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First American Title[™]
HOMEBUILDER SERVICES



Underwriting the Mechanics Lien Risk

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First American Title™

Agenda

- What are mechanics' liens and lien rights?
- Who can file a lien?
- Lien Timeline
- Why are they a problem for title insurance?
- Policy coverage
- How can we mitigate the risk?



What are they?

- **RCW Chapter 60.04**

State of _____

MECHANIC'S LIEN

STATE OF _____
COUNTY OF _____

Notice is hereby given that the Mechanic's Lien (the "Lien"), is filed as of the _____ day of _____, 20____ (the "Effective Date"), by _____ (Claimant) located at _____ (Address), with the license number _____ (license date) and expiring on _____ (Expiry date), (the "Claimant"), claims a construction lien in sum of \$ _____ (Claim amount) for labor, services, materials, and/or equipment furnished for improvement to certain real property owned by _____ (Owner(s)) (collectively, the "Owner"), located at _____ (Address including county), and with the legal description: _____ (Property legal description) (the "Property").

This Lien is claimed, separately and severally, as to both the buildings and improvements thereon, and the said land.

The Claimant (and (Check one) the Owner Other) entered into a contract on _____ (Date) (attached hereto as Exhibit A) whereby the Claimant provided the following labor, services, materials and/or equipment at the Property (the "Work"):

_____ (Contract description), for the total amount of \$ _____ (Contract price).

The first day of the Work on the Property by the Claimant was _____ (Date).
The last day of the Work on the Property by the Claimant was _____ (Date) (the "Completion Date").



- Statutory lien that secures payment for labor, materials, equipment, or professional services supplied for the purpose of improving, repairing or maintaining real property that includes the right to lien.

Who can file a lien?

- Contractors
- Subcontractors
- Equipment and/or Material Providers
- Professional Services
 - Architects
 - Surveyors



Lien Timeline

- Notice of claim must be recorded no later than 90 days after the claimant has ceased to provide labor, materials, equipment or professional services.
- Lien Duration is no longer than 8 calendar months after the claim of lien has been recorded.
 - UNLESS an action to enforce the lien is filed by the lien claimant in the Superior Court in the county where the property is located.



Why is it a problem for title insurance?

- The claim of lien created under RCW 60.04 shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.
- Most lenders and some owners want coverage for this risk by the deletion of the exception.

Exception

- What is the general exception?
 - Any lien or right to a lien for services, labor, equipment, or material or medical assistance, unless such lien is shown by the Public Records as of the Date of Policy.



Covered Risks

Covered Risk 2 (Owners & Loan Policies)

2. **Any defect in or lien or encumbrance on the Title.** Covered Risk 2 includes, but is not limited to, insurance against loss from:
- a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
 - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.



Covered Risks

Covered Risk 8 (Homeowners' Policy)

8. Someone else has a lien on Your Title. Some examples of liens are:
 - a. a lien of real estate taxes or assessments imposed on Your Title by a governmental authority due or payable, but unpaid;
 - b. a Mortgage;
 - c. a judgment lien;
 - d. a State or federal tax lien;
 - e. a charge by a homeowner's or condominium association; or
 - f. a statutory lien, attaching before or after the Date of Policy, for service, labor, material, or equipment in connection with an improvement or work related to the Land and furnished before the Date of Policy.



Covered Risks

- Covered Risk 10 (Loan Policy)

10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance on the Title as security for the following components of the Indebtedness:
 - a. the amount of the principal disbursed as of the Date of Policy;
 - b. the interest on the obligation secured by the Insured Mortgage;
 - c. the reasonable expense of foreclosure;
 - d. amounts advanced for insurance premiums by the Insured before the acquisition of the estate or interest in the Title; and
 - e. the following amounts advanced by the Insured before the acquisition of the estate or interest in the Title to protect the priority of the lien of the Insured Mortgage:
 - i. real estate taxes and assessments imposed by a governmental taxing authority; and
 - ii. regular, periodic assessments by a property owners' association.

- Covered Risk 11 (Loan Policy)

11. The lack of priority of the lien of the Insured Mortgage upon the Title:
 - a. as security for each advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for service, labor, material, or equipment arising from construction of an improvement or work related to the Land when the improvement or work is:
 - i. contracted for or commenced on or before the Date of Policy; or
 - ii. contracted for, commenced, or continued after the Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on the Date of Policy to advance; and
 - b. over the lien of any assessments for street improvements under construction or completed at the Date of Policy.

11(a) Covers future disbursements

Insuring the risk

- If we don't take exception, we have insured the risk
- This may also include future disbursements
- If we insured the risk, we have a duty to defend!

Even if we win, we lose!

Endorsement Coverage

- ALTA 32/33 Series
 - Incremental Coverage
- CLTA 122
 - Insures against specific items that occur after the Date of Policy and prior to the date of the Endorsement.
- ALTA 14
 - Not intended for providing coverage for mechanics liens on construction transactions.
- Modification Endorsement
 - May bring Policy date forward
 - Craft an exception to use on the Endorsement to narrow and define what mechanics' lien coverage is being provided



How can you mitigate risk?

- Ask questions
 - Has work started prior to closing/Policy date?
 - Who are the parties involved?
 - What is the source of funds?
 - Owner equity
 - Loan funds
 - What controls does the lender have in place for draws?
 - Review the Construction Loan Agreement

Items to consider and review

- Project Budget
- Appraisal
 - Loan to value ratio
- Physical Inspection
- Survey
- The internet
 - Research the project and developer or contractor

Indemnity Agreement

- Borrower on construction loans
- Loan Guarantors on Construction loans
- Seller on new home sale or rehab sale
- General Contractor



Lien Waivers

- Intended for work that has been completed in the last 90 days preceding the closing/Policy date
- General Contractor
- Subcontractors
- Professional service providers

Priority Agreements

- Intended for work that has started and will continue post policy date.



What if a Mechanics' Lien is already recorded?



- This could be a red flag
- Are there more liens anticipated?
- You may need a release of lien bond

Proceed with caution!

In Summary

- Gather as much information as you can!
- The more you know protects both the insured and the Company from potential claims.





Questions?

THANK YOU!

