

BARKER OLMSTED & BARNIER

A PROFESSIONAL LAW CORPORATION

THE TOP TEN MISCONCEPTIONS ABOUT MECHANIC'S LIENS



Attorney

David J. Barnier

2341 Jefferson Street
Suite 200

San Diego, CA 92110

Direct: 619.682.4842

Main: 619.682.4040

Fax: 619.220.7056

djb@barkerolmsted.com

www.barkerolmsted.com

“Even if the claimant ultimately is owed an amount much larger than the amount stated on his Preliminary Notice, the claimant may still recover on a mechanic’s lien for this much-increased amount if the claimant’s estimate on his Preliminary Notice was made reasonably using some form of information available to the claimant. The claimant will lose his mechanic’s lien rights if the estimate in his Preliminary Notice is completely random.”



1. **A Preliminary Notice must be served within 20 days of the claimant first providing benefit to the project; otherwise, the claimant loses his entire mechanic’s lien rights.**

A mechanic’s lien claimant *should* serve his Preliminary Notice on the reputed property owner within 20 days of the claimant first providing labor/materials/equipment/etc. to the project. If a Preliminary Notice is served more than 20 days after this date, the claimant does not lose his entire mechanic’s lien rights. The claimant still has mechanic’s lien rights for all labor/materials/equipment/etc. provided for the period of time that begins on the date that is 20 days prior to the date that the Preliminary Notice was served, forward.

The date of service is determined by the date that the Preliminary Notice is mailed by certified mail. The Preliminary Notice must be served by certified mail, and the green card receipts must be retained to show proof of delivery (or proof that delivery was attempted but refused by the recipient).

A Preliminary Notice cannot be served too early. The estimate and the identify of the owner must be reasonably investigated by the claimant prior to serving the Preliminary Notice, but once the Preliminary Notice is served, the claimant need not revise his estimate nor serve a new owner that he learns about after serving his Preliminary Notice.

2. **If a claimant identifies and serves a Preliminary Notice on a party that is not the actual owner of the property, the claimant’s Preliminary Notice is defective and the claimant necessarily loses his mechanic’s lien rights.**

This is probably not true, assuming that the claimant reasonably researched the ownership of the property and served his Preliminary Notice on the party whom he believed to own the property. The key question is whether the claimant did actually make a reasonable inquiry into the owner’s identity. If the claimant did, then he has served the “reputed” owner of the property, and has thereby satisfied California Civil Code section 3097.

3. A claimant's estimate within his Preliminary Notice must reasonably resemble the value that the claimant ultimately provides to the project.

Actually, the similarity between a claimant's estimate within his Preliminary Notice and the value actually bestowed to a project is irrelevant in determining whether the Preliminary Notice is valid. Similar to a claimant's obligation to reasonably investigate the ownership of the property before stating the owner's name within his Preliminary Notice, the claimant must only make a reasonable effort to estimate the value of labor/materials/equipment/etc. that he expects to provide to the project. For a subcontractor, this amount will usually be the subcontract price. For a supplier, the supplier should ask his customer what quantity of materials the supplier expects to purchase from the supplier for the project.

Even if the claimant ultimately is owed an amount much larger than the amount stated on his Preliminary Notice, the claimant may still recover on a mechanic's lien for this much-increased amount if the claimant's estimate on his Preliminary Notice was made reasonably using some form of information available to the claimant. The claimant will lose his mechanic's lien rights if the estimate in his Preliminary Notice is completely random.

For both the identity of the owner and the estimate amount within the Preliminary Notice, a claimant would be smart to make a record of any conversations it has that form the basis of his understanding as to the identify of the owner or his estimate within his Preliminary Notice.

4. The value of a mechanic's lien is equal to the contract balance owed to the claimant at the end of the project.

"A mechanic's lien value is equal to the lesser of: 1) the value of labor/materials/equipment/etc. provided to the project or 2) the contracted price of the labor/materials/equipment/etc. provided to the project.."

Very often, yes. However, the value of a mechanic's lien is limited to the labor/materials/equipment/etc. that are actually incorporated into the property. A lumber supplier who supplies \$10,000 of lumber to a framing subcontractor for use on a particular property will only have mechanic's lien rights for the quantity of lumber that is incorporated into the property.

Further, a mechanic's lien value is equal to the lesser of: 1) the value of labor/materials/equipment/etc. provided to the project or 2) the contracted price of the labor/materials/equipment/etc. provided to the project.

A lawsuit on a mechanic's lien will require the claimant to prove more than a lawsuit on a contract claim. The claimant must show: 1) that either a valid Preliminary Notice was served or that no Preliminary Notice was required; 2) that the mechanic's lien was timely recorded; 3) that the lawsuit was filed within 90 days of the date that the mechanic's lien was recorded; and 4) the value of labor/materials/equipment/etc. provided to the project or the contract price owed to the claimant, the portion of this value that remains unpaid, and that the labor/materials/equipment/etc. were actually "incorporated" into the project.

It is important to note that the entirety of labor/materials/equipment/etc. does not need to actually be "incorporated" into the project. For example, a framer will cut pieces of lumber and not all lumber will actually be incorporated into a building. Cutting off end pieces of lumber is a necessary part of the process and the value of the whole stick is included in the mechanic's lien amount. Likewise, equipment used on the project will not be "incorporated," and the claimant need only show that the equipment was used to improve the project.

**5. Attorneys' fees and interest may be added to both:
A) The amount stated on a mechanic's lien and/or
B) The amount of the judgment entered on the mechanic's lien.**

The amount stated on the mechanic's lien cannot include either attorneys' fees nor interest. However, a mechanic's lien may note that 10% interest is also owed on top of the principal amount of the mechanic's lien.

Interest can be recovered as part of a judgment on a lawsuit foreclosing on the mechanic's lien. At trial, the amount of the mechanic's lien is determined, and interest on this amount will be added to the judgment amount at the statutory rate of 10% per year. The date from which interest starts is unclear, but is likely the date that the claimant became owed by his customer.

Attorneys' fees will not be included in the amount of the judgment related to the mechanic's lien, even if the claimant has an attorneys' fees provision in his contract.

Attorneys' fees are still recoverable from the claimant's customer via a separate cause of action for breach of contract.

Interest may be recovered via the judgment on the mechanic's lien, but no legal right to interest exists until a judgment is entered, so a claimant may have a hard time negotiating interest with an owner who stands ready to pay the principal amount of a mechanic's lien before a lawsuit is filed or even if a lawsuit is filed but the trial has not yet been held.

6. A mechanic's lien must be recorded within 30 days after a notice of completion is recorded.

A mechanic's lien must be recorded no later than 30 days after the recording date of a valid notice of completion (60 days for a general contractor), or 90 days after the date of actual completion if no valid notice of completion is recorded. If an invalid notice of completion is recorded, the 90-day rule applies.

To be valid, a notice of completion must be recorded within 10 days after the actual date of completion. The notice must state the date of completion. If the date stated is inaccurate, the notice of completion is still valid if the actual date of completion is within 10 days prior to the date on which the notice of completion is recorded.

For private projects, actual completion has occurred upon any one of the following:

1. Completion of the entire work of improvement (each residential unit is considered to be a separate work of improvement);
2. The occupation or use of a work of improvement by the owner or his agent, accompanied by cessation of labor thereon;
3. Acceptance of the work of improvement by the owner; or
4. After work has begun, a cessation of labor for 60 days, or a cessation of labor for 30 days accompanied by the recording of a valid notice of cessation.

For public projects, actual completion has occurred when the public entity accepts the work of improvement.

7. It's good practice to record a mechanic's lien as soon as equipment materials or services are first provided for the project.

The mechanic's lien must not be recorded until the entirety of labor/materials/equipment/etc. being provided under a contract have actually been provided

A subcontractor that records a mechanic's lien before completing his work under a contract has recorded the lien prematurely and will likely lose all mechanic's lien rights.

"A subcontractor that records a mechanic's lien before completing his work under a contract has recorded the lien prematurely and will likely lose all mechanic's lien rights. .."

For a supplier providing materials pursuant to a credit application, there is not one contract with a set quantity of materials. Rather, each order/invoice represents an individual contract. The supplier may record one mechanic's lien combining the invoices, or the supplier may record multiple mechanic's liens each related to one or more invoices (assuming that each mechanic's lien meets all timing requirements and other requirements).

Retention is not legally owed until full completion of the work, and logically that non-owed retention amount might not yet be lienable under the "lien is for the amount owed under the contract" rule, but because the entirety of work will have been provided at the time the lien is recorded, the amount owed as retention may be included in the lien amount even if it is not yet due under the underlying contract.

8. If at trial the court determines that a claimant's mechanic's lien overstated the amount that the claimant is actually owed, the claimant loses his entire mechanic's lien rights and is denied a judgment on his mechanic's lien.

This is true only if the claimant *willfully overstated* the amount of his mechanic's lien. If the amount of the mechanic's lien was overstated due to an error or on the basis of a good faith belief that the amount was accurate, the mechanic's lien amount will be adjusted at trial with the ultimate judgment amount being entered for the appropriate amount, and the claimant will not lose his mechanic's lien rights as to the valid amount of the mechanic's lien.

9. After recording a mechanic's lien, a claimant has 90 days to file suit on the mechanic's lien, otherwise the claimant loses his entire mechanic's lien rights.

The deadline to file suit on a recorded mechanic's lien is 90 days after the date that the mechanic's lien was recorded. The status of the project is not directly relevant to the deadline for filing suit on a mechanic's lien.

If the claimant fails to file a lawsuit within 91 days after the mechanic's lien is recorded and the claimant is asked by the owner to provide or record a release of the mechanic's lien, the claimant must provide or record a mechanic's lien release, or risk that the owner will file an action in court seeking the release of the mechanic's lien, on which the law allows the owner to recover his attorneys' fees.

If 91 days pass after a mechanic's lien is recorded but the deadline to record a mechanic's lien has not yet passed (due to the project not being complete), then the claimant might still have the legal right to record a new mechanic's lien for the same value. However, this claim might be successfully challenged by an owner via an argument by the owner that the mechanic's lien rights expired when the claimant failed to timely file a foreclosure lawsuit. The current state of the law in California is unclear on this issue.

There is a distinction between a mechanic's lien release and a statutory mechanic's lien "Waiver and Release" pursuant to California Civil Code section 3262. A mechanic's lien release relates only to the particular mechanic's lien that is referenced by the release. A section 3262 Waiver and Release forever releases the claimant's mechanic's lien rights related to the project, whether through a specific date (via a "progress" Waiver and Release) or entirely (via a "final" Waiver and Release).

The best strategy is to voluntarily release the mechanic's lien prior to the 90-day deadline to sue and to note on the face of the release that the release is without prejudice. This should not be done for any particular situation without consulting with a construction attorney who can provide advice appropriate for the specific situation.

10. A mechanic's lien judgment is identical to any other judgment obtained after a court trial.

The procedure followed during a mechanic's lien lawsuit is similar to that of the "typical" lawsuit. To prevail at trial, a mechanic's lien claimant must show: 1) that all notice and timing requirements have been met, 2) the value of the entire labor/materials/equipment/etc. provided to the project, and 3) the balance owed to the claimant. If successful at trial, the court will enter a judgment on the claimant's mechanic's lien.

A mechanic's lien judgment is different from the more well-known money judgment. A "money judgment" can be based upon a contract, a tort (such as a personal injury claim), or various other types of claims. A money judgment can be enforced by levying almost all types of property owned by the judgment debtor.

By contrast, a judgment on a mechanic's lien merely entitles the mechanic's lien claimant to implement a foreclosure sale as to the property, with the proceeds of the foreclosure sale going to the parties with claims on title in the order of their priority. A mechanic's lien judgment does not allow the claimant to levy any bank accounts or any other personal property of the owner.

A mechanic's lien by itself does not entitle the claimant to an equitable claim in the property until a lawsuit has been filed on the mechanic's lien *and* a judgment is entered on the mechanic's lien. A mechanic's lien is recorded with the county recorder and is seen by any person that researches the title to the property at the county recorder's office. The mechanic's lien provides notice to any interested person that the claimant intends to pursue his equitable claim against the property via a lawsuit (or at least that the claimant has reserved his right to pursue his equitable claim via a lawsuit). If a judgment is ultimately entered after a lawsuit on the mechanic's lien is filed, the claimant has the right to foreclose on the property and to recover the proceeds of a foreclosure sale according to the claimant's position on title.

Lenders will be concerned about lending money to a property owner if a mechanic's lien has already been recorded, as the mechanic's lien would provide the mechanic's lien claimant with "priority" over

the lender if the claimant obtains a judgment on his mechanic's lien. Likewise, potential purchasers of the property typically will require that the title to the property be "free and clear" at the time the property is purchased, as mechanic's liens are still valid against the property even if the owner sells the property.

Typically, a foreclosure sale does not go forward, as the owner would rather pay the mechanic's lien judgment.

For any particular project, all mechanic's lien claimants stand in the same position on title. The respective dates that their mechanic's liens were recorded are irrelevant. A landscaper's mechanic's lien recorded at the end of the project has the same priority as the mechanic's lien of a grader that is recorded near the beginning of the project.



About David Barnier

Mr. Barnier practices business litigation with an emphasis on construction law and a particular emphasis on litigation involving breach of contract claims, mechanic's liens, stop notices and payment bond claims. A large part of his practice includes counseling his construction clients on contract issues, including the preparation of contracts, the review of proposed contracts, and advising clients regarding on-the-job disputes. He frequently presents seminars to the construction industry by which he explains the complex laws affecting the industry, and how companies can avoid litigation or, as a last resort, be best prepared for litigation. In addition to business litigation, Mr. Barnier also practices in general civil litigation and estate planning.



Mr. Barnier's articles and opinions on construction law topics have been published in the Los Angeles Times, the Daily Transcript, and numerous construction trade journals. He was the featured speaker at the 2005 Structural Roof Erectors Association Annual Spring Meeting in Phoenix, Arizona, and has presented seminars sponsored by the Engineering & General Contractors Association (EGCA), the Daily Transcript, and other construction trade groups.

Mr. Barnier may be reached directly at **(619) 682-4842** or via email at **djb@barkerolmsted.com**.