

# PUBLICATION

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## Overview of Mechanic's and Materialmen's Liens in Tennessee

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**January 17, 2007**

In Tennessee, the legislature created a statutory mechanism to afford entities or individuals which supply labor or material for the improvement of real property with security for that which they supplied.(1) Because mechanic's and materialman's liens (collectively "mechanic's liens") are statutory liens that did not exist in the common law, the Courts strictly construe the statute as to the creation, perfection and enforcement of mechanic's liens.(2)

There are two basic divisions of mechanic's liens within the current statutory scheme. The first division is whether the lien claimant has a direct contract or an indirect contract with the owner of the real property. In other words, is the lien claimant a contractor or a subcontractor? The second division is whether the improved property is residential or commercial. The following is a simplified summary of the statutory scheme in order to provide a clearer picture of the Tennessee lien process.

### Improvements

In order to have a mechanic's lien, the claimant must have contributed to the improvement of the real property. Therefore, the key question is, what is an improvement.(3) The statute contains definitions of *improve and improvement*. Essentially, to improve real property means to create a permanent change to the real property, such as the construction or demolition of a building. Interestingly, the permanent changes to the real property can include such things as the installation of ornamental shrubbery or trees, driveways, or private roadways on the real property.(4)

If a person or entity performs the work or supplies the materials with which permanent changes to the real property are made, that person or entity has a lien to secure payment for those materials or labor. The lien attaches to whatever interest the owner has in the real property. For instance, the lien can attach only to the leasehold interest.(5)

### Attachment of the Lien

A mechanic's lien attaches at the time of visible commencement of operations.(6) In other words, when any party begins to make the improvements, an "inchoate" lien attaches to the real property. When all work stops for 90 days, the new liens attach on the visible resumption of operations.(7) The determination of when visible commencement of operations occurs is often very important in disputes between lien claimants and lenders. For instance, did the lender record its deed of trust before visible commencement of operations? If so, the lien of the deed of trust has priority. If the deed of trust was not recorded before visible commencement of operation, the mechanic's lien or liens have priority.

### Direct Liens

As stated in the introduction, the critical question to answer is whether the lien claimant is a direct lienholder or an indirect lienholder. Any person or entity who has a contract directly with the owner has a direct lien against the real property. The claimant can be a contractor, a laborer or a material supplier.(8) The direct lien continues for one year after the work is finished or materials are furnished and until the final decision of any suit filed within the year to perfect the lien.(9) In other words, the contractor performing the labor has one year

from completion of the work to file his lawsuit to perfect and enforce the mechanic's lien. The material supplier has one year from the date of the last delivery or one year from the completion of the work.(10)

As between the owner and the direct lien claimant, the lien claimant does not have to serve or record any notice as to the lien because the owner is aware of the contract and the work which is being performed. However, to protect against bona fide encumbrancers or purchasers for value without notice of the lien, the direct lien claimant still has to record a Notice of Lien in the register's office within 90 days of the completion of the work.(11) So long as the notice is filed within the 90-day period, the lien has precedence over a subsequent conveyance or encumbrance.(12)

## Indirect Liens

The indirect lien claimant is the subcontractor or material supplier who does not have a direct contract with the owner.(13) There are limitations on who can acquire an indirect lien, and there are more steps which the indirect lien claimant must take to perfect its lien.

## Residential Property

Indirect liens do not attach to "residential property." "Residential property" is defined as a building in which the owner intends to reside as long as it has four or fewer units.(14) The general contractor is the only party who obtains a lien as to "residential property."(15) The exception to the general rule occurs when the owner and the general contractor are the same. In that case, the subcontractors of the general contractor and suppliers who contract with the general contractor have liens.(16) Additionally, if the owner does not intend to reside in the house, it does not constitute "residential property" under the statute.(17)

## Commercial Property

Indirect liens do attach to commercial property. The indirect lien claimant, however, has to comply with a number of statutory requirements to perfect and enforce the indirect lien on commercial property. Initially, the indirect lien claimant has to send a Notice of Nonpayment to the owner and the contractor within 90 days of the last day of the month within which work, services or materials for which it has not been paid were provided.(18) There is very specific information that must be included in the Notice of Nonpayment. The Notice has to contain 1) the name and address of the indirect lien claimant; 2) a general description of the work, services or materials provided; 3) the last date on which the claimant performed work and/or provided services or materials; and 4) a description which identifies the real property against which a lien may be claimed.(19) The good news for the claimant is that most of the required information can be found on the building permit. (20) The Notice of Non-Payment can be served by registered or certified mail, return receipt requested, hand delivery with sworn notarized statement, or any other commercial delivery service which can confirm delivery.(21)

If the indirect lien claimant does not send a Notice of Nonpayment within 90 days of each of the applicable months, it loses its lien for the month in question.(22) The indirect lien claimant, however, still has a claim for any retainage.(23)

Even after sending the Notice of Nonpayment, the indirect lien claimant also must send a Notice of Lien.(24) The claimant who supplied materials has to send the Notice of Lien within 90 days of the date on which it last supplied materials or within 90 days of the completion of improvement.(25) The subcontractor or laborer simply has to send the Notice of Lien within 90 days of the completion of improvement.(26)

The Notice of Lien also has to be recorded to give notice to third parties.(27) Therefore, it has to be properly verified and acknowledged.(28) The indirect lien claimant also has to file a lawsuit to enforce the lien within 90 days after the date of the Notice of Lien.(29)

## Enforcement

In order to enforce the lien (direct or indirect), the lien claimant has to file a verified complaint and have an attachment issued against the subject property within the statutory period of time.(30) In other words, the direct lien claimant has to file an action and have the attachment issued within one year of the completion of the work, and the indirect lien claimant has to file an action and have the attachment issued within 90 days of the Notice of Lien. The failure to have the attachment issued within the time limit is a fatal defect in the lien suit.(31)

## Bond to Discharge Lien

Once a lien is filed against real property, the owner or the contractor can file a bond to discharge the lien. The bond is in the amount of the lien claim. Alternatively, the contractor's payment bond can be recorded to fulfill the same role.(32)

## Notice of Completion

Once the project is completed, the owner can also force any potential lien claimants to assert their lien by filing a Notice of Completion.(33) The Notice of Completion has to contain 1) the name of owner of the land; 2) the name of the prime contractor; 3) the description of the property; 4) the date of completion; 5) a warning as to the impending sale of the property or settlement of claims; 6) an address to which to send lien notices; and 7) an acknowledgment.(34) If a lien claimant does not respond (in writing by registered or certified mail) to the Notice of Completion within the applicable time period (ten days for residential property and 30 days for commercial property), the lien is lost.(35)

## Amount of Lien and the Recovery of Attorney's Fees and Interest

The lien claimant is only entitled to a lien for unpaid amounts due materials or labor related to the improvement of the subject property. The lien claimant is also required to apply any funds related to the project to the charges related to the project. (36)

The indirect lien claimant will not be able to recover any attorney's fees incurred in pursuing the lien claim.(37) If the direct lien claimant has an attorney's fee provision in its contract, it should be able to recover attorneys' fees as part of the lien claim.(38)

The indirect lien claimant should be able to recover prejudgment interest at the statutory rate of ten percent from, at least, the date the complaint was filed.(39) The direct lien claimant should be able to recover prejudgment interest at the greater of the statutory rate of ten percent or the contractual interest rate.(40)

## No Waiver of Lien Rights in Contracts

On May 19, 2005, Governor Bredesen signed an Act which amended T.C.A. §66-11-124(b) and explicitly prohibited the waiver of lien rights in a contract. The provision reads:

Any contract provision that purports to waive any right of lien under this chapter is void and unenforceable as against the public policy of this state.

The Act became effective on July 1, 2005, and it applies only to contracts which came into existence after that date.(41)

## Conclusion

As you have probably realized, the Tennessee mechanic's lien statutory scheme is complex and complicated. Because the Courts strictly construe the statute as to the creation, perfection and enforcement of mechanic's

liens, the failure to comply with all of the necessary steps can be fatal to a valid lien claim. The lien claimant should frequently consult with counsel to make sure that the necessary steps are being taken to preserve, perfect and enforce its lien.

- (1) See T.C.A. §§66-11-101 to 146 (1993).
- (2) *Sequatchie Concrete Co. v. Cutter Labs*, 116 S.W.2d 162 (Tenn. 1980)
- (3) See T.C.A. §66-11-101(6) & (7).
- (4) *Id.*
- (5) *Venture Construction Co. v. Apple Music, Inc.*, 847 S.W.2d 509 (Tenn. Ct. App. 1992).
- (6) T.C.A. §66-11-104(a). Demolition, surveying, excavating, clearing, filling or grading and the delivery of materials for the work are excluded from the events which trigger visible commencement of operations.
- (7) T.C.A. §66-11-104(b).
- (8) T.C.A. §66-11-102(a). Surveyors, architects and engineers are also entitled to liens under this section. See T.C.A. §66-11-102(b) & (c).
- (9) T.C.A. §66-11-106.
- (10) See *Voightman & Co. v. Southern Ry.*, 123 Tenn. 452, 131 S.W. 982 (1910); *In re Premier Hotel Development Group*, 270 B.R. 234 (Bankr. E. D. Tenn. 2001) (There is a “dead period” — i.e., more than ninety days after the last material is supplied and before the completion of the project in which the material supplier cannot properly give notice. The Bankruptcy Court, therefore, held that when the material supplier provided notice in the “dead period,” it failed to provide the requisite statutory notice and lost its lien. See *Id.* at 238-39..
- (11) T.C.A. §66-11-112.
- (12) *Owen Lumber & Millwork, Inc. v. National Equity Corp.*, 940 S.W.2d 66 (Tenn. Ct. App. 1996).
- (13) T.C.A. § 66-11-115.
- (14) T.C.A. §66-11-146(a)(1).
- (15) T.C.A. §66-11-146(a)(2).
- (16) T.C.A. §66-11-146(b)(2).
- (17) See *C & C Aluminum Builders Supply v. Rynd*, 4 S.W.3d 191 (Tenn. Ct. App. 1999).
- (18) T.C.A. §66-11-145(a).
- (19) *Id.*
- (20) T.C.A. §66-11-145(b). The name of the owner, the owner's address, the contractor, the contractor's address, and the property description stated on a building permit are conclusively presumed to be correct for the Notice of Nonpayment.
- (21) T.C.A. §66-11-145(a). Until April, 2002, the method of delivery was very important. The Notice had to be served by registered or certified mail, return receipt requested. In *Vulcan Materials Company v. Gamble Construction Co., Inc.*, 56 S.W.2d 571 (Tenn. Ct. App. 2001), the Court of Appeals held that a hand delivery was ineffective. The Legislature quickly amended the statute to allow for alternative delivery methods.
- (22) See *Masonry & Roof Deck Services, Inc. v. Chattanooga Assisted Living Retirement Community, LLC*, Chancery Court of Hamilton County, Tennessee, Case No. 00-0433 (June 14, 2002) (citing *CMT, Inc. v. West End Church of Christ*, 1996 WL 64003 (Tenn. Ct. App. Feb. 15, 1996)).
- (23) T.C.A. §66-11-145(c).
- (24) T.C.A. §66-11-145(e). The Notice of Lien is a sworn statement as to the amount due, the work performed and a reasonably certain description of the subject property. See T.C.A. §66-11-117. A reasonably certain description is a description which informs one of ordinary intelligence of the premises to which the notice refers. *Southern Blow Pipe & Roofing Co. v. Grubb*, 36 Tenn. App. 641, 260 S.W.2d 191 (1935)
- (25) T.C.A. §66-11-112. The indirect material supplier, therefore, has to be cautious of the “dead period” discussed in footnote 10.
- (26) T.C.A. §66-11-115(b). The crucial issue is often when completion occurred. In *Davis v. Smith*, 650 S.W.2d 47 (Tenn. Ct. App 1983), the Court of Appeals indicated that the determinative issue is whether the work being performed was part of the original plan of construction and was not done to correct imperfections - i.e., punch

list items. *Id.* at 50.

(27) *McDonnell v. Amo*, 162 Tenn. 36, 34 S.W. 212 (1930).

(28) See *Pulaski Lumber Co. v. Harpeth S., Inc.*, 501 S.W.2d 275 (Tenn. 1973) & *Don Huckaby Plumbing Company, Inc. v. Cardinal Industries Mortgage Co.*, 848 S.W.2d 57 (Tenn. 1993).

(29) T.C.A. §66-11-115(c).

(30) T.C.A. §66-11-126.

(31) *C.O. Christian & Sons v. Nashville P.S. Hotel, Ltd.*, 765 S.W.2d 754 (Tenn. Ct. App. 1988).

(32) T.C.A. §66-11-142(a).

(33) T.C.A. §66-11-143.

(34) T.C.A. §66-11-143(b).

(35) T.C.A. §66-11-143(d). The only real defense to a Notice of Completion is a challenge to actual completion of the project. Substantial completion is not sufficient. *Davis v. Smith*, 650 S.W.2d 47 (Tenn. Ct. App. 1983).

(36) See T.C.A. §66-34-304 & 401 which are part of the Prompt Pay Act of 1991 - T.C.A. §66-34-101 *et. seq.*

(37) See *H.W. Jenkins Co. v. G.T. Designs of Memphis, Inc.*, 1998 WL 135077 (Tenn. Ct. App. 1998). The American Rule applies to mechanic's lien claims. As a result, "in the absence of a contract, statute or recognized ground of equity so providing there is no right to have attorney's fees paid by an opposing party in civil litigation." *Id.* (citing *State v. Thomas*, 585 S.W.2d 606, 607 (Tenn. 1979)).

(38) *Id.*

(39) See generally *Myint v. Allstate Insurance Company*, 970 S.W.2d 920 (Tenn. 1998).

(40) See *H.W. Jenkins Co. v. G.T. Designs of Memphis, Inc.*, 1998 WL 135077 (Tenn. Ct. App. 1998).

(41) Public Acts of 2005, Chapter No. 197, House Bill No. 743.