

The Washington State construction lien statute is found at Revised Code of Washington (RCW) 60.04. It is titled the “Mechanics and Materialman’s Lien Statute.” This name is misleading – it is not the lien that mechanics have. It is the lien that contractors have. (Auto mechanics, by the way, have lien rights on cars and trucks they repair under the Chattel Lien Statute – RCW 60.08.)

One of the most misleading statements in law is found at the beginning of the construction lien statute. RCW 60.04.021 states:

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

Reading this, you might think that you have lien rights just because you have done work on a project. This is not the case. To have a lien, you have to comply with the technicalities and requirements of the lien statute – especially the notice requirements set out in RCW 60.04.031 and RCW 18.27.114.

Another one of the most misleading statements in law is found at the end of the construction lien statute. RCW 60.04.900 states:

RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.

This language suggests that Courts should be forgiving of small mistakes by contractors claiming liens, and should protect the contractor’s right to payment by allowing the contractor to fix small problems in a lien and to continue to claim lien rights. Courts are not that forgiving very often.

For instance, in the case Lumberman's, Inc. v. Barnhardt, 89 Wn. App. 283, 286, 949 P.2d 382 (1997), the Court said that “Although RCW 60.04.900 states that the lien statutes are to be liberally construed to provide security for all parties intended to be protected by their provisions, case law has established that mechanics' and materialmans' liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches.” This means that, if you don't claim your lien correctly, dotting every i, crossing every t, providing every notice, and using the right words when providing these notices, you will not have a valid lien.

Valid liens are good to have – they provide leverage which greatly increases your chance of getting paid once a job goes sour. However, bad liens are worse than nothing. You can end up paying the other side's attorney's fees and litigation expenses once they defeat your bad lien in court.

*The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.*

RCW 60.04.181 (3) (emphasis added).

#### *WHAT IS A LIEN?*

A construction lien is a right in real property to secure payment for work done to improve the property. It is like a mortgage – except that, unlike a mortgage, which is created when the creditor and the landowner agree to have the mortgage secure the debt, a construction lien arises

automatically – the landowner does not have to agree to it. If the landowner agrees to have the work done and the contractor does the work, the contractor can claim a lien.

There are two different theories of construction liens. First, the New York theory, which is that only a general or prime contractor has an agreement with the owner, so only the general or prime contractor can claim a lien. Under this theory, subcontractors and suppliers can make claims against the general contractor, who then can make a claim for a lien against the owner; but subcontractors and suppliers cannot skip over the general contractor and claim a lien directly. The second theory, the Pennsylvania theory, allows subcontractors and suppliers to claim a lien directly against the site. Michael Keyes, Construction Lien Practice and Procedure Manual for the State of Washington, 9 (3d ed. 1992) (hereinafter Keyes).

Until 1992, Washington was a pure “Pennsylvania State” and subcontractors and suppliers could claim a lien directly against the property on which they did work or to which their materials were added. In 1992, the Legislature modified this slightly by providing a limited circumstance when an owner is protected from liens by paying the general contractor. RCW 60.04.031 (3)(b). This limitation only applies to homeowners who remodel, alter or repair their owner-occupied, single-family residence or garage. When a homeowner remodels or alters his home or garage, the homeowner’s lien liability to subcontractors is limited to “amounts not yet paid to the prime contractor by the owner at the time the [Notice to Owner] . . . is received, regardless of whether amounts not yet paid to the prime contractor are due.” Therefore, if a homeowner has prepaid the price of a remodel, subcontractors cannot claim a lien even if the contractor takes the money and runs.

This is a sticky situation for subcontractors and suppliers, because you cannot tell how much a homeowner has already paid the owner. When working on home remodels, the best practice is to require that if the owner has prepaid the contract amount, the contractor prepay you (at least most of) the subcontract price. (Add a “pay when paid” clause to the subcontract – because then the contractor has to prepay you if it has been prepaid. Contractors usually like these clauses, because they protect contractors from cash-flow problems if the owner is late in payment. If the contractor doesn’t like the clause, it probably means that the contractor is sitting on prepaid money. Be careful with these clauses, however. Make sure the clause is a “pay when paid” clause, rather than a “pay if paid” clause. Under a “pay when paid” clause, you are entitled to payment within a reasonable time even if the contractor is never paid; under a “pay if paid” clause, you are not entitled to payment at all if the contractor is never paid. Also – send out the Notice to Owner as soon as you get the subcontract and before you start work. You are only entitled to claim a lien for amounts unpaid at the time the homeowner receives notice of your lien right – so you should give the homeowner notice as soon as possible.

#### *WHY WANT A LIEN?*

Claiming a lien is a hassle – it requires pages of notices, sent out according to a rigid timeline. The rules change depending on what kind of project you are working on. If you make a mistake, you could end up paying the other side’s costs and attorney’s fees. Is it all worth it?

Liens provide leverage. A lien gives a contractor or supplier the right to threaten to take away the owner’s property if the owner does not pay. If the choice is between paying for the

work (even paying twice for the work) and losing the property, most owners pay. As Kerry Lawrence and Michael Keyes (two of the authors of the new lien statute) observe,

Mechanic's lien foreclosures are an excellent example of "Cases are won or lost on their merits, they settle based on risk and leverage." While large numbers of mechanic's lien foreclosure complaints are filed, very very few result in a decree of foreclosure. Many liens are invalid or only partially perfected. Of those that remain a not insubstantial percentage are wiped out by foreclosure of a superior deed of trust; or abandoned due to a low probability of recovery. The vast majority that remain are either settled or any resulting judgment is paid. In all of our discussions with clients, construction attorneys, title insurers and others I have only heard of six properties going through the sheriff's sale procedure after a mechanic's lien foreclosure.

Kerry Lawrence & Michael Keyes, "Construction Liens: Creation, Perfection, Priority and Foreclosure", Chapter 9B of Foreclosing, Protecting and Defending Against Liens, (Washington State Bar Association 1996) (hereinafter "Lawrence and Keyes").

#### *WHO CAN CLAIM A LIEN?*

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.021.

"Improvement" means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c) providing professional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection.

RCW 60.04.011(5)

Together, these definitions provide for the lien rights of most of the players on a construction project. The first section is the broadest – applying to most of the trades involved in a project. Unlike the law prior to 1992, the lien statute now specifically includes demolition work as an improvement allowing the demolition contractor to claim a lien. This change in the law (which occurred in 1992) specifically overrules prior caselaw. (Previously, lien rights arose when a contractor helped build something. Courts considered demolition to be tearing something down, not building something, and did not give the demolition contractor a lien right. See Dean v. McFarland, 81 Wn.2d 215, 500 P.2d 1244 (1972). This is no longer the law, and demolition contractors have lien rights.)

The second section of the definition of improvement gives landscapers lien rights. Under the old law, landscapers had their own, landscapers’ lien. Now, landscapers have construction liens, just like the other subcontractors, under the construction lien statute.

The third section applies to professional services. Professional services are defined as “surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property.” RCW 60.04.011(13). Under this section, architects, engineers and surveyors have lien rights under the construction lien statute.

Further, the work does not necessarily have to be done onsite to provide for lien rights. Improvements to common areas and facilities at condominiums provides the contractor with a pro-rata lien on each unit (the owner of each unit can exonerate the lien against his unit by

paying his share of the lien). However, if the work is done on a single unit at the request of the unit's owner, the lien attaches only to the unit of the person requesting the work.

If labor done off-site at the request of the owner or the owner's agent is related to the development of the property and is necessary for the use of the property, then the work gives the contractor a lien right. Northlake Concrete Prods., Inc. v. Wylie, 34 Wn. App. 810, 663 P.2d 138 (1983). (This case held that labor done installing a sewer line to a property gave the subcontractor a lien on the property for the labor performed. This case was decided under the old statute -- and it held that a lien was available under only part of the old statute.)

Generally, materials have to be incorporated into the site to give the supplier a right to claim a lien.

Items sold to a property owner will not give rise to a claim under the lien statute unless they become fixtures. Westinghouse Elec. Supply Co. v. Hawthorne, 21 Wn.2d 74, 78, 150 P.2d 55 (1944). For personal property to become a fixture, it must meet *each* of the following requirements: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold.

Emerald City Elec. v. Jensen Elec., 68 Wn. App. 734, 740, 846 P.2d 559 (1993).

However, if materials are specially manufactured for the project and delivery of the materials is wrongfully refused, the supplier *should* have a lien right. Haskell v. McClintic Marshall Co., 289 F. 405, 412 (9th Cir. 1923). However, no Washington court has yet answered this question.

Who, then, does not have lien rights? In a recent case, a gas station was replacing its underground storage tanks. While removing the tanks, the contractor found that the dirt on the site was contaminated. The owner hired an environmental clean-up firm to remove and dispose

of the contaminated soil. The clean-up firm was not paid, so it filed a lien and sought to foreclose. The Trial Court refused to honor the lien, and the Court of Appeals affirmed the decision. TPST Soil Recyclers v. W.F. Anderson Constr., 91 Wn. App. 297, 957 P.2d 265 (1998). The Court looked at the first definition of improvement, “Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same.” *Id.* at 299. The Court then observed that the only work the environmental cleanup firm did was to haul dirt away from the site. The Court noted that this clean up was not part of an overall plan to develop the lot. The Court then stated that hauling contaminated dirt away does not construct, repair, or fill in any real property. The Court then held that hauling contaminated dirt away does not count as an alteration, remodel, demolition, clearing, or grading of a site unless it is done as part of an over-all scheme to improve the site by building on it or to make it suitable for someone else to build on it. Even though a clean site is far more valuable than a contaminated site, and even though a clean site is easier to develop than a contaminated site, the Courts refused to give the clean-up firm a lien.

The Court ruled that merely hauling away contaminated dirt, without more, is not an improvement of a property giving the clean-up firm lien rights unless it is part of a larger project to develop a structure on the property, or to create a lot suitable for development. This is the case even though the clean-up work improves the property in the sense that it makes the property more valuable. Another court might decide this case differently – and, if so, the Supreme Court will eventually have to decide the issue. But for now the bottom line is that lien rights arise from projects to build or improve structures or building sites – and not from projects designed merely to clean up an existing site unless the clean-up alters or remodels some structure.

### *WHAT IS COVERED BY A LIEN?*

The lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the labor, professional services, equipment, or materials were furnished, as the court deems appropriate for satisfaction of the lien. If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien.

#### RCW 60.04.051

Under the old law, different kinds of liens attached to different amounts of property. Now, the construction lien attaches to the “lot, tract or parcel of land” which is improved. The improvement to the land, as a fixture, has become part of the land and is subject to the lien. The question remains – if the owner owns adjacent lots on which the contractor did no work or to which the supplier supplied no materials, is the additional land subject to the lien? Probably not.

It is up to the court to decide how much of an owner’s property is subject to a lien, and no one can truly predict what a court will do. A court may treat multiple lots or tracts as part of the same parcel for lien purposes. For instance, if an owner is developing several lots as part of a single project, and you do work on only one of the lots, a court may allow you to claim a lien against the adjacent lots on which you did not work because those lots were part of the same “parcel” being developed by the owner. However, a lien will attach only to the property it describes – so, if you want to attach adjoining parcels, make sure you describe them on the lien. Further, courts will likely only allow liens to attach to the amount of property necessary to satisfy the lien if the property is foreclosed upon. For this reason, unless there is a problem with

the property on which the work actually occurred that makes the property worth less than the value of the work, it is a good practice to lien only the jobsite.

Further, when claiming liens against more than one lot or parcel, designate the amount due on each lot. If your contract is for a single sum – claim the entire sum against both lots. However, if you can divide your contract price between different lots, you should do so. This is especially important when the different lots are owned by different people. If you do not separate your claim by lot, you will lose your priority position to other claims. RCW 60.04.131.

In the case of a subdivision, before final plat approval, lien the whole parcel (it is the only legal parcel). When you file a lawsuit to foreclose your lien, you should then request that the Court give you permission to amend your lien. Your amendment should specifically name the lots on which you did work, and you should release the lots on which you did no work. This amendment requires Court approval. RCW 60.04.091(2). As long as you are fully secured, you will have enough leverage to be paid. If you seek to be over-secured, you will alienate a court if the court thinks that you are over-reaching. However, if the first thing you do when bringing your lawsuit is to demonstrate to the Court that you are not over-reaching, you will impress the Court with your honesty and integrity. Any little advantage helps in Court – and showing the judge that you are the good guy in the lawsuit is worth more than being over-secured by an over-reaching lien.

Further, RCW 60.04.051 also includes the long-standing rule that a construction lien is limited to the *interest or estate of the owner who ordered the work*. For instance, as a general rule, if the work is ordered by a tenant under a lease, the lien will attach only to the tenant's leasehold and will not attach to the property. Stetson-Post Mill Co. v. Brown, 21 Wash. 619, 59 P. 506 (1899). Leases are hard to sell at foreclosure sales. They are for a limited length of time, provide limited rights of use and occupancy, and (worst of all) many of them will simply disappear if foreclosed on (a foreclosure of a tenant's interest is a forced assignment of that interest – and if the lease has a nonassignment clause, as many do, foreclosure is not an option).

However, if the lease itself shows that the owner of the property (not the tenant) is really the person who requested the work, then the lien will attach to the property itself, even though the tenant is the point of contact for the contractor. For instance, a lease which required the tenant “to make all the repairs required by the building, fire or wire codes” makes the tenant an agent of the owner when the tenant hires a contractor to do the work. In such case, the property itself, and not merely the tenancy, is subject to the lien.

This principle applies to other kinds of interests as well. If a tenant in common (one of several co-owners of a single property) requests work, the lien will attach only to that person's partial ownership interest in the property (unless the tenant in common can be found to be an agent for some or all of his other cotenants). Patrick v. Bonthius, 13 Wn.2d 210, 124 P.2d 550 (1942). If the work is requested by a person buying the land under a land contract, the lien attaches only to that person's contract right – and not to the right of the person who still owns the land and is selling it – unless, again, the contract purchaser is an agent of the seller. Adams v. Dose, 87 Wash. 575, 152 P. 9 (1915) and Dahlman v. Thomas, 88 Wash. 653, 153 P. 1065

(1915). (Further, if the land contract has an anti-assignment clause, we have another example of a useless estate for lien purposes.) A purchaser at a judicial sale owns the property subject to redemption rights, and a redemptioner, by redeeming the property, cuts off construction lien rights of contractors working for the foreclosure purchaser – again, unless the redemptioner consented to or authorized the work. You should be careful doing work on foreclosed properties within the one-year redemption period following a judicial sale. RCW 6.23.010, 020. Properties sold from the Courthouse steps often need a lot of expensive work and you can lose the protection of the lien if the one-time debtor/owner (or any other redemptioner) purchases the property back (perhaps refinancing the property based on the new equity created by your work).

On the bright side – a construction lien is like a mortgage or a deed of trust, and it is not limited by the owner’s homestead exemption. Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 P. 803 (1915). As a secured debt, a lien should survive bankruptcy. Bankruptcy rules allow for the filing and perfection of pre-existing liens (See §362(b)(3) of the Bankruptcy Code which allows a creditor to perfect a lien even after a bankruptcy stay is in place if state law allows perfection of a lien to relate back to a date prior to the commencement of the case (date work began or date obligation became due)), but it is better to have filed your lien before your customer files a petition in bankruptcy. Again, speed is rewarded, and you should not sit on your notices and claims until the last minute. Also, you will have to take special steps to foreclose on the property after the owner has filed for bankruptcy. You will have to prove to the bankruptcy court that you have a secured debt and then petition for relief from stay to allow you to foreclose. However, these things are beyond the scope of this paper. If you receive notice that the owner of a property you have liened has filed bankruptcy, call a bankruptcy attorney.

### *HOW TO GET (AND KEEP) A LIEN?*

If you do work improving a property, you get a lien, right? Wrong. If you do work improving a property, and provide all the right people with the right notices and claims in the right form, you get a lien. Liens require work both onsite and in the home office.

### *WHO AUTHORIZED THE WORK?*

In order to allow you to claim a lien, you must have performed work at the request of the owner of the property against which you are claiming the lien – or at the request of the owner’s agent or construction agent.

*OWNER* – An owner is anyone possessing an estate or interest in the property. Owners include tenants, contract purchasers, mortgage holders, and fee owner. If there are multiple owners (as with tenants in common) – or different kinds of owners (as with leases) – then the lien attaches only to the interest of the owner requesting the work (unless that person is also the agent of some other owner). If the owner who ordered the work has his interest foreclosed, then the liens for that work are extinguished since those liens are subordinate to the interest of the owner being foreclosed. Irwin Concrete v. Sun Coast Properties, 33 Wn. App. 190, 653 P.2d 1331 (1982). If the foreclosure sale brings in enough money to pay off the debts senior to you, with money left over – you will be paid from the excess. However, even if your lien is extinguished without payment to you, you will have redemption rights under the redemption statute (RCW 6.23.010) and you do not lose your right to sue for payment, just your right to foreclose on the lien.

*AGENT* – There are two types of agents who can request work and, by doing so, subject an owner’s interest to a lien. First is a common law agent with actual or implied authority to hire the contractor for the owner. This kind of agency is a matter of agreement between the owner and his agent. If the owner gives another person the authority to hire a contractor, and that other person does hire the contractor, it is just as if the owner hired the contractor himself.

Generally, partners are agents for each other with regard to the partnership’s business. RCW 25.05.100. Officers are agents for corporations in the company’s business as set out in the bylaws. RCW 23B.08.400-410. Husbands and wives are generally agents for each other with regard to their community property. RCW 26.16.030(3); 60.04.211. Finally, almost any person can be the agent for any other person – they just have to agree on it.

*CONSTRUCTION AGENT* – The second kind of agent who can subject a property to a lien is a “construction agent.” Construction agency is a special kind of agency created by the construction lien statute to allow subcontractors and suppliers to claim liens against owners even though they do not have any agreement directly with an owner.

The statute defines “Construction Agent” as:

any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, or other person having charge of any improvement to real property, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter.

RCW 60.04.011(1).

Therefore, a “Construction Agent” is usually a contractor who is registered as a contractor under RCW 18.27. Sometimes an architect, engineer or some other person has control over the project on behalf of an owner. Such a person should also be a “Construction Agent”

under the statute. If you are subcontracting with a contractor or subcontractor on a project, you must make sure that the contractor or subcontractor is registered as a contractor under RCW 18.27 or licensed as an electrical contractor under RCW 19.28. If you do not – and you are working for an unlicensed contractor – who will lose your lien rights.

A contractor or subcontractor required to be registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW, or otherwise required to be registered or licensed by law, shall be deemed the construction agent of the owner for the purposes of establishing the lien created by this chapter only if so registered or licensed. Persons dealing with contractors or subcontractors may rely, for the purposes of this section, upon a certificate of registration issued pursuant to chapter 18.27 RCW or license issued pursuant to chapter 19.28 RCW, or other certificate or license issued pursuant to law, covering the period when the labor, professional services, material, or equipment shall be furnished, and the lien rights shall not be lost by suspension or revocation of registration or license without their knowledge. No lien rights described in this chapter shall be lost or denied by virtue of the absence, suspension, or revocation of such registration or license with respect to any contractor or subcontractor not in immediate contractual privity with the lien claimant.

RCW 60.04.041.

Under this provision, each licensed contractor or subcontractor is a “Construction Agent” for the owner with regard to the subcontractors or suppliers beneath him. If the contractor or subcontractor is not licensed, then he is not a “Construction Agent.” Therefore, even if you are licensed and work on a project, if the contractor or subcontractor who hires you on a job is not licensed, you lose your lien right.

This is actually an improvement over the old law. Under the old law, if anyone above you on the contract chain was not licensed, you would lose your lien right. Fair Price House Moving, Inc. v. Pacleb, 42 Wn. App. 813, 714 P.2d 21 (1986). The new law, enacted in 1992,

provides that “No lien rights described in this chapter shall be lost or denied by virtue of the absence, suspension, or revocation of such registration or license with respect to any contractor or subcontractor not in immediate contractual privity with the lien claimant.” Therefore, you have to make sure that the contractor or subcontractor who hires you is licensed, but you no longer have to make sure that the person who hires him is licensed, and so on up the chain of contract to the prime contractor.

There may be two important exceptions to this rule. First, substantial compliance with the contractor’s registration act is sufficient for some purposes under the act. Substantial compliance by the person you are in contract with *may* be sufficient to make him or her a Construction Agent. (See Mike’s Rental Machinery, Inc. v. Corbett-Draw Farms, Inc., 44 Wn. App. 257, 721 P.2d 1000 (1986)). Second, the exemptions at RCW 18.27.090 *may* be an exception to the rule and *may* cause the exempt person to be a Construction Agent as an “other person having charge of any improvement to real property.”

When the project is controlled by an architect or engineer, there is uncertainty as to the licensing requirements. RCW 60.04.011(1) speaks of any “licensed contractor” or “architect” or “engineer” – grammatically, it does not seem to say that contractors hired by unlicensed architects or engineers lose their lien rights. Further, RCW 60.04.041 only deals with contractors – stating that contractors have to be licensed or registered. It does not address whether architects or engineers who control the project also have to be licensed. Therefore, contractors hired by unlicensed architects or engineers *may* have lien rights. However – it is best to be safe and make sure that the person who hires you is licensed or registered.

## PRE-CLAIM NOTICES

*NOTICE TO OWNER* – The Notice to Owner is the principle form of notice required under the lien statute. Not everyone who is entitled to claim a lien has to provide a Notice to Owner. However, anyone who must provide a Notice to Owner who fails to do so loses their lien. There is no harm in providing the Notice even when you don't have to.

RCW 60.04.031 (1)-(4) provides that:

(1) Except as otherwise provided in this section, every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien. If the prime contractor is in compliance with the requirements of RCW 19.27.095, 60.04.230, and 60.04.261, this notice shall also be given to the prime contractor as described in this subsection unless the potential lien claimant has contracted directly with the prime contractor. The notice may be given at any time but only protects the right to claim a lien for professional services, materials, or equipment supplied after the date which is sixty days before:

(a) Mailing the notice by certified or registered mail to the owner or reputed owner; or

(b) Delivering or serving the notice personally upon the owner or reputed owner and obtaining evidence of delivery in the form of a receipt or other acknowledgment signed by the owner or reputed owner or an affidavit of service. In the case of new construction of a single-family residence, the notice of a right to claim a lien may be given at any time but only protects the right to claim a lien for professional services, materials, or equipment supplied after a date which is ten days before the notice is given as described in this subsection.

(2) Notices of a right to claim a lien shall not be required of:

(a) Persons who contract directly with the owner or the owner's common law agent;

(b) Laborers whose claim of lien is based solely on performing labor; or

(c) Subcontractors who contract for the improvement of real property directly with the prime contractor, except as provided in subsection (3)(b) of this section.

(3) Persons who furnish professional services, materials, or equipment in connection with the repair, alteration, or remodel of an existing owner-occupied single-family residence or appurtenant garage:

(a) Who contract directly with the owner-occupier or their common law agent shall not be required to send a written notice of the right to claim a lien and shall have a lien for the full amount due under their contract, as provided in RCW 60.04.021; or

(b) Who do not contract directly with the owner-occupier or their common law agent shall give notice of the right to claim a lien to the owner-occupier. Liens of persons furnishing professional services, materials, or equipment who do not contract directly with the owner-occupier or their common law agent may only be satisfied from amounts not yet paid to the prime contractor by the owner at the time the notice described in this section is received, regardless of whether amounts not yet paid to the prime contractor are due. For the purposes of this subsection "received" means actual receipt of notice by personal service, or registered or certified mail, or three days after mailing by registered or certified mail, excluding Saturdays, Sundays, or legal holidays.

(4) The notice of right to claim a lien described in subsection (1) of this section, shall include but not be limited to the following information and shall substantially be in the following form, using lower-case and upper-case ten-point type where appropriate.

NOTICE TO OWNER

IMPORTANT: READ BOTH SIDES OF THIS NOTICE CAREFULLY.  
PROTECT YOURSELF FROM PAYING TWICE

To: ..... Date:.....

Re: (description of property: Street address or general location.)

From: .....

AT THE REQUEST OF: \_\_\_\_\_ (Name of person ordering the professional services, materials, or equipment)

THIS IS NOT A LIEN: This notice is sent to you to tell you who is providing professional services, materials, or equipment for the improvement of your property and to advise you of the rights of these persons and your responsibilities. Also take note that laborers on your project may claim a lien without sending you a notice.

**OWNER/OCCUPIER OF EXISTING RESIDENTIAL PROPERTY**

Under Washington law, those who furnish labor, professional services, materials, or equipment for the repair, remodel, or alteration of your owner-occupied principal residence and who are not paid, have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

The law limits the amount that a lien claimant can claim against your property. Claims may only be made against that portion of the contract price you have not yet paid to your prime contractor as of the time this notice was given to you or three days after this notice was mailed to you. Review the back of this notice for more information and ways to avoid lien claims.

**COMMERCIAL AND/OR NEW RESIDENTIAL PROPERTY**

We have or will be providing professional services, materials, or equipment for the improvement of your commercial or new residential project. In the event you or your contractor fail to pay us, we may file a lien against your property. A lien may be claimed for all professional services, materials, or equipment furnished after a date that is sixty days before this notice was given to you or mailed to you, unless the improvement to your property is the construction of a new single-family residence, then ten days before this notice was given to you or mailed to you.

Sender: .....  
Address: .....  
Telephone: .....

Brief description of professional services, materials, or equipment provided or to be provided:  
.....

**IMPORTANT INFORMATION ON REVERSE SIDE**

**IMPORTANT INFORMATION FOR YOUR PROTECTION**

This notice is sent to inform you that we have or will provide professional services, materials, or equipment for the improvement of your property. We expect to be paid by the person who

ordered our services, but if we are not paid, we have the right to enforce our claim by filing a construction lien against your property.

LEARN more about the lien laws and the meaning of this notice by discussing them with your contractor, suppliers, Department of Labor and Industries, the firm sending you this notice, your lender, or your attorney.

COMMON METHODS TO AVOID CONSTRUCTION LIENS: There are several methods available to protect your property from construction liens. The following are two of the more commonly used methods.

DUAL PAYCHECKS (Joint Checks): When paying your contractor for services or materials, you may make checks payable jointly to the contractor and the firms furnishing you this notice.

LIEN RELEASES: You may require your contractor to provide lien releases signed by all the suppliers and subcontractors from whom you have received this notice. If they cannot obtain lien releases because you have not paid them, you may use the dual payee check method to protect yourself.

YOU SHOULD TAKE APPROPRIATE STEPS TO PROTECT YOUR PROPERTY FROM LIENS.

YOUR PRIME CONTRACTOR AND YOUR CONSTRUCTION LENDER ARE REQUIRED BY LAW TO GIVE YOU WRITTEN INFORMATION ABOUT LIEN CLAIMS. IF YOU HAVE NOT RECEIVED IT, ASK THEM FOR IT.

.....

Who doesn't have to provide a "Notice to Owner"? 1) The Prime Contractor; 2) Laborers; and 3) Subcontractors working directly for the prime contractor (first tier subcontractors), *except* first tier subcontractors on residential remodels by a homeowner. Everyone else has to give notice – and giving the notice never hurts.

*NOTICE OF FURNISHING PROFESSIONAL SERVICES* – People who provide professional services -- such as architectural, surveying or engineering services, have to provide a special notice. This is because while labor and materials are visible on the jobsite, professional services are, by their nature, invisible.

RCW 60.04.031(5) provides that:

Every potential lien claimant providing professional services where no improvement as defined in RCW 60.04.011(5) (a) or (b) has been commenced, and the professional services provided are not visible from an inspection of the real property may record in the real property records of the county where the property is located a notice which shall contain the professional service provider's name, address, telephone number, legal description of the property, the owner or reputed owner's name, and the general nature of the professional services provided. If such notice is not recorded, the lien claimed shall be subordinate to the interest of any subsequent mortgagee and invalid as to the interest of any subsequent purchaser if the mortgagee or purchaser acts in good faith and for a valuable consideration acquires an interest in the property prior to the commencement of an improvement as defined in RCW 60.04.011(5) (a) or (b) without notice of the professional services being provided. The notice described in this subsection shall be substantially in the following form:

NOTICE OF FURNISHING PROFESSIONAL SERVICES

That on the \_\_\_ (day) \_\_\_ day of \_\_\_ (month and year) \_\_\_, (name of provider) \_\_\_ began providing professional services upon or for the improvement of real property legally described as follows:

[Legal Description  
is mandatory]

The general nature of the professional services provided is.....

The owner or reputed owner of the real property is.....

- .....  
(Signature)
- .....  
(Name of Claimant)
- .....  
(Street Address)
- .....  
(City, State, Zip Code)
- .....  
(Phone Number)

Unless the professional service provider provides this notice, his or her lien will subordinate to a subsequent mortgage and will be lost if the property is ever purchased by a good faith purchaser.

*NOTICE TO CUSTOMER* – The “Notice to Customer” is not required by the lien statute. Rather, it is required by the contractor licensing statute. This Notice is required on almost all private residential projects and on all moderate commercial projects. When a prime contractor fails to provide this notice, he loses his lien rights, violates the contractor licensing statute, and violates the Consumer Protection Act. RCW 18.27.114 provides:

(1) Any contractor agreeing to perform any contracting project: (a) For the repair, alteration, or construction of four or fewer residential units or accessory structures on such residential property when the bid or contract price totals one thousand dollars or more; or (b) for the repair, alteration, or construction of a commercial building when the bid or contract price totals one thousand dollars or more but less than sixty thousand dollars, must provide the customer with the following disclosure statement in substantially the following form using lower case and upper case twelve-point and bold type where appropriate, prior to starting work on the project:

**"NOTICE TO CUSTOMER**

This contractor is registered with the state of Washington, registration no. ...., and has posted with the state a bond or deposit of ..... for the purpose of satisfying claims against the contractor for breach of contract including negligent or improper work in the conduct of the contractor's business. The expiration date of this contractor's registration is .....

**THIS BOND OR DEPOSIT MIGHT NOT BE SUFFICIENT TO COVER A CLAIM THAT MIGHT ARISE FROM THE WORK DONE UNDER YOUR CONTRACT.**

This bond or deposit is not for your exclusive use because it covers all work performed by this contractor. The bond or deposit is intended to pay valid claims up to .....that you and other customers,

suppliers, subcontractors, or taxing authorities may have.  
FOR GREATER PROTECTION YOU MAY WITHHOLD A  
PERCENTAGE OF YOUR CONTRACT.

You may withhold a contractually defined percentage of your construction contract as retainage for a stated period of time to provide protection to you and help insure that your project will be completed as required by your contract.

YOUR PROPERTY MAY BE LIENED.

If a supplier of materials used in your construction project or an employee or subcontractor of your contractor or subcontractors is not paid, your property may be liened to force payment and you could pay twice for the same work.

FOR ADDITIONAL PROTECTION, YOU MAY REQUEST  
THE CONTRACTOR TO PROVIDE YOU WITH ORIGINAL  
"LIEN RELEASE" DOCUMENTS FROM EACH SUPPLIER OR  
SUBCONTRACTOR ON YOUR PROJECT.

The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the state Department of Labor and Industries."

(2) A contractor subject to this section shall notify any consumer to whom notice is required under subsection (1) of this section if the contractor's registration has expired or is revoked or suspended by the department prior to completion or other termination of the contract with the consumer.

(3) No contractor subject to this section may bring or maintain any lien claim under chapter 60.04 RCW based on any contract to which this section applies without alleging and proving that the contractor has provided the customer with a copy of the disclosure statement as required in subsection (1) of this section.

(4) This section does not apply to contracts authorized under chapter 39.04 RCW or to contractors contracting with other contractors.

(5) Failure to comply with this section shall constitute an infraction under the provisions of this chapter.

(6) The department shall produce model disclosure statements, and public service announcements detailing the information needed to assist contractors and contractors' customers to comply under this section. As necessary, the department shall periodically update these education materials.

If you are required to provide the “Notice to Customer”, but fail to do so – your lien is invalid. RCW 18.27.114 (3). Further, failing to provide the “Notice to Customer” is an infraction of RCW 18.27. Infractions under RCW 18.27 expose contractors to various penalties (RCW 18.27.340) and are violations of the Consumer Protection Act. RCW 18.27.350; RCW 19.86. In such case, the contractor’s customer “may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained.” RCW 19.86.090. That is, failure to give the “Notice to Customer” can expose you to treble damages (up to \$10,000) plus court costs and attorney’s fees under the Consumer Protection Act.

If you ever work for residential homeowners, you should put the “Notice to Customer” in all your form contracts or on all your bids and estimate sheets. If you work on four or fewer residences, and the contract price is more than \$1,000 (a new window installation contract can cost enough) – you must provide the customer with the “Notice to Customer” *before* you do any work. The same is true for small and moderate commercial remodels – contracts for between \$1,000 and \$60,000. RCW 18.27.114 (1)(a) and (b). Again, there is no harm in giving this “Notice to Customer” even when you don’t have to give it. There is no reason not to have the “Notice to Customer” preprinted on all your estimates and contracts.

You should also note (as you probably already know from your bond company or from L&I) that the bond amount required has increased to \$6,000 for specialty contractors and to \$12,000 for general contractors. If you are maintaining a blocked savings account that you have not increased to the new levels – deposit more money immediately.

## CHECKLIST BY KINDS OF CLAIMANT

To determine whether a lien is valid, you can use the following checklist – taken from Lawrence and Keyes, p 9B-3 - 9B-5. This is an extremely useful checklist, which I use in my practice to quickly determine whether or not there is an obvious problem with a lien. You can use it to both double-check your own liens and to check for errors in liens by other contractors. If the claimant is:

### 1. **General Contractor**

A. Is the claimant properly registered or licensed?

– RCW 18.27.010, 18.27.030, 18.27.090

– Electricians RCW 19.28

B. Did the claimant provide the “Notice to Customer” if required?

– RCW 18.27.114

**CAUTION – DO NOT CONFUSE “NOTICE TO CUSTOMER” WITH “NOTICE TO OWNER.”**

C. No “Notice to Owner” required for materials, professional services, or equipment supplied by prime contractor.

– RCW 60.04.031

– Hayes v. Gwinn, 49 Wn.2d 908, 307 P.2d 1064 (1957).

### 2. **Subcontractor**

A. Is the claimant properly registered or licensed?

– RCW 18.27.010, 18.27.030, 18.27.090

– Electricians RCW 19.28

B. Did the subcontractor work for a registered contractor?

– RCW 60.04.041, RCW 18.27

– Current RCW 60.04.041 (enacted in 1992) partially overrules Fair Price House Movers, Inc. v. Pacleb, 42 Wn. App. 813, 714 P.2d 321 (1986).

C. If the subcontractor supplied equipment or materials, or was not in privity with the prime contractor, did the subcontractor give the Notice to Owner? Subcontractor may still have a valid lien for labor (laborer's lien).

– RCW 60.04.031

3. **Supplier of Material or Equipment** (no labor, or labor only ancillary to supplying materials, professional services, or equipment).

A. No registration or license required of supplier.

– RCW 18.27.090

– Arctic Stone, Ltd. v. Dadvar, 127 Wn. App. 789, 112 P.3d 582 (2005); Harbor Millwork, Inc. v. Achttien, 6 Wn. App. 808, 496 P.2d 978 (1972).

B. If supplied directly to owner, no “Notice to Owner” required.

– Northlake Concrete Prods., Inc. v. Wylie, 34 Wn. App. 810, 663 P.2d 1380 (1983); Hayes v. Gwinn, 49 Wn.2d 908, 307 P.2d 1064 (1957).

C. If supplied at request of “construction agent” [contractor or subcontractor] must send “Notice to Owner.”

– RCW 60.04.011, 60.04.031

D. If supplied at request of contractor or subcontractor, was the contractor or subcontractor registered or licensed?

– RCW 60.04.041; RCW 18.27

4. **Provider of Professional Services**

A. Is claimant a licensed architect, engineer, or land surveyor?

– RCW 18.08, RCW 18.43.

– 1985 enactment of RCW 18.08 probably overruled holding in Sherwood v. Wise, 132 Wash. 295, 232 P. 309 (1925).

B. Did claimant file “Notice of Furnishing Professional Services”?

– RCW 60.04.031

C. If services provided directly to owner, no “Notice to Owner” required.

– RCW 60.04.031

D. If provided at request of “construction agent” [contractor or subcontractor] must send “Notice to Owner.”

– RCW 60.04.011, 60.04.031

E. If provided at request of contractor or subcontractor, was the contractor or subcontractor registered or licensed?

– RCW 60.04.041; RCW 18.27

**CLAIM**

If you provided all the required notices, did the work, and got stiffed on payment – it is time to file your claim. There are two keys to filing a proper claim: (1) use the right form and (2) file on time. RCW 60.04.091 states that:

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

....., claimant, vs....., name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to \*chapter 64.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT: .....  
TELEPHONE NUMBER:.....  
ADDRESS:.....

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE:  
.....

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:  
.....

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property): [We provide all three kinds of description when available.] .....

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"):.....

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED:.....

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: .....

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE:.....

....., Claimant

.....

(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF ....., SS.

....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

.....  
[lien claimant]

Subscribed and sworn to before me this . . . . day of. . . . .

.....  
[notary]

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181.

A common mistake in claiming a lien is waiting too long – trying to be nice and work things out with the person who didn't pay you on time. In his On War, Carl Von Clausewitz observed that the mistakes that come from kindness are the very worst (1976). This is true of lien claims. Do not wait to file your lien while you try to negotiate with the person who has not paid you. File your lien – and then negotiate from a position of strength. You will be far more likely to get paid – and you will not lose your lien.

Remember – you only have ninety days to file your lien after you stop working – and ninety days goes by very quickly when you are trying to lobby for payment by sending letters and making phonecalls. You are entitled to payment for your work; a lien just secures your right. Filing a lien is an act of self-preservation, it is not a hostile act. Most contractors recognize this – as do most sophisticated owners.

Another common mistake is to modify the language of the lien. The statute says that the lien need not be word-for-word, so long as it is in “substantially the following form.” This is a trap. Don't fudge the form. This trap is particularly true of the verification language signed by the claimant and notarized. The required language is “I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.” This language is different from the language in the old statute. It is also different from the ordinary notary language. Lumberman's, Inc. v. Barnhardt, 89 Wn. App. 283, 949 P.2d 382 (1997). ***If you use the wrong language, you will lose your lien. The pre-printed lien forms you can buy at stationary stores may use the wrong language.***

This rule was affirmed, with force, by Division II of the Court of Appeals (Pierce County south and the Peninsula) in a case argued by the author of this paper: Flag Constr. Co. v. Olympic Blvd. Partners, 109 Wn. App. 286; 34 P.3d 1250 (2001). While Divisions I or III of the Court of Appeals may have decided this case differently (some recent decisions from Division 1 (King County north) have been more forgiving) – the rule is that any mistake may be fatal. Don't make mistakes.

Another mistake that is common is undervaluing your lien. The lien statute gives you the right to recover your unpaid principal contract balance, plus interest, sales tax, and attorney's fees. Many lien claimants only claim a lien for their principal amount. This means that they have only secured payment for their principal amount – leaving the remaining claim amounts unsecured by the lien. When we draft a lien, we include – as the lien amount – the principal plus some percentage (usually ½ the principal for small claims (under \$35,000) and 1/3 the principal for large claims (over \$35,000)). To avoid confusion, you should spell this out – for instance, if you have a claim for \$60,000 – we would draft the lien to claim: “\$60,000 principal, plus interest, costs and fees as allowed by the statute, estimated to be \$20,000, for a total lien amount of \$80,000.” This secures both the principal amount owing and the additional amounts you can receive under the lien statute.

Finally, the lien statute gives you the right to recover attorney's fees and court costs incurred in enforcing the lien. RCW 60.04.181. However, you will lose this right by filing the claim of lien but not providing the owner of the property with a copy of it (by registered or certified mail, or by personal service) within fourteen days. RCW 60.04.091.

## MISCELLANEOUS

### *SITE POSTING AND INFORMATION REQUIREMENTS OF PRIME CONTRACTOR –*

RCW 60.04.230 requires that, on any construction project costing more than five thousand dollars, the prime contractor post a legible notice containing the following:

- (a) The legal description, or the tax parcel number and the street address (if available);
- (b) The property owner's name, address, and phone number;
- (c) The prime contractor's business name, address, phone number, current state contractor registration number and identification; and
- (d) Either the name, address, and phone number of the office of the lender administering the interim construction financing, if any; or the name and address of the firm that has issued a payment bond, if any, on behalf of the prime contractor for the protection of the owner if the bond is for an amount not less than fifty percent of the total amount of the construction project.

Additionally, “The prime contractor shall immediately supply the information listed in RCW 19.27.095(2) to any person who has contracted to supply materials, equipment, or professional services or who is a subcontractor on the improvement, as soon as the identity and mailing address of such subcontractor, supplier, or professional is made known to the prime contractor either directly or through another subcontractor, supplier, or professional.” RCW 60.04.261. The information required under RCW 19.27.095 (2) is essentially the same as that required under RCW 60.04.230. This information is to allow potential lien and bond claimants to make their claims more easily by providing them with a running start on the information needed.

If the prime contractor fails to post the jobsite and provide information, he will be exposed to civil penalties. Additionally, he will not be entitled to receive a copy of any “Notice to Owner” sent out by subcontractors and suppliers. “If the prime contractor is in compliance with the requirements of RCW 19.27.095, 60.04.230, and 60.04.261, [the Notice to Owner] shall

also be given to the prime contractor as described in this subsection unless the potential lien claimant has contracted directly with the prime contractor.” RCW 60.04.031.

The problem with the jobsite postings is that they have a habit of disappearing. Every supplier, subcontractor, or laborer who shows up on the jobsite wants to take the posting home – and will do so. The solution to this problem is to provide a lot of postings at the job shack so that anyone can take one without bothering to tear off the one glued up at the front of the site.

“*STOP PAYMENT*” *NOTICE TO LENDER* – RCW 60.04.221 provides potential lien claimants with some additional protection through the real property lender (usually a bank that is providing interim financing through a construction loan). The statute does not require that the lender pay the contractor providing the notice, and the statute does not apply if a payment bond of at least 50% of the construction financing has been posted by the owner or general contractor. However, by involving the construction financier in the lien process, the “Notice to Real Property Lender” provides a potential lien claimant with additional leverage that might make the difference between being paid now, or later, or not at all. The “Notice to Lender” should be in the following form:

NOTICE TO REAL PROPERTY LENDER

(Authorized by RCW 60.04.221)

TO: .....

(Name of Lender)

.....

(Administrative Office-Street Address)

.....

(City) (State) (Zip) AND TO:

.....

(Owner) AND TO:

.....

(Prime Contractor-If Different Than Owner)

.....  
(Name of Laborer, Professional, Materials, or Equipment Supplier) whose business address is ....., did at the property located at..... (Check appropriate box)  
( ) perform labor ( ) furnish professional services ( ) provide materials ( ) supply equipment as follows:.....  
.....  
which was ordered by ..... whose address was stated to be.....

The amount owing to the undersigned according to contract or purchase order for labor, supplies, or equipment (as above mentioned) is the sum of.....Dollars (\$.....). Said sums became due and owing as of.....

You are hereby required to withhold from any future draws on existing construction financing which has been made on the subject property (to the extent there remain undisbursed funds) the sum of..... Dollars (\$.....).

IMPORTANT

Failure to comply with the requirements of this notice may subject the lender to a whole or partial compromise of any priority lien interest it may have pursuant to RCW 60.04.226.

DATE: .....

By: .....

Its: .....

A lien claimant who remains unpaid five days after the date payment came due may, within thirty-five days after the payment due-date, give the lender this notice. This “Notice to Lender” or “Stop Notice” must be sent (registered or certified mail) to the lender administering the construction loan, and copies must also be sent to the owner and the general contractor (also registered or certified mail). Again, the lender does not have to pay you once you send this notice. However, the lender must either withhold your claim amount from future loan

disbursements, or your lien will be given priority over the construction loan. This means the construction lender must either lean on the owner or contractor to pay you, or you will have a right to be paid before the construction lender is paid if the job goes sour and the property is sold at a foreclosure sale.

*CONSUMER PROTECTION –*

Even though liens are routine parts of doing business in construction – and even though liens are devices of self-protection, rather than attack, some contractors or owners are offended by lien claims. Sometimes these owners or contractors threaten to punish the person claiming the lien by slandering their reputation, withholding future work, or otherwise damaging the person claiming the lien. RCW 60.04.035 addresses this circumstance –

The legislature finds that acts of coercion or attempted coercion, including threats to withhold future contracts, made by a contractor or developer to discourage a contractor, subcontractor, or material or equipment supplier from giving an owner the notice of right to claim a lien required by RCW 60.04.031, or from filing a claim of lien under this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. These acts of coercion are not reasonable in relation to the development and preservation of business. These acts of coercion shall constitute an unfair or deceptive act or practice in trade or commerce for the purpose of applying the consumer protection act, chapter 19.86 RCW.

As observed above, the Consumer Protection Act is a strong statute. It provides for treble damages as a penalty up to \$10,000, and for costs and attorney’s fees.

*RIGHTS OF THE OWNER –*

The owner may bond around the lien claim. “The bond shall contain a description of the claim of lien and real property involved, and be in an amount equal to the greater of five thousand dollars or two times the amount of the lien claimed if it is ten thousand dollars or less,

and in an amount equal to or greater than one and one-half times the amount of the lien if it is in excess of ten thousand dollars.” This bond clears the title to the property – providing substitute security for the lien claim. The lien claim then proceeds as an action against the bond, rather than as an action against the property. RCW 60.04.161.

During the lien lawsuit, the owner may also withhold payments from a general contractor for lien amounts recorded by subcontractors, suppliers or laborers. Further, if the lien is reduced to a judgment against the owner’s property, the owner can offset (backcharge) the amount of the judgment against the amount due a contractor. RCW 60.04.151.

A lien must be released immediately upon payment to the lien claimant of the lien amount. RCW 60.04.071.

Finally, the owner or general contractor can challenge a Claim of Lien or a Notice to Real Property Lender as a frivolous claim by filing a special proceeding in Superior Court to challenge the claim. The statute provides for an expedited “show cause” proceeding. This action requires the lien claimant to appear and show cause why the lien should not be released as “frivolous, made without reasonable cause, or clearly excessive.” If the lien is found to be a bad lien, the court will order that the lien be released or reduced.

If the lien is a good lien, it will survive the challenge, but the lien claimant will still have to sue to foreclose on the lien. The prevailing party in the show cause action will be awarded attorney’s fees and costs. RCW 60.04.081. This claim that a lien is frivolous can also be asserted as a defense and counterclaim in the lien foreclosure lawsuit.

## *HOW TO ENFORCE A LIEN*

Once you have filed a claim of lien, you must sue to enforce it within eight months after filing it, or your lien expires and you lose it. At this point, you should consult with an attorney if you have not yet done so. Attorneys, as professional court gladiators, should know the best way to proceed once you are in court. Your suit must be in the county where the lien was recorded (the county where the property is located), and you must serve a summons and complaint upon the owner of the property within ninety days of filing your suit. RCW 60.04.141. Your complaint to foreclose lien should also include a complaint for breach of contract against the person who failed to pay you, unless that person has declared bankruptcy. If you are a subcontractor or supplier to a contractor, you should also make a claim against the contractor's bond. Further, it should specifically ask for costs and attorney's fees as allowed by RCW 60.04.181 and by your contract if your contract has an attorney's fees provision. Attach your lien to your complaint.

Further, before drafting your complaint, research the title of the property. All owners of record, in whatever capacity, should be joined to the suit. Failure to join the party means that, if it comes time to foreclose on the property, you cannot foreclose upon the unnamed person's interest. Specifically name as defendants: (1) both spouses (community property); (2) all partners (partnerships); (3) any tenants; (4) any purchasers under contract; (5) all condominium owners; (6) all other lien claimants; and (7) anyone else showing up on a title report as a person who might be claiming an ownership interest (if they aren't claiming an interest – let them come forward and say so to get out of the suit). Many attorneys order and recommend ordering "litigation guarantees" prior to filing your complaint. Even if you do not order a litigation guarantee, get a title report on the property.

Failure to join and serve all owners and persons claiming liens on the property (under the old law, RCW 60.04.100, repealed in 1992) used to make the entire lien foreclosure void -- killing the lien. Kinskie v. Capstin, 44 Wn. App. 462, 722 P.2d 876 (1980); Queen Anne Painting v. Olney & Assocs., 57 Wn. App. 389, 788 P.2d 580 (1990). Now that RCW 60.04.100 has been repealed and RCW 60.04.141 has been enacted, failure to join and serve all proper parties in the foreclosure action makes the action ineffective as to the unnamed party. Davis v. Bartz, 65 Wash. 395, 118 Pac. 334 (1911). Any party you wish to claim priority over is a proper party (for instance, other lien claimants). You should name all owners, tenants, lien claimants, and the holders of any mortgages or judgments recorded after you recorded your lien.

You don't need to name and serve superior encumbrances – such as mortgage holders whose mortgages predate the project – but you may want to do so. Naming a mortgage bank notifies the bank that the action is starting, which will probably make the bank nervous about the solvency of their debtor and may cause the bank to require that the debtor prove that he is good for the money by, for instance, paying you off.

In your Complaint, you must “allege and prove” that you are a registered contractor. If you are entering contracts under a trade name – you must register the trade name before you can sue to enforce contracts. RCW 19.80.040. If you have a trade name, allege your registration. If you had to provide the “Notice to Customer” prior to doing work on the project – allege that you did so and attach the document in which you provided the “Notice to Customer.”

When alleging priority and rank among lien claimants, do not claim to have priority or rank. Rather, request that the Court determine priority and rank. Priority of lien claims is determined by the date on which the lien claimant started work. Rank is determined by the statute – giving certain favored claimants preferred positions. The five ranks of liens are “(a)

Liens for the performance of labor; (b) Liens for contributions owed to employee benefit plans; (c) Liens for furnishing material, supplies, or equipment; (d) Liens for subcontractors, including but not limited to their labor and materials; and (e) Liens for prime contractors, or for professional services.” RCW 60.04.181.

Rank is what matters in most lien cases -- priority is less important. So long as there are no intervening non-construction liens (e.g. a judgment lien, a mortgage, etc.) all lien claimants are dealt with according to rank -- the claimants at each rank receiving a pro-rata share of the pay-out from a sale. Where there is an intervening non-construction lien, that lien cuts the ranks into two parts. All construction liens that predate the intervening interest are dealt with by rank; then the intervening encumbrance is satisfied; finally, all the remaining (later) construction liens are dealt with by rank.

This is just an over-view of what happens once a claim of lien becomes the subject of a lawsuit. Lien suits, like all lawsuits, become very complicated and technical very quickly. You should hire an attorney to prosecute your suit for you – and the lien statute encourages this by allowing you to recover attorney’s fees when you win.



# Disclosure Statement Notice to Customers

Business Name: \_\_\_\_\_

This contractor is registered with the state of Washington, registration no. \_\_\_\_\_ has posted with the state a bond or deposit of \$\_\_\_\_\_ for the purpose of satisfying claims against the contractor for breach of contract including negligent or improper work in the conduct of the contractor's business. The expiration date of this contractor's registration is \_\_\_\_\_.

***THIS BOND OR DEPOSIT MIGHT NOT BE SUFFICIENT TO COVER A CLAIM THAT MIGHT ARISE FROM THE WORK DONE UNDER YOUR CONTRACT.***

This bond or deposit is not for your exclusive use because it covers all work performed by this contractor. The bond or deposit is intended to pay valid claims up to \$\_\_\_\_\_ that you and other customers, suppliers, subcontractors, or taxing authorities may have.

***FOR GREATER PROTECTION YOU MAY WITHHOLD A PERCENTAGE OF YOUR CONTRACT.***

You may withhold a contractually defined percentage of your construction contract as retainage for a stated period of time to provide protection to you and help insure that your project will be completed as required by your contract.

***YOUR PROPERTY MAY BE LIENED.***

If a supplier of materials used in your construction project or an employee or subcontractor of your contractor or subcontractors is not paid, your property may be liened to payment and you could pay twice for the same work.

***FOR ADDITIONAL PROTECTION, YOU MAY REQUEST THE CONTRACTOR TO PROVIDE YOU WITH ORIGINAL "LIEN RELEASE" DOCUMENTS FROM EACH SUPPLIER OR SUBCONTRACTOR ON YOUR PROJECT.***

The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the state Department of Labor and Industries.

I have received a copy of this disclosure statement.

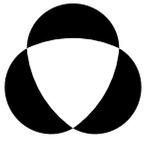
Dated this \_\_\_\_\_ day of \_\_\_\_\_ of the year \_\_\_\_\_.

\_\_\_\_\_  
Signature of Customer

*The contractor must retain a signed copy of this disclosure statement in his or her files for a minimum of three years and produce a signed or electronic signature copy of the disclosure statement to the department upon request.*

For more information, please refer to [RCW 18.27.114](#).

**FORM A1**



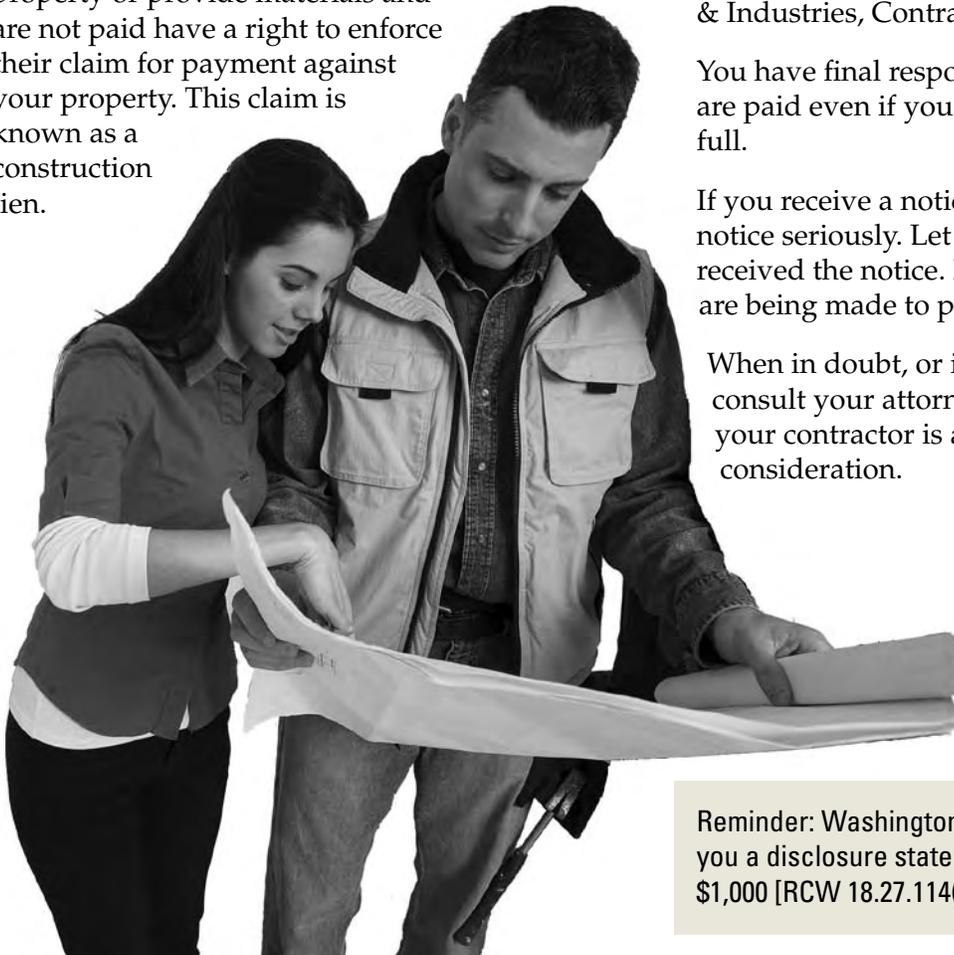
# Facts About Construction Liens

## What you should know about contracts

If your contractor fails to pay subcontractors, suppliers or laborers or neglects to make other legally required payments, those who are owed money can look to your property for payment, **even if you have paid your contractor in full.** This is true if you have hired a contractor to build a new home or are buying a newly built home.

It is also true when you remodel or improve your property, although the amount of your liability may be limited to the amount you owe the prime contractor at the time a lien is filed.

Under Washington laws, those who work on your property or provide materials and are not paid have a right to enforce their claim for payment against your property. This claim is known as a construction lien.



People who supply materials or labor ordered by your contractor are permitted by law to file a lien only if they do so within 90 days of cessation of performance or delivery of materials. The time frame is spelled out in RCW 60.04.091.

If you enter into a contract to buy a newly built home, you may not receive a notice of a lien based on a claim by a contractor or material handler. Be aware that a lien may be claimed even though you have not received a notice.

Before making final payment on the project, request a completed lien release form from each contractor and material supplier. A sample of this release of lien form is available from the Department of Labor & Industries, Contractor Registration Section.

You have final responsibility for seeing that all bills are paid even if you have paid your contractor in full.

If you receive a notice to enforce a lien, take the notice seriously. Let your contractor know you have received the notice. Find out what arrangements are being made to pay the sender of the notice.

When in doubt, or if you need more details, consult your attorney. When and how to pay your contractor is a decision that requires serious consideration.

Reminder: Washington laws require contractors to give you a disclosure statement if your contract exceeds \$1,000 [RCW 18.27.114(A) or (B)].

## How to protect your investment

If you are dealing with a lending institution, ask your loan officer what precautions the lending institution takes to verify that subcontractors and material suppliers are being paid when mortgage money is paid to your contractor.

Request lender supervision when dealing with a lending institution that provides interim or construction financing.

Ask the prime contractor to disclose all potential lien claimants as a condition of payment. A lien claimant must mail (by certified or registered mail or by personal service) a copy of the claim of lien to the owner within 14 days of the time the lien is recorded [RCW 60.04.091(2)]. While an action is ongoing, an owner may withhold from this prime contractor the amount of money for which a claim is recorded by a subcontractor, supplier or laborer [RCW 60.04.151].

It is recommended that your check be made payable jointly, naming the contractor and the subcontractor or supplier as payees.

Upon payment and acceptance of the amount due, the owner has the right to an executed release of all lien rights by lien claimants [RCW 60.04.071].

Consider using an escrow agent to protect your interests. Find out whether your escrow agent will protect you against liens when disbursing payments. If you are interested in this alternative, consult your attorney.

Request that your contractor post a performance bond in the amount of the project cost. That will give you recourse in the event the contractor fails to complete the building agreement.

### Please note:

This notice was prepared by the Department of Labor & Industries, Specialty Compliance Services Division, for reproduction by lending institutions and contractors for distribution to their clients. It explains the basics of the construction lien law to help you protect yourself. This information is not a reflection upon the abilities or credit of your contractor.

 **On the Web:** Find more information about hiring a contractor at:

[www.Lni.wa.gov/TradesLicensing/Contractors/HireCon](http://www.Lni.wa.gov/TradesLicensing/Contractors/HireCon)

### For more information

Contractor Registration Hotline:  
1-800-647-0982

You may also call your local L&I office. See listings under "Washington State of" in the government section or the white pages of the telephone book.

Other formats for persons with disabilities are available on request. Call 1-800-647-0982. TDD users, call 360-902-5797. L&I is an equal opportunity employer.

**THE CONSTRUCTION SITE POSTING REQUIREMENT**

**Washington State Mechanic's & Materialmen's Lien**

**PROPERTY OWNER** \_\_\_\_\_

**ADDRESS** \_\_\_\_\_

**TELEPHONE** \_\_\_\_\_

**JOB SITE ADDRESS** \_\_\_\_\_

**LEGAL DESCRIPTION OR TAX PARCEL #** \_\_\_\_\_

\_\_\_\_\_

**CONTRACTOR** \_\_\_\_\_

**ADDRESS** \_\_\_\_\_

**TELEPHONE** \_\_\_\_\_

**REGISTRATION NO.** \_\_\_\_\_

\_\_\_\_\_

**LENDER AND/OR BONDING COMPANY** \_\_\_\_\_

**ADDRESS** \_\_\_\_\_

**TELEPHONE** \_\_\_\_\_

**NOTICE TO OWNER**  
**IMPORTANT: READ BOTH SIDES OF THIS NOTICE CAREFULLY**  
**PROTECT YOURSELF FROM PAYING TWICE**

To: \_\_\_\_\_

Date: \_\_\_\_\_

Re: \_\_\_\_\_  
(Description of property: street address or general location)

From: \_\_\_\_\_

**AT THE REQUEST OF:** \_\_\_\_\_  
Name of person ordering their professional services, materials, or equipment.

**THIS IS NOT A LIEN:** This notice is sent to you to tell you who is providing professional services, materials, or equipment for the improvement of your property and to advise you of the rights of these persons and your responsibilities. Also take notice that laborers on your project may claim a lien without sending you a notice.

**OWNER/OCCUPIER OF EXISTING RESIDENTIAL PROPERTY**

Under Washington law, those who furnish labor, professional services, materials, or equipment for the repair, remodel, or alteration of you owner-occupied principal residence and who are not paid, have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

The law limits the amount that a lien claimant can claim against your property. Claims may only be made against that portion of the contract price you have not yet paid to your prime contractor as of the time this notice was given to you or three days after this notice was mailed to you. Review page 2 of this notice for more information and ways to avoid lien claims.

**COMMERCIAL AND/OR NEW RESIDENTIAL PROPERTY**

We have or will be providing professional services, materials or equipment for the improvement of your commercial or new residential project. In the event you or your contractor fail to pay us, we may file a lien against your property. A lien may be claimed for all professional services, materials, or equipment furnished after a date that is sixty days before this notice was given to you or mailed to you, unless the improvement to you property is the construction of a new single-family residence, then ten days before this notice was given to you or mailed to you.

Sender: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Brief description of professional services, materials, or equipment provided or to be provided: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## Important Information for your Protection

- This notice is sent to inform you that we have or will provide professional services, materials or equipment for the repair, remodel, or alteration of you property. We expect to be paid by the person who ordered our services, but if we are not paid, we have the right to enforce our claim by filing a construction lien against your property.
- **LEARN** more about the lien laws and the meaning of this notice by discussing them with our contractor, suppliers, Department of Labor and Industries, the firm sending you this notice, your lender, or your attorney.
- **COMMON METHODS TO AVOID CONSTRUCTION LIENS:** There are several methods available to protect your property from construction liens. The following are two of the more commonly used methods.
  - **DUAL PAYCHECKS** (Joint Checks): When paying your contractor for services or materials, you may make checks payable jointly to the contractor and the firms furnishing you this notice.
  - **LIEN RELEASES:** You may require your contractor to provide lien releases signed by all the suppliers and subcontractors from whom you have received this notice. If they cannot obtain lien releases because you have not paid them, you may use the dual payee check method to protect yourself.
- **You should take appropriate steps to protect your property from liens.**
- **Your prime contractor and your construction lender are required by law to give you written information about lien claims. If you have not received it, ask them for it.**

**NOTICE OF FURNISHING PROFESSIONAL SERVICES**

That on the   (day)   day of  (month and year) ,  (name of provider) , began providing professional services upon or for the improvement of real property legally described as follows:

**LEGAL DESCRIPTION IS MANDATORY**

The general nature of the professional services provided is \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The owner or reputed owner of the real property is \_\_\_\_\_.

\_\_\_\_\_ (signature)

\_\_\_\_\_ (name of claimant)

\_\_\_\_\_ (street address)

\_\_\_\_\_ (city, state, zip code)

\_\_\_\_\_ (phone number)

[CLAIMANT],

Claimant,

v.

[PERSON WHO OWES MONEY],

Debtor.

CLAIM OF LIEN UNDER RCW 60.04

NOTICE IS HEREBY GIVEN that the company named below claims a lien pursuant to Chapter 60.04 RCW. In support of this lien, the following information is submitted:

1. Name of Lien Claimant: [Claimant]  
Telephone: [Claimant's phone number]  
Address: [Claimant's address]
2. Date on which the claimant began to perform labor, provide professional services, supply materials or equipment, or the date on which employee benefit contributions became due:  
[FIRST DATE OF WORK]
3. Name of person indebted to the claimant:  
[PERSON WHO OWES MONEY – NOT NECESSARILY OWNER]
4. Description of the property against which a lien is claimed:  
Assessor's Tax Parcel No.: [Tax Parcel Number]  
Street Address: [Street Address of Property]
5. Name of the owner or reputed owner of subject property:  
[OWNER OF PROPERTY]
6. The last date on which labor was performed; professional services were furnished; contribution to an employee benefit plan were due or material or equipment was furnished:  
[LAST DATE OF PUNCH LIST WORK]
7. Principal amount for which a lien upon the property is claimed: [Unpaid Amount]
8. Claimant is not the assignee of this claim. [MOST LIKELY TRUE]





DECLARATION OF MAILING

I, \_\_\_\_\_, declare under penalty of perjury according to the laws of the State of Washington that I caused to be mailed a true and correct copy of the Claim of Lien Under RCW 60.04, recorded March 1, 2012, by regular mail and certified mail, postage prepaid to:

OWNER

A courtesy copy was mailed by regular mail to:

GENERAL CONTRACTOR

on this \_\_\_ day of \_\_\_\_\_, 20 \_\_, at \_\_\_\_\_, WA.

\_\_\_\_\_  
signature



RETURN ADDRESS:

**[PERSON FILING LIEN AND ADDRESS]**

DOCUMENT TITLE: **CLAIM OF LIEN UNDER RCW 60.04**

REFERENCE NUMBER(S) OF RELATED DOCUMENTS

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GRANTOR(S) (LAST, FIRST AND MIDDLE INITIAL)

**[OWNER]**

GRANTEE(S) (LAST, FIRST AND MIDDLE INITIAL)

**[CLAIMANT]**

LEGAL DESCRIPTION (ABBREVIATED FORM: I.E., LOT, BLOCK, PLAT OR SECTION, TOWNSHIP, RANGE, QUARTER)

**[LEGAL DESCRIPTION]**

ASSESSOR=S PROPERTY TAX PARCEL/ACCOUNT NUMBER **[PARCEL NUMBER]**

The Auditor/Recorder will rely on the information provided on this form. The staff will not read the document to verify the accuracy or completeness of the indexing information provided herein.