Blueprint

for Design Professionals

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Welcome to our third edition of Blueprint For Deisgn Professionals. The articles for this issue provide a primer for the litigation process and on Mechanic's liens. Let us know your thoughts as it helps us to deliver to you information relevant to your practice. Send us article ideas, risk management questions, and any other comments you might have to David Soltero at dsoltero@navg.com. While we may not be able to respond to you directly, we will do our best to incorporate the answers and ideas in future issues.

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"What do you do when served with a lawsuit?"

NOT GETTING PAID? … HAVE YOU CONSIDERED A MECHANICS' LIEN?

By Steve Swanson

Mechanics' liens can provide a powerful tool, especially in a down economy, to obtain payment from unwilling owners. Mechanics' liens are legislatively created remedies that provide contractors a means to collect payment for services rendered.

Design professionals are often unaware they may assert Mechanics' liens to secure payment and, even when they are aware, often do not know how to perfect a lien claim. A failure to properly perfect

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SERVED WITH A LAWSUIT? A STEP BY STEP PRIMER ON WHAT TO EXPECT.

By Richard Capshaw

What do you do when served with a lawsuit? Pull down the shades and lock the doors? Enter Witness protection? Get on a plane to Brazil?

Here's an overview on what to expect should you be served with a lawsuit. The first thing that you should do is immediately notify your insurance agent and make sure that all insurance carriers who might potentially be responsible for the issue are promptly notified, in writing. The professional should then expect contact from the applicable insurer seeking information concerning the

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a lien claim can result in an inability to recover on the lien.

Each state has its own statute governing Mechanics' liens on projects located within its borders. The various state statutes have similarities because they address the same competing interests of owners, lenders, contractors, subcontractors, laborers, and design professionals. However, the differences between the statutes are crucial because the procedure for perfecting a Mechanics' lien varies from state to state. This variability creates traps for the unwary design professional because failure to strictly adhere to the varying procedural requirements may be fatal to a lien claim. Perhaps the most common error rendering lien claims defective is failure to comply with applicable notice provisions.

Notice requirements are crucial under any Mechanics' lien statute. Each provides that claimants must give notice of their claims by providing certain information to specified parties within strict time limitations. This article summarizes Mechanics' lien notice provisions applicable to **private** projects in four populous states (from east to west: Massachusetts, Illinois, Texas, and California) to illustrate the diversity in Mechanics' lien notice provisions that designers may encounter nationwide.

Massachusetts

Massachusetts amended its Mechanics' lien statute (M.G.L.A. 254 §1, et seq.) effective July 1, 2011 to expressly allow for lien claims by design professionals, specifically defined as Massachusetts licensed/registered architects, landscape architects, professional engineers, site professionals, and land surveyors. The design professional's claim must arise from a **written contract** with an owner of any interest in real property, whether the work is only proposed or is actually constructed. The design professional must file with the county registry of deeds a "notice of contract" in the form set forth in the statute at any time after the written contract is executed, but must file no later than the *earlier* of: (a) 60 days after a notice of substantial completion is filed by the owner/contractor; or (b) 90 days after the design professional last performed professional services.

A design subconsultant must comply with distinct notice requirements. The subconsultant agreement must be written and must be approved in writing by or on behalf of the owner. The form of the subcontractor's notice of contract is provided in the statute and includes additional information not required in the design professional's notice including a statement of the original subcontract amount, amount of approved extras, and payments received. The design subconsultant must file its notice within the earlier of: (a) 60 days of the filing of a notice of substantial completion by the owner/contractor; or (b) 90 days after the last day either the original design professional or the subconsultant last performed professional services. The design subconsultant must provide the owner with actual notice of its notice of contract. Both design professionals and their subconsultant are then required to file, within 30 days of the last possible date that their notice of contract could have been filed, a statement of lien setting forth the amount due.

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Illinois

The notice requirements for an Illinois Mechanics' lien (770 ILCS 60/1, et seq.) for an "original" contractor (one who directly contracted with the owner or the owner's authorized agent) provide that it may record a lien notice with the county recorder of deeds any time after the contract is signed, but no later than *four months* following the date of its last work. This creates a lien claim good against the owner and any other third-party claimant. The notice should be in the form of an affidavit providing the information specified in the statute including: a brief statement of the claimant's contract, the balance due, and a description of the real estate. An original contractor who fails to file the notice within the four-month deadline may still have limited lien rights against the original owner if it records its lien notice and/or files suit to foreclose its lien claim within two years of its last work.

By contrast, a subcontractor of any tier must serve notice of its lien on the owner *and lender* within *90 days* of its last work to assert a lien. A subcontractor who fails to meet its 90-day notice requirement may still have lien rights if it was properly identified as an unpaid subcontractor on sworn statements submitted to the owner (the lien is then limited to the unpaid amount shown on the sworn statement). The form of the subcontractor's notice is provided in the statute.

Illinois design professionals usually fall into the "original contractor" category because they traditionally contract directly with the owner. However, a design professional is considered a subcontractor if it contracted with someone other than the owner (e.g., an architect who contracts with a design-build contractor). Disputes may arise about a designer's status in situations where the designer contracted with a tenant, a prospective purchaser, or a land trustee rather than the record owner. The question in each case is whether those non-owners contracted with the owner's knowledge and authority.

Texas

The Texas statute (V.T.C.A., Prop. Code § 53.001, et seq.) requires claimants to file an affidavit with the county clerk no later than the 15th day of the fourth calendar month after the indebtedness accrues (three months for residential projects). To comply, a claimant must first determine when the indebtedness "accrued." As in Illinois, this depends on whether the claimant is an original contractor or a subcontractor. For an original contractor, indebtedness accrues on the last day of the month during which the contract is completed, terminated, or abandoned. For subcontractors, accrual occurs when the work or material is provided. The contents of the affidavit are specified in the statute and include a sworn statement of the claim amount, description of the property and the work performed, and may include a copy of the contract. A copy of the affidavit must be sent by registered/certified mail to the owner and, if the claimant is a subcontractor, to the original contractor within five days after the affidavit is filed.

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California

There is a two-tiered system in California (Cal. Code ¶3081.1, et seq.). A California design professional may assert a "design professional lien" before construction work commences. This tier acknowledges the reality that design professionals perform services that may never be realized if a project is abandoned before construction starts. A design professional lien arises prior to commencement of construction and is only valid if the landowner or his agent was the contracting party (not a third-party), the designer's contract was written, and the original owner still holds title to the property when the lien is recorded. Most importantly, a design professional lien is only valid if "a building permit or other governmental approval in furtherance of the work" was obtained. This requirement may prevent lien rights for early design phases where no building permit or government approval is obtained.

The notice requirements for a design professional lien are: (1) a design professional must first send ten days' written notice of non-payment to the owner by registered or certified mail; (2) once the ten-day cure period expires, the design professional must record a notice of lien with the county recorder containing the specified information, including identifying the building permit or other governmental approval required for the claim; and (3) the notice of lien must be filed within 90 day after the design professional learns the work will not commence.

The design professional lien expires in 90 days unless suit is filed to foreclose the lien, or if construction work commences. Once construction begins, design professional liens expire and must be replaced with an ordinary Mechanics' lien claims. This is the second tier. The notice required for a design professional's regular Mechanics' lien includes a "preliminary 20-day notice (private work)" given to the owner and lender within 20 days of the construction work commencing by personal service or by registered/certified mail. This is a more onerous requirement than those statutes where the date of last work triggers the notice period. In California, contractors must give Mechanics' lien notices at the start of construction even *before* payment disputes arise. Design professionals are at particular risk because they may be unaware that contractors have commenced work on the site, thus causing their design professional lien to expire and triggering the 20-day notice period for an ordinary Mechanics' lien. It should also be noted that a design professional providing services for a single-family, owner-occupied residential project has no Mechanics' lien rights unless the construction cost exceeds $100,000.

Conclusion

Mechanics' lien claims are complex. Whether or not filing a Mechanics' lien against a client makes sense is a case by case determination which should not be taken lightly. It is, nevertheless, a tool for recovery of outstanding fees. You should consult an attorney with the requisite expertise when making your decision.

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background and status of this matter. The representative of the insurer may also provide you with counsel. Acquiring professional liability coverage from qualified agents and quality insurers pays dividends when there is a claim. Because of the relationships that have been established over the years, the attorneys retained by your professional liability carrier to represent you have extensive experience in design professional liability law. Conventional wisdom is that you don't need insurance until you really need insurance, but when you need the insurance you have, it is at that point that the insurance company will demonstrate its real level of commitment.

Once an attorney is retained, you should expect that attorney to promptly contact you and to provide you with assurance that the claim will be properly and timely addressed so that your legal, factual and financial interests are protected. Counsel, with your assistance, will identify the alleged acts, errors or omissions that form the basis for the claim brought by the plaintiff (i.e., the person(s) or entity that filed the lawsuit against you). He or she will also review your contract (which sets forth the scope of services your firm provided on the project). If the claim is asserted by a third party with whom you did not contract it will typically be a negligence claim. If the claim is brought by a party with whom you contracted, then you should expect the claim(s) asserted to be for negligence and breach of contract. Whether a contract claim or a negligence claim, your attorney will be assessing whether your services met the standard of care - whether the professional services were rendered in a manner that is consistent with the degree of care and skill of a similarly situated design professional.

In certain jurisdictions, the next step that will be undertaken on your behalf is an examination of the adequacy of any legal prerequisites to the pursuit of legal action. For example, in Texas, there is a certificate of merit statute which requires an affidavit to be filed by the plaintiff contemporaneously with the petition. That affidavit must be executed by a licensed design professional who is competent to testify and who holds the same license as the design professional against whom the claim is made and who has knowledge, skill, experience, education, training, or practice in similar work. The affidavit must specify acts of negligence that caused damage. Indeed, if a valid certificate of merit is not filed, then you should expect an effort to dismiss the claim or otherwise compel the production of evidence from a qualified design professional setting forth why and on what basis s/he believes an error or omission occurred.

The next step is your attorney will file an Answer (or other responsive pleading) on your behalf. This pleading may be extensive or relatively brief depending on the jurisdiction. For example, in some jurisdictions, such as Texas, free amendment of pleadings is allowed without permission from the court. However, in other jurisdictions, particularly those that follow the federal rules of procedure, amendment is not allowed without permission from the court. In those jurisdictions with free amendment rules, you should expect less detail in the responsive pleadings; where permission of the court is required to amend pleadings, you should expect a much more detailed document.

The next step involves pre-trial discovery and will require you, working with counsel, to answer written questions provided by the plaintiff. In addition, you will likely be asked to attend a deposition where all other parties to the lawsuit are able to ask you questions

As an important step before pre-trial discovery proceeds, counsel will likely develop a road map of what evidence is sought and from whom that evidence will be acquired.

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Your attorney will be present to insure you are not asked improper questions.

As an important step before pre-trial discovery proceeds, counsel will likely develop a road map of what evidence is sought and from whom that evidence will be acquired. Many insurers require regular reporting, which you will also receive, from trial counsel. The reports will provide assessments of: (1) the status of the matter; (2) damages; (3) potential exposure; and (4) likely liability. The advice given in these reports is intended to be a clear and unbiased assessment of the claim, but these reports should never be considered as the position that counsel, as your advocate, may take in presenting your defense.

The next phase of litigation involves the retention of testifying experts by each party. In almost all, if not all, lawsuits involving your professional services, the plaintiff is required to present expert testimony. The battle of experts will be joined and result in an expert being retained both for the plaintiff and a responding expert for you. While you as a design professional are certainly an expert and qualified to express opinions, it is generally a better tactic to involve independent experts who can assess the work that has been done as a peer review exercise.

The next step will be the analysis of dispositive motions such as summary judgment. Essentially, a motion for summary judgment seeks dismissal of the case because there is no question of fact and the only possible conclusion based on the undisputed facts is that the design professional is not legally liable. Your counsel will seek to apply the law to the facts to determine whether there is a legal basis for the assertion of such a motion. While dispositive motions should always be investigated at the earliest possible stage and reexamined throughout the course of the case, because of the nature of a negligence action, it is generally difficult to obtain dismissal by summary judgment. In any event, summary judgment motions can almost never be filed until after discovery is at an end.

Before a trial is ultimately conducted by a finder of fact, in most cases a jury, it is almost always required that a mediation occur. Mediation is a settlement conference that is attended by the design professional, the insurer and the plaintiff and moderated by a third party. The mediation is conducted in an effort to resolve the claim; you should know that mediations are often based largely upon economic factors as opposed to the merits of the claim(s).

While most claims involving design professionals are resolved by settlement, some claims cannot be resolved and a trial may be required. It is at this point that you and your attorney will begin preparations and strategy for trial. Settlement negotiations usually go through trial, but if the matter does not settle, plaintiff's claims will be decided on by a jury or judge.

Being part of a lawsuit can be frustrating. It is often a long and drawn out affair that seems to depend little on the merits of the underlying claim. The foregoing is a general outline of what should be expected by the design professional upon receipt of a lawsuit and will, hopefully, give you some guidance in handling this stressful process.

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Hopefully you will never need this information. However, so long as professional services are provided, there is always the potential you will be dragged into a lawsuit. The response to that lawsuit is where the design professional's informed purchase of professional liability insurance bears fruit.

Richard Capshaw and his team at Capshaw & Associates devote their practice to the resolution of disputes. Richard has provided negotiation, mediation, arbitration, and litigation services for design professionals and other participants in the construction industry for over 25 years. Richard is a frequent speaker on insurance and construction law and was a contributing author to the books *Architect and Engineer Liability* and *Claims Against Design Professionals*, first and second editions and the author of the article "Statute of Repose, Dead or Alive?" Richard is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization and a member of ABOTA

Nothing contained within the above articles should be considered the rendering of legal advice. Anyone who reads these articles should always consult with an attorney before acting on anything contained in these or any other articles on legal matters, as facts and circumstances will vary from case to case.

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