

## Liens – What Are They And How Do I File One?

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Receiving payment for services rendered by engineers can sometimes be a frustrating experience. It is not uncommon for payments to be late, or even worse, for the client to refuse to pay. For these situations, the engineer should evaluate whether it would be beneficial to file a mechanic's lien. This article provides a broad overview of the lien process. To properly file a lien can often be a complex task. It is recommended that you consult your attorney before enforcing any lien rights.

A mechanic's lien is a special legal right and remedy for certain parties who contribute labor, materials, rental equipment, or services to improve real property. The lien may entitle the claimant who holds the lien to force the sale of the improved real property to pay for the labor or materials provided. The vast majority of lien disputes, however, are resolved before it becomes necessary to force the sale of the improved real property.

In North Carolina, there are different lien rights and procedures depending upon whom the claimant contracts with. Where the claimant has a contract directly with the owner of the improved real property ("contractor"), the claimant has the right to file a Claim of Lien on Real Property. Where the claimant contracts with someone other than the owner ("subcontractor"), the claimant has the right to serve a Notice of Claim of Lien Upon Funds, and may also have the right to file a Claim of Lien on Real Property. This article assumes the following two examples in describing the different liens. If an engineer contracted directly with the owner, the engineer would be deemed a "contractor" for purposes of the lien statute. If an engineer contracted with an architect, who in turn contracted with the owner, the engineer would be deemed a "subcontractor."

The North Carolina General Statutes establish five requirements that must be met before a contractor may enforce a Claim of Lien on Real Property: (1) the claimant must perform or furnish labor or professional design or surveying services or furnish materials or rental equipment; (2) the claimant must do so pursuant to a contract, express or implied; (3) the contract must be with the owner of the real property; (4) the contract must be for the improvement of the real property; and (5) the claimant must comply with the procedural requirements of Part 1 of Article 2 of Chapter 44A of the North Carolina General Statutes.

An express contract may be in written or oral form. Express contracts do not need to be in writing unless required by statute. Implied contracts are those that are assumed to exist by the circumstances and relationship of the engineer and the client. The lien statute does not require that the improvement to the real property actually occur as long as the engineer has performed design work or other skilled services.

The "owner" is not necessarily the person whose name appears on the deed to the property. Many different people may have an interest in the improved real property, although the lien will extend only to the actual interest the owner has in the improved real property. For example, a lease is an interest in real property, and a tenant can be an

“owner” of the improved real property. The engineer’s lien rights will generally extend only to the tenant’s rights in the real property – the lease. Likewise, a person who enters into a written contract to purchase real property obtains an equitable interest in the property. If that purchaser orders an improvement to be made to the property, even before that person obtains title to the property, his interest in the property may be subject to the engineer’s lien. However, a North Carolina court determined that if a person does not exercise an option to purchase real property then that person does not hold an equitable interest in the property.

A lien must be “perfected” and enforced by the engineer. In order to perfect the lien, a Claim of Lien on Real Property must be filed in the Clerk of the Superior Court in the county where the real property is located. The lien must be filed within 120 days of the last day the engineer provided professional engineering services. The Claim of Lien on Real Property must contain specific information to identify the engineer, the owner, and the party with whom the engineer contracted. The Claim of Lien on Real Property must include the dates where professional services were first and last furnished, a general description of the professional services performed, and a description of the property. Lastly, the amount claimed owed must be included.

The Claim of Lien on Real Property is enforced by filing a lawsuit. The lawsuit must be commenced within 180 days of the last day the engineer provided professional engineering services. The lawsuit includes a claim for money owed. The lien is only a means to secure payment of the court judgment that is found to be owed under the contract to improve real property.

If the engineer is a subcontractor (i.e. has contracted with the architect), the engineer may file a Claim of Lien on Real Property against the owner by standing in the architect’s shoes to enforce the architect’s lien rights on the real property. However, in order to do this, the engineer must also serve a Notice of Claim of Lien Upon Funds.

A Notice of Claim of Lien Upon Funds is a lien on the project funds that the owner owes to the contractor. A subcontractor/claimant’s establishment of a lien on the funds serves as notification to those above it in the contract chain that money has not been properly paid downstream. The claimant may be able to prevent the party above it in the contract chain from getting paid until the claimant’s lien claim has been satisfied. If the contractor has been paid in full before the subcontractor’s lien on funds is served, this lien on funds will be ineffective because no funds are owed by the owner to the contractor upon which the lien may attach.

To assert a lien on funds, the subcontractor sends a Notice of Claim of Lien Upon Funds to the party who is holding the project funds owed to the person who in turn owes the subcontractor. For instance, in the example cited earlier, the engineer would serve the Notice of Claim of Lien Upon Funds on the owner who holds project funds owed to the architect who then owes the engineer. The engineer would also serve the Notice of Claim of Lien Upon Funds on the architect.

The Notice of Claim of Lien Upon Funds must contain specific information to identify the engineer, the party the engineer contracted with (the architect), and any party

up the contract chain against or through whom lien rights are claimed (the owner). The Notice of Claim of Lien Upon Funds also must include a general description of the professional services performed and the amount claimed owed by the engineer. Unlike a Claim of Lien on Real Property, there is no time limit for serving the owner with a Notice of Claim of Lien Upon Funds. The engineer merely has to serve the Notice while there are still project funds to which his lien may attach.

If the owner receives the Notice of Claim of Lien Upon Funds and owes project funds to the architect who owes the engineer, the owner must retain funds up to the amount stated in the Notice and cannot pay those funds until the claim is satisfied or discharged. If the owner owes more money than the amount being claimed in the Notice, the owner is only required to hold the amount that has been claimed, and the owner is free to pay the balance otherwise due and owing.

If the owner receives the Notice of Claim of Lien Upon Funds but proceeds with payment to the architect, the owner may be personally liable to the engineer for the amount of money paid, up to the amount of the claim. The owner's wrongful payment of the lien funds may allow the engineer to assert a lien directly against the owner's improved real property.

Unlike the statutes applicable to a lien on real property, which set forth detailed procedures for enforcing the Claim of Lien on Real Property, the lien statutes set forth no specific procedure for enforcing a lien on funds. Unless the lien claimant's demands can be worked out informally, the lien claimant will need to file suit to enforce its lien rights. In the example, the engineer sues the architect, as well as the owner. The engineer will need to obtain a court judgment against the architect, and then petition the court for an order directing the owner to pay the engineer out of the funds the owner has withheld following receipt of the Notice of Claim of Lien Upon Funds.

There are other practical considerations for the engineer to consider in determining whether to file a lien. The purpose of filing a lien is to obtain a security for a debt owed. The statutory mechanisms for filing liens are not as straightforward as they may appear. Furthermore, even if the lien is filed properly, obtaining payment is not guaranteed. The engineer must consider how filing a lien would affect the practice of providing professional engineering services to his/her clients. At the very least, engineers should educate themselves on their rights under the North Carolina lien statute and be prepared to utilize those rights if necessary.

## **Bio**

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