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## Good Company

### Demystifying Mechanics Liens in Massachusetts

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Massachusetts, like most jurisdictions, has a comprehensive statutory scheme for asserting and enforcing mechanics liens. Though it is a powerful tool, many companies do not understand what a mechanics lien is, when they can lien a project, and how to go about it. While the technical intricacies of the statute are beyond the scope of this article, an overview of the process should help you understand whether you should be thinking about asserting a lien.

#### What is a mechanics lien?

A mechanics lien is an involuntary encumbrance on real estate much like a mortgage. In a traditional mortgage, as security for your loan, you give the lending bank the right to foreclose on your property (sell it out from under you) in the event that you do not pay your promissory note. That right to foreclose is embodied in the mortgage that you give to the bank and is recorded in the registry of deeds. A mortgage is, therefore, really nothing other than a discrete type of lien on your property.

While a mortgage is voluntary, i.e. in exchange for borrowing money you agree to execute a mortgage, sometimes liens can be involuntary. For example, a court might authorize the recording of a real estate attachment on your property in the context of a lawsuit. Like a mortgage, the real estate attachment is security for the claimants in the lawsuit, and if you do not pay the judgment that the claimants recover, they can sell your property at a foreclosure sale to satisfy the judgment. This is an example of an involuntary lien.

A mechanics lien is also an involuntary lien. It allows a tradesperson (contractor, subcontractor, supplier, etc.) on a construction project to assert an involuntary lien on the project owner's property to secure payment for work performed. The lien is only available for private property; and not for public property. If the claimant is not paid, that person can foreclose on the lien and sell the property at public auction to satisfy the lien just as could a foreclosing creditor of an attachment or a mortgage. Thus, the specter of having a property foreclosed upon to satisfy a lien usually gets the quick attention of the owner who either will satisfy the lien, or bring pressure to bear on whoever should have made the payment. It is the rare case where the mechanics lien actually goes to a foreclosure sale.

#### Who can lien?

Mechanics liens, contrary to their name, are not for mechanics. The class of persons entitled to lien is very broad, provided however that there is a written contract. You cannot claim a mechanics lien based on an oral contract. Contractors can lien on any contract for the "erection, alteration, repair or removal of a building, structure, or other improvement to real

property, or for furnishing material or rental equipment, appliances, or tools therefore.” Subcontractors, lower-tier subcontractors and suppliers can lien where their contract provides “labor, including construction management and general contractor services, and material or rental equipment, appliances, or tools which shall be furnished by virtue of said contract” which are “furnished for the building or structure or other improvement”. This broad definition covers virtually everyone who works on a construction project. (Arguably, engineers or architects who do not actually work on the building, structure or other improvement are not covered, though this is still a somewhat open question).

### **How much can I lien for?**

Your lien can only be for value of what you actually provided. Interest and attorneys’ fees are not typically included in the lien amount. Subcontractors, however, cannot recover more than the amount due or to become due under the general contract at the time the lien is asserted, regardless of whether the subcontractor may be owed more than that. For example, if the owner only owes (or will owe) the general contractor \$50,000 under the owner/general contractor contract, the maximum amount a subcontractor can claim is \$50,000. Lower-tier subcontractors have it even worse. They can only recover up to the amount due or to become due to the first-tier subcontractor at the time the lien is asserted. Thus, if the owner owes the general contractor \$100,000, but the general contractor only owes the first-tier subcontractor \$25,000, the lower-tier subcontractors can only collect up to \$25,000. This can be mitigated, however, by sending to the general contractor a statutory form called a “Notice of Identification” within 30 days of commencement of work by the lower-tier subcontractor. In that case, the lower-tier subcontractor will be treated the same as a first-tier subcontractor, i.e. the lien will be capped at the amount due to the first-tier subcontractor at the time the lien is asserted. The “Notice of Identification” itself is not a lien and there is no downside for sending one to the general contractor. Notwithstanding, few lower-tier subcontractors do so.

### **How do I claim my lien?**

Assuming you have a written contract and are within the class of persons entitled to lien, the claiming of a lien is a relatively simple process involving three steps. The first step is recording a “Notice of Contract” in the registry of deeds where the property is located. You will need the legal description of the underlying property to do this. The form is provided in the statute, and there are strict outside time limits for recording this document. Technically, you can record the Notice of Contract on the day you sign a contract. You do not have to wait until you commence work or have a problem. Practically, most contractors will wait for a problem as, understandably, assertion of a lien rarely endears you to anyone. The date of this recording is the date of your lien.

The second step is to record a “Statement of Account”. This form itemizes the amount of your lien. Again, there are strict time deadlines, though you can file anytime after the Notice of Contract has been recorded. The downside to early recording is that you may not have incurred all your costs yet and it triggers the third and final step, filing of a lawsuit within 90 days to enforce (foreclose on) the lien.

The outside periods for recording these documents varies depending on a variety of factors, as do notice requirements to the owner. As a gross oversimplification, you generally have at least 90 days from when you last provided labor or materials as the outside date to assert the lien (though in most cases you have significantly longer). There are some infrequent situations where the period may be shorter, but if you start thinking about asserting a lien early within that 90-day period more likely than not you will be fine.

### **Can I do this myself?**

The forms and the rules are found in Massachusetts General Laws c. 254. As a statutory remedy, there is little or no margin for error. A missed deadline or an improper form may invalidate the lien. The statutes are not written in plain English and can be confusing. Given the complexity of the statute, it is recommended that you consult with someone who is familiar with the statute and comfortable with its meaning. If you are a corporation, in Massachusetts you must hire a lawyer to file a lawsuit that would include a suit to foreclose on a lien (though individuals can act as their own lawyer). The forms are simple, but perfection of a lien demands strict attention to detail and timing. At least for the first few times, counsel is recommended.

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