KANSAS

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LIEN LAW ONLINE

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Frequently Asked Questions

1. **Does Kansas law require any notice or filing prior to the performance of the work?** Not for commercial projects. A Warning Statement must be given to the property owner if a subcontractor wishes to claim a lien on pre-existing residential property. K.S.A. 60-1103a. On new residential property, the contractor must file a Notice of Intent to Perform pursuant to K.S.A. 60-1103b.

2. **What is the time frame for filing a claim of lien?** A contractor has four months after the date of the last material, equipment, or supplies were furnished or the last labor was performed under the contract in order to file its mechanic's lien. K.S.A. 60-1102. A subcontractor, supplier, or other person has three months after the date the last supplies, materials, equipment or labor was furnished. K.S.A. 60-1103.

3. **What is the deadline for filing suit to initiate a lien foreclosure action?** An action to foreclose a mechanic's lien under K.S.A. 60-1105(a) must be brought within one year from the time of filing the lien statement.

4. **Does the Kansas law impose mandatory notice requirements?** Yes. The lien filing must be served by personal service, restricted mail, or posted upon the premises if the owner is unknown.

5. **Does Kansas law impose special requirements or limitations on lower tier subcontractors or suppliers?** No.

6. **When is a contractor or supplier deemed to have last performed work or furnished materials so as to trigger the start of the lien filing period?** The test to determine specifically when the work is completed (thus, beginning the time running for filing a mechanic's lien) is whether the work is part of the work necessary to be performed under the terms of the original contract to complete the job. *Security Benefit Life Insurance Corp. v. Fleming Companies, Inc.*, 21 Kan. App. 2d 833 (1995). Any delay in finishing work necessary and required under the contract must comply in good faith with the requirements of the contract. *Id.*

7. **Does Kansas law provide a procedure for bonding or otherwise removing the claim of lien?** Yes. The contractor or owner may file a bond which will discharge all liens pursuant to K.S.A. 60-1110.

8. **What construction project participants are not protected by the lien law?** Subcontractors of subcontractors, a supplier of a supplier and a supplier to a sub-subcontractor have no lien rights under Kansas law.

9. **What costs or damages are typically not allowed in a lien claim?** Generally, the amount of the lien claim is the reasonable value of the labor, equipment, materials or supplies used or consumed in the project. There is no allowance for attorney's fees, costs or other charges.

Lien Law Basics

The general theory behind Kansas mechanic's liens is that labor expended and materials supplied in the construction of an improvement add an actual value to the property; thus, the property may be properly bound as security for payment of labor which enhances its value.[1] K.S.A. 60-1101 allows "any person furnishing labor, equipment, material or supplies used or consumed for the improvements of real property, under a contract with the owner or with the trustee, agent or spouse of the owner, . . ."

The mechanic's lien is purely statutory and was not found at common law. The modern right to acquire and enforce a mechanic's lien exists only by virtue of the legislative authority. At common law, the only lien available was a possessory lien on personal property for the work of artisans and trade people. Therefore, one's entire right to assert a mechanic's lien depends upon the wording of the statute. The current Kansas mechanic's lien laws were enacted in 1963, however, have been slightly modified subsequently. These laws are substantially similar to prior law, however, it is advisable to review the pre-1963 statutes when researching or relying on holdings of pre-1963 case law to assure they are consistent and applicable to current statutes. Case law from other states may not be applicable based upon the wording of the statutes in other jurisdictions.

Generally, there are two systems of statutory lien rights, those are known as the "New York system" and the "Pennsylvania system." Under the "New York system," the supplier or subcontractor who files a lien is dependent upon and claims through the claim of the general contractor. Under the "Pennsylvania system," the supplier or subcontractor may have his own direct claim independent of that of the general contractor. The Kansas statutes follow the "Pennsylvania system." However see K.S.A. 60-1103(d) generally limiting the liability of the owner to the amount of the original contract.

Construction of Lien Statutes

The general rule is that the lien statutes are strictly construed in deciding if the lien attaches, and liberally construed once the lien has attached. Those claiming a mechanic's lien have the burden of bringing themselves clearly within the provisions of the statute.[2] While courts give liberal construction to statutory provisions once a mechanic's lien has attached[3], strict construction in the absence of equitable considerations is the rule when deciding whether a lien attaches[4]

Property Subject to Lien Rights

Type of Property, Estates, Rights Effected

Fee Title

Generally, Kansas courts have held that in the interpretation of mechanic's lien statutes, the word "owner" should not be narrowly construed.[5] In fact, "owner" means the owner of an interest or estate in real property, and includes every character of title, whether legal or equitable, fee simple or leasehold. *Id.*

The right to lien upon real property is usually limited to the interest of the party who had labor performed and materials furnished.[6] It was held that one in possession of real estate under a verbal agreement for conveyance to him becomes the equitable owner within the meaning of the mechanic's lien statute and that the lien of the materialmen attached to such interest.[7] If the interest owned by the person who makes the contract is less than a fee simple estate, the lien is upon the lesser estate.[8]

The fee title requirement has been stretched and expanded in numerous cases. In *Pierce v. Osborne*, 40 Kan. 168, 19 P. 656 (1888), the Supreme Court of Kansas held that a person in the possession of real estate under a deed conveying the right of occupancy, and coveting for the conveyance of the absolute title, will be deemed an owner, within the meaning of the mechanic's lien laws, and may subject his interest in the property to a mechanic's lien. Similarly, a person in possession of real estate under a verbal agreement to convey the fee simple title to him was held to be an owner thereof within the meaning of statutes relating to materialmen's liens, and may subject his interest to such a lien. Another example of the expansion from fee title is *E.W. Smith Lumber Co. v. Arnold, et al*, 88 Kan. 465, 129 P. 178 (1913), where the court found that a purchaser of vacant lots under an oral contract by which he agreed to pay part of the purchase price in cash, the balance when the deed was delivered, with the understanding that he was to erect houses on the lots, and took possession before making the cash payment, and contracted for labor and material which were used in erecting houses, had acquired the equitable title and that a lien for the labor and material was allowed to attach.

A lien also attached when, under a purchase contract requiring that a contractor purchased a described lot, build a house according to plans and specifications and upon completion convey fee simple title, the purchasers at the time the contractor acquired title to the lot, were owners of an equitable interest, which was subject to the liens of the subcontractors, which attached to full ownership of purchasers on the contractor's conveyance of fee simple title.[9] The opinion in the *Toler* case came on the heels of *Wichita Federal Savings & Loan Assoc. v. Jones*, 155 Kan. 821, 130 P. 2d 556 (1942), which held that a mechanic's lien may attach to the owner's equitable interest in real estate.

In short, Kansas courts have generally interpreted the fee title of land rather broadly.

Leased Property

The general rule in regard to leased property is that when a lien arises due to work for a lessee, that lien can only attach to the leasehold, not the fee. This is explained in *Lentz Plumbing Co. v. Fee*, 235 Kan. 266, 679 P.2d 736 (1984), because "the rights of the mechanic's lien claimant can rise no higher than those of the person with whom he has contracted or to whom he has furnished labor or materials."[10] An important exception to this rule exists where the lease allows improvements to be made on the property and that the expense of the improvements will be deducted from the rentals.[11]

Another rule set forth in the *Lentz* case deals with the landlord-tenant relationship in determining whether a mechanic's lien can exist. Without the authority or consent of the landlord, or some act of the landlord to make his estate liable, a tenant cannot charge the land with a mechanic's lien. Further, the estate of the owner cannot be subjected to a lien for work done or materials furnished at the instance of the lessee unless the lessee may be regarded as an agent or trustee of the owner. Courts tend to look at the express or implied conduct and acquiescence of the owner in all other circumstances which would estop the landlord from denying that principal-agent relationship existed. In determining whether that relationship existed, the court in *Lentz* found that it was not enough that the lessor should merely know that improvements are being made by the lessee, nor that he should have agreed with him that repairs or improvements are to be made by the lessee, because repairs or improvements may be done for the convenience of the lessee and not because of any benefit to the lessor or his property.

Two Kansas cases, besides *Lentz*, have further shaped Kansas law in regard to liens on leaseholds. In *Kansas City Heartland Construction Company v. Maggie Jones South Port Café*, 250 Kan. 32, 824 P. 2d 926 (1992), a contractor who performed renovation work for a lessee in a shopping center filed an action against the lessor to foreclose on a mechanic's lien. The lower courts found for the contractor but the Kansas Supreme Court reversed, ruling in favor of the lessor. The court held that a mechanic's lien could be enforced against a lessor only if the lessee was an agent of the lessor, and that the evidence did not support a finding of either express or implied agency. The court looked to the lease itself, which had an article specifically stating that it did not create a principal-agent relationship. There was also no written agreement between the lessee and the lessor that the lessee would act as lessor's agent. Regarding implied agency, the court held that it is the manifestation of the alleged principal and agent as between themselves that is decisive, and not apparent to a third party or what the third party should have known; agency will not be inferred just because a third party assumed that it existed. Further, the lessor did not receive any benefit from extensive leasehold improvements made, and lessor did not assume authority for the renovations by abating rent while renovations were being completed.

In *Manhattan Mall Company v. Shult*, 254 Kan. 253, 864 P. 2d 1136 (1993), Shult had leased space in the Manhattan Mall. A contractor performed work on the space, Shult defaulted on his lease and vacated the premises and the contractor then filed a mechanic's lien. The general partnership that was managing and general partner of the limited partnership that was record owner of a portion of the leasehold estate, sued the contractor, seeking to remove the cloud of the mechanic's lien on the abandoned leasehold interest in the mall. Although the majority of the court's discussion was based on the lack of timeliness in which the lien was filed, the court did hold that where the only interest sought under a mechanic's lien was a leasehold which was physically abandoned by tenant and legally abandoned by trustee in bankruptcy, mechanic's lien as filed, became null. Thus, the landlord was not liable for payment under that lien, which was untimely filed.

Parties Entitled to Lien Rights

One of most obvious parties that can claim a lien under mechanic's lien laws is a **contractor**. "Contractor", for purposes of mechanic's lien law, is one who furnishes labor or materials under contract directly with the owner for the improvement of property.[12]

One step farther out from a contractor is a **subcontractor**, defined for purposes of mechanic's lien law as one who assumes portion of contract from the original contractor or another subcontractor for performance of all or part of services or work which the other had obligated himself to perform under contract with the owner.[13] The court in *Rankin v. Rankin*, 86 Kan. 899, 122 P. 1120 (1912) gave a similar definition that a subcontractor is one who takes from the contractor a specified part of the work. There is no privity of contract between a subcontractor and a property owner.[14] Therefore, the subcontractor can obtain a mechanic's lien only by complying with the statutory provisions, discussed later in this chapter.

For the purposes of liens, the subcontractor is bound to some terms of the original contract. Because the basis of a mechanic's lien is the contract with the owner of the property to be improved, and, while a subcontractor is not bound by all of the terms of the contract that was made with the owner, he or she must take notice of the specifications in the contract relating to the particular materials or job which he or she undertakes to furnish.[15] The subcontractor, consequently, is bound by those specifications. *Id.* In the *Eggleston* case, where a contractor and a subcontractor entered into an agreement and the subcontractor installed a heating system substantially different from the requirements of the contract, and insufficient for the purpose intended, the subcontractor was not entitled to foreclose a mechanic's lien against the owner's land. *Id.*

Another category of people that often try to claim liens are **employees** of a contractor. However, the Kansas Supreme Court has held that the contractor himself had the mechanic's lien because he furnished the labor that was actually performed by others working under the contractor.[16] In one view, a laborer who works under an agreement with the contractor is a subcontractor, but because a subcontractor is actually one who takes from the contractor a specified part of the work, this view is not usually taken.[17] An example where workers for a contractor attempted to claim a lien occurred in *Goodyear Tire and Rubber Co. v. Jones*, 433 F. 2d 629 (10th Cir. 1970). In *Goodyear*, the court held that **employees** of a contractor were not entitled to a labor lien under Kansas mechanic's lien statutes, in relation to lump sum payments of $5,500.00 each provided for in a contract with the contractor, where the agreement described such payments as "an additional wage" which would be paid to employees if they remained on the job until the project was done. *Id.*

The furthest step out from a contractor in Kansas case law are the final three categories that will be discussed in this section: subcontractors of a subcontractor, suppliers of a supplier, and suppliers of subcontractors and contractors. First, a **subcontractor of a subcontractor** has no lien rights under Kansas law.[18] Similarly, a **supplier of a supplier** is not entitled to a mechanic's lien.[19] The *J.W. Thompson Co.* case did distinguish the supplier of a supplier from the supplier of a subcontractor or contractor. *Id.* **Suppliers of equipment and materials to contractors and subcontractors** come within the purview of protection afforded by both mechanic's liens and public works bonds. Some examples of case law which have upheld this doctrine include the following two cases.

In *D.J. Fair Lumber Co. v. Karlin*, 199 Kan. 366, 430 P. 2d 222 (1967), the court held that where a lumber company supplied materials at the request of a contractor but without the contract with the owner, the lumber company could acquire a mechanic's lien only by full compliance with the mechanic's lien statutes. Also, in *Smith v. Chicago Lumber and Coal Co.*, 84 Kan. 190, 114 P. 372 (1911), the court upheld a mechanic's lien. In *Smith*, a contractor went to the office of a lumber company, stated to the company's agent that he had "S's contract" and wanted material. The two went out into

the company's yard and looked over at stock, and thereafter, the company furnished the contractor material as needed which was used in the improvement of S's lots. The court held that the destination of the material was sufficiently indicated to entitle the company to a lien.

An example where a court did not find that a lien existed was in *Murphree v. Trinity Universal Insurance Co.*, 176 Kan. 290, 269 P. 2d 1025 (1954). In *Murphree*, subcontractors who claimed to have contracted for materials furnished with the contractor, and not with the owner, were not entitled to a lien under the statute providing for lien in favor of any person who furnishes materials or labor under contract with owner of any tract or piece of land.

Time Limitation for Filing Claim of Lien

A contractor has four months after the date of the last material, equipment, or supplies were furnished or the last labor was performed under the contract in order to file its mechanic's lien. K.S.A. 60-1102. A subcontractor, supplier, or other person has three months after the date the last supplies, materials, equipment or labor was furnished. K.S.A. 60-1103. The test to determine when specifically work is completed (thus, beginning the time running for filing a mechanic's lien) is whether the work is part of the work necessary to be performed under the terms of the original contract to complete the job.[20] Any delay in finishing work necessary and required under the contract must comply in good faith with the requirements of the contract. *Id.*

Location for Filing Claim of Lien

When filing a lien statement under K.S.A. 60-1102, it must be filed with the Clerk of the District Court of the county in which the property is located. K.S.A. 60-1102(a). The Clerk of the Court will index the lien by party names and file number. K.S.A. 60-1102(b). The statute is silent as to service of a contractor's lien upon the owner.

A lien filed under the subcontractor supplier statute K.S.A. 60-1103 is obtained in the same manner as those of an original contractor under K.S.A. 60-1102, with several additional requirements. First, the Warning Statement, if required to be given for improvements of residential property under K.S.A. 1103(a) must be sent. Second, a Notice of Intent to Perform pursuant to K.S.A. 60-1103(b) must have been filed, if required. Third, the lien must be filed and served.

Procedure for Creation

Preparing the Lien Statement

An example of a Lien Statement is found in the forms appendix at the end of this chapter. The statute clearly spells out what information is necessary to be included in the Lien Statement. K.S.A. 60-1102 states that the claimant must file with the Clerk of the District Court in the county where the property is located a verified statement showing: (1) the name of the owner; (2) name and address sufficient for service of process of the claimant; (3) a description of the real property; and (4) a reasonably itemized statement of the amount of the claim. K.S.A. 60-1102(a).

(1) Identifying the Owner

The lien statement must identify the owner. K.S.A. 60-1102(a)(1). Practice note: The Register of the Deeds office will contain the latest recorded conveyance of the property and should disclose the record owner. K.S.A. 60-1103(b) defines an "owner contractor." It is uncertain whether a person who contracts with a "owner contractor" should treat this as a subcontractor situation and file under K.S.A. 60-1103 or whether a person should treat this as a contract with owner and file under K.S.A. 60-1101. Currently, there is no case law indicating whether this is an option of the lien claimant or whether the owner contractor definition is the exclusive remedy.

(2) Identifying the Property

The lien statement must contain "a description of the real property." K.S.A. 60-1102(a)(3). Obviously, a legal description is the ideal method to identify real property. However, case law has held that a description should "enable a person familiar with the locality to identify the premises with reasonable certainty, to the exclusion of others."[21] The description of the property in the *Sutherland* case was "one barn and the surrounding tract of land belonging to" the party at a rural route address containing the city and state. This description was held to be insufficient to meet the standards of certainty required by the statute. A property description included in the mechanic's lien statement describing a single tract of land on which there were multiple construction projects on the tract is sufficient.[22] Lien claimants are not required to identify the portion of a tract benefited by the improvements provided. *Id.*

(3) Reasonably itemized Statement

The lien claimant must file "a reasonably itemized statement and the amount of the claim, but if the amount of the claim is evidenced by a written instrument, or if a promissory note has been given for the same, a copy thereof may be attached to the claim in lieu of an itemized statement." K.S.A. 60-1102(a)(4). A "reasonably itemized statement" as used in the statute dealing with filing of mechanic's liens is a statement that is neither excessive nor insufficient in detail.[23] An itemized statement that allows the landowner to ascertain whether the work was completed and whether the charges are fair is sufficient. *Id.* A mechanic's lien with attached photocopies of invoices as an itemized statement was held sufficient where the attached photocopies were of very poor quality and the descriptions of the items provided were very general, but the amounts were legible.[24]

(4) Oath and verification requirements

Although K.S.A. 60-1102(a) requires that the lien statement be verified, the lien claimant does not have to take a formal oath to verify the claim.[25] Furthermore, K.S.A. 53-509 and 53-601 provide the form of acknowledgment or verification that is sufficient.

A business entity lien claimant must show the agency or representation of the corporate officer signing the lien statement.[26] A corporate verification under oath based on business records rather

than actual knowledge is sufficient.[27] A lien statement may be verified by an affidavit within the lien statement.[28]

Filing and Recording the Lien Statements

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Service and Notice

There are several different methods to serve notice of the lien. K.S.A. 60-1103(b) outlines these methods:

> First, personal service in accordance with K.S.A. 60-304 and 308.
>
> Second, restricted mail.
>
> Third, posting notice upon the premises if the address of the owner is unknown.

The statement may be served upon any one owner as opposed to all of the owners under the prior statute.[29]

A Checklist for Kansas Mechanic's Liens is supplied to assist in determining the actions or components necessary for a proper lien statement.

Prime (General) Contractor (Dealing Directly with the Owner)

Statute K.S.A. 60-1101 and 60-1102

K.S.A. 60-1101 and 60-1102 provide for the lien of a general contractor or prime contractor. The distinction between contractor and subcontractor or supplier is that a general contractor has a **direct contract** with the owner, trustee, agent or spouse of the owner of the real property. K.S.A. 60-1101 provides:

> "Any person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property, **under a contract with** the owner or with the trustee, agent or spouse of the owner, shall have a lien upon the property for the labor, equipment, material or supplies furnished and for the cost of transporting the same. . . ." Emphasis added.

Direct Privity Requirement

Direct contractual privity is required in order to establish a lien under K.S.A. 60-1101. Any person with a claim not in direct privity cannot claim under this statute but rather, must claim under K.S.A.

60-1103. A contractor is one who furnishes labor or materials under a contract direct with the owner for the improvement of the property.[30]

The owner for purposes of a lien statement is one who contracted for the materials.[31] A person cannot have a lien unless he furnished materials under a contract with the named owner, or under an agreement with someone having a contract with the named owner. *Id.*

Subcontractors/Suppliers (Dealing with One other than the Owner)

Statute K.S.A. 60-1103

K.S.A. 60-1103 provides for a lien for subcontractors, suppliers and other persons furnishing labor, equipment, materials or supplies. It is important to note that these individuals must be performing or supplying under an agreement with the contractor, subcontractor or owner contractor in order to obtain a lien. An "owner contractor" is defined as "any person, firm or corporation who is the fee title owner of the real estate, and enters into contracts for labor, equipment, materials or supplies used or consumed in the improvement of real property." K.S.A. 60-1103(b)(1) and (2).

Indirect Privity

Although contractual privity with some entity in privity with the owner is required, when the chain becomes too long or remote the claimant is not entitled to lien rights. A supplier to a subcontractor is entitled to a lien.[32] A supplier to a supplier is not entitled to a mechanic's lien.[33] A supplier to a sub-subcontractor is not entitled to a lien under K.S.A. 60-1103 and similarly, is not provided coverage under a public works bond issued under K.S.A. 60-1111.[34]

Residential Property Exceptions

K.S.A. 60-1103a and K.S.A.1103b state an important exception to the rights of subcontractors, laborers and suppliers to claim a mechanic's lien. K.S.A. 1103a and 1103b provide for additional notice when the improvements are to residential property.

Preexisting Residential Property

K.S.A. 60-1103a deals with the improvement of pre-existing residential property. Pre-existing residential property is defined as those not used or intended to be used as a residence for more than two families, nor for use for commercial purposes or for the outbuildings not associated with the main structure.[35] A subcontractor wishing to claim a lien on such pre-existing residential property must provide a Warning Statement to the property owner. Please see the forms at the end of this chapter for the warning statement which must be substantially similar to that found at K.S.A. 60-1103a(c). This warning statement is not necessary if the total claim does not exceed $250.00.[36]

New Residential Property

K.S.A. 60-1103b provides that if a subcontractor, laborer or supplier wishes to exert a lien on new residential property, it must first furnish a Notice of Intent to Perform. "New residential property" means a new structure which is constructed for use as a residence for two or fewer families and not for commercial purposes.[37] Likewise, an improvement to pre-existing structure is not included within the definition of new residential property. A lien is available after the passage of title on new residential property to a good faith purchaser only if the claimant has filed a Notice Of Intent To Perform prior to the recording of the deed affecting passage of title to such new residential property.[38] Notice shall be filed in the office of the Clerk of the District Court in the county where the property is located. A subcontractor still will have lien rights, even if it fails to file a Notice Of Intent To Perform or Warning Statement. Apparently, the penalty for failure to file notice or give warning is that the lien is void against a bona fide purchaser. The Notice Of Intent To Perform is found in the form appendix at the end of this chapter.

When any claimant who has filed a Notice Of Intent To Perform has been paid in full, such a claimant is required to file a Release of Notice of Intent to Perform and Waiver of Lien. The form of the Release Of Notice Of Intent To Perform is found at the forms appendix at the end of this chapter.

Notwithstanding the requirements to file a Release Of Notice Of Intent To Perform and Waiver Of Lien following full payment, even if the subcontractor, supplier or laborer has not received payment, the notice of intent to perform expires 18 months following the date of filing unless the claimant has perfected a lien under K.S.A. 60-1101 or 60-1103.

Enforcement of Claim of Lien

Legal and Equitable Actions

The mechanic's lien claimant must file an action to foreclose the mechanic's lien in order to enforce its rights. The burden of proof is on the lien claimant.[39]In an action to foreclose the mechanic's lien, the lien claimant may bring other causes of action, such as breach of contract or similar matters. See the forms appendix to this chapter for a sample petition. The action to foreclose a mechanic's lien is similar to a mortgage foreclosure action. In Kansas, there is a rule of presumptive use that proof of delivery of materials to the building site is *prima facie* evidence that the material was used at the building site.[40] This presumption is rebuttable.

Limitations

An action to foreclose a mechanic's lien under K.S.A. 60-1105(a) must be brought within one year from the time of filing the lien statement. However, if a promissory note is attached to the lien in lieu of an itemized statement, the action may be commenced within one year from the maturity of the note. *Id.*

Necessary Parties

In a lien foreclosure action, all lien holders and other encumbrancers of record shall be made parties. K.S.A. 60-1106. In an action brought by subcontractor, supplier or person other than original contractor, such original contractor is a necessary party to the litigation.

Stay

Any action to foreclose a lien for a building or improvement which is still in the course of construction may be stayed.[41] The trial judge on application of any party engaged in furnishing labor or materials for such building or improvements still under construction may stay the trial for a reasonable time to permit the filing of a lien statement by such party.

The filing of a bankruptcy petition will act to stay any action to collect or enforce a mechanic's lien.[42]

If the proceeds of the sale are insufficient to pay all of the claimants, then the court shall order each of them to be paid in proportion to the amount due each of them.[43] The collection of interest is allowed if it is included within the original contract between the parties. However, the contract interest rate by a subcontractor cannot be claimed against the owner.[44]

Procedure for Discharging Liens

Bond Filing Discharge

The contractor or the owner may execute a bond to the State of Kansas for the use of all potential lien claimants which shall act to discharge all liens.[45] When the bond is approved and filed, no lien attaches and liens already filed are discharged. The remedy of the lien claimant is to sue upon the bond. In order to recover on the bond, the lien claimant does not have to show that the lien was perfected but rather, could have been if the bond was not filed.[46]

Release

The lien claimant may file a Release of Lien at the same office where the original lien was filed.

Lien Waivers and Releases

Effect of Waivers

The right of a materialman to assert and perfect a mechanic's lien is a statutory privilege which he may waive by agreement.[47] To be an effective waiver of a mechanic's lien, an agreement must be certain in its terms, clear and unequivocal. *Id.* Practitioner's note: The construction contract may contain a waiver of lien rights or a substitution of bond in order to secure payment to suppliers and subcontractors. A supplier or subcontractor may request the use of joint checks when such a waiver is in effect. Lien claimants may partially waive their lien rights. A lien claimant may reduce the amount of its lien claim by filing a partial waiver of lien rights.

Lien Priorities Issues

Priority Among Lien Claimants

The mechanic's lien is preferred to all other liens and encumbrances which are subsequent to the commencement of the furnishing of such labor, equipment, materials or supplies at the site of the property subject to the lien.[48] The lien priority starts the date labor was first performed or materials were first delivered to the property. *Id.* When two or more liens are in effect for the same improvements, all liens are treated equally to the date of the earliest unsatisfied lien.[49] This allows the owner or other encumbrancer whose interest is later than the lien claimant to pay off all prior liens and establish priority. A mechanic's lien has priority over a federal tax lien.[50]

Assignment of Liens

A lien may be assigned to include all rights and remedies, subject to all defenses.[51] A statement should be filed and recorded with the Clerk of Court. This separate instrument is attached to the original lien. The assignee should seek to provide notice to all interested parties and contractually require the original lien holder to assist in enforcement of the lien.

Defenses and Remedies

Defenses to Mechanic's Liens

Failure to Comply with Statutes

As all mechanic's liens rights are purely a creature of statutes, the provisions of the statute must be followed strictly. Any defect in obtaining a lien could prove fatal. A careful practitioner will check the timeliness, notice requirements, necessary parties to the lawsuit, requirements for a reasonably itemized statement, and other statutory defenses to a mechanic's lien action.

Defective or Incomplete Work

Defective or incomplete work is generally a defense to the amount to be recovered under the mechanic's lien rather than a defense to the validity of the mechanic's lien. However, the careful practitioner will carefully scrutinize the last date of materials supplied in a situation where the contractor left or was terminated due to default.

Payment

Payment is a defense to a mechanic's lien. Payments by an owner to a subcontractor can be credited against the general contractor's claim.[52] An amount paid to a subcontractor by a surety or third party is not deducted from the general contractor's mechanic's lien claim. *Id.*

Items Includable in Lien Claims

K.S.A. 60-1101 sets forth four lienable items: **labor, equipment, materials, or supplies**. These items, as well as the transportation of them, as long as they are used or consumed for the purpose of improving real property, are the basis for a lien on the property by the person or persons who furnished them.

According to K.S.A. 60-1101, items must be used or consumed to subject property to a mechanic's lien. Kansas courts have used the reasoning set forth in *Benner-Williams, Inc. v. Romine*, 200 Kan. 483, 437 P. 2d 312 (1968) to justify this requirement. This reasoning is that it is unfair to burden the property with a lien unless the labor or material was actually used to improve the property, and thus "become part of the realty itself." *Benner-Williams* at 485. The lienholder does not have to actually deliver the material to the real property itself, but merely demonstrate that the material or labor was eventually used or consumed there.[53] However, courts have made it clear that mere delivery to a building site is insufficient to meet the used or consumed standard.[54] The materials must be actually used in the construction of the building in order to sustain a mechanic's lien. *Id.*

Labor

The meaning of "lienable labor" originally referred to physical labor.[55] Numerous decisions have since held that the term "labor", as used in the current Kansas mechanic's lien statutes, can be liberally construed to include physical and mental toil, bodily or intellectual exertion.[56] As discussed earlier in the chapter, for either physical or mental labor to be lienable, it must be used or consumed for the improvement of the property.

Labor which has failed to be held lienable by a court of law has varied. Payments described as an "additional wage" paid to employees if they remain on the job until the end of the project were held not to be entitled to a labor lien.[57] The Court in *Bridgeport Machine Company v. McKnab*, 136 Kan. 781, 18 P. 2d 186 (1933), held that labor furnished in repairing machinery, tools and equipment retained by a contractor was not lienable. Also, freight charges of a trucking company for transporting certain carloads of brick from the city of their manufacture to the city of where the bricks were to be used for the repairing of public streets were held not lienable claims for labor.[58] Finally, architectural and engineering services provided by contractors did not constitute lienable labor resulting in "improvement" to real property within the meaning of the mechanic's lien statute, where construction was never commenced and no visible or physical manifestation of work of contractors ever appeared on the property.[59]

Materials

The "used or consumed" standard is best illustrated in cases where materials are involved. Generally, lienable material is that which enters into, becomes a part of, and remains with the completed work.[60] The Kansas Supreme Court has held that under Kansas mechanic's lien law, it is imperative to prove that at least some of the materials purchased were used in the construction or improvement in order to recover.[61] The reason behind this holding is that property should not be burdened with a lien to secure the price of material which never entered into its construction or improvement. What materials qualify for a lien vary from case to case. The following is not an exhaustive list of material types reported.

* Material that has been held lienable includes: the lumber furnished and used in making forms for a concrete structure[62], dirt furnished for grading a lot[63], and mileage expenses[64].

* Non-lienable material has included: material for a movable cupboard[65], material for improvement of an oil refinery at instance of lessee when it was not used to repair or improve the property[66], windows custom built for the project were not incorporated[67] and that terpentine applied after completion of construction would not extend the lien[68].

Equipment and Supplies

Before the present statute was enacted, equipment and supplies were not held lienable. The early cases dealing with equipment and supplies usually reasoned that their non-lienable status was due to the statute. In *Road Supply & Metal Company v. Bechtelheimer*, 240 P. 846, 119 Kan. 560 (1925), the Kansas Supreme Court disagreed with the argument by the party attempting to attain the lien that the use of machinery and equipment as material within the meaning of the mechanic's lien statute. The court further discussed the federal statutes which did include such a provisions, but found them not controlling. Similarly, in *Bridgeport Machine Company v. McKnab*, 136 Kan. 781, 18 P. 2d 186 (1933), the court held that machinery, tools, equipment, and that labor and supplies furnished in repairing them, not consumed but used and retained by the contractor for further use, were not lienable under the old statute.

There has been little litigation as to equipment and supplies under the current statute. Therefore, the general inquiry regarding these items seems to be whether they were used or consumed, and any further, more particular rule has not been established as of this publication.

Used or Consumed for Improvement of Real Property

Along with proving that lienable items were used or consumed, a lien claimant must also demonstrate that the item was used or consumed for the purpose of improving real property.[69] In *Haz-Mat*, the

Supreme Court of Kansas took several observations from past cases in considering what is an "improvement of real property." These include: (1) what is or is not an improvement of real property must necessarily be based upon the circumstances of each case; (2) improvement of the property does not require the actual construction of a physical improvement on the property; (3) the improvement of real property need not necessarily be visible, although in most instances it is; (4) the improvement of the real property must enhance the value of the real property, although it need not enhance the selling value of the property; (5) for labor, equipment, materials or supplies to be lienable items, they must be used or consumed and thus become part of the real property; (6) the nature of the activity performed is not necessarily a determining factor of whether there is an improvement of real property within the meaning of the statue; rather, the purpose of the activity is more directly concerned in the determination of whether there is an improvement of property which is thus lienable; and (7) the furnishing of labor, equipment, materials or supplies used or consumed for the improvement of real property may become lienable to establish or be part of an overall plan to enhance the value of the property, its beauty or utility, or to adapt it for a new or further purpose, or if the furnishing of labor, equipment, material, or supplies is a necessary feature of a plan of construction of a physical improvement to the real property. *Haz-Mat* at 175.

Additionally, the court took the *Black's Law Dictionary*'s definition of "improvement of real property" which was: "A valuable addition made to real property (usually real estate) or an amelioration and its condition, amounting to more then mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."[70]

The court in *Haz-Mat,* using the tools above, found that removal of hazardous waste was not part of a plan to improve the property and that its removal would not necessarily enhance the value of real property. Within the context of labor, materials, equipment and supplies, similar conclusions have been reached by Kansas courts.

Special Requirements for Lower-Tier Subcontractors and Suppliers

None in Kansas.

Criminal and Civil Penalties

Lien Fraud

Kansas does not have a specific statute addressing lien fraud. Both lien fraud and slander of title are treated under common law in Kansas in contrast with several other states.

Forms

Warning Statement

Release of Lien

Notice of Intent to Perform

Lien Statement (Subcontractor Mechanic's Lien)

Release of Notice of Intent to Perform and Waiver of Lien

Checklist for Kansas Mechanic's Liens

Notes

[1]*Mark Twain Kansas City Bank v. Kroh Brothers Development Company,* 14 Kan. App. 2d 718-719 (1990), citing *Given v. Campbell*, 127 Kan. 378, 380 (1929).

[2]*Lentz Plumbing Company v. Fee*, 235 Kan. 266, 274 (1984).

[3]*Lewis v. Wanamaker Baptist Church*, 10 Kan. App. 2d 99, 100 (1984)

[4]*Goodyear Tire and Rubber Company v. Jones*, 317 F. Supp. 1285, 1289 [D. Kan. 1968]; *affirmed* 433 F. 2d 629 [10th Cir. 1970]; *Mark Twain Kansas City Bank v. Kroh Brothers Development Company*, 14 Kan. App. 2d 718-719 (1990); *Haz-Mat Response, Inc. v. Certified Waste Services, Ltd.*, 21 Kan. App. 2d 56, 60 (1995)).

[5]*Toler v. Satterthwaite,* 200 Kan. 103, 434 P. 2d 814 (1967).

[6]*Norris v. Nitsch*, 183 Kan. 86, 325 P. 2d 326 (1958).

[7]*Drug Company v. Brown*, 46 Kan. 543, 26 P. 1019 (1891)

[8]*Hathaway v. Davis & Rankin*, 32 Kan. 693, 696, 5 P. 29 (1884); *Choteau, et al v. Thompson & Campbell*, 2 Ohio St. 114 (1853).

[9]*Toler v. Satterthwaite*, 200 Kan. 103, 434 P. 2d 814 (1967).

[10]*See also, Kansas City Heartland Construction Co. v. Maggie Jones South Port Café, Inc.*, 250 Kan. 32, 824 P. 2d 926 (1992).

[11]*Patter v. Conley*, 83 Kan. 676 (1911); *Brown v. Walker*, 100 Kan. 542 (1917).

[12]*Stewart v. Cunningham*, 219 Kan. 374, 548 P. 2d 740 (1976).

[13]*See, Stewart v. Cunningham*, 219 Kan. 374, 548 P. 2d 740 (1976).

[14]*Sutherland Lumber Co. v. Due*, 212 Kan. 658, 512 P. 2d 525 (1973).

[15]*Eggleston v. White*, 113 Kan. 325, 214 P. 623 (1923).

[16]*Isbell v. Payne*, 158 Kan. 298, 147 P. 2d 718 (1944).

[17]*Rankin v. Rankin*, 86 Kan. 899, 122 P. 1120 (1912).

[18]*Washington v. Houston Lumber Co.*, 310 F. 2d 881 (10th Cir. 1962); *Indiana Limestone Co. v. Cuthwort*, 126 Kan. 262, 267 P. 983 (1928); *Nixon v. Cyndon Lodge No. 5, Knights of Pythias of Salina,* 56 Kan. 298, 43 P. 236 (1896). *But see,* K.S.A. 60-1103(a).

[19]*J.W. Thompson Co. v. Wells Products Corp.*, 243 Kan. 503, 758 P. 2d 738 (1988).

[20]*Security Benefit Life Insurance Corp. v. Fleming Companies, Inc.*, 21 Kan. App. 2d 833 (1995).

[21]*Sutherland Lumber Company v. Due*, 212 Kan. 658 (1973).

[22]*J. Walters Construction Company v. Greystone South Partnership, L.P.*, 15 Kan. App. 2d 689 (1991).

[23]*Kopp's Rug Company, Inc. v. Talbot*, 5 Kan. App. 2d 565 (1980).

[24]*Scott v. Strickland*, 10 Kan. App. 2d 14 (1984).

[25]*Double S, Inc. v. Northwest Kansas Production Credit Association*, 17 Kan. App. 2 740 (1992).

[26]*Ekstrom United Supply Company v. Ash Grove Line and Portland Cement Company,* 194 Kan. 634 (1965).

[27] *Star Lumber and Supply Company v. Capitol Construction Company*, 238 Kan. 743 (1986).

[28] *Kansas Lumber Company v. Wang*, 12 Kan. App. 2d 20 (1987).

[29] *Scott v. Strickland*, 10 Kan. App. 2d 14 (1984).

[30] *Stewart v. Cunningham*, 219 Kan. 374, 377 (1976).

[31] *Construction Materials, Inc. v. Becker*, 8 Kan. App. 2d 394-399 (1983).

[32] *See*, K.S.A. 60-1103.

[33] *J.W. Thompson Company v. Wells Products Corporation*, 243 Kan. 503 (1988).

[34] *Wichita Sheet Metal Supply, Inc. v. Dahlstrom and Ferrell Construction Company*, 246 Kan. 557 (1990); *Vanguard v. American States*, 19 Kan. App. 2d 63 (1993).

[35] K.S.A.60-1103a(1).

[36] K.S.A. 60-1103a(d).

[37] K.S.A. 60-1103b(a).

[38] K.S.A. 60-1103b(b).

[39] *Kopps Rug Company v. Talbott*, 5 Kan. App. 2d 565 (1980).

[40] *Seyb-Tucker Lumber and Implement Company v. Hartley*, 197 Kan. 58 (1966), *Star Lumber and Supply Company v. Capitol Construction Company*, 238 Kan. 743 (1986).

[41] K.S.A. 60-1107.

[42] 11 U.S.C. §362.

[43] K.S.A. 60-1109

[44] *Scott v. Strickland*, 10 Kan. App. 2d 14 (1984).

[45] K.S.A. 60-1110.

[46] *Bob Eldridge Construction Company v. Pioneer Materials, Inc.*, 235 Kan. 599 (1984).

[47] *Benner-Williams, Inc. v. Romine*, 200 Kan. 483 (1968).

[48] K.S.A. 60-1101.

[49] K.S.A. 60-1101.

[50] 26 U.S.C. §6323; *McDaniel v. Jones*, 235 Kan. 93 (1984).

[51] K.S.A. 60-1104.

[52] K.S.A. 60-1103(b); *Dick v. LaVilla Inns, Inc.*, 212 Kan. 101 (1973).

[53] *Lumber Company v. Smith*, 84 Kan. 190, 114 P. 372 (1911).

[54] *Seyb-Tucker Lumber & Implement Company v. Hartley*, 197 Kan. 58, 415 P. 2d 217 (1966).

[55] *Road Supply & Metal Company v. Bechtelheimer*, 119 Kan. 560, 240 P. 846 (1925).

[56] *See, Mark Twain*, 14 Kan. App. 2d at 719.

[57] *Goodyear Tire & Rubber Company v. Jones*, 433 F. 2d 629 (C.A. 10 Kan. 1970).

[58] *Union Traction Company v. Kansas Casualty & Surety Company*, 112 Kan. 774, 213 P. 169 (1923).

[59]*Mark Twain Kansas City Bank v. Kroh Brothers Development Company,* 14 Kan. App. 2d 718-719 (1990), 798 P. 2d 511, 14 Kan. App. 2d 714.

[60]*Road Supply & Metal Company v. Bechtelheimer*, 119 Kan. 560, 240 P. 846 (1925).

[61]*Hopes Architectural Products, Inc. v. Lundy's Construction, Inc.*, 762 F. Supp. 1430 (D. Kan. 1991), *aff'd*, 1 F. 3d 1249 .

[62]*Chicago Lumber Company v. Douglas*, 89 Kan. 308, 131 P. 563 (1913)

[63]*Southwestern Electrical Company v. Hughes*, 139 Kan. 89, 30 P. 2d 114 (1934)

[64]*Geis Irrigation Co. v. Satanta Feeder Yards, Inc.* 214 Kan. 373 (1974)

[65]*Badger Lumber & Coal Company v. Schmidt*, 122 Kan. 48, 251 P. 196 (1926)

[66]*Comley Lumber Company v. Mid-Co Petroleum Company*, 116 Kan. 78, 225 P. 744 (1924)

[67]*Hopes Architectural Products, Inc. v. Lundy's Construction, Inc.*, 762 F. Supp. 1430 (D. Kan. 1991)

[68]*Seyb-Tucker Lumber & Implement Company v. Hartley* (1966), 197 Kan. 58, 415 P. 2d 217 (1966)

[69]*Haz-Mat Response, Inc. v. Certified Waste Services Unlimited*, 259 Kan. 166, 910 P. 2d 839 (1996).

[70]*Black's Law Dictionary*, 757 (6th Ed. 1990)