



## Ohio Mechanics' Liens: Perfecting a Mechanics' Lien (Part Two of Two)

by **Matthew D. Harper** and **Gene R. Abercrombie**

Property owners having improvements constructed on their property need to pay close attention to Ohio's mechanics' lien statutes. Briefly stated, mechanics' liens are liens against real property (such as commercial real estate or a family home) placed by contractors, subcontractors, material suppliers and laborers who supply labor or materials to improve a real property. Mechanics' liens exist to secure the value of the labor and materials benefitting the real property. In the event that a mechanics' lien claimant is not paid for the value of its work, the real property itself can be ordered sold by a court to ensure payment. With a small amount of pre-planning and attention to detail, however, owners can significantly reduce the possibility that the mechanics' lien is filed against their real property.

In the first installment of this two-part series (see the October issue of *LawTrends* on our web site), we considered mechanics' lien perfection in general, as well as how a contractor can secure the value of labor and materials by placing a mechanics' lien on real property it improves. This article considers the other side of mechanics' lien issues: advising property owners on how to protect against mechanics' liens.

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## **File and Serve a Notice of Commencement**

If you are a non-residential (i.e., commercial) property owner seeking to lessen the possibility of mechanics' liens, the first step you must take is recording a "notice of commencement." The notice of commencement must be recorded *before* the start of any work that could lead to a mechanics' lien. After recording, the notice of commencement must be served on the general contractor. Service on the general contractor must be made in a manner that provides evidence of receipt, such as personal service with a signed receipt or certified mail, return receipt requested. The notice of commencement must also be served on any materialman or subcontractor that requests a copy within ten days of the request. A copy of the notice of commencement must also be posted at the job site.

Timely serving a notice of commencement in the commercial setting is critical because it makes subcontractors and materialmen responsible for timely filing of notices of furnishing. After a property owner serves a notice of commencement, a subcontractor or materialman working to improve commercial property has 21 days to file a notice of furnishing. If more than 21 days pass, a subcontractor or materialman can still file a notice of furnishing, but any lien that follows will be limited to amounts owing for labor and materials supplied within the 21 day period immediately preceding service of the notice of furnishing and thereafter. The subcontractor or materialman will have lost any lien rights for labor or material supplied earlier. Thus, compliance with the notice of commencement requirements is vital because without it, a subcontractor or materialman can place a mechanics' lien on your property at any time without ever having to provide a notice of furnishing. By having the notice of commencement in place, the property owner forces contractors to act promptly or risk losing their lien rights.

## **Obtain Affidavits and Waivers for Any Payments Made**

Regardless of whether your property is residential or non-residential (which dictates whether or not you should file a formal notice of commencement), the "affidavit and waiver" stage is essential to protecting your property from mechanics' liens. (It is prudent to consult an attorney on whether your property is residential or non-residential. For example, houses being constructed by builders for resale (i.e. a "spec house") are treated as commercial property under the Ohio Mechanics' Lien Act even though the ultimate use will be for a residence. Because of the different requirements applicable to residential versus commercial property under the Ohio Mechanics' Lien Act, you want to be certain that you have correctly categorized your property from the outset.) Always take the following steps as a property owner.

Before you pay a general contractor, secure an affidavit from him or her. In his or her affidavit, the general contractor should swear to the identity of all materialmen, subcontractors and laborers that have worked on the project. He or she should also swear to the amounts still owed to those parties. This information is important because it tells you both *who* theoretically could attach a mechanics' lien to your property and to *how much* such an encumbrance could amount.

After identifying those who have worked on your property under the general contractor, start to obtain lien waivers. Lien waivers are signed documents by which those otherwise entitled to place mechanics' liens on your property give up their right to do so. Get a lien waiver from the general contractor, along with all materialmen or subcontractors identified on the general contractor's affidavit. In the commercial real estate context, your highest

priority should be to get lien waivers from any materialmen or subcontractors who served notices of furnishing on you, because they have properly protected their mechanics' lien rights. However, regardless of whether your real estate is residential or non-residential, a prudent property owner should still get lien waivers from all materialmen and subcontractors who worked on the project, regardless of whether they served notices of furnishing. This becomes doubly important in the residential real estate context, where notices of furnishing are not required.

For payments other than final payments, materialmen and subcontractors will usually provide lien waivers dating through the last payment. However, for the final payment, you should insist on full and complete waivers of lien. Doing so will extinguish the mechanics' lien rights of those parties entirely. By extinguishing the mechanics' lien rights of all parties involved, you will protect yourself (and your real estate investment) from preventable future problems.

*To obtain more information on mechanics' liens, please contact the authors at our Toledo office (419-241-6000).*



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*Mr. Harper and Mr. Abercrombie gratefully acknowledge the assistance of Daniel W. Everson, a summer associate, in preparing this two-part series. Mr. Everson is a third year law student at Ohio State University.*

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