

Construction Employers: How to Handle Price Escalations & Getting Paid

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Presenter



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Debt Collection

- Strong Contract
- Change Orders
- Having a System
- Pursuing a Judgment
- Collecting a Judgment
- Mechanic's Liens



Strong Contract

- Payment terms
- Due dates
- Attorneys' fees and collection costs
- Pre-lien notice
- Mediation Clauses
- Liquidated damages



Price Increases

- Huge price volatility during the pandemic
- Force Majeure?
 - “Act of God”
 - Can no longer rely on this type of clause
 - At this point delays and price increases are not only “foreseeable,” they are commonplace.
 - Perhaps applies if materials are totally unavailable.

Price Increases

- Contract Price Options
 - Fixed Price
 - Cost-Plus
 - Guaranteed Maximum Price (GPM)
- Can be very difficult to convince a court to award extra costs under a fixed price or GPM contract without a change order.
- Price Escalation Clauses



Price Increases

- **Example for Prime Contract:**
- **Price Sensitive Materials:** If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed so that application of such unit prices to the actual quantities causes substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted. If the cost of the materials described below which are required for the Work (“Price Sensitive Materials”) increase by more than ___% over the amount estimated and included for the Price Sensitive Materials in calculating the Guaranteed Maximum Price (“Material Price Threshold”), the Guaranteed Maximum Price shall be increased by ___% of any such increase beyond the Material Price Threshold, but in no event shall the increase exceed \$_____.
- Price Sensitive Material:
- HVAC, Electrical, Plumbing equipment
- Drywall
- Siding Materials
- Lumber

Price Increases

- **Material Price Increases.** Contractor and Subcontractor acknowledge that in certain cases it is not possible to control the pricing for, availability of, or the time for delivery of certain materials necessary for the Subcontractor's Work. If the costs of the materials described below which are required for the Subcontractor's Work increase over the "Quoted Amount" stated below, the Subcontract Sum shall be increased by any such increase beyond the Quoted Amount ("Material Price Increases"). If the delivery date for the Specified Materials is delayed by the supplier or manufacturer ("Supplier Delay"), Subcontractor's date to complete its Work will be extended by a number of days equal to the duration of the Supplier Delay.

Materials

Quoted Amount



Change Orders

- Be Diligent
- Set the tone early – on the very first change put it in writing
- Be sure to update the total contract price and the deadline to complete the work
- Collect payment at the time of the Change Order
 - Don't defer until the end

Having a System

- Don't let payments slide
- Develop form letters or emails to remind customers about payment
 - 30 days – “Just touching base on the next payment”
 - 45 days – “We still haven't seen the next payment and don't want to schedule to be affected
 - 60 days – “We'll need to stop working unless we can clear up the payment situation”
 - 90 days – Wait, why are you still working?
- File mechanic's liens at 90-100 days (sooner if warranted)

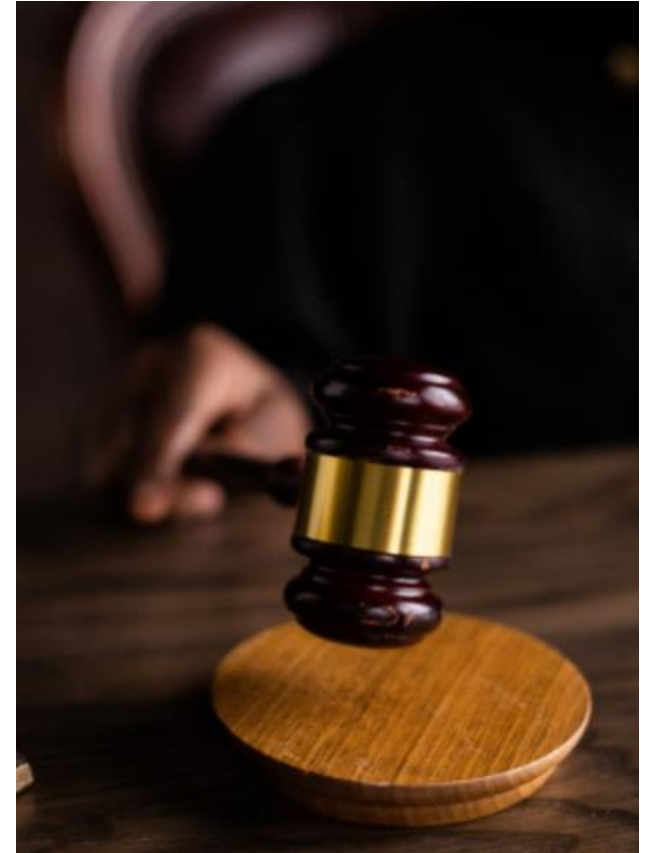


Pursuing a Judgment

- Deadline = 6 years from date the payment became overdue
- Conciliation Court = Claims up to \$15,000
 - Inexpensive, informal, short, unpredictable/uncertain
 - Can be appealed to District Court
 - Can pursue a conciliation court judgment without waiving mechanic's lien rights
- District Court = Claims of any size
 - Expensive, formal, long, more predictable/more certain
 - Can be appealed to Court of Appeals
 - Mechanic's lien claims can only be pursued in district court
- Arbitration
 - Private proceeding, so action and outcome are not public record
 - Can be less expensive than district court
 - Cannot be appealed – arbitrator's decision is final
 - If included in your contract, make sure the exact process is described in detail

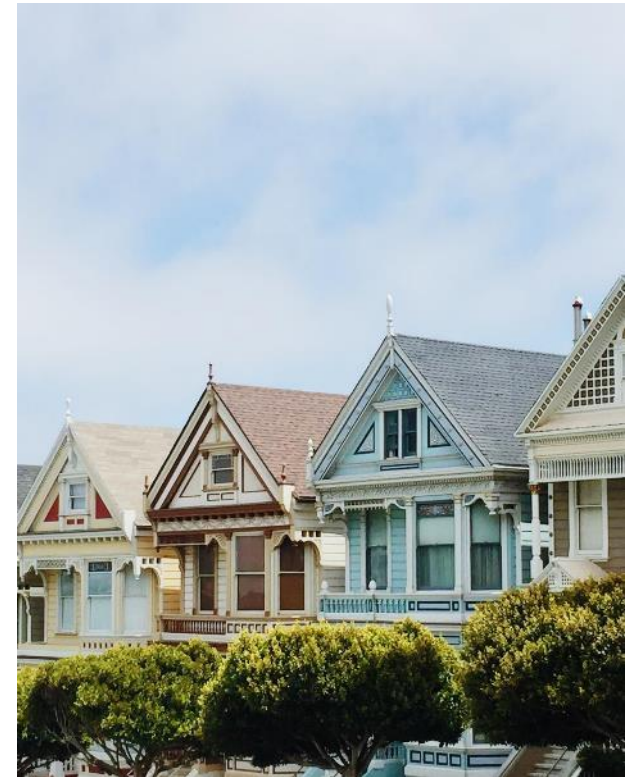
Collecting a Judgment

- Finding Assets
- Asset Attachments
- Bank Accounts
- Real Estate
- Orders for Disclosure
- Post-judgment Discovery



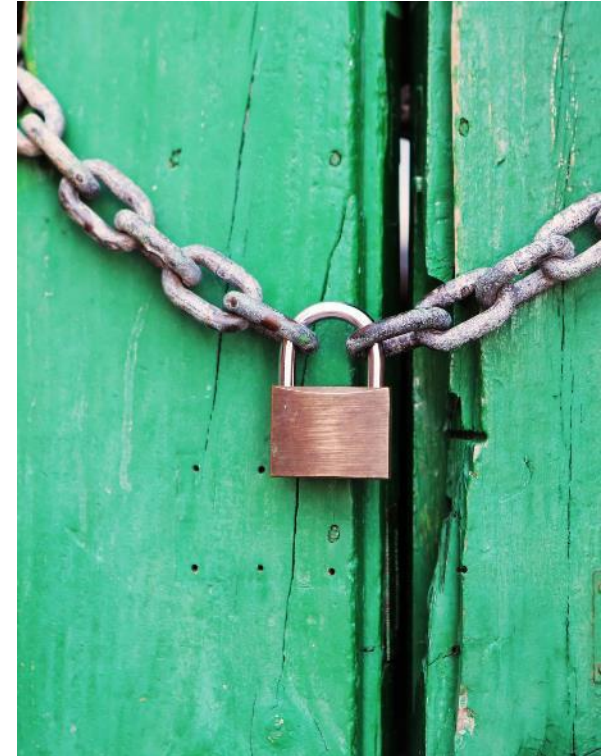
What is a Mechanic's Lien?

- A statutory remedy for persons who contributed to improvement of real property.
- Provides a security interest in real property they improved and provides for the sale of the property to pay for the improvements.
- An action against real property itself.
- Minnesota has had a mechanic's lien law since 1858, the year Minnesota attained statehood.
- Minnesota Statutes Chapter 514 provides for and governs mechanic's liens.



Why is a Lien Important to me?

- A mechanic's lien provides the lien holder with a security interest in the real estate to which it contributed value through work or materials.
 - A security interest is a source for payment should the debtor become insolvent.
- Attorneys' fees may be recovered if lien foreclosure is successful.



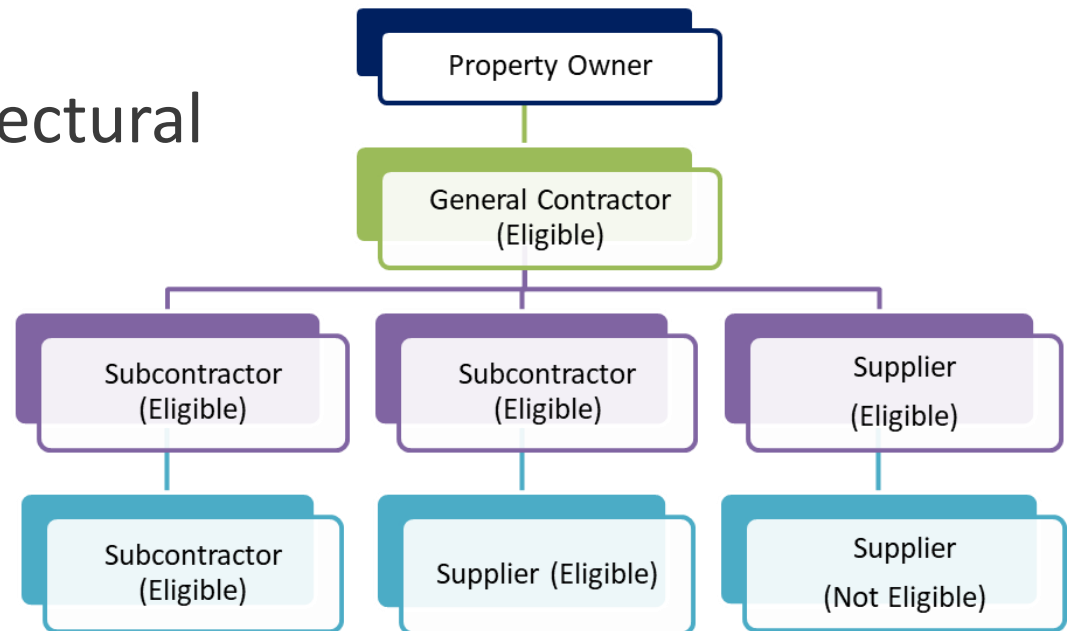
Why is a Lien Important to me?

- Following proper lien procedure puts the owner and general contractor on notice that you are diligent and unlikely to be an easy victim.
 - Owners react to mechanic's liens by applying pressure on the contractor or making direct payment to subcontractors/suppliers.
- But, filing a mechanic's lien does not automatically guarantee payment. Prior encumbrances may leave little or no equity to pay off the mechanic's lien.
 - Inquire of the owner's and contractor's solvency and of encumbrances upon the property.



Who is Eligible?

- Minn. Stat. §514.01
- Whoever provides:
- Engineering, architectural design, surveying
- Labor
- Material
- Machinery



Who is Eligible?

“Whoever performs ... whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon the improvement, and upon the land on which it is situated...”



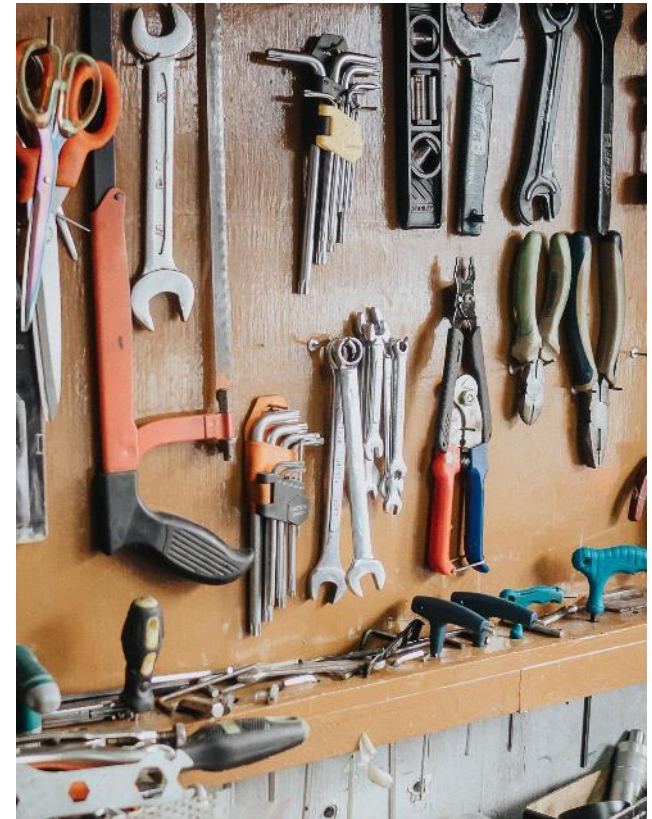
What Type of Contribution Qualifies?

- Minn. Stat. §514.01

“Whoever ... contributes to the improvement of real estate ... shall have a lien ... for the erection, alteration, repair, or removal of any building, fixture, bridge, wharf, fence, or other structure thereon, or for grading, filling in, or excavating the same, or for clearing, grubbing, or first breaking, or for furnishing and placing soil or sod, or for furnishing and planting of trees, shrubs, or plant materials, or for digging or repairing any ditch, drain, well, fountain, cistern, reservoir, or vault thereon, or for laying, altering or repairing any sidewalk, or in or upon the adjoining half of any highway, street, or alley upon which the same abuts.”

Limitations to Liens

- Repair vs. Improvement
 - Must add value or significantly extend the useful life
 - Maintenance is a repair, not an improvement
- Lessees
 - Work performed at the request of a lessee without the owner's knowledge/consent
 - Consent presumed unless notice given
 - Work at the request of a lessee for the installation of trade fixtures
- Public property is generally not subject to liens



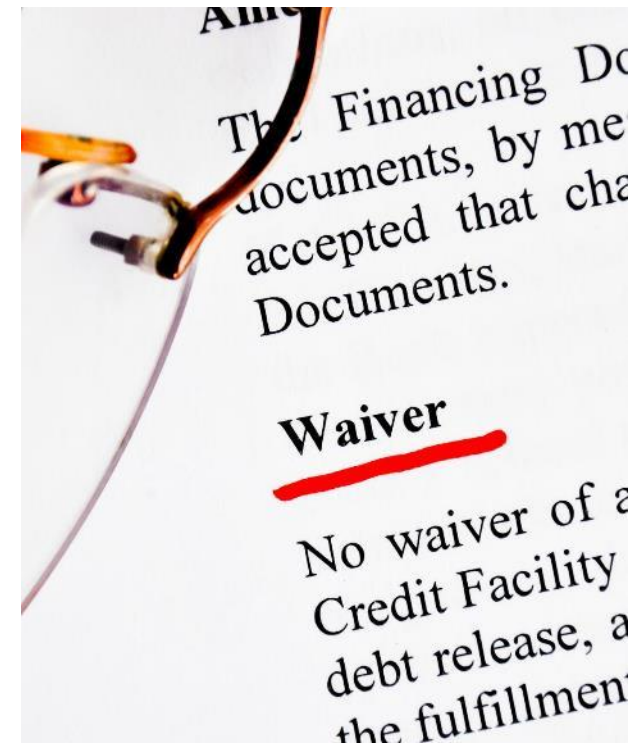
Priority of a Lien

- Applies to relative ranking of interests in the property
- All mechanic's liens for the same improvement are coordinate and equal
- They have a priority over all other interests not of record on the date the liens attach
- Often means whether claimant gets paid in full amount of lien



Lien Waivers

- Once paid for contribution to the property, or for a portion of his contribution to the property, the lien holder must provide the owner with a lien waiver corresponding to the amount paid. Minn. Stat. §514.07.
- Use the appropriate standard lien waiver forms when issuing lien waivers. Do not attempt to modify full lien waiver forms for use as partial lien waivers.
- View lien waiver forms provided by General Contractors with caution and substitute standard forms.



Lien Waivers

- Contract provisions that require a Contractor, Subcontractor, or Supplier to waive its right to a mechanic's lien or to a claim against a payment bond before that person or entity has been paid, are void and unenforceable. (Minnesota Statute §337.10, subd. 2)



2 Basic Steps for Perfecting a Mechanic's Lien

- Serve pre-lien notice if required.
- Draft, serve and file a mechanic's lien statement within 120 days of the last date of contribution to the property.
- Commence a mechanic's lien foreclosure action within one year of the last date of contribution to the property and have the property sold at a sheriff's sale.

These steps must be followed in most cases exactly as required by Chapter 514, otherwise the mechanic's lien will be unenforceable.



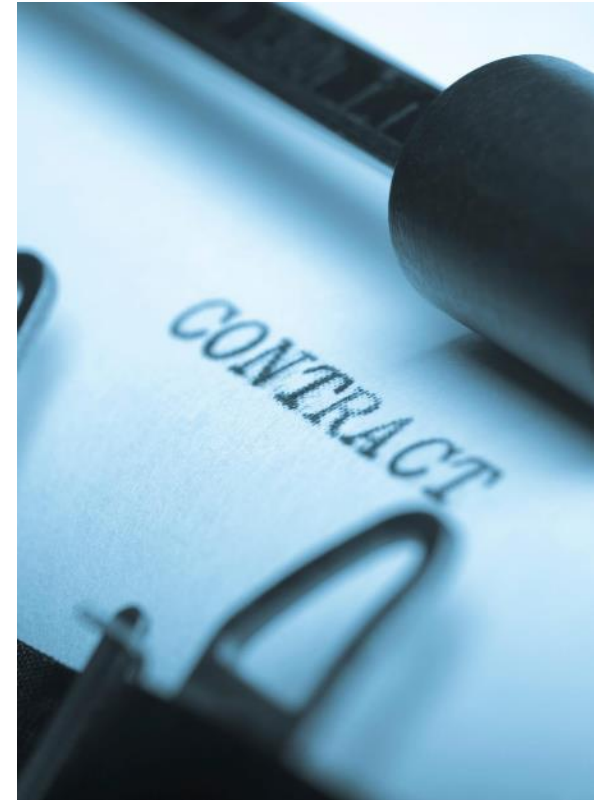
Pre-Lien Notice

- Pre-lien notice is a written notice issued by the lien claimant to the owner notifying the owner that certain persons may have the right to assert a lien against the property.
- Purpose of pre-lien notice is to prevent the owner from being unfairly surprised by mechanic's liens filed by unpaid subcontractors and suppliers.



Pre-Lien Notice

- Prime Contractor
 - Include in written contract
 - If no written contract within 10 days by certified mail or personal service.
 - Licensed residential work requires a written contract
- Subcontractor/Supplier
 - Serve personally or by certified mail within 45 days of first day of work or delivery.
 - If owner makes payment prior to 45 days and prior to receipt of notice, the lien could be limited, even to \$0.00.
 - Person who contracts with supplier must provide name and address of Owner within 10 days of request.



Property-Use Exceptions to Pre-Lien Notice

- Pre-lien notice is not required for improvements to commercial property (that is not in agricultural use) which is wholly or predominantly non-residential in use if the improvement:
 - provides or adds more than 5,000 useable sq. ft. of floor space; or
 - is an improvement where the existing property contains more than 5,000 total useable sq. ft. of floor space; or
 - is an improvement to property which contains more than 5,000 sq. ft. and does not involve the construction of the new building or an addition to an existing building.
- Notice required for improvement to retail tenant space of less than 5,000 sq. ft. even if shopping mall was greater than 5,000 sq. ft.

If in doubt, provide pre-lien notice.

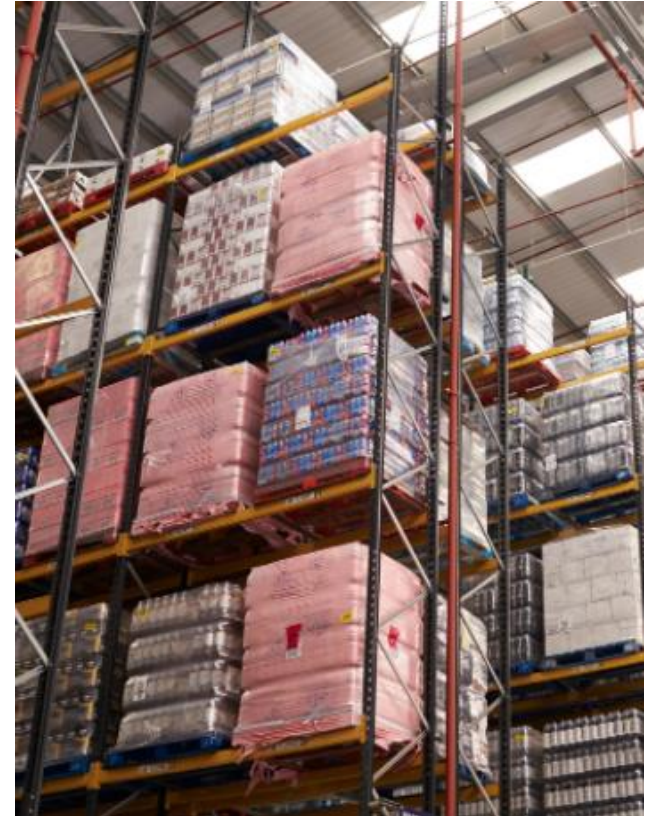
Prime Contractor Pre-Lien Notice

- Minn. Stat. §514.011 Subd. 1
- The notice must be in at least 10 point bold type and included in a written contract, or in some cases it may be served via certified mail or personal delivery within 10 days of reaching an oral agreement to do the work.
- The “mail within 10 days” option does not apply to residential contracts because agreements must be in writing.



Subcontractor/Supplier Pre-Lien Notice

- Minn. Stat. §514.011 Subd. 1
- The notice must be in at least 10 point bold type, if printed, or in capital letters, if typewritten, and be served upon the owner via certified mail or personal delivery within 45 days of the Subcontractor's or Supplier's first labor or delivery.



The undersigned hereby gives notice to the public and states as follows:

1. I am acting at the instance of the lien claimant, _____, a _____ under the laws of the State of _____ as its _____.
2. The lien claimant hereby gives notice of intention to claim and hold a lien upon the land in _____ County, Minnesota, described as follows:
3. The name and mailing address (and license number, if applicable) of the lien claimant is :
4. The amount of the lien claimed is \$ _____, plus interest and attorney's fees and costs, and is due and owing to the lien claimant for labor performed or skill, material or machinery furnished to the land.
5. The lien claimant did or supplied the following: _____
6. The lien claimant's contribution to the improvement was performed or furnished from _____ to _____, for the following persons:
7. The name of the present owner of the land according to the best information lien claimant now has is:
8. The lien claimant acknowledges that a copy of this statement must be served personally or by certified mail on the owner, the authorized agent of the owner or the person who entered into the contract with the lien claimant within 120 days of doing the last work or furnishing the last item of such skill, material or machinery.
9. Notice as required by Minnesota Statutes Section 541.011(2), if any, was given.

STATE OF MINNESOTA)

(Name of Company) _____

) ss.

COUNTY OF _____)

(Name of Person Signing) _____

Check here if part or all of the land is Registered (Torrens) ____

_____, being duly sworn, on oath says that I am the _____ of the lien claimant in the within statement, and have knowledge of the facts stated in the statement. This statement is made at the instance of said lien claimant and is true of my own knowledge.

(Name of Person Signing)

Subscribed and sworn to before me this ____ day of _____, 2014.

(Signature of Notary Public or other official)



Foreclosure of the Lien

- 1. Within one year from the date of last improvement to the project, commence foreclosure lawsuit in the district court and file a Notice of Lis Pendens against the subject property.
- 2. If foreclosure is not commenced within one year, the mechanic's lien becomes unenforceable.
 - Filing an arbitration demand will not stop the running of the one-year period.
- 3. If not resolved, the foreclosure proceeding eventually results in a trial before a judge where all parties with interests in the property present their evidence and arguments.



Foreclosure of the Lien

- 4. Following the completion of a trial and the rendering of the verdict, the successful lien claimants must request the court to order a foreclosure sale conducted by the sheriff.
 - At the foreclosure sale, the property is sold and the proceeds from the sale used to pay off the interest holders in the property based upon their priority of interest.
 - It is important to note that the mechanic's lien holder's interest assumes priority based upon the date of the first visible improvement to the property.
 - Redemption periods – generally 1 year residential property/ 6 months property.



Mechanic's Lien

- The three basic steps to perfect a mechanic's lien are as follows:
 - provide pre-lien notice within the statutory time period (if required);
 - draft, serve and file a mechanic's lien statement within 120 days of the last work;
 - commence a lien foreclosure action within one year of the last date of work.
- Be proactive; protect your mechanic's lien rights.
- Pay your subcontractors and suppliers what you have been paid.
- Don't wait until your accounts receivables are overdue, be the one who gets paid.



Questions?

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