Seese v. Hoza*, 43 Pa. D. & C.3d 639 (1982).

<sup>77</sup> 49 P.S. §1502(a)(2).

<sup>78</sup> 49 P.S. §1502(a)(2).

## Owner

The Lien Claim must state the name *and* the address of the owner or reputed owner.<sup>79</sup> To meet these criteria, a claimant should order a title search in the registry of deeds to determine the correct name of the legal owner.<sup>80</sup> It may be possible to later amend a Lien Claim to correct a mistake in the name of the owner if the contractor is somehow misled.<sup>81</sup>

## Tenants and Leaseholds

A claimant who completes tenant improvements can obtain a lien on the leasehold interest.<sup>82</sup> The end result would be a foreclosure on the leasehold. If the lease ends due to default or expiration, the lien will continue, at least as to fixtures, machinery or other similar properties.<sup>83</sup> Work for a tenant does not result in lien rights against the owner, however, unless the owner agrees in writing that the construction or improvements are for the owner's immediate use and benefit.<sup>84</sup>

## Multiple Owners

If a property has multiple owners and only one owner orders the work, the claimant may obtain a lien only in the partial interest of the one ordering the work.<sup>85</sup> Where a husband and wife own property as tenants by the entirety, notice must be served on both.<sup>86</sup> However, this may be accomplished by service of two copies of the notice on one spouse at the spouses' residence or place of business.<sup>87</sup>

## Contract Purchaser

A lien will attach, although the owner of the lots on which the houses are built has only an equitable interest.<sup>88</sup> This means that if a contract purchaser has improvements constructed on the property, then a lien will attach to the contract purchaser's interest.

## Description of the Improvement and Property

A lien claimant should perform a title search to properly identify the lien property<sup>89</sup> and property owner.<sup>90</sup> The lien extends to the structure constructed or improved and to as much of the surrounding land as may be reasonably necessary to maintain the economic value of the building.<sup>91</sup> The Lien Claim must state "such description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them."<sup>92</sup>

<sup>79</sup> 49 P.S. §1503(2); *Delmont Mech. Servs. v. Kenver Corp.*, 450 Pa. Super. 666, 674, 677 A.2d 1241, 1245-46 (Pa. Super. Ct. 1996) [failure to correctly name the owner of the property is a fatal defect and renders the lien invalid].

<sup>80</sup> *Penstan Supply Div. of Hajoca Corp. v. Traditions of Am., L.P.*, 9 Pa. D. & C.5th 567, 569-70 (Pa. County Ct. 2010) [Lien is invalid identifying "Traditions of America" as owner, where "TOA PA IV, L.P." was the record owner].

<sup>81</sup> *L-Co. Cabinet Corp. v. Summit Square Apartments, Inc.*, 64 Pa. D. & C.2d 528 (Leb. Co. 1973).

<sup>82</sup> 49 P.S. §1201(3); *Westmoreland v. Century III Assoc.*, 16 Pa. D. & C.3d 218 (1980).

<sup>83</sup> 49 P.S. §1509.

<sup>84</sup> 49 P.S. §1303(d); *American Seating Co. v. City of Philadelphia*, 434 Pa. 370, 256A.2d 599 (1969); *Westmoreland v. Century III Assoc.*, 16 Pa. D. & C.3d 218, (1980).

<sup>85</sup> *Keller v. Denmead & Son*, 68 Pa. 449 (1871).

<sup>86</sup> *King Manor Homes, Inc. v. Green*, 25 Monroe L.R. 56, 42 Pa. D. & C.2d 136 (1967); *N-B Building Supply Co. v. Cresko*, 54 Luz. Co. 275 (1965).

<sup>87</sup> *Glemba v. Gaso*, 69 Pa. D. & C.2d 347 (1975).

<sup>88</sup> *Tilo Roofing Co. v. Abeloff*, 75 Pa. D. & C. 535 (1950).

<sup>89</sup> *See Kihm-Bowen Mach Co. v. Midwest Supply Co.*, 3 Pa. D.&C 755 (1923).

<sup>90</sup> 49 P.S. §1503(2); *Delmont Mech. Servs. v. Kenver Corp.*, 450 Pa. Super. 666, 677 A.2d 1241 (1996); *Empire Excavating Co. v. Luzerne County Housing Authority*, 303 Pa. Super. 25, 449 A.2d 60 (1982); *Carter-Jones Lumber Co. v. Northwestern Pa Humane Soc'y Lgl Animal Care Prods.*, 2006 Pa. Commw. LEXIS 689 (2006).

<sup>91</sup> *Northeast Brick Co. v. Street Road Shopping Center*, 50 Pa. D. & C.2d 614 (1970).

<sup>92</sup> 49 P.S. §1503; *Penstan Supply Div. of Hajoca Corp. v. Traditions of Am., L.P.*, 9 Pa. D. & C.5th 567, 570 (Pa. County Ct. 2010).

A description of an entire planned subdivision development is a sufficient description of the property for a Lien Claim for paving roads and the establishment of storm water drainage areas.<sup>93</sup> A metes and bounds description<sup>94</sup> or a deed book and page reference from the land records<sup>95</sup> are sufficient.

If the claimant works on multiple structures, the Lien Claim should identify the structures and the specific labor or material supplied to each structure.<sup>96</sup> If multiple improvements are involved, the claimant may need to file separate claims for each improvement and allocate the debt among the various improvements.<sup>97</sup> If the multiple improvements form a single business or residential plant, then the claimant can file a single lien. If the multiple improvements do not form a single business or residential plant, however, then the claimant must file multiple apportioned liens.<sup>98</sup> A condominium development is a “single residential plant,” such that five mechanic’s liens were valid against five unsold units each filed for the entire amount due for eight condominium units and common elements.<sup>99</sup> However, townhouses, separate dwelling houses, a double house with a continuous roof, and a group of 20 houses on separate lots do not qualify as single “plants,” so that the claims must be apportioned as to each parcel.<sup>100</sup> Some of the individual claims can be less than \$500 if the total debt meets the \$500 minimum.<sup>101</sup>

No lien is allowed for labor or materials furnished for a purely public purpose,<sup>102</sup> although it is apparently possible for a municipality to consent to subjecting public property to a mechanic’s lien claim.<sup>103</sup> The exemption from the mechanic’s lien statute does not depend on ownership of the property and improvement by a public entity. Privately owned property can be used for a purely public purpose and be exempt from mechanic’s liens.<sup>104</sup> Publicly owned property used for a proprietary and not governmental purpose can be subject to a lien.<sup>105</sup> The factors considered are: (1) the public’s access to the services provided by the entity, (2) whether the entity’s function with respect to the property is a governmental function or a proprietary function, (3) whether the entity operates with the possibility or motive of profit, and (4) whether allowing execution upon the liens would disrupt an essential public service.<sup>106</sup>

## Structure

To have lien rights, the claimant must provide labor and materials for the “improvement” of a building, structure or other improvement that is erected or constructed on land.<sup>107</sup> At least one court case states that nothing in the mechanic’s lien law requires that a structure actually exist if the erection or construction was performed incidental

<sup>93</sup> *Brubacher Excavating, Inc. v. Lower Macungie Twp.*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 111 (Pa. C.P. 2012).

<sup>94</sup> *Wash. Eng’g & Constr. Co. v. Nitrochem L.L.C.*, 58 Pa. D. & C.4th 195, 2002 Pa. Dist. & Cnty. Dec. LEXIS 203 (Pa. County Ct. 2002), citing *Marchak v. McClure*, 176 Pa. Super. 381, 108 A.2d 77 (Pa. Super. Ct. 1954).

<sup>95</sup> *Leeward Constr. v. SCP 2007-C27-093 LLC*, 5 Pa. D. & C.5th 377, 2008 Pa. Dist. & Cnty. Dec. LEXIS 138 (Pa. County Ct. 2008).

<sup>96</sup> *Penstan Supply Div. of Hajoca Corp. v. Traditions of Am., L.P.*, 9 Pa. D. & C.5th 567, 570 (Pa. County Ct. 2010) [Lien is invalid where claimant had conducted work on multiple structures on the property and failed to state which materials were used or which improvements were made for each structure].

<sup>97</sup> 49 P.S. §1306(b); *Penstan Supply Div. of Hajoca Corp. v. Traditions of Am., L.P.*, 9 Pa. D. & C.5th 567, 571 (Pa. County Ct. 2010); *Morrissey Const. Co. v. Cross Realty Co.*, 48 Pa. D. & C.2d 565 (1969).

<sup>98</sup> 49 P.S. §1306(b); *Clearwater Concrete & Masonry, Inc. v. Lowe’s Home Ctrs., Inc.*, 2010 Phila. Ct. Com. Pl. LEXIS 193, 9-10 (Pa. C.P. 2010) [actually refers to “multiple parcels,” but should probably be “multiple improvements”], *aff’d Clearwater Concrete & Masonry v. Lowe’s*, 26 A.3d 1208 (Pa. Super. Ct. 2011).

<sup>99</sup> 49 P.S. §1306(b); 68 Pa.C.S. §3409; *Metco, Inc. v. Moss Creek, Inc.*, 529 Pa. 53, 58, 601 A.2d 802, 804-05 (Pa. 1992).

<sup>100</sup> *Metco, Inc. v. Moss Creek, Inc.*, 529 Pa. 53, 601 A.2d 802, 804-05 (1992), citing *Meyers Plumbing & Heating Supply Co. v. Caste*, 350 Pa. Super. 482, 504 A.2d 942 (Pa. Super. Ct. 1986).

<sup>101</sup> 49 P.S. §1306(b).

<sup>102</sup> 49 P.S. §1303(b); *Brubacher Excavating, Inc. v. Lower Macungie Twp.*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 111 (Pa. C.P. 2012); *Empire Excavating Co. v. Luzerne County Housing Authority*, 303 Pa. Super. 25, 449 A.2d 60 (1982).

<sup>103</sup> *American Seating Co. v. Philadelphia*, 434 Pa. 370, 256 A.2d 599 (1969).

<sup>104</sup> *Carter-Jones Lumber Co. v. Northwestern Pa. Humane Soc’y LGL Animal Care Prods.*, 913 A.2d 1002, 1005-1006 (Pa. Commw. Ct. 2006) [Humane Society that provided the primary means for controlling the animal population, spaying and neutering animals and the county had delegated the duty of enforcing the animal cruelty laws to the shelter].

<sup>105</sup> *American Seating Co. v. Philadelphia*, 434 Pa. 370, 375, 256 A.2d 599, 601-02 (Pa. 1969) [A sports arena owned by the City of Philadelphia was not exempt from a mechanic’s lien where the municipality acts as an absent landlord, entrusting the management and control of its premises to its tenant, where the building was constructed and paid for by the tenant, and where the municipality in owning the building, discharges a function not governmental in nature, but rather proprietary and quasi-private].

<sup>106</sup> *Carter-Jones Lumber Co. v. Northwestern Pa. Humane Soc’y LGL Animal Care Prods.*, 913 A.2d 1002, 1005-1006 (Pa. Commw. Ct. 2006).

<sup>107</sup> 49 P.S. §1201(1).

to the proposed construction of an improvement.<sup>108</sup> However, other cases state that a structure must be built or at least started.<sup>109</sup>

The mere fact that products have been supplied under a contract that includes material for construction does not entitle the supplier to a lien for the material.<sup>110</sup> For example, a tennis court, standing alone, is not a structure and a claimant would have no lien rights for supplying such labor and materials.<sup>111</sup> The labor and material might, however, be lienable if the tennis court adjoined a home or other structure.<sup>112</sup> A swimming pool is a structure.<sup>113</sup> Seeding and mulching or excavation and grading alone do not provide lien rights,<sup>114</sup> but will if performed in connection with proposed construction of an improvement.<sup>115</sup>

Fixtures and personal property can provide lien rights if they are permanent and become part of the real estate.<sup>116</sup> However, equipment and fixtures used in supermarkets that are not of a kind that commonly adds value to the realty are not lienable.<sup>117</sup>

## Description of Labor or Materials Furnished

A claimant must provide either a detailed statement of the kind and character of the labor and materials furnished and the prices charged for each, *or* if the claimant had a contract for an agreed sum, the claimant must identify the contract and provide a general statement of the kind and character of the labor or materials furnished.<sup>118</sup> If a claimant is filing a single claim for labor or materials provided under multiple contracts, the claimant should sufficiently identify all of the contracts.<sup>119</sup>

In order to qualify as labor, services must be connected to the actual construction of a building.<sup>120</sup> For example, time spent negotiating contracts with subcontractors is not lienable labor.<sup>121</sup> There is no lien claim for prejudgment interest above the legal rate or attorney's fees, since they do not constitute labor or materials.<sup>122</sup> Interest will run on a lien at the statutory rate of 6% per annum from the date the judgment is entered.<sup>123</sup> There is a claim for profit on changes.<sup>124</sup> There are mechanics' lien rights only on a debt for work done or for materials furnished, and not for unliquidated damages for breach of a contract.<sup>125</sup>

Suppliers of rental equipment appear to have lien rights.<sup>126</sup> Demolition work, excavation, grading, filling, paving and landscaping are expressly given lien rights if "incidental" to the erection of improvements.<sup>127</sup> Lien rights exist for groundwork and site preparation performed as an integral part of a planned construction process, even if construction

<sup>108</sup> *B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*, 2013 PA Super 120, 71 A.3d 274, 278-79 (Pa. Super. Ct. 2013).

<sup>109</sup> *Blue Mt. Equip. Rental Corp. v. Phillips Station Riverfront South, L.P.*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 63 (Pa. County Ct. 2013), *citing Alguire v. Keller*, 68 Pa. Super. 279 (1917) [basement foundation is not a sufficient structure for lien rights if the house is not otherwise completed].

<sup>110</sup> *W.H. Harrison & Brother v. Women's Homeopathic Assoc.*, 134 Pa. 558, 19 A. 804 (1890).

<sup>111</sup> *Frank v. Kutner*, 71 Pa. D. & C.2d 501 (1975).

<sup>112</sup> *Frank v. Kutner*, 71 Pa. D. & C.2d 501 (1975).

<sup>113</sup> *W.H. Kneas Lumber Co., Inc. v. Ciccarone*, 20 Pa. D. & C.2d 407 (1961).

<sup>114</sup> *Northwood Nurseries v. Timber Hill, Inc.*, 66 Pa. D. & C.2d 314 (1974); *Sampson-Miller Associated Companies, Inc. v. Landmark Realty Co.*, 224 Pa. Super. 25 (1973).

<sup>115</sup> *B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*, 2013 PA Super 120, 71 A.3d 274, 278-79 (Pa. Super. Ct. 2013).

<sup>116</sup> 49 P.S. §1201(1); *Joyce v. Sarnelli*, 29 Pa. D. & C.3d 544 (1984).

<sup>117</sup> *Joyce V. Sarnelli*, 29 Pa. D. & C.3d 544 (1984).

<sup>118</sup> 49 P.S. §1503(5), (6); *Commerce Bank/Harrisburg, N.A. v. Kessler*, 2012 PA Super 100, 46 A.3d 724, 734-35 (2012) [substantial compliance is sufficient]; *Supply Companies, Inc. v. Campbell*, 43 Pa. D. & C.3d 245 (1986).

<sup>119</sup> 49 P.S. §1306(a); *Rome Elec. Co. v. R.&F. Const., Inc.*, 70 Pa. D. & C.2d 168 (1974).

<sup>120</sup> *Metropolitan International v. Union Investment Co.*, 17 Pa. D. & C.3d 519 (1981).

<sup>121</sup> *Bennett v. Frederick R. Gerry Co.*, 273 Pa. 585, 117 A. 345 (1922).

<sup>122</sup> 49 P.S. §1201(7) & (9); *Artsmith Dev. Group, Inc. v. Updegraff*, 2005 PA Super 11, 868 A.2d 495 (Pa. Super. Ct. 2005); *Wyatt Inc. v. Citizens Bank of Pa.*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 386 (Pa. County Ct. 2006) *affd on appeal Wyatt Inc. v. Citizens Bank of Pa.*, 2009 PA Super 107, 976 A.2d 557 (Pa. Super. Ct. 2009).

<sup>123</sup> 42 Pa.C.S.A. §8101; *Brubacher Excavating, Inc. v. Commerce Bank/Harrisburg, N.A.*, 2010 PA Super 67, 995 A.2d 362, 370 (Pa. Super. Ct. 2010).

<sup>124</sup> *Artsmith Dev. Group, Inc. v. Updegraff*, 2005 PA Super 11, 868 A.2d 495 (Pa. Super. Ct. 2005).

<sup>125</sup> *Wyatt Inc. v. Citizens Bank of Pa.*, 2009 PA Super 107, 976 A.2d 557 (Pa. Super. Ct. 2009).

<sup>126</sup> 49 P.S. §1201(5); *see Blue Mt. Equip. Rental Corp. v. Phillips Station Riverfront South, L.P.*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 63 (Pa. County Ct. 2013).

<sup>127</sup> 49 P.S. §1201(12)(a); *Hunter v. Meadville Sandblasting, Inc.*, 14 Pa. D. & C.4th 562 (1992); *Blue Mt. Equip. Rental Corp. v. Phillips Station Riverfront South, L.P.*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 63 (Pa. County Ct. 2013) [demolition].

of the building never occurred.<sup>128</sup> If the grading and excavation was performed independent of a building construction plan, however, no lien would attach.<sup>129</sup> Lien rights also exist for paving roads and the establishment of storm water drainage areas for a planned subdivision development.<sup>130</sup> However, there would be no lien rights if the work was performed for the sale of vacant lots. Houses or other buildings must be a part of the construction plan.<sup>131</sup>

“Initial fitting up and equipping” of necessary fixtures, machinery and equipment for the improvements also give lien rights.<sup>132</sup> Supplying fixtures, machinery and equipment after the initial construction apparently does not give lien rights. The erection of machinery in an existing building does provide lien rights, however, if there were also incidental improvements necessary to allow for the machinery to operate which created a distinct new use for the building and effected a material change in the interior.<sup>133</sup>

## Claimant

### Remote Contractors and Suppliers

Only three classes of persons are entitled to a mechanic’s lien: general contractors, subcontractors and those with a direct contract with subcontractors.<sup>134</sup> For the purpose of filing mechanic’s liens, these terms are defined by the code.<sup>135</sup> It doesn’t matter whether a claimant usually considers itself a supplier or a labor and materials subcontractor. Anyone who has a contract, express or implied, with the owner of the property is a contractor, provided they supply labor and materials for the erection, construction, alteration or repair of an improvement on the property.<sup>136</sup>

A subcontractor has an express or implied contract directly with a general contractor for the supply of labor or materials to the property or has an express or implied contract with a subcontractor, who in turn had a contract directly with the general contractor.<sup>137</sup>

Architects or engineers who contract with a contractor are not subcontractors within the definition provided by the code.<sup>138</sup> They can only be contractors and have lien rights if they contract directly with the owner.<sup>139</sup>

All entities below sub-subcontractors have no lien rights.<sup>140</sup> This effectively cuts off lien rights for any material supplier dealing with a sub-subcontractor. A supplier to a supplier never has lien rights.<sup>141</sup> Accordingly, a material supplier will only have lien rights if it had a contract directly with the owner, a contract directly with a general contractor or with a subcontractor that supplied labor *and* material to a project and had a contract directly with a general contractor.

## Amendment of Claim

A Lien Claim may be amended without prejudice to intervening rights if both parties agree or if the claimant is granted leave of court,<sup>142</sup> A claim may not be amended after the time for filing has expired if the amendment:

1. Seeks to substitute a different property.
2. Changes the identity of the owner or the contractor with whom a subcontractor dealt.
3. Increases the amount of the claim.<sup>143</sup>

<sup>128</sup> *B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*, 2013 PA Super 120, 71 A.3d 274 (Pa. Super. Ct. 2013; *see also* 49 P.S. §1305 [except in case of destruction by fire or other casualty, where, through no fault of the claimant, the improvement is not completed, the right to lien shall nevertheless exist]; *but see Blue Mt. Equip. Rental Corp. v. Phillips Station Riverfront South, L.P.*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 63 (Pa. County Ct. 2013) [decided months before *B.N. Excavating*].

<sup>129</sup> *Dollar Bank, FSB v. EM2 Dev. Corp.*, 716 A.2d 671, 673-674 (Pa. Super. Ct. 1998).

<sup>130</sup> *Brubacher Excavating, Inc. v. Lower Macungie Twp.*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 111, 3-4 (Pa. C.P. 2012).

<sup>131</sup> *B.N. Excavating, Inc. v. PBC Hollow-A, L.P.*, 2013 PA Super 120, 71 A.3d 274, 281-84 (Pa. Super. Ct. 2013).

<sup>132</sup> 49 P.S. §1201(12)(b).

<sup>133</sup> 49 P.S. §1201(10); *Wendt & Sons v. New Hedstrom Corp.*, 2004 PA Super 355, 858 A.2d 631, 636 (Pa. Super. Ct. 2004).

<sup>134</sup> 49 P.S. §1303(a).

<sup>135</sup> 49 P.S. §1201.

<sup>136</sup> 49 P.S. §1201(4); *Gunter Geiger System, Ltd. v. Aristocrat Upholstery Co., Inc.*, 220 Pa.Super. 442 (1972).

<sup>137</sup> 49 P.S. §1201(5).

<sup>138</sup> 49 P.S. §1201(5).

<sup>139</sup> 49 P.S. §1201(5); *Bennett v. Frederick R. Gerry Co., et al.*, 117 A. 345 (Pa. 1922).

<sup>140</sup> 49 P.S. §1303(a); *See Hamilton v. Means*, 155 Pa. Super. 245, 38 A.2d 528 (1944).

<sup>141</sup> 49 P.S. §1201(5); 49 P.S. §1301(a); 49 P.S. §1303(a).

<sup>142</sup> 49 P.S. §1504.

<sup>143</sup> 49 P.S. §1504; *Zeigler Lumber & Supply Co. v. Golden Triangle Development Co., Inc.*, 229 Pa.Super. 548 (1974).

## AMOUNT OF CLAIM AND ALLOCATION

### Amount Claimed

A claimant has no lien rights unless the amount of the claim is more than \$500.<sup>144</sup>

### Allocation and Tracing

Allocation concerns getting the correct property lien for the correct dollar amount. A lien is “overinclusive” or “overbroad” if it liens property to which the contractor supplied no labor or materials. A lien is “overburdening” if it liens a property for more than the value of the labor and materials supplied to that property. These are obviously related concepts.

Allocation issues involve multiple pieces of property. A townhouse building, for example, includes multiple townhouse units. Each townhouse unit is a separate parcel of real estate. The claimant must file a separate Lien Claim for each property.<sup>145</sup>

Materials that are actually delivered to the owner or placed on or near the property are presumed to have been used in the improvement, although “proof to the contrary can be shown.”<sup>146</sup> However, a property owner cannot defeat lien rights by moving materials to another site.<sup>147</sup>

### Open Account Suppliers

If a claimant has multiple contracts to supply labor and materials on a single project, the claimant can “consolidate” the contracts into a single claim.<sup>148</sup> As discussed above, this means an open account supplier can count their deadline from when the last delivery is completed.<sup>149</sup> This also means that a supplier can make a single Lien Claim for multiple contracts on one property. If more than one property is involved, however, it is still necessary to allocate the claim among properties.

## ENFORCEMENT OF MECHANIC'S LIEN CLAIM

### Form of Enforcement

To enforce a claim, the claimant must eventually obtain a judgment upon the claim filed.<sup>150</sup> This is done by filing a complaint to enforce, similar to a lawsuit seeking judgment on a contract. The action is commenced by filing a complaint with the prothonotary (clerk of the court). The procedure to obtain a judgment on a claim is essentially the same as the procedure for any civil court action.<sup>151</sup> The complaint must identify:

1. The name and address of each party to the action. If the action is commenced by a subcontractor, the complaint must include the name and the address of the contractor.
2. The court, term and number.
3. The date of filing the claim. A copy of the claim must be included as an exhibit.
4. A demand for judgment.<sup>152</sup>

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<sup>144</sup> 49 P.S. §1301.

<sup>145</sup> 49 P.S. §1306(b); *Metco, Inc. v. Moss Creek, Inc.*, 385 Pa. Super. 542, 561 A.2d 808 (1989); *Meyers Plumbing and Heating Supply v. Caste*, 350 Pa. Super. 482, 504 A.2d 442 (1986).

<sup>146</sup> 49 P.S. §1302; *Kissinger Structural Sales, Inc. v. Strubinger*, 40 Pa. D. & C.3d 43 (1983); *Old Fellows Hall v. Masser, Inc.*, 24 Pa. 507 (1855); *Global Church Builders and Suppliers, Inc. v. Bethel Park Christian Church*, 32 Som. 349 (1973).

<sup>147</sup> *Haney v. Moorhead*, 61 Pa. Super. 187 (1915).

<sup>148</sup> 49 P.S. §1306(a); *Morrissey Const. Co. v. Cross Realty Co.*, 48 Pa. D. & C.2d 565 (1969); *Rome Elec. Co. v. R.&F. Const., Inc.*, 70 Pa. D. & C.2d 168 (1974).

<sup>149</sup> 49 P.S. §1306(a).

<sup>150</sup> 49 P.S. §1701(a).

<sup>151</sup> 49 P.S. §1701(a).

<sup>152</sup> Pa. R. Civ. P. 1656

## Deadline for Enforcement

The claim must be enforced by filing a complaint within two years of the date the claim was filed, unless the time is extended by the owner in writing.<sup>153</sup> A judgment must be entered within five years from the date the original claim is filed or it will be entirely lost.<sup>154</sup>

## Set-Offs Allowed but No Counterclaims

A defendant cannot bring a counterclaim but may seek a set-off that is limited to the amount of the Lien Claim.<sup>155</sup> The set-off must arise from the same transaction or occurrence as the claim.<sup>156</sup> This means that while a defendant owner or contractor can raise direct defenses to the claim, such as defective work or delays, they cannot raise problems arising from another project or different contract.

## DEFENSE OF PAYMENT: OWNER'S RESPONSIBILITY FOR PAYMENT TO SUBCONTRACTORS

There is no automatic defense of payment for most commercial Pennsylvania project owners. The basic rule is that most commercial owners can be required to pay for the project twice. Even if the owner has paid the general contractor in full, a subcontractor will be able to establish a lien and eventually foreclose on the property. The burden is on commercial owners to make sure that all subcontractors are paid or take affirmative steps to create a defense of payment.

Accordingly, the Formal Notice is for the protection of the owner, who, upon receipt of notice, can withhold funds from the contractor in order to pay the subcontractor's claim.<sup>157</sup> For this reason, it is also to a claimant's benefit to send a notice as soon as possible. If an owner can withhold payment from the contractor, it is more likely the claimant will be paid without the time and expense of filing suit to enforce the Lien Claim. An owner will fight a Lien Claim much harder if the owner faces the possibility of paying for the project a second time.

Once an owner has been served with a notice of intention to file a claim, the owner is allowed to withhold funds from the contractor.<sup>158</sup> The owner can require the contractor to promptly settle or discharge the claim.<sup>159</sup> This is discussed in greater detail in the section below titled Rights and Options of Owners and Lenders.

Any owner on any type of project can create a defense of payment by filing a copy of the general contract in the prothonotary's office before commencing construction.<sup>160</sup> This will limit each subcontractor to a pro rata share of money still owed the general contractor.<sup>161</sup> Most commercial Pennsylvania project owners will do this. Most Pennsylvania construction lenders require it. Any owner can also give the subcontractor written notice of the contract payment provisions to create a defense of payment,<sup>162</sup> although this is more difficult and less common.

In most owner-occupied residential projects, the owner will have a defense of payment to a subcontractor lien.<sup>163</sup> The owner will have a defense of payment if (1) the owner has paid the general contractor in full, (2) the property is used or is intended to be used as the residence of the owner or a tenant of the owner *subsequent to occupation by the owner*, and property must be a residential property single townhouse or a residential property consisting of one or two dwelling units.<sup>164</sup> It seems that a tenant would not have a defense of payment for any construction unless the

<sup>153</sup> 49 P.S. §1701(b); *Tully Drilling Co., Inc. v. Shenkin*, 409 Pa. Super. 333, 597 A.2d 1230 (1991).

<sup>154</sup> 49 P.S. §1701(d); *Fisher Sprinkler Co., Inc. v. Ide*, 305 Pa. Super. 554 (1982).

<sup>155</sup> 49 P.S. §1701(e); *Matternas v. Stehman*, 642 A.2d 1120, 434 Pa. Super. 255 (1994).

<sup>156</sup> 49 P.S. §1701(e); *Matternas v. Stehman*, 642 A.2d 1120, 434 Pa. Super. 255 (1994).

<sup>157</sup> 49 P.S. §1601.

<sup>158</sup> 49 P.S. § 601.

<sup>159</sup> 49 P.S. §§1602, 1603.

<sup>160</sup> 49 P.S. §1405.

<sup>161</sup> 49 P.S. §1405.

<sup>162</sup> 49 P.S. §1405.

<sup>163</sup> (Whether or not the General Contract has been recorded); 49 P.S. §1301(b).

<sup>164</sup> 49 P.S. §1301(b).

(b) Subcontractor. A subcontractor does not have the right to a lien with respect to an improvement to a residential property if:

(1) the owner or tenant paid the full contract price to the contractor;  
 (2) the property is or is intended to be used as the residence of the owner or subsequent to occupation by the owner, a tenant of the owner; and  
 (3) the residential property is a single townhouse or a building that consists of one or two dwelling units used, intended or designed to



property was previously *occupied by the owner*. This would also seem to rule out any builder or developer-owned residential properties. Professional residential builders must file a copy of the general contract in the prothonotary's (clerk's) office before commencing construction or give the subcontractor written notice of the contract payment provisions to create a defense of payment.<sup>165</sup>

The statute says that "a subcontractor does not have the right to a lien with respect to an improvement to a residential property" if all of these conditions are met. However, subcontractors would normally have no way to know whether the owner had paid the general contractor or whether the owner intended to use the property for their own residence. Accordingly, it appears that subcontractors can and should file their Lien Claims if they are not paid. The statute seems to recognize this, stating that a court can issue an order discharging the lien against the property when the owner or tenant has paid the full contract price to the general contractor in response to a petition or motion to the court by the owner or a party in interest.<sup>166</sup> It is up to the owner to contest the lien. It is not clear who has the burden of proof on each condition. However, a subcontractor would not be in possession of evidence regarding payments by the owner or the intended use of the property, so the owner should have the burden.

An owner can also have a partial defense of payment. Where the owner or tenant has paid the contractor less than the full contract price, a court can also reduce the lien to the amount of the unpaid contract price owed.<sup>167</sup>

## PRIORITY

Various types of liens can be placed on a piece of real estate. Some liens are "consensual," such as a deed of trust or mortgage. These are placed on the property purposefully by the property owner. Other liens are "involuntary" or "judicial," including judgment liens and mechanic's liens.

The general rule is that all liens have priority in the order that they are filed in the land records. The term "first trust" or "first mortgage" means that this was the first trust filed in the land records on that property. A "second trust" is the second trust to be recorded in the land records on that property. If the property is foreclosed upon, the first trust holder receives all of the proceeds of sale, until the first trust holder has been paid in full. If there are any sales proceeds left, they go to the second trust holder, until the second trust holder is paid in full, and so on. The priority of any type of lien is extremely important. Priority will determine whether or not the lienholder gets paid upon foreclosure. A lien with low priority can easily be worthless.

There are very few exceptions to this "first in time, first in right" general rule. One exception is a mechanic's lien that is inchoate, as are mechanic's liens in Pennsylvania, Virginia and the District of Columbia. If a mechanic's lien is inchoate, this means that the lien relates back to the time when work began on the property, even if the Lien Claim is not filed with the court until a later time. The lien exists from the moment labor and material are supplied to the property, as long as the claimant eventually perfects the lien by filing.<sup>168</sup>

### Priority between Mechanic's Liens and Other Liens

In erection and construction (new construction) projects, the Pennsylvania mechanic's lien has priority over most other liens filed with the court after the date of "visible commencement upon the grounds" of the project.<sup>169</sup> One exception to this general rule is that purchase money mortgages and open-end mortgages (construction loans) have priority over mechanic's liens, regardless of when these mortgages are filed in the land records. Given the broad language in the statute, even purchase money mortgages and construction loans filed *after* a Lien Claim may have priority over the Lien Claim.<sup>170</sup>

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be built, used, rented or leased for living purposes. For the purposes of this paragraph, the term "townhouse" shall mean a single-family dwelling unit constructed in a group of three or more attached units in which each unit extends from foundation to roof with a yard or public way on at least two sides.

49 P.S. §201 (14 ). "Residential Property" is also zoned residential and means not more than three (3) stories in height, not including basement.

<sup>165</sup> 49 P.S. §1405.

<sup>166</sup> 49 P.S. §1510(f)(1).

<sup>167</sup> 49 P.S. §1510(f)(2).

<sup>168</sup> 49 P.S. §1508(a).

<sup>169</sup> 49 P.S. §1508(a); *Collegeville National Bank v. Frehafer*, 7 Pa. D. & C.2d 14 (1955); *Knoell v. Carey*, 291 Pa. 531, 140 A. 522 (1928).

<sup>170</sup> 49 P.S. §1508(c).

### **Contracts to Alter or Repair Existing Structures**

Where the improvement is an alteration or repair, the priority of the mechanic's lien is as of the date of the filing of the claim.<sup>171</sup> This is an exception to the general rule that Pennsylvania mechanic's liens have priority over other liens filed with the court after the date of "visible commencement upon the grounds" of the project. For this reason, it is all the more important for alteration and repair contractors to promptly file their Lien Claim.

Construction work performed as an adaptation of an existing building which renders it fit for a new use and effected a material change in its interior is "erection and construction" and not "alterations and repairs."<sup>172</sup>

### **Impact on Lenders**

Before settling on any real estate loan, a lender without a properly drafted purchase money mortgage or construction loan should investigate whether any construction activity has recently occurred on the security property. Any mechanic's lien filed as a result of new construction may have priority over the new mortgage lien, even though the mechanic's lien claim may not be filed until much later.<sup>173</sup>

### **Priority over Construction Loans, Credit Line Mortgages and Open-End Mortgages**

With open-end mortgages (construction loans), the lender may advance additional funds days, months or even years after the mortgage has been filed in the land records. Lenders can essentially "hold their place" by recording an "open-end mortgage" that states a maximum future amount. If an open-end mortgage is properly filed and at least 60% of the mortgage proceeds are used for or at least are intended to pay construction costs, the lender can advance future funds up to the maximum amount of the open-end mortgage without checking for visible commencement of work on the security property.<sup>174</sup>

A construction loan (open-end mortgage used to pay for the cost of completing erection, construction, alteration or repair of the property) will have priority over any type of mechanic's lien, whenever at least 60% of the mortgage proceeds are intended to pay or are used to pay all or part of the costs of construction.<sup>175</sup> Costs of construction are defined to include all costs for erection, construction, alteration, repair, mandated off-site improvements, government impact fees and other construction-related costs, including, but not limited to taxes, insurance, bonding, inspections, surveys, testing, permits, legal fees, architect fees, engineering fees, consulting fees, accounting fees, management fees, utility fees, tenant improvements, leasing commissions, payment of prior filed or recorded liens or mortgages, including mechanics liens, municipal claims, mortgage origination fees and commissions, finance costs, closing fees, recording fees, title insurance or escrow fees.<sup>176</sup>

In addition, the lender may have priority for advances made for the payment of taxes, assessments, maintenance charges, insurance premiums or costs incurred for the protection of the mortgaged premises, or expenses incurred by a construction lender because of default or advances made under a construction loan to enable completion of the improvements for which the construction loan was originally made, if such mortgage states that it shall secure such unpaid balances.<sup>177</sup> Given the broad language in the statute, open-end mortgages filed even after a Lien Claim may have priority over the Lien Claim.<sup>178</sup> A mechanic's lien claimant will want to give notice of a Lien Claim to a lender as soon as possible. Although not required by any statute, this may freeze construction draws.<sup>179</sup> If the lender is not obligated to make additional advances under the construction loan, the mechanic's lien may have priority over any future advances after notice.<sup>180</sup>

<sup>171</sup> 49 P.S. §1508(b).

<sup>172</sup> *Wyatt Inc. v. Citizens Bank of Pa.*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 386 (Pa. County Ct. 2006) *aff'd on appeal Wyatt Inc. v. Citizens Bank of Pa.*, 2009 PA Super 107, 976 A.2d 557 (Pa. Super. Ct. 2009); *Wendt & Sons v. New Hedstrom Corp.*, 2004 PA Super 355, 858 A.2d 631 (Pa. Super. Ct. 2004).

<sup>173</sup> 49 P.S. §1508(a).

<sup>174</sup> 42 Pa. C.S.A. §8143 and 42 Pa. C.S. §8143(b).

<sup>175</sup> 49 P.S. §1508(c).

<sup>176</sup> 49 P.S. §1201(15). This expanded definition of construction costs and the 60% of mortgage proceeds safe harbor in 49 P.S. §1508(c) were added in a 2014 amendment to the statute in response to the result in *Commerce Bank/Harrisburg, N.A. v. Kessler*, 2012 PA Super 100, 46 A.3d 724 (2012).

<sup>177</sup> 42 Pa. C.S. §8144.

<sup>178</sup> 49 P.S. §1508(c).

<sup>179</sup> See *Trustees of C.I. Mortgage Group v. Stagg of Huntingdon, Inc.*, 247 Pa. Super. 336, 372 A.2d 854 (1977) *rev'd on other grounds*, 484 Pa. 264, 399 A.2d 386 (1978) for discussion of Construction Loan Advances generally.

<sup>180</sup> 42 Pa. C.S. §8143(b) and (d).

### Priority over Purchase Money Loans

A purchase money loan is used to acquire real estate. Purchase money mortgages, like construction loans, have priority over mechanic's liens, provided these mortgages are promptly filed in the land records.<sup>181</sup> Given the broad language in the statute, purchase money mortgages filed even after a Lien Claim may have priority over the Lien Claim.<sup>182</sup> Accordingly, even though the inchoate Pennsylvania mechanic's lien will survive a sale of the property, the priority of a purchase money lender for the mortgage can dramatically affect the priority of the mechanic's lien and could mean that a mechanic's lien claimant is undersecured or entirely unsecured.

### Priority between Different Mechanic's Liens

In general, all mechanic's liens on the same tier of the payment chain have equal priority. It does not matter which mechanic's lien is filed first, so long as all mechanic's liens are valid.<sup>183</sup>

The most obvious difference in priority will come from validity. If a mechanic's lien is invalid because it was not filed in a timely manner or named the wrong owner, then it has no priority at all. This contractor has no mechanic's lien and is just another unsecured creditor.

Lower tier contractors with valid liens are preferred over upper tier contractors with valid liens under the mechanic's lien statute. The lien of a subcontractor will be preferred to the lien of the general contractor.<sup>184</sup>

### Sale or Foreclosure of Property

The priority of various liens on real property also determines whether or not the liens survive foreclosure or other sale of the property. Upon foreclosure by any lien holder, all inferior liens are eliminated. The inferior lien holders have no security interest in the property after foreclosure. When any lien holder forecloses on real property, all liens that are prior will survive the foreclosure. The foreclosure purchaser now owns the property "subject to" the prior liens.

Since mechanic's liens are prior to some other liens, they survive some foreclosures. Since mechanic's liens are inchoate, they can actually be filed after foreclosure.<sup>185</sup> A lender that does not have an open-end or purchase money mortgage may foreclose on a piece of real estate only to see a mechanic's lien filed after they have taken title. The mechanic's lien claimant must be certain to name the new property owner in the mechanic's lien, but lien rights otherwise still exist. Since purchase money mortgages and open-end mortgages are superior to mechanic's liens, however, foreclosure on these types of mortgages would cut off lien rights.

Mechanic's lien rights for the erection or construction of improvements (new construction) survive any other type of sale of the property, even a transfer to a governmental entity.<sup>186</sup> Any real estate purchaser must be aware that mechanic's liens might be filed after they purchase the property for labor and materials supplied to the prior owner.<sup>187</sup> For this reason, real estate purchasers and title insurance companies always insist that the real estate seller sign an affidavit stating that no labor and materials have been supplied to the property or that payment has been made for all such labor and materials. This may not be enough protection if the real estate seller is insolvent. Real estate purchasers, therefore, may want to independently inquire about whether labor and materials have been recently supplied to the property and whether all persons supplying labor and materials have been paid.

If property is conveyed in good faith and for valuable consideration prior to filing a claim for alterations or repairs (not new construction), then the lien is lost.<sup>188</sup>

<sup>181</sup> 42 Pa.C.S. § 8141(1) [Purchase money mortgages have priority from the time they are delivered to the mortgagee, if they are recorded within 10 days after their date; otherwise, from the time they are left for record].

<sup>182</sup> 49 P.S. § 1508(c).

<sup>183</sup> *Collegeville National Bank v. Frehafer*, 7 Pa. D. & C.2d 14 (1955); *Dubois Lumber & Coal Co. v. Miller*, 48 Montg. 197 (1931).

<sup>184</sup> *Kiem v. McRoberts*, 18 Pa. Super. 167 (1901).

<sup>185</sup> *Collegeville National Bank v. Frehafer*, 7 Pa. D. & C.2d 14 (1955); *Wagner v. Manback*, 18 Pa. C.C. 471 (1896); See subsection above, Priority between Mechanic's Liens and Other Liens.

<sup>186</sup> *Brubacher Excavating, Inc. v. Lower Macungie Twp.*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 111 (Pa. C.P. 2012).

<sup>187</sup> However, it may be risky to wait to send notice of a lien until after an innocent purchaser has gone to settlement. *Kelly Sys. v. Koda*, 2008 Pa. Dist. & Cnty. Dec. LEXIS 250, 9-10 (Pa. County Ct. 2008), vacated and remanded with no published opinion at *Kelly Sys. v. Koda*, 987 A.2d 832 (Pa. Super. Ct. 2009) [Had purchasers been aware of the financial condition of their general contractor they would have been able to withhold monies and avoid the lien. We will not allow a subcontractor to delay filing a lien on property, with knowledge of the general contractor's illiquidity, in order to reach a more creditworthy property owner. We conclude that the plaintiff is equitably estopped from collecting from the new owners].

<sup>188</sup> 49 P.S. § 1303(c).

## Bankruptcy

Because the lien is inchoate, the “automatic stay” of the United States Bankruptcy Code should not stay the perfection of the mechanic’s lien claim for new construction. The lien is not a “preference” because the claimant always had the mechanic’s lien from the moment of visible commencement of the work. The perfection of the lien just gives public notice of this fact. In the case of new construction, the claimant is a secured creditor from the moment labor and material are supplied to the property and retains secured status even though lien enforcement proceedings are filed long after bankruptcy.<sup>189</sup> In the case of alteration or repair contracts in Pennsylvania, however, the claimant has no lien until the Lien Claim is filed. Filing a Lien Claim for alteration or repair work after a bankruptcy petition would violate the automatic stay.<sup>190</sup> In other words, a bankruptcy by the owner or an upstream contractor would probably eliminate lien rights for alteration or repair contracts.<sup>191</sup>

It is clear that a claimant can serve the initial Notice of Intent on the Owner after the general contractor files bankruptcy without seeking the permission of the United States Bankruptcy Court.<sup>192</sup> If a general contractor files bankruptcy, a subcontractor can still send its Notice of Intent on the owner and file the Lien Claim. In fact, it is important to keep in mind that the Notice *must* still be served and the Lien Claim filed within the normal time limits. It is still possible, but unlikely, that a bankruptcy by an owner would stay service of a Notice of Intent. It is also not clear whether a bankruptcy by the owner or an upstream contractor would stay the filing of the Lien Claim with the court clerk. The safest course would be to obtain relief from the stay and file the claim before the time limit expires.

It is probable that the bankruptcy of the project owner,<sup>193</sup> or the general contractor<sup>194</sup> or any other upstream contractor will delay the time for filing the lawsuit.<sup>195</sup> The “automatic stay” of the Bankruptcy Code means that any mechanic’s lien claimant would need “relief from the stay” from the Bankruptcy Court to file their Complaint to Enforce a Mechanic’s Lien Claim. The mechanic’s lien claimant probably is also provided additional time, however, to file later. The Complaint to Enforce Mechanic’s Lien must be filed within 30 days after the Automatic Stay terminates.<sup>196</sup>

## MECHANIC’S LIEN WAIVERS

A unique feature of Pennsylvania Mechanic’s Lien Law is that a general contractor can waive a subcontractor’s right to a mechanic’s lien in certain situations.<sup>197</sup> Lien waivers are always permitted in exchange for payments received.<sup>198</sup> Contractors will also be able to waive lien rights for lower tier subcontractors (and subcontractors can waive their own lien rights in a subcontract) on residential projects.<sup>199</sup> Contractors will also be able to waive lien rights for lower tier subcontractors (and subcontractors can waive their own lien rights in a subcontract) on all projects if the general contractor posts a payment bond to cover the value of the labor and materials provided. Only a general contractor has any statutory authority to waive the lien rights of lower tier

<sup>189</sup> *T.P. Elec., Inc. v. GGC, LLC (In re GGC, LLC)*, 329 B.R. 36 (Bankr. W.D. Pa. 2005). See generally *In re Gem Construction Corporation of Virginia*, 262 B.R. 638 (2000); *M & T Electrical Contractors v. Capital Lighting and Supply, Inc.* (In re M & T Electrical Contractors, Inc.), 267 B.R. 434 (Bkcy Ct. D.C. 2001).

<sup>190</sup> *Northup v. Ben Thompson Enterprises*, 220 B.R. 855, 859 (Bankr. E.D. Pa. 1998); *In re Poloron Products*, 76 B.R. 383 (Bkrty.M.D.Pa. 1987).

<sup>191</sup> *T.P. Elec., Inc. v. GGC, LLC (In re GGC, LLC)*, 329 B.R. 36 (Bankr. W.D. Pa. 2005).

<sup>192</sup> *Yobe Electric v. Graybar Electric Co.*, 30 Bankr. 114 (Bankr. W.D. Pa. 1983), *aff’d* 728 F.2d 207 (3d Cir. 1984); *H.T. Bowling, Inc. v. Bain*, 52 Bankr. 58 (W.D. Va. 1985), *aff’d in part and rev’d in part*, 64 Bankr. 581 (W.D. Va. 1986).

<sup>193</sup> *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990).

<sup>194</sup> *Thompson v. Air Power, Inc.*, 248 Va. 364, 448 S.E.2d 598 (1994).

<sup>195</sup> *In re Concrete Structures, Inc.*, 261 B.R. 627 (2001); *Graybar Electric Company, Inc. v. Property Technologies, Ltd. (In re Property Technologies, Ltd.)*, 263 B.R. 750 (Bkcy Ct. E.D.Va. 2001).

<sup>196</sup> *McCoy v. Chrysler Condo Developers Ltd. Partnership*, 239 Va. 321, 389 S.E.2d 905 (1990).

<sup>197</sup> 49 P.S. §1402.

<sup>198</sup> 49 P.S. §1401(b)(1).

<sup>199</sup> *Brubacher Excavating, Inc. v. Commerce Bank*, 995 A.2d 362 (Pa. Super. 2010); *cf. Floors, Inc. v. Altig*, No. 1173 EDA 2008, Superior Court of Penn (2009). *Altig* seemed to say that a general contractor may still waive the lien rights of a subcontractor on all projects. However, this was a residential project and the case does not discuss the dollar amount of the general contract. The court did not seem to acknowledge the qualification in section 1402 that a general contractor can waive a subcontractor’s lien rights “provided lien rights may be waived as set forth under section (1)401.”

subcontractors. Subcontractors cannot waive the lien rights of their lower tier sub-subcontractors, who must each sign a release in exchange for payment.<sup>200</sup>

All contractors should also be careful to review waivers signed for progress payments. It is still possible to inadvertently waive lien rights for future deliveries in a progress payment waiver.<sup>201</sup>

### Stipulation against Liens by the General Contractor

Subcontractors on residential projects should check whether lien stipulations have been or will be filed when considering whether to supply labor and materials. Even if an owner has required a Stipulation Against Liens, a claimant may still be able to establish lien rights if the Stipulation was improperly filed. A Stipulation Against Liens may also be ineffective if it is in bad faith or the owner and general contractor are related parties.

### Filing of Stipulation

Most general contractor waivers are made by filing a “Stipulation Against Liens.”<sup>202</sup> This is either a short waiver document separate from the general contract, or it is contained in the general contract itself. This Stipulation is filed in the prothonotary’s (court clerk’s) office in the county where the project is located. The Stipulation must be filed under *one* of the following circumstances:

1. Prior to commencement of work upon the ground or
2. Within 10 days after execution of the principal contract or
3. Not less than 10 days prior to the contract with the subcontractor.<sup>203</sup>

Accordingly, a subcontractor can check in the prothonotary’s office immediately prior to signing a subcontract to make sure that no Stipulations have been filed. Subcontractors must be able to check the prothonotary’s office before signing a subcontract to determine their security rights prior to lending money. For this reason, the law requires owners to make sure that the Stipulation is filed and properly indexed.<sup>204</sup>

The Stipulation must be indexed in the names of both the general contractor *and* the owner of the property.<sup>205</sup> The prothonotary keeps this index so subcontractors can check for stipulations. If the Stipulation is not properly indexed, the waiver will fail and the subcontractors will have lien rights.<sup>206</sup> Additionally, a subcontractor will still have lien rights if the prothonotary has made an indexing mistake. This is one way that lien rights can still exist, even though the owner or lender required a Stipulation Against Liens. However, if a lien claimant has *actual* knowledge of a lien waiver by the general contractor before the subcontractor claimant supplies labor and materials, the claimant will have no lien rights, regardless of whether the lien waiver was properly filed.<sup>207</sup>

If the project includes land located in more than one county, the waiver must be filed in *both* county courts.<sup>208</sup>

### Filing of General Contract

Instead of filing a separate Stipulation Against Liens, the owner can simply file the entire general contract.<sup>209</sup> If the contract includes a waiver of liens and is properly filed and indexed, lien rights will be effectively waived on projects on which lien waivers are permissible.

Filing the general contract may also create a defense of payment, although it is more effective to have the general contract simply waive lien rights altogether on projects on which lien waivers are permissible. If a general contract

<sup>200</sup> 49 P.S. § 1401(b)(2); *L&W Supply Corp. v. Amin*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 672, 8-9 (Pa. County Ct. 2010).

<sup>201</sup> See chapter, Contract Terms and Preserving Rights; section, Contract Administration; subsection, Waiver Forms.

<sup>202</sup> 49 P.S. § 1402.

<sup>203</sup> 49 P.S. § 1402.

<sup>204</sup> *Lisk Plumbing and Heating Co. v. Schons*, 283 Pa. Super. 344 (1981); *Patrick McGuigan Roofing v. Kallman*, 405 Pa. Super. 586, 592 A.2d 1368 (1991).

<sup>205</sup> 49 P.S. § 1402; *Patrick McGuigan Roofing v. Kallman*, 405 Pa. Super. 586, 592 A.2d 1368 (1991).

<sup>206</sup> *Site Improvements, Inc. v. Central and Western Chester County Industrial Development Authority*, 293 Pa. Super. 1, 437 A.2d 960 (1981).

<sup>207</sup> 49 P.S. § 1402.

<sup>208</sup> See *Lisk Plumbing and Heating Co. v. Schons*, 283 Pa. Super. 344 (1981).

<sup>209</sup> 49 P.S. § 1405.

is filed, however, the Lien Claims of subcontractors can be limited to a pro rata share of the amount still owed to the general contractor at the time the Lien Claim is filed and served on the owner.<sup>210</sup>

### Lien Rights Despite Stipulation

Subcontractors and suppliers should always be aware of their security rights in determining whether to supply labor and materials to a project, at what price and whether some form of consensual security should be required. If payment problems arise on a residential project with a lien waiver, however, claimants may still have lien rights. First, claimants should check whether lien waivers have been properly filed in a timely manner and properly indexed, as discussed in the section above on Filing of Stipulation.

If a general contract is made between the owner and someone not intending in good faith to be the contractor, any lien waiver in that general contract is invalid.<sup>211</sup> Property can be subject to liens where the general contractor is the agent of the owner or if the owner is actually dealing with himself.<sup>212</sup> Bad faith may be imputed and property subject to lien, when an owner and general contractor are the same or related persons or entities.<sup>213</sup> It is possible, however, for a corporation, in good faith, to create one entity to own real estate and a separate related entity to act as general contractor.<sup>214</sup>

### Waiver in Contract

Under Pennsylvania law, a lien waiver in a subcontract is effective in a subcontract signed by the subcontractor on residential projects,<sup>215</sup> or on non-residential projects on which the general contractor posts a payment bond to cover the value of the labor and materials provided.<sup>216</sup> Lien waivers are always permitted in exchange for payments received.<sup>217</sup> Subcontractors will be able to waive their own lien rights in their subcontracts on all projects if the general contractor posts a payment bond to cover the value of the labor and materials provided. Subcontractors should also be careful to review waivers signed for progress payments. It is still possible to inadvertently waive lien rights for future deliveries in a progress payment waiver.

### Waiver for Partial Payment

Contractors are usually requested to sign waivers of lien at the time of each progress payment. Waiver forms presented for signature at that time vary greatly in their wording and effect.<sup>218</sup> Pennsylvania law still suggests that progress waivers can be effective to completely waive mechanic's lien rights in the future, even if the initial progress payment is very small.<sup>219</sup> Contractors often believe that if the waiver form recites a specific dollar amount as received, then mechanic's lien rights are waived only to the extent of that dollar amount. This may not be true, and a contractor should be careful to inspect the waiver form to determine the extent of rights waived. If there is an "express intent" to waive lien rights for future deliveries, the waiver will be effective.<sup>220</sup> There is no case law yet to tell us what sort of language would show an "express intent" to waive future lien rights, so subcontractors and suppliers should assume the worst. Common lien waiver language is effective to waive future lien rights in other states. This is discussed in greater detail in the chapter on Contracts and Preserving Rights, Contract Administration, Waiver Forms.

<sup>210</sup> 49 P.S. §1405; See section above, Defense of Payment: Owner's Responsibility for Payment to Subcontractors.

<sup>211</sup> 49 P.S. §1407.

<sup>212</sup> *Glemba v. Gaso*, 69 Pa. D. & C.2d 347 (Washington Co., 1975); *L-Co Cabinet Corp. v. Summit Square Apartments, Inc.*, 64 Pa. D. & C.2d 528 (1973).

<sup>213</sup> *Glemba v. Gaso*, 69 Pa. D. & C.2d 347 (Washington Co., 1975); *L-Co Cabinet Corp. v. Summit Square Apartments, Inc.*, 64 Pa. D. & C.2d 528 (1973).

<sup>214</sup> *Foggia Builders, Inc. v. RJD Construction Co., Inc.*, 75 Pa. D & C.2d 170 (Del. Co. 1975), *aff'd*, 360 A.2d 235 (Pa. Superior Ct.).

<sup>215</sup> 49 P.S. §1401(a).

<sup>216</sup> 49 P.S. §1401(b)(2).

<sup>217</sup> 49 P.S. §1401(b)(1).

<sup>218</sup> See chapter, Contract Terms and Preserving Rights; section, Contract Administration; subsection, Waiver Forms.

<sup>219</sup> 49 P.S. §1403.

<sup>220</sup> 49 P.S. §1403.

## RIGHTS AND OPTIONS OF OWNERS AND LENDERS

### Right to Eliminate Lien Rights

An owner can make sure no liens are filed on residential projects by requiring a Stipulation Against Liens from the general contractor and making sure that it is properly filed.<sup>221</sup>

### Right to Pay for the Project Only Once

Alternatively, the owner can create a defense of payment by filing a copy of the general contract.<sup>222</sup> In this case, the recovery of all lien claimants will be limited to the amount unpaid under the general contract.<sup>223</sup>

### Rule to File Claim

At any time after completion of work by a subcontractor, an owner or contractor can file a "Rule." After the Rule is filed, the subcontractor named therein must file any claim within 30 days after he receives notice of the filing.<sup>224</sup> If the subcontractor does not file its claim within this time, its lien rights are lost.<sup>225</sup> By filing a Rule, an owner can create a definite timetable for all mechanic's lien claims to be filed and more quickly make a final payment to the general contractor.

### Right to Retain Funds from General Contractor

Once an owner has been served with a subcontractor's notice of a claim or intention to file a claim, it may withhold enough money from the amount due the general contractor that is sufficient to "protect the owner from loss until such time as the claim is finally settled, released, defeated, or discharged."<sup>226</sup> An owner served with a notice should always elect to retain funds in this manner. To do so, however, the owner must give written notice to the general contractor that contains the following:

1. The name of the subcontractor, the amount of the claim and the amount withheld by the owner.
2. That unless the contractor settles, defends or secures against the claim within 30 days from service of the notice, the owner may pursue additional remedies.<sup>227</sup>

After the general contractor receives such a notice, he has 30 days to complete one of the following:

1. Settle or discharge the subcontractor's claim and give the owner a written copy of the waiver, release or satisfaction signed by the claimant;<sup>228</sup>
2. Agree in writing to defend against the claim and furnish the owner security against the claim, if the owner has not already retained sufficient funds to protect against loss if the contractor does not prevail; or<sup>229</sup>
3. Furnish the owner security to protect the owner from the loss on account of the claim.<sup>230</sup>

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<sup>221</sup> 49 P.S. §1402.

<sup>222</sup> 49 P.S. §1402.

<sup>223</sup> 49 P.S. §1405.

<sup>224</sup> 49 P.S. §1506(a).

<sup>225</sup> 49 P.S. §1506(a).

<sup>226</sup> 49 P.S. §1601.

<sup>227</sup> 49 P.S. §1602(b).

<sup>228</sup> 49 P.S. §1603(1).

<sup>229</sup> 49 P.S. §1603(2).

<sup>230</sup> 49 P.S. §1603(3).

If the general contractor does not settle, discharge, defend or bond off the claim, the owner is permitted to:

1. Pay the claim of the subcontractor and assume the subcontractor's rights as against the contractor<sup>231</sup> or
2. Defend against the mechanic's lien claim, in which case the general contractor is liable to the owner for all costs of defense, including reasonable attorney's fees, whether the defense is successful or not.<sup>232</sup>

### **Bond or Discharge of Liens**

At any time after a Lien Claim has been filed, the owner or "any party in interest" can petition the court to discharge the lien by paying into court the dollar amount of the Lien Claim.<sup>233</sup> The court will hold the funds deposited as security for the lien claimant, but the real property will no longer be encumbered by the lien.<sup>234</sup> Owners and lenders often require this procedure if a Lien Claim is filed. Owners or general contractors may want to use this procedure instead of paying off a lien claimant if they intend to defend against the Lien Claim.

Instead of paying cash into court, the petitioner can post a bond for double the amount of the required deposit or in such lesser amount as the court approves.<sup>235</sup>

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<sup>231</sup> 49 P.S. §1604(1).

<sup>232</sup> 49 P.S. §1604(2).

<sup>233</sup> 49 P.S. §1510(a).

<sup>234</sup> 49 P.S. §1510(a).

<sup>235</sup> 49 P.S. §1510(d).