



## INDIANA MECHANIC'S LIENS

Midwest Building Suppliers Association, Inc.  
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Joshua W. Casselman  
RUBIN & LEVIN, P.C.  
135 N. Pennsylvania St., Suite 1400  
Indianapolis, IN 46204  
(317) 860-2878  
Fax No. (317) 453-8631  
email: [jcasselman@rubin-levin.net](mailto:jcasselman@rubin-levin.net)

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## I. INTRODUCTION

- A. The information set forth below provides an overview of lien rights available to those who supply materials or labor to private construction projects in Indiana.
- B. There are two statutory remedies available to suppliers of materials or labor on private construction projects:
  - 1. The mechanic's lien (Ind. Code Section 32-28-3-1, *et al.*); and
  - 2. The notice to owner of personal liability claim (Ind. Code Section 32-28-3-9).
- C. The method and requirements for asserting each of these claims and the remedies they provide are discussed below.

## II. MECHANIC'S LIENS

- A. What is a mechanic's lien?
  - 1. A mechanic's lien is a type of secured interest a creditor holds in real estate to secure a debt.
  - 2. Some types of liens are contractual and voluntary in nature (*e.g.*, a home mortgage or a lien on the title of a financed vehicle). Other liens are "forced" and involuntary. This means there is no requirement that the claimant and property owner agree that the creditor possesses an interest in the property. Instead, a claimant may unilaterally assert a property interest on specific property of the owner by operation of statute. A mechanic's lien is a type of "forced lien" created by statute.
  - 3. One of the benefits of filing a lien is that it runs with the real estate.
    - a. The lien allows the claimant to exercise concurrent remedies:
      - (1) A claimant may proceed directly against the party that owes the debt on a breach of contract or similar theory (*i.e.*, file an *in personam* action); and/or
      - (2) A claimant may foreclose the mechanic's lien and have the real estate sold at a Sheriff's sale to pay the debt (*i.e.*, file an *in rem* action).
    - b. Because the lien runs with the real estate, even if the property owner conveys the real estate to someone else, the purchaser takes

the real estate subject to the lien. Accordingly, the lien claimant can still sue the transferee in an *in rem* foreclosure action and foreclose its lien on the transferred real estate.

- c. Although the creditor can only recover the debt it is owed once, the mechanic's lien provides a method of recovery in addition to an unsecured breach of contract claim.
4. Public Projects: Mechanic's liens may not be imposed upon or enforced against public property held for public use. So-called "public works projects" are not subject to lien rights. Instead, on these projects, Indiana statute provides for remedies against payment bonds and claims against contract proceeds separate from the mechanic's lien statute.
- B. The right to hold a mechanic's lien is statutory and is strictly construed by Indiana courts. To impose a mechanic's lien, a party must:
1. Be one of the persons or entities entitled to hold a mechanic's lien, as defined by the statute; and
  2. Strictly comply with statutory requirements which govern the creation and perfection of the lien.
- C. Who may file a mechanic's lien?
1. A mechanic's lien may be filed by contractors, subcontractors, mechanics, lessors of equipment and any other persons performing labor or furnishing materials to the project. Ind. Code Section 32-28-3-1(a).
  2. Only those persons who provide labor or materials to improve the real estate or a structure thereon are entitled to file a mechanic's lien. Materials and services give rise to lien rights to the extent they constitute valuable additions to the real estate.
    - a. The mechanic's lien statute provides that "contractors" are among those who may file a mechanic's lien. The Indiana Supreme Court has held, however, that merely having a contract with the project owner does not make one a "contractor" for purposes of mechanic's lien law. *Premier Invs. v. Suites of Am., Inc.*, 644 N.E.2d 124 (Ind. 1994).
      - (1) A "contractor" under the statute is one who contracts to erect or construct a building or other improvement. This requires some act of physical labor in connection with the creation of a structure or improvement on land.

- (2) Thus, the Court held in *Premier Investments* that a real estate developer performing purely supervisory services (*i.e.*, providing no physical labor that could add to the value of the land or structure thereon) was not a “laborer” under the mechanic’s lien statute and was not entitled to hold a mechanic’s lien.
  - (3) If a contract exists between the parties, the amount of the mechanic’s lien can be for no more than the amount of the contract. *Farah, LLC v. Architura Corp.*, 952 N.E.2d 328 (Ind. Ct. App. 2011).
- b. Those who have an “equitable” ownership in the improved real estate cannot file a mechanic’s lien. In *Premier Investments*, the developer was to receive 25% of the profits of the hotel when finished and a portion of any profits realized on the sale or refinancing of the real estate. The Court held that, even if supervisory services were lienable, the developer would not be entitled to a lien because its interest was too similar to that of an owner.
  - c. In another case, a firm that supplied advertising services and signs to assist a developer in marketing a residential subdivision was not entitled to a mechanic’s lien under the statute, even if such services arguably added value to the properties. The services did not constitute an “improvement” to the land, as none of the services added permanent, intrinsic value to the real estate. *Greenland Homes, Inc. v. E & S Mktg. Res., Inc.*, 227 B.R. 710 (Bankr. S.D. Ind. 1998.)
  - d. Where the sole owner of a corporation entered into a contract in his own name with homeowners, but recorded a mechanic’s lien in the name of his corporation, the lien was invalid. *Mullis v. Brennan*, 716 N.E.2d 58 (Ind. Ct. App. 1999).
  - e. Registered professional architects, engineers and surveyors are entitled to assert lien rights under the express language of the statute. Ind. Code Section 32-28-11-1.
  - f. A mechanic’s lien filed by an electrical contractor was held invalid where the only work performed within the time allowed for filing the mechanic’s lien was on personal property not affixed to the land. This case involved a bagger that sat on a pallet behind a building. The Court held the bagger was more in the nature of a trade fixture, and therefore was not subject to a mechanic’s lien. A

trade fixture is personal property which can be removed without substantial or permanent damage to the premises and is capable of being set up or used in business elsewhere. *Dinsmore v. Lake Elec. Co., Inc.*, 719 N.E.2d 1282 (Ind. Ct. App. 1999).

- g. Under well-established law, the fact that an owner has paid the general contractor in full, does not preclude the filing of a mechanic's lien. However, despite this rule, the Court of Appeals recently affirmed the trial court's finding that a subcontractor committed slander of title, in part, because the subcontractor refused to release its mechanic's lien after receiving notice that the owner had paid the general contractor in full. *Walsh & Kelly, Inc. v. Int'l Contractors, Inc.*, 943 N.E.2d 394 (Ind. Ct. App. 2011).
- h. A supplier to a materialman usually cannot file a mechanic's lien because a supplier to a supplier is considered "too remote" from the project. *R.T. Moore Co., Inc. v. Slant/Fin Corp.*, 966 N.E.2d 636 (Ind. Ct. App. 2012). For example, a manufacturer of floor covering who sells to a distributor who then sells to a flooring subcontractor is considered too remote from the project to be entitled to assert a mechanic's lien.

D. What must a materialman show to hold a mechanic's lien?

- 1. A materialman must be prepared to demonstrate that the materials were supplied with the consent and authority or at the direction of the project owner or his agent.

The issue of the owner's consent and authority often arises in landlord/tenant situations, including shopping centers. In *Stern & Son, Inc. v. Gary Joint Venture*, 530 N.E.2d 306 (Ind. Ct. App. 1988), the Indiana Court of Appeals held that the consent of a shopping center owner must be more than inactive or passive consent. The lien claimant's burden to prove active consent is especially important when the improvements are requested by someone other than the landowner (*e.g.*, a lessee and/or the lessee's agent). In *Stern & Son*, the lease between the shopping center owner and the tenant called for particular improvements to be made by the tenants, the owner approved the construction plans and, on several occasions, the owner visited the construction site to monitor progress. Despite this, the Court found the approval of the plans and monitoring of progress were "perfunctory" (*i.e.*, merely to determine whether they met construction standards of the shopping center), and that mere awareness of the work to be done was not enough to show the active consent of the property owner necessary for a mechanic's lien to attach.

2. A materialman must also show that the materials were intended for use on the particular project where the creditor files the lien. *Stanray Corp. v. Horizon Constr., Inc.*, 342 N.E.2d 645 (Ind. App. 1976). Some of the practical ways this can be shown include:
  - a. Issuing a quotation/estimate for the entire project, as opposed to selling materials on as-needed basis or requiring a purchase order for the entire project.
  - b. Assigning job numbers to customer accounts.
  - c. Maintaining separate accounts for each project for which the customer is buying materials.
  - d. Keeping records of the delivery of materials, including delivery receipts.
  - e. Keeping in mind the “remoteness” problems discussed above:
    - (1) Even if materials are of a type that are lienable, the supplier may be too remote to show that the materials were actually intended to be used on the project to which the supplier wants the lien to attach.
    - (2) A materialman to a materialman usually does not know where its materials will ultimately be used.
3. Finally, the materialman must demonstrate that the materials were actually used on the project. *Stanray Corp.*, 342 N.E.2d 645. Under Indiana case law, use is presumed if the materials were delivered to the project. *Templeton v. Sam Klain & Son, Inc.*, 425 N.E.2d 89 (Ind. Ct. App. 1981).

E. How does notice and perfection of the mechanic’s lien occur?

1. The “notice” required to make a mechanic’s lien valid and enforceable involves steps designed to ensure the project owner and third parties are aware of the interest being claimed in the real estate that secures a debt.
2. For most types of real estate, “notice and perfection” occurs when a lien meeting statutory requirements is properly and timely filed in the county recorder’s office. However, there are special pre-lien filing notice requirements for owner-occupied dwellings, which are discussed below.

3. Perfection of a mechanic's lien through filing in the same place where other land transactions are recorded (the county recorder's office) ensures the lien will run with the land.
  - a. Courts have held that the purpose of the filing requirement is to provide notice of the lien claimant's interest in the real estate to those who may subsequently obtain an interest in the real estate (e.g., lenders and purchasers).
  - b. Because subsequent purchasers and lenders will find (or should find) a properly filed lien in their title search before closing on their transactions, the lien claimant's interest is "perfected" (i.e., enforceable) against those persons, as well as the project owner. Thus, for example, a properly recorded mechanic's lien cannot be invalidated or be placed in a subordinate position if the real estate is subsequently conveyed or mortgaged.

F. Preparing the Mechanic's Lien.

1. Under Ind. Code Section 32-28-3-3, to obtain a valid mechanic's lien on real estate, the Notice of Intention to Hold Mechanic's Lien must contain:
  - a. The name and address of the claimant.
  - b. The name of the owner(s) and legal description of the property as set forth on the latest entry on the county auditor's transfer books at the time of filing notice or, if in Marion County, the county assessor's transfer books.

When preparing a mechanic's lien be wary of relying upon information obtained over the telephone from a third party. The Indiana Court of Appeals held in *Capital Drywall Supply, Inc. v. JAI Jagdish, Inc.*, 934 N.E.2d 1193 (Ind. Ct. App. 2010), that a lien claimant was not entitled to rely on a telephone conversation with the Auditor's Office to determine the correct owner of the record title. Instead, the lien claimant should have reviewed the transfer books first hand to determine the correct name of the owner.

- c. The address of the owner(s) as set forth in the property tax records of the county in which the property is located.
- d. The common address of the property.
- e. The amount of the claim.

- f. Be verified (“sworn”) and filed in duplicate (one for recorder and one for each owner).
  - g. The signature of the claimant or his representative. The statute permits an attorney licensed to practice law in the State of Indiana to sign the lien on behalf of his/her client.
2. Recording the mechanic’s lien (Ind. Code Section 32-28-3-3):
- a. The notice containing the information outlined above must be filed with the county recorder where the property is located.
  - b. The notice is then mailed to the property owner by the county recorder.
- G. Deadlines to record mechanic’s liens (Ind. Code Section 32-28-3-3):
- 1. For Class 2 Projects (single or double family dwellings), the notice must be recorded within **60 days** after the date on which the claimant last furnished materials or labor.
    - a. “Class 2 Projects” are those related to Class 2 structures or improvements upon real estate auxiliary to Class 2 structures, referenced in several provisions of the revised mechanic’s lien statute. A “Class 2 structure” is not defined in the mechanic’s lien statute, but is defined at Ind. Code Section 22-12-1-5. For purposes of the mechanic’s lien law, Class 2 Projects are generally those connected to improvements to single or double family dwellings and the real estate on which they are situated. (This may include paving, ornamental landscaping, and other “non-structural” improvements, as well as construction of or improvements to the structures themselves.)
  - 2. For Commercial Projects and Utility Projects, the notice must be recorded within **90 days** after the date on which the claimant last furnished materials or labor.
    - a. “Utility projects” are those referenced in several provisions of the revised mechanic’s lien statute that consist of projects “owned, operated, managed, or controlled by a public utility. . . municipally owned utility. . . joint agency. . . rural electric membership corporation. . . or not-for-profit utility. . . and intended to be used and useful for the production, transmission, delivery, or furnishing of heat, light, telephone, water, or power to the public.”

- b. “Commercial projects” are all other projects.
3. The time limit for recording the lien on commercial and residential projects does not begin to run until the claimant has performed all acts required under the contract.

### *Summary of Important Deadlines*

The time period for filing a mechanic’s lien on commercial or utility projects is **90 days** after last providing labor or materials to the project. The time period for filing a mechanic’s lien on Class 2 Structures is **60 days** after last providing labor or materials to the project.

If a Class 2 Project is also an owner-occupied dwelling, the pre-lien notice requirements (discussed below) may apply.

4. Calculating the deadline.
- a. It is important not to rely on invoice dates in calculating the deadline to record the lien. The better practice is to keep track of delivery or service dates, which are much more reliable in establishing last furnishing dates.
  - b. In determining the lien deadline, a claimant cannot “tack” separate and distinct contracts.
    - (1) If a claimant has a contract to provide services to Building A on Lot A, and also has a separate contract to provide services to Building B on Lot B, the claimant must file its lien on Building A within the time limit after completing work on Building A and for the amounts due on Building A only, even if Buildings A and B have the same owner.
    - (2) Material Suppliers: It is recommended that material suppliers obtain a purchase order for the entire job or issue a quote for the entire job. This will help establish that the series of invoices are really part of a single contract.
  - c. The completion of punch list work or call back items may not extend the time period to record a mechanic’s lien, even if such work requires additional material or labor.
    - (1) Acts which are merely incidental to the contract may not qualify as the date from which the lien deadline is

calculated. In *Riddle v. Newton Crane Service, Inc.*, 661 N.E.2d 6 (Ind. Ct. App. 1996), a subcontractor finished work called for under the contract and a few days later returned to the job site to retrieve a piece of heavy equipment it had used in performing its work. The Court held that the retrieval of the crane, which was merely incidental to performance of the contract, was not the date on which materials or labor were last furnished to the project. Thus, the subcontractor's mechanic's lien was untimely and invalid.

- (2) Work performed to correct a problem with the work originally contemplated under the contract may extend the lien filing period. *Smith v. Bruning Enters., Inc.*, 424 N.E.2d 1035 (Ind. Ct. App. 1981). However, work performed under a new contract or gratuitously will not serve as a basis for extending the 60/90-day lien filing period. *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91 (Ind. Ct. App. 1999). A key inquiry in determining whether lien rights are extended is whether the work performed was contemplated under the original contract or was performed under a new contract.

d. Consequences of filing an untimely lien: If a claimant does not timely record its lien, the lien will not be perfected and will be deemed invalid. Additionally, the claimant runs the risk of being sued by the project owner for slander of title. Knowingly recording an untimely mechanic's lien subjects the claimant to potential liability to the property owner for actual and punitive damages and attorney's fees.

e. Lien filing after the project owner files bankruptcy:

- (1) The bankruptcy of the project owner results in an automatic stay on all attempts at debt collection after the date of the bankruptcy filing. However, filing a mechanic's lien after the project owner has filed bankruptcy does not violate the automatic stay as long as the lien relates to labor or materials supplied before the bankruptcy. The lien will be treated as if it were filed on the date that the materials or labor were first provided to the project (*i.e.*, the filing "relates back" to a date prior to the bankruptcy filing.)
- (2) As a practical matter, if the claimant is a supplier and anyone in the chain of contracts files bankruptcy (*i.e.*,

owner, general contractor, or subcontractor), the claimant should strongly consider filing a mechanic's lien in order to secure the debt, as there is likely to be a disruption in the down-stream flow of payments.

#### H. Pre-Lien Notices - Owner-Occupied Family Dwellings

1. The law presumes that the typical homeowner is ignorant of the rights afforded to labor or material suppliers by the mechanic's lien statutes. Accordingly, homeowners of either single or double family dwellings are afforded the extra protection of pre-lien notice. The prospective lienholder is required to record and give personal notice to the owner of the right to hold a lien.
  - a. Providing pre-lien notice is not the same as notice and perfection of the mechanic's lien. A pre-lien notice is, under certain circumstances, a condition precedent for later filing a valid lien on a single or double family dwelling. Additionally, the lien claimant must allege compliance with the pre-lien notice statute in its complaint foreclosing the lien on an owner-occupied dwelling. *Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296 (Ind. Ct. App. 1997).
  - b. A mechanic's lien on an owner-occupied dwelling filed without pre-lien notice is not perfected, and the claimant risks liability for slander of title.
2. There are exceptions to the pre-lien notice requirement. These include:
  - a. Dwellings used as rental property or for commercial purposes (e.g., spec homes).
  - b. Where the prospective lienholder has a direct contract with the homeowner (*i.e.*, goods or services are being provided directly to the homeowner, and not to a general contractor).
3. Contents and Timing of Pre-lien Notice - The requirements of the pre-lien notice depend on the type of project for which the labor or material is supplied.
  - a. Repairs and remodeling (Ind. Code Section 32-28-3-1(h))
    - (1) The pre-lien notice for repairs and remodeling does not need to be filed with the county recorder.

- (2) The claimant must send written notice directly to the occupying owners within 30 days of the date that the material or labor was first furnished to the project.
  - (3) This written notice must be furnished to all owners of the real estate. Thus, if husband and wife own the real estate jointly, separate notice must be sent to each spouse, even if they live at the same address.
  - (4) The mechanic's lien must still be timely recorded to perfect the lien.
- b. New Construction (Ind. Code Section 32-28-3-1(i))
- (1) The pre-lien notice on new construction must be filed with the county recorder's office.
  - (2) The claimant must furnish written pre-lien notice directly to the occupying owners within 60 days of the date the materials or labor were first furnished to the owner-occupied dwelling.
  - (3) This notice must be furnished to all owners of the real estate. Thus, if husband and wife own the real estate jointly, separate notices must be sent to each spouse.
  - (4) The statute provides that the pre-lien notice is to be furnished to the owner of the real estate as named in the latest entry in the county auditor's or township assessor's transfer books.
  - (5) The mechanic's lien itself must still be filed to perfect the lien.
4. In all cases where pre-lien notice is required, the claimant (not the county recorder) must furnish the pre-lien notice to all owners.
- a. The validity of pre-lien notice is not affected by the temporary absence of the owner. It is a good idea, however, to send the notice by certified or registered mail, return receipt requested, or have some other proof of mailing.
  - b. It is also recommended that the claimant use the address where property tax statements are mailed to the property owners.

- c. The Court has held that a pre-lien notice for new construction delivered to the owner, but not filed with the county recorder's office, as required by statute, rendered the subsequent mechanic's lien null and void. *Rose & Walker, Inc. v. Scott E. Swaffar*, 721 N.E.2d 899 (Ind. Ct. App. 2000). A claimant must comply with the statute, which is strictly construed.
- H. Beware of the Innocent Purchaser Rule. In Indiana, a mechanic's lien will not attach to a single or double family dwelling obtained by an innocent purchaser who gave value and did not have notice of the lien, unless the notice to hold the lien is recorded prior to the recording of the deed under which the purchaser takes title to the real estate. Ind. Code Section 32-28-3-1(j). If the lien is not recorded before the deed, the ability to perfect a mechanic's lien is "cut off" by the innocent purchaser. For example, if a claimant has provided labor or materials to a general contractor for the construction of a spec home, its mechanic's lien must be recorded before the general contractor sells the home to an innocent purchaser.

I. Statutory No-Lien Contracts

1. Statutory no-lien contracts are allowed only on Class 2 and Utility projects and land being prepared for Class 2 Structures. If certain requirements are met, a no-lien contract entered into by the project owner and the prime contractor defeats the filing of mechanic's liens by subcontractors and material suppliers. In order to be enforceable, a no-lien contract must:
  - a. Be in writing;
  - b. Contain the correct legal description of the real estate;
  - c. Be acknowledged before a notary;
  - d. Be recorded in the county recorder's office where the land is located; and
  - e. Be recorded within five (5) days after execution.
2. A no-lien contract is usually indexed by the recorder under the name of the general contractor and the owner. When properly recorded, the burden is on subcontractors and material suppliers to search the recorder's records for no-lien contracts before providing labor or materials to the project.
  - a. There is no requirement that notice of the no-lien contract be posted on the job.
  - b. A no-lien contract that is not properly recorded is ineffective because subcontractors or material suppliers would not have notice. If properly recorded, the no-lien contract is effective even if subcontractors or materialmen have no actual knowledge of the no-lien contract.

3. A no-lien contract is unenforceable with respect to liens for work performed before the contract is recorded.
4. A no-lien contract must be between the owner and the general contractor. A no-lien contract between the general contractor and a subcontractor is ineffective against sub-subcontractors and material suppliers to the sub.
5. Commercial projects:
  - a. No-lien contracts are not allowed on commercial projects. However, no-lien contracts are allowed on projects to prepare land for Class 2 residential construction.
  - b. Indiana statute provides that any provision in a contract is VOID if it requires a person entitled to assert a mechanic's lien to waive the right to a lien against the real estate or a claim against a payment bond before the person is paid for the labor or materials furnished. Ind. Code Section 32-28-3-16(b).
  - c. Any contractual provision in which a person agrees not to file a notice of intention to hold a mechanic's lien is VOID. Ind. Code Section 32-28-3-16(c). However, in one Indiana case, the court held that an owner could enforce a no-lien contract against a general contractor, despite the fact that the recording requirements of the no-lien statute were not followed. This case creates some uncertainty as to whether or not private no-lien contracts are enforceable.
  - d. An obligor's receipt of payment from a third person cannot be a condition precedent to, limit or be a defense to the provider's right to record or foreclose a lien against the real estate that was improved by the provider's labor, material or equipment. Ind. Code Section 32-28-3-18(c). Therefore, so-called paid-if-paid contracts do not preclude the exercise of lien rights.
6. For ALL projects: Any provision in a construction contract on a project located in Indiana which subjects the contract to the laws of another state, or which requires litigation, arbitration, or other dispute resolution process to occur within another state is VOID. Ind. Code Section 32-3-8-17.

J. Duty to Release Mechanic's Lien

1. When the obligation secured by the lien is paid, the mechanic's lien must be released. To protect against insufficient funds and closed accounts, a claimant should not release a lien until it has ensured the check has cleared

the bank. A claimant should, when possible, request payment by certified check or cashier's check.

2. If there is a valid no-lien contract, the holder must release the lien.
3. Under Ind. Code Section 32-28-6-1 and Ind. Code Section 32-28-1-2, the failure to release a lien when required could result in liability for:
  - a. actual damages;
  - b. liquidated damages of \$10 per day after the 15th day until released or the lien expires;
  - c. \$500, plus court costs and attorney's fees; and/or
  - d. Punitive damages.
4. It is important to be aware of the difference between "satisfaction" and "release" of a mechanic's lien. IF THE DEBT HAS NOT BEEN PAID, a claimant should delete the "fully paid and satisfied" language in the Release of Mechanic's Lien.
  - a. "Satisfaction" means the claimant has been paid in full. A claimant may release a mechanic's lien, even if the debt is not satisfied.
  - b. If a claimant inadvertently indicates that the lien is "satisfied," not only will it release the mechanic's lien, but it may also bar any cause of action the claimant may have on the underlying obligation (e.g., breach of contract claim).

K. Filing Suit to Foreclose on a Mechanic's Lien

1. The right to sue on a mechanic's lien is separate and distinct from the right to sue on the contractual obligation.
2. A suit to foreclose on a mechanic's lien must be filed within one (1) year of the date that notice of the lien was recorded, otherwise the lien becomes null and void. Ind. Code Section 32-28-3-6.
3. A project owner or another lienholder may demand that suit be filed on a mechanic's lien prior to the lien expiring at the end of one (1) year. If such a demand is made, suit must be filed within 30 days of the date on which the owner or lienholder provided notice to the claimant of the suit demand. If suit is not filed within those 30 days, the lien becomes null and void. Ind. Code Section 32-28-3-10.

4. A foreclosure suit should name as defendants all parties who have an interest in the real estate. A title search should be conducted to determine the names of all lienholders, mortgage holders, and others who have an interest in the real estate being foreclosed.
5. If a foreclosure judgement is obtained, the real estate can be sold at Sheriff's sale.
6. Lien Priorities on Commercial Projects:
  - a. A mortgage recorded prior to labor or materials being furnished by the mechanic's lien claimant will have priority over the mechanic's lien as to the real estate. Ind. Code Section 32-21-4-1 (a mortgage takes priority according to the time of its filing); *City Savings Bank v. Eby*, 954 N.E.2d 459 (Ind. Ct. App. 2011).
  - b. Where a mechanic's lien is recorded before a mortgage, the mechanic's lien will have priority over the mortgage as to both the land and improvements. Ind. Code Section 32-28-3-5(b) ("when the statement and notice of intention to hold a lien is recorded, the lien is created . . . a lien created under this chapter has priority over a lien created after it.").
  - c. Subject to the construction mortgage exception below, a mechanic's lien for labor or materials provided before the mortgage is recorded will have priority over a mortgage, even if the mechanic's lien is recorded after the mortgage. Ind. Code Section 32-28-3-5(b) (a mechanic's lien "relates back to the date the mechanic or other person began to perform the labor or furnish the materials or machinery.")
    - (1) This is known as the "relation back doctrine": A mechanic's lien relates back to the date that work or materials were first furnished. *Greyhound Fin. Corp. v. R.L.C., Inc.*, 637 N.E.2d 1325 (Ind. Ct. App. 1994).
  - d. Subject to the construction mortgage exception below, the mechanic's lien statute gives a mechanic's lien claimant priority with regard to new improvements it made to the real estate, even if the mortgage is recorded before the mechanic's lien is recorded and before the mechanic's lienholder begins its work or furnishes any materials. Accordingly, as a general rule, a mechanic's lien holder has priority over other liens as to the specific improvements the lienholder made and can remove and sell those improvements.

e. IMPORTANT EXCEPTION FOR CONSTRUCTION MORTGAGES:

- (1) Ind. Code Section 32-28-3-5(d) provides: “The mortgage of a lender has priority over all [mechanic’s liens] recorded after the date the mortgage was recorded to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate.”

Under this statute, on commercial projects, a previously recorded mortgage has priority over a later recorded mechanic’s lien, even if the lien claimant began its work before the construction mortgage was recorded. This so-called super-priority relates to both the land and any improvements made by the lien claimant. Accordingly, with respect to construction mortgages recorded prior to the mechanic’s lien, the “relation back doctrine” does not apply and, additionally, the lien claimant does not have priority in its improvements.

- (2) As noted below, prior law, which treated construction mortgages like mechanics’ liens, still applies to Class 2 and Utility projects. Ind. Code Section 32-28-3-5(b).

- f. There is no “priority” among mechanic’s lienholders. Ind. Code Section 32-28-3-5. The doctrine of “first in time, first in right” does not apply to mechanic’s liens. Those with valid mechanic’s liens share *pro rata* in the proceeds from the sale of the real estate.

7. Lien Priorities on Class 2 and Utility Projects.

- a. The same priority rules that apply on commercial projects also apply on Class 2 and Utility projects with the following exception:

A construction mortgage, executed and recorded after work begins on the real estate, generally shares in the proceeds of sale in the same manner as a mechanic’s lien claimant. Those with valid mechanic’s liens and construction mortgagees generally share *pro rata* in the proceeds from the sale of the real estate.

L. Recovery of Attorney’s Fees

1. Attorney’s fees are recoverable as part of a foreclosure judgment on a mechanic’s lien.

2. Attorney's fees are not allowed if a claimant is seeking to enforce an invalid lien.
3. Attorney's fees are not allowed if the property owner has paid the general or prime contractor in full.
4. In *Johnson v. Blankenship*, 679 N.E.2d 505, 510 (Ind. 1997), an award of attorney's fees in excess of \$20,000 was upheld in a mechanic's lien foreclosure, even though the lien amount was just under \$6,000. The Court found the award of attorney's fees was warranted because of the complexities and length of the case.

### **III. IMPOSING PERSONAL LIABILITY ON THE OWNER**

#### **A. Notice to Owner of Personal Liability Claim (Ind. Code Section 32-28-3-9)**

1. In addition to the mechanic's lien remedy, subcontractors and material suppliers can serve a personal liability notice on the owner.
2. Once the owner receives this notice, a "lien" attaches to the general contractor's account receivable from the owner.
  - a. The remedy impounds contract proceeds due to be paid to the general contractor by the project owner.
  - b. The owner is personally liable to the claimant to the extent of any proceeds due or to become due from the owner to the general contractor at and after the time the owner receives the claimant's notice.
3. Requirements for asserting a notice to owner of personal liability claim:

This claim requires written notice to be sent to the owner or the owner's agent setting forth:

- a. The amount of the claim;
- b. A detailed description of the services rendered or materials provided on the project;
- c. The name of the contractor for whom the claimant performed work or furnished material; and
- d. A statement that the claimant intends to hold the owner liable or responsible for the claim.

A legal description of the real estate is not a requirement of the notice.

- B. Personal Liability Notice to Owner Before Work is Performed (Ind. Code Section 32-28-3-9(f)).
1. The statute indicates that the personal liability notice can be given before labor is performed or materials or machinery furnished.
  2. Requirements for the notice:
    - a. Amount of the contract price;
    - b. Identification of the labor the person has contracted to perform or identification of the materials or machinery the person is contracted to furnish; and
    - c. Name of the contractor for whom the claimant will be performing work or providing material.
- C. Advantages of Notice to Owner of Personal Liability claim
1. Provides a direct claim against the project owner.
  2. There is no 60/90-day time limit. The personal liability notice to the owner may be given any time before the owner pays the general contractor in full.
  3. Longer time limitation for filing suit than mechanic's lien.
  4. Unaffected by a no-lien contract.
  5. Not an exclusive remedy. May still file a mechanic's lien.
  6. Leverage. After receiving a valid notice, an owner may be held liable for damages or have to pay twice if it pays the general contractor.
  7. It is not a defense to the owner if the general contractor has paid your subcontractor in full.
- D. Disadvantages of Notice to Owner of Personal Liability claim
1. No right to attorney's fees.
  2. Does not relate back to the time that a claimant first furnished labor or materials. Thus, if the owner is in bankruptcy, sending the letter would probably violate the automatic stay, creating potential liability for the claimant.

3. The owner of the project has the first right of setoff against its account payable to the general contractor for the general contractor's breach. The owner can combine contracts in setting off.
4. All claimants share pro-rata in the fund held by the owner if there are insufficient funds to pay all claimants in full.

#### **Disclaimer**

**This article is designed to provide a basic understanding of concepts of the law. The law, however, is very much subject to change and to interpretation by different courts. Additionally, the applicable law varies from situation to situation. Accordingly, this article should be viewed as educational in nature, and not to be considered as either legal advice or a substitute for competent advice from a qualified attorney. Rubin & Levin, P.C., and the author of this material encourage that you seek independent legal counsel to address any questions pertaining to particular issues or situations which you may encounter.**

RUBIN & LEVIN, P.C. | 135 N. Pennsylvania St., Suite 1400 | Indianapolis, IN 46204 | [www.rubin-levin.com](http://www.rubin-levin.com)