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Avoiding the Seven Deadly Sins of Mechanic's Lien Claimants

by Dean R. Brackenridge

Your work on a construction project is completed, but still awaits final payment. Discussions with the owner, architect or construction manager have generated promises, yet payment has not crossed your desk. Time is running out, and you need to record a mechanic's lien to protect your interests.

Indiana's Mechanic's Lien Statute is highly technical in nature and presents numerous traps for the unwary. Awareness of common pitfalls encountered by other mechanic's lien claimants can lessen the risk of falling into those very same traps yourself. Although these seven deadly sins of mechanic's lien claimants do not exactly match-up with the original Seven Deadly Sins, traces of greed, sloth and pride can be found in several recurring mechanic's lien flaws.

1. Failure to Properly Identify When the Work "Ends" and Record Notice Within Allotted Time

You must know the exact date contract work ends. The clock begins to run the day the contractor last performs work or delivers project materials. Indiana's Mechanic's Lien Statute requires a claimant to record its mechanic's lien within 60 days for some residential projects, or 90 days for certain commercial projects, "after performing labor or furnishing materials." Ind. Code § 32-28-3-3. A contractor "completes its work, and the…period for filing a notice of intention to hold mechanic's lien commences, when the [contractor] finishes the task for which it was hired." *Riddle v. Newton Crane Serv., Inc.*, 661 N.E.2d 6, 10 (Ind. Ct. App. 1996).

Claimants often stumble by failing to accurately define the "task," the completion of which starts the clock. In one case, a contractor filed a mechanic's lien more than 60 days after last working on the project, but within 60 days of removing its equipment. The court held that removing one's equipment is not work under the contract. Typically, once the time to record your mechanic's lien has expired, you cannot revive the time limit by doing additional work incidental to the original contract.

2. Failure to Initiate Lien Foreclosure Litigation on Time

Once you have properly recorded a mechanic's lien, you must sue within one year of recording the lien. Ind. Code § 32-28-3-6. This one year time limit shortens if the property owner provides written notice to the lienholder to foreclose the lien within 30 days after receiving the notice. The requirements for such a "30 Day Letter" are almost as rigid as the requirements for filing a lien. A 30 Day Letter must mention a foreclosure action, the relevant mechanic's lien statute and the statutory 30 day period. Otherwise, the letter will not provide statutory notice. *Wind Dance Farm, Inc. v. Hughes Supply*, Inc., 792 N.E.2d 79, 84 (Ind. Ct. App. 2003). Even though a court ultimately may not hold that an owner's letter provided notice, upon receiving any communication asking, or demanding, that a contractor drop or enforce a lien, the better strategy is to have a lawyer promptly review the letter and advise you how to proceed.

3. Overstating the Amount of the Lien

When recording a mechanic's lien, a contractor should be careful not to overstate the lien amount. An intentional or negligent overstatement of the lien amount can invalidate the lien. *Abbey Villas Dev. Corp. v. Site Contractors, Inc.*, 716 N.E.2d 91, 101 (Ind. Ct. App. 1999). Courts in other states have invalidated mechanic's liens due to an overstated claim amount. *See, e.g., West v. Wilson* 297 P. 847, 848 (Ore. 1931). While an honest mistake may not necessarily void a lien, contractors should be diligent in accurately calculating the value of a lien. Liens that appear to overstate the amount due will likely hamper efforts to enforce the lien, potentially even invalidating it.

4. Failure to Properly Identify Property to Which Lien Attaches

Properly identifying the property being liened almost always proves more difficult than expected. Securing proper identification often requires a title company's services and often takes several business days. A mechanic's lien must include both the legal description of the property and the street and number (if any) where the improvements subject to the lien are located. Ind. Code § 32-28-3-3(c)(4). For example, in one case, the court found a mechanic's lien invalid and overturned a foreclosure because it included the wrong legal description of the property at issue. *Froberg v. Northern Indiana Constr., Inc.*, 416 N.E.2d 451, 454 (Ind. Ct. App. 1981). Some courts have enforced mechanic's liens so long as the property description is sufficient to identify the land to which the lien attaches. However, to avoid potential problems, be sure to carefully determine and confirm the accurate

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Challenging Impact Fees When the "Impact" Claimed by the Government Is Too Great

by Thomas F. Bedsole

Impact fees are fees imposed by a local governmental unit on a new development because it will "impact" the unit, creating a need for new public infrastructure, such as parks, roads and sewers. By statute, Ind. Code § 36-7-4-1300 *et seq*., the "impact fee" should generally equal the new development's proportionate share of the directly related capital cost of such infrastructure. The amount of the impact fee must be adjusted down for state and federal grants for the project, future taxes or fees to be charged to the fee payer for the use of the service and credits for the value of infrastructure authorized to be built and dedicated to public use by the fee payer.

Before assessing an impact fee, a local governmental unit must prepare a "zone improvement plan" which, among other things, describes the existing infrastructure and level of service provided to the community, and estimates future development and needed level of service in specified "impact zones." Within one year after this plan is created or updated, and following a public hearing, the unit may adopt an impact fee ordinance, which sets forth a fee schedule or a formula for assessment of impact fees on new development within the impact zone. These impact fees may only be used for the designated public infrastructure. The impact fee typically must be assessed 30 days after issuance of an improvement location permit or submission of a development plan. The fee is due upon issuance of a structural building permit, but may be paid under an installment plan. An impact fee must be refunded upon application if the infrastructure is not completed within two years or no reasonable progress toward completion has been made within six years of the planned completion date, so it pays to keep an eye on whether the governmental unit uses the fees as planned.

But what happens if the "impact" claimed by the governmental unit is too great? That depends on the circumstances of the fee and its imposition. There are two avenues for impact fee complaints. First, a person may appeal the amount of the assessed fee to a three-member impact fee review board. Such an appeal may be brought within 30 days of the fee's due date if: (1) the fee amount is premised on an incorrect fact assumption; (2) the fee exceeds one of the numerous statutory limitations; or (3) the fee fails to meet requirements of the specific impact fee ordinance. The appeal may also specifically address the application of a credit for infrastructure required to be built and dedicated to the unit as a condition of permit approval.

The procedures for appeal in this manner are established by the impact fee ordinance and the review board itself. The three-member impact fee review board must include a real estate broker, an engineer and a certified public accountant, but cannot include a plan commission member.

A person wishing to challenge the amount of an assessed impact fee must file a petition with the impact fee review board within 30 days after a unit issues the structural building permit. The petition must include a description of the new development at issue, all facts related to the assessment and an explanation of why the fee assessed is wrong or excessive. The unit must respond within 30 days, explaining why the fee amount is correct. Following an evidentiary hearing, the review board will issue a determination, accompanied by written findings of fact. The petitioner can appeal the review board's decision to a trial court, which reviews the case *de novo*. If the trial court vacates the decision, the matter goes back to the review board to correct the fee assessment.

The second broader avenue, available to any person having an interest in property that if developed would be subject to an impact fee ordinance, is to seek a declaratory judgment or injunction to challenge or clarify the effect of the ordinance. A declaratory judgment or injunction action can be brought even before impact fee assessment and can address matters beyond the specific fee assessed upon an individual, such as the validity of the impact fee ordinance itself or the application of the ordinance in a specific impact zone. The grounds for such a challenge include: failure to adopt or timely update a zone improvement plan; failure to account for use of other revenue sources to defray the capital costs of the proposed public infrastructure; failure to provide for application of credits; or the imposition of delays on the development to create time to adopt a new impact fee ordinance. Perhaps most importantly, declaratory or injunctive relief can be sought if the ordinance exaggerates the need for new infrastructure or the amount of fees needed to pay for it.

> ***"A declaratory judgment or injunction action can be brought even before impact fee assessment"***

Finally, a catch-all provision allows a landowner to challenge the ordinance for any failure to comply with the impact fee statute. For example, challenges could be brought if: a unit tries to collect an impact fee less than six months or more than five years after adopting the ordinance; it fails to use appropriate professional engineering consultation prior to adopting a zone improvement plan; the ordinance fails to provide an objective and uniform standard for calculation of a fee so that a landowner cannot accurately predict the fee that would be imposed on a new development; or a unit attempts to assess a fee on preexisting development.

Impact fees can be substantial, but a governmental unit is required to follow specific requirements when enacting or assessing them. Thankfully, a person "impacted" by the fees has remedies if the impact becomes too great as a result of improper calculation or enactment of such fees. ♦

Are Your Plans Really Your Plans?

by Joel E. Tragesser

Building an architectural work combines the talents of many professionals, probably too many to identify for most homes and buildings. The home builder or contractor most often receives credit for the construction because it is too difficult to list all the employees, consultants, and subcontractors. In many projects, however, neither the contractor nor the owner own the copyrights that may protect plans and certain architectural works. The failure to own and register copyrights is often not appreciated and sometimes costly.

Whether employees, contractors, or architectural firms create plans, a builder should take certain measures to determine if: (1) there are any restrictions on its use of the plans; or (2) other builders will be permitted to use the same or similar plans. These questions should also be answered if a builder purchases or licenses plans from a third party. United States Copyright laws protect works of art, which include technical drawings (plans) and architectural works (certain buildings). Many builders incorrectly assume that the party who pays for the creation of the plans simply and automatically owns the copyrights to the plans. This assumption is not always true, and a builder often learns this after a competitor begins using its most highly demanded plans.

The U.S. Copyright Office provides useful circulars explaining the basic scope of protection afforded to plans. U.S. Copyright laws do not protect every element, feature, or detail of a plan. For instance, a window is a functional element common to most buildings, so a builder could not prevent competitors from including a window in plans. However, a builder may design an original selection or arrangement of windows and spaces in a plan that could be protected from copying by competitors. Thus, plans that contain unique ideas, or a different expression of an idea, are best suited for copyright protection.

The U.S. Copyright Office also provides forms containing detailed instructions that explain the written application. All structures are not available for registration, and certain other restrictions may apply. While the logistics of preparing and submitting an application are often straightforward, these steps may be more difficult if there is no written document explaining the relationship between the builder and the plans' author. Thus, a builder should complete certain tasks that make the process of registering a copyright much easier.

The "author" of a plan (work) and the "claimant" (owner) of the copyright to the work are not necessarily the same party. The author is usually either: (1) the person who actually designed the work; or (2) the employer of the person who actually designed the work within the scope of employment. The owner can be: (1) the author; (2) the author's employer; or (3) someone who has acquired ownership of the copyright to the work. If the copyright to the work has been registered with the U.S. Copyright Office, the owner should immediately record the transfer document with the U.S. Copyright Office.

While registering the copyrights for works is no longer required, U.S. Copyright laws provide benefits for filing an application to register before certain events occur. These benefits include the ability to elect statutory damages and to collect attorney's fees, both of which can be substantial. In most instances, a copyright registration is required before filing a lawsuit for infringement of a work.

Builders should document the people or companies who created plans and prepare an inventory identifying the owner(s) of each plan. Having this information readily available is useful if a builder must make a copyright infringement claim against a competitor or unauthorized user. This information may also prove false another person's allegations of copying. A builder should determine the following for each plan:

- The individual(s) who created the plan ("author") along with any individuals who assisted in the creation of the plan in any manner;
- Whether the author(s) used other plans or materials to create the plan, and if so, the author(s) and copyright owner(s) of such other plans or materials;
- Whether the builder employed the author(s) as an employee or independent contractor;
- Whether the builder executed any written agreement with the author(s);
- Whether the builder and/or author(s) executed any written agreement with the copyright owner of any other plans or materials;
- Whether the plan has been published;
- Whether construction of the plan has been completed; and
- Whether the plan has been registered with the U.S. Copyright Office.

When a builder suspects that a competitor copied a plan, the builder should first confirm its rights to and ownership of the plan. If not, the builder may learn that the competitor has obtained superior rights to the plan, and the builder may then be defending a claim of infringement, rather than asserting a claim against the competitor.

The analysis of whether infringement occurred may be complicated and fact-sensitive, but this analysis is hampered if builders have not documented the steps taken to create plans. The result of these steps is a portfolio that identifies which plans are owned or available for use by the builder, and possibly only the builder. ♦

About the Author

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legal description of the property. Remember that proper identification may take several days.

5. Failure to Properly Identify the Owner of the Real Property

In addition to properly identifying the property, a lien must list the correct legal name of the property owner. The Mechanic's Lien Statute requires a mechanic's lien notice to list the property owner's name and latest address as shown in the county's property tax records. Ind. Code § 32-28-3-3(c)(3). Sometimes courts strictly interpret this requirement and may require the owner's name to be exactly correct. In one case, a contractor filed a notice of lien against a company named "Transco," when in fact the property owner was "Transco Railcar." *Logansport Equip. Rental, Inc. v. Transco, Inc*., 755 N.E.2d 1135 (Ind. Ct. App. 2001). Even though both companies had the same ownership, the court invalidated the lien, stating that although "[h]ypertechnicalities should not be used to frustrate the remedial purpose of mechanic's liens, . . . we find that listing the wrong owner on the notice is not a hypertechnicality." *Id.* at 1137. Before filing a lien, take time to check county tax records, and name the legal owner exactly as shown in those records.

6. Failure to Give Proper Pre-Lien Notices to Owner

The general rule is that when a subcontractor provides labor and/or materials to a project, there is no duty to provide preliminary notice to the property owners. However, the Mechanic's Lien Statute imposes additional requirements for liens on some residential property. Before liening certain residential property, a subcontractor or materialman must notify the owner, in writing, within 30 days of providing labor or materials to an existing residence, or within 60 days of providing labor or materials for new residential construction. In the case of new residential construction, the statute requires the written notice to be filed with the county recorder's office within 60 days as well. Ind. Code § 32-28-3-1(h)-(i). Indiana courts have invalidated mechanic's liens when residential subcontractors failed to provide the required pre-lien notice. To protect your rights when providing labor and/or materials on a residential project, be certain to provide project owners the required notice.

7. Wrong Party to Assert Claim

Often, the distinction between the contractor as an individual and the contractor as a corporation blurs. Only the actual party to the contract has the right to enforce a mechanic's lien. In one case, a contractor entered into a contract with a homeowner, signing the contract as an individual rather than as a corporate representative. *Mullis v. Brennan*, 716 N.E.2d 58 (Ind. Ct. App. 1999). Unfortunately, when it came time to record a lien, the corporation and not the individual recorded it. The court ruled against the contractor, noting that the Mechanic's Lien Statute's requirements relating to the persons entitled to the lien are strictly construed. *Id*. at 63. Take care when signing contracts, and carefully review your contracts before filing your liens. If signing as a corporate representative, make sure to show that distinction in the signature block. The person or entity pursuing the lien must exactly match the legal party to the contract.

Conclusion

Although this article is not an exhaustive look at all the potential pitfalls awaiting mechanic's lien claimants, paying attention to these details may help you avoid common errors. Also, be mindful that other conditions exist that must be satisfied to protect your mechanic's lien rights, such as obtaining the land owner's consent before furnishing labor or materials on credit. Many of the lessons are similar: when facing the deadline to file a mechanic's lien, contractors should understand that the process, when done correctly to avoid potential pitfalls, will take several days. Do not wait until the eleventh hour to begin the process of enforcing your rights. ♦

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