Construction Law: The Law of Private Contracts

Oklahoma contract law is codified in title 15 of the Oklahoma Statutes. For the most part, these statutes are "default rules" that supply the governing rule if the contract is silent or invalid as to the point at issue. A contract requires:

1. Parties capable of contracting.
2. Their consent.
3. A lawful object; and,
4. Sufficient cause or consideration.[1]

A contract is either express or implied.[2] In express contracts, the terms are stated in words.[3] In contrast, the existence and terms of an implied contract are manifested by conduct.[4]

Express Contracts

While you may have challenges with proof, all contracts may be oral, except those required to be in writing.[5] What contracts must be in writing? The Statute of Frauds provides:

> The following contracts are invalid, unless the same, or **some note or memorandum** thereof, be in **writing** and **subscribed by the party to be charged**, by an agent of the party or by a broker of the party pursuant to Sections 858-351 through 858-363 of Title 59 of the Oklahoma Statutes:
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> 1. An agreement that, by its terms, is not to be performed within a year from the making thereof;
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> 2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in the article on guaranty;
>
> 3. An agreement made upon consideration of marriage, other than a mutual promise to marry; or
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> 4. An agreement for the leasing for a longer period than one (1) year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent or a

[1] 15 O.S. § 2
[2] 15 O.S. § 131
[3] 15 O.S. § 132
[4] 15 O.S. § 133
[5] 15 O.S. § 134

> broker of the party sought to be charged, is invalid, unless the authority of the agent or the broker be in writing, subscribed by the party sought to be charged.[6] (emphasis added)

One attempting to prove that her client has met the Statue of Frauds will argue that a valid, express contract was created, the terms of which are sufficiently clear, and are proved by writings and extrinsic evidence without resorting to parol. *Thompson v. Giddings*[7] is a leading case on the subject.

In *Thompson*, the court ordered specific performance of a contract to convey real property. The buyer tendered a check bearing the notation "5 A Royalty N 1/4 of Sec. 21-17-1." The seller (the party to be charged) signed a receipt for the check, subsequently obtained a better offer for her royalty interest, and returned the check to the buyer, unsuccessfully arguing that the contract was terminated.

The *Thompson* court's analysis focused on two parts. First, whether the check met the "subscribed by the party to be charged" requirement. The court stated that a memorandum may consist of two or more writings and it is not essential that each of them be signed by the party to be charged, if the one signed refers to other and it appears that both were executed and exchanged as part of same transaction. The court reasoned that the check and receipt could be considered together as supplementing each other or curing any deficiencies in the other. Thus, a court may source the facts from two or more writings to determine whether the party to be charged subscribed the writings.

Second, the *Thompson* court determined whether the writings contained the essential elements of the contract, namely 1) the identity of the contracting parties, 2) the property involved, and 3) the terms of sale.

As for the description of the property, a court will stretch to find that the statute was satisfied. For example, the *Thompson* court stated that if it appears that the party sought to be charged owns but one parcel of property answering the description in the memorandum and the

[6] 15 O.S. § 136
[7] *Thompson v. Giddings*, 276 P.2d 229, 1954 OK 281

description is definite enough that buyer knows exactly what he is buying and the seller knows what she is selling and court can, with the aid of competent extrinsic evidence, apply the description to the exact property intended to be sold.

If one cannot meet the Statute of Frauds, then she may potentially rely on the well-settled doctrine of partial performance. In *Harris v. Arthur*[8], the court identified the acts done under a verbal contract for the sale of an interest in land that will prevent the use of the statute of frauds: 1) the delivery of possession to, or the assumption of exclusive and notorious possession by, the vendee under the verbal contract of sale, and with the knowledge of the vendor, accompanied by part payment of the consideration; OR 2) the expenditure of money by the vendee in making improvements, permanently beneficial to the estate, with the knowledge of the vendor, and in pursuance of such parol agreement of sale; OR 3) where the parties have so acted under the parol agreement as to alter their position so that a restoration to the former position is impractical or impossible; OR 4) where the parties have so acted under the agreement that to allow the defendant to take shelter under the statute, would be to inflict an unjust and unconscientious injury or loss upon the other party.

The doctrine of Promissory Estoppel has been used to thwart argument based on the Statute of Frauds. Four elements are necessary to establish a cause of action for promissory estoppel: (1) a clear and unambiguous promise; (2) foreseeability by the promisor that the promisee would rely upon it; (3) reasonable reliance upon the promise to the promisee's detriment; and (4) hardship or unfairness can be avoided only by the promise's enforcement.[9]

What are the Terms of the Express, Written Contract?

Rarely do attorneys draft or redline a contract without an integration clause, stating something like "the provisions contained herein, including additional provisions in Exhibit "A" hereto, if any, are the complete terms of the agreement." If the contract does not have an integration clause, one may rely on an Oklahoma statute that states the execution of a contract in writing,

[8] *Harris v. Arthur*, 127 P. 695, 36 Okla. 33
[9] *Garst v. University of Oklahoma*, 8 P.3d 927, 2001 OK CIV APP 144

whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument.[10] Caselaw construing the statute states that if an examination of a contract itself reveals that it was intended to be a complete and exclusive statement of all terms, parol evidence may not be introduced to show additional, consistent terms.[11] Also, in the absence of fraud or mistake, all previous oral discussions are merged into and superseded by the terms of an executed written agreement or instrument, and such instrument cannot be varied or the terms thereof changed by parol testimony pursuant to the integration statute.[12]

How will a Court Interpret the Contract?

A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.[13] The language of a contract is to govern its interpretation, if the language is clear and explicit.[14] When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this article.[15]

In cases of uncertainty, the language of a contract should be **interpreted most strongly against the party who caused the uncertainty** to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.[16] (emphasis added)

Typically, the "party who caused the uncertainty" is the drafter. Attorneys attempt to get around the statute with a clause like "This Agreement shall be construed without regard to the party or parties responsible for its preparation and it shall be deemed to have been prepared jointly by all parties, acting upon advice of counsel. This Note is the product of negotiation among the parties

[10] 15 O.S. 137
[11] *Southwestern Bell Media, Inc. v. Eden*, 848 P.2d 584, 1993 OK CIV APP 10
[12] *Albert & Harlow, Inc. v. Fitzgerald,* 389 P.2d 994, 1964 OK 42
[13] 15 O.S. § 152
[14] 15 O.S. § 154
[15] 15 O.S. § 155
[16] 15 O.S. § 170

and, therefore, the parties waive any right to require that any ambiguity or question about the terms of the Agreement be construed adversely against any party."

Implied Contracts

Again, an implied contract is one in which the existence and terms are manifested by conduct.[17] Where the contractor gave the dealer a check in payment of certain invoices and all interest charged to that date, there was an implied contract on the contractor's part to pay interest after 30 days from delivery of goods; the contractor's acts implied that it contracted to pay interest accrued subsequent to the payment of all interest up to the date the invoices were paid. Having reached the conclusion that there was an implied contract to pay interest, the recovery was founded upon contract and did not constitute damages.[18]

Indemnity

Like most states, Oklahoma has a specific statute for indemnity in construction contracts. Oklahoma's anti-indemnity statute provides:

> A. For purposes of this section, "construction agreement" means a contract, subcontract, or agreement for construction, alteration, renovation, repair, or maintenance of any building, building site, structure, highway, street, highway bridge, viaduct, water or sewer system, or other works dealing with construction, or for any moving, demolition, excavation, materials, or labor connected with such construction.
>
> B. Except as provided in subsection C or D of this section, any provision in a construction agreement that requires an entity or that entity's surety or insurer to **indemnify, insure, defend or hold harmless** another entity against liability for damage arising out of death or bodily injury to persons, or damage to property, **which arises out of the negligence or fault of the indemnitee**, its agents, representatives, subcontractors, or suppliers, is void and unenforceable as against public policy.
>
> C. The provisions of this section do not affect any provision in a construction agreement that requires an entity or that entity's surety or insurer to indemnify another entity against liability for damage arising out of death or bodily injury to persons, or damage to property, **but such indemnification shall not exceed any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable** to the indemnitor, its agents, representatives, subcontractors, or suppliers.

[17] 15 O.S. 133

[18] *Ray F. Fischer Co. v. Loeffler-Green Supply Co.,* 289 P.2d 139, 1955 OK 234

> D. This section shall not apply to construction bonds nor to contract clauses which require an entity to purchase a project-specific insurance policy, including owners' and contractors' protective liability insurance, project management protective liability insurance, or builder's risk insurance.
>
> E. Any provision, covenant, clause or understanding in a construction agreement that conflicts with the provisions and intent of this section or attempts to circumvent this section by making the agreement subject to the laws of another state, or that requires any litigation, arbitration or other dispute resolution proceeding arising from the agreement to be conducted in another state, is void and unenforceable.[19] (emphasis added)

No cases have construed this statute. However, take a look at Westlaw or Lexis because that statute has been cited in trial court documents.

Exculpatory Clauses

While the terms indemnity and exculpatory are often used interchangeably, they are, in fact, different. An exculpatory clause releases in advance the second party for any harm the second party might cause the first party after the contract is entered. An indemnification clause protects against claims made by parties outside the contract.[20]

In Oklahoma, an exculpatory clause is considered "distasteful" but will be enforced if it meets three conditions: 1) its language must evidence a clear and unambiguous intent to exonerate the would-be defendant from liability for the sought-to-be-recovered damages, 2) at the time the contract (containing the clause) was executed there must have been no vast difference in bargaining power between the parties, and 3) enforcement of the clause must never (a) be injurious to public health, public morals or confidence in administration of the law or (b) so undermine the security of individual rights vis-a-vis personal safety or private property as to violate public policy.[21]

[19] 15 O.S. § 221
[20] *Arnold Oil Props., LLC v. Schlumberger Tech. Corp.*, 672 F.3d 1202
[21] *Schmidt v. United States*, 912 P.2d 871, 1996 OK 29

Implied Covenants

A contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties, and as arise from the language of the contract and the circumstances under which it was made.[22] Express covenants control over implied covenants.[23]

Every contract in Oklahoma contains an implied duty of good faith and fair dealing.[24] Recently, this writer came upon a contractor refusing to provide surety bond information to the subcontractor. This writer argued that the contractor had an implied covenant to provide this information and wrote "If a surety bond exists on this project that inures to the benefit of Subcontractor, and Subcontractor is unable to attach that surety bond because a deadline is missed because of Contractor's refusal to provide the surety bond, then Subcontractor will seek additional damages from Contractor for intentional torts. Again, I ask you to immediately provide a copy the surety bond."

Warrant v. Represent

Although most contracts have a section so designated, there is widespread doubt about the precise difference between a *representation* and a *warranty*. One theory, not far from the truth, is that a *representation* amounts to a statement that the present situation is so-and-so, while a *warranty* is a guarantee that it will be so in the future. In fact, though, there are four salient differences between them: (1) a *warranty* is conclusively presumed to be material (therefore giving rise immediately to a claim for breach), while the burden is on the party claiming breach to show that a *representation* is material; (2) a *warranty* must be strictly complied with in every particular, while substantial truth is the only requirement for a *representation*; (3) a *warranty* is an essential part of a contract, while a *representation* is usually only a collateral inducement; and

[22] *Miller v. Indep. Sch. Dist. No. 56*, 609 P.2d 756, 1980 OK 19
[23] *Cent. States Prod. Corp. v. Jordan*, 86 P.2d 790, 184 Okla. 262
[24] *Wathor v. Mut. Assur. Adm'rs, Inc.*, 87 P.3d 559 *See also* Oklahoma Construction Law, Randi Donaldson Cary, Thomson Reuters, Ch. 1.3 and Construction Litigation Handbook, James Acret and Annette Davis Perrochet, Thomson Reuters, Ch. 3.6

(4) an express *warranty* must be written on the face of the document, while a *representation* may be written or oral.[25]

Roofing Contracts

Like oil and gas, most Oklahoma attorneys will encounter issues with roofing. A residential contract for roofing has three (3) requirements:

1. A right to cancel within seventy-two (72) hours after the homeowner receives notice from insurer that claim is denied. The cancellation clause must be in boldface 12-point type. And, fully completed in duplicate, attached to the contract, a Notice of Cancellation.[26]

2. A statement that all individuals performing work under the roofing contract are covered by workers' compensation insurance.[27]

3. If the contract is solicited at a residence, then the contract must state a right to cancel by mailing notice before midnight of the third business day after the contract is signed.[28]

Also, encourage the roofing contractor to ensure that both husband and wife sign the roofing agreement, else non-signing spouse could claim that he was unaware of the work, and refuse payment, arguing homestead.

Subcontractors v. Salaried employee

In *Duncan v. Powers Imports*,[29] the Oklahoma Supreme Court identified 11 factors that should be considered in deciding whether a person is an independent contractor or employee. No one factor is controlling, and the relationship must be based on the set of facts peculiar to the case. The 11 factors are: (a) the nature of the contract between the parties, whether written or oral; (b) the degree of control which, by the agreement, the employer may exercise on the details of the

[25] Garner's Dictionary of Legal Usage, the first paragraph of which draws from *Black's Law Dictionary* (Bryan A. Garner ed., 9th ed. 2009)
[26] 59 O.S. § 1151.21
[27] 59 O.S. § 1151.22
[28] 14A O.S. § 2-502
[29] *Duncan v. Powers Imports,* 884 P.2d 854, 1994 OK 126

work or the independence enjoyed by the contractor or agent; (c) whether or not the one employed is engaged in a distinct occupation or business and whether he carries on such occupation or business for others; (d) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (e) the skill required in the particular occupation; (f) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (g) the length of time for which the person is employed; (h) the method of payment, whether by the time or by the job; (i) whether or not the work is a part of the regular business of the employer; (j) whether or not the parties believe they are creating the relationship of master and servant; and (k) the right of either to terminate the relationship without liability.

The Negative Lien Clause

An Oklahoma case held that the filing of a lien did not violate a contract clause that prevented the filing of liens "arising out of and in the course of [its] performance of [the] sub-contract." The Court reasoned that the contractual requirement is aimed at compelling a subcontractor to pay for the labor and materials it uses on the job so as to prevent the filing of liens, and did not purport to extinguish the subcontractor's statutory right of protection against nonpayment of the contract price.[30]

That being said, this writer believes that a carefully crafted clause agreed to between parties of equal bargaining power would be enforceable. For example:

“Contractor shall not file any liens and shall not allow its subcontractors to file any liens on Company’s property. Contractor shall ensure that all subcontractors, as a condition of providing work or services for Contractor covered by the Contract, shall execute a Waiver of Lien in the form set forth in Exhibit B hereto. Contractor shall provide Company with a list of subcontractors, together with documents evidencing that all laborers, subcontractors, and suppliers of materials and equipment have been paid and are not claiming liens on Company’s

[30] *M & W Masonry Constr., Inc. v. Head*, 562 P.2d 957, 1976 OK CIV APP 34

property for such labor, services, or materials under the provisions of applicable state statures, rules and regulations."

A contractor, subcontractor or materialman may counter with this clause:

"Contractor shall not encumber Company's property unless either 1) Company fails to pay for work as described in 5.1, or 2) Company shall file a petition in bankruptcy or for reorganization or for an arrangement pursuant to any present or future federal or state bankruptcy law or under any similar federal or state law, or shall be adjudicated a bankrupt or insolvent or shall make an assignment for the benefit of its creditors or shall admit in writing its inability to pay its debts generally as they become due."

Choice of Law and Venue Deemed Unenforceable

The Fair Pay for Contraction Act applies to Oklahoma public projects and states " A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state."[31]

The Change Order

Nearly always a construction contract will state "…any change order must be signed by Owner." Remember, that Oklahoma law may help the contractor/subcontractor that does not have a signed change order as required by the contract. A statute states that a contract in writing may be altered by an executed oral agreement.[32]

Miscellaneous Tips

1. When this author reads a construction contract on behalf of a client, he pays particular attention to indemnity, insurance, payment, and scope of work clauses.
2. A contractor should think twice before walking off the job (substantial compliance v. material breach).

[31] 61 O.S. § 227
[32] 15 O.S. § 237

3. Notice and right to cure should be strictly adhered to.
4. "Time is of the essence" clause should be added to all contracts. Else, courts will allow a reasonable time.
5. Define the "Effective Date" thoroughly. This writer likes "When used in this Agreement, the term 'Effective Date' or the phrase 'the date of this Agreement' shall mean the last date that either Buyer or Seller execute this Agreement.
6. Consider this ADR clause: "Before either Party may take any legal action against the other party, a face-to-face meeting shall occur between Danny Quinnett and David Meyer with a neutral third-party present."
7. Even if the contract calls for Arbitration via AAA, the parties may agree to submit the dispute to a mutually-agreeable arbitrator and use the OK rules of arbitration.
8. Draft recitals to memorialize intent and explain; remember to incorporate recitals into the agreement.
9. A settlement agreement may be set aside if a court finds duress. Consider drafting a "this agreement is not duress" clause in the agreement.
10. Look to factoring agreements for sample language, clauses and documents that are creditor friendly—there are none better.
11. If your client is a materialman, and is unsure where the materials will be used, consider an article 9 clause: "Company shall maintain a purchase money security interest in the Goods for any portion of the purchase price not paid at the time of delivery and retain this interest until Company has received the full purchase price for the goods."

MECHANICS AND MATERIALMEN'S LIENS

A mechanics and materialmen's lien secures payment of a private debt (the lien cannot be used in a public construction project). Our lawmakers consider construction so vital to the Oklahoma economy that it gave those engaged in the industry special protections with this lien. It's available to contractors, subcontractors and materialmen.

Why is the lien so strong?

1. Mortgages have an "event of default" provision that states that the note will be accelerated if the borrower allows a lien to attach to the property;
2. In a lien foreclosure action, one must join as party defendants all those that claim an interest in the property.[33] Thus, a mortgagee and other lien claimants must be joined. A tactful call to the lender, informing it that a foreclosure suit is imminent and the lender will be a party defendant will sometimes be all the pressure the lien claimant need apply;
3. Attorneys' fees are granted to the prevailing party;[34]
4. The lien is a cloud on the property's title. The property cannot be sold nor borrowed against until the lien is satisfied or the foreclosure period expires;[35]
5. It is preferred to all other liens or encumbrances which may attach to or upon such land, buildings or improvements or either of them subsequent to the commencement of such building;[36]
6. When perfected, the lien claimant becomes secured, acquiring collateral in the property and preferred in bankruptcy;
7. Lien may be perfected post-bankruptcy petition without violating the stay; and
8. Misapplication of construction funds by an owner, contractor or subcontractor can lead to a charge of embezzlement by bailee. The managing officers of the offending entity will be charged.[37]

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[33] 42 O.S. § 173
[34] 42 O.S. § 176
[35] 2016 Title Examination Standards Handbook, Real Property Law Section of the Oklahoma Bar Association; Ch. 24.10 Mechanics and Materialmen's Liens
[36] 42 O.S. § 141
[37] 42 O.S. § 152 and 42 O.S. § 153

There's a catch to all these benefits. One must file the lien on time. Liberality should be given to the enforcement of the lien, after the lien has clearly attached, and not in determining the question as to whether or not a lien exists.[38]

When to File

When must the lien be filed? It depends. Different filing deadlines attach, depending on the lien claimant's relationship with the property owner. Contractors are those that enter into an agreement with the property owner. All others are considered subcontractors.

1. Contractors must file the lien within four (4) months of the date equipment was last furnished or labor last performed on the project.[39] Any contractor who falsifies any statement regarding liens on labor or material to any owner of a dwelling, upon conviction, shall be guilty of a felony.[40]

2. Subcontractors. Before a lien is filed, a re-lien notice must be sent to the property owner and general contractor.[41] The notice must be sent within seventy-five (75) days of the date equipment was last furnished or labor last performed on the project, and contain specific language as required by the Oklahoma statute.[42] The notice may be hand delivered[43] or sent certified mail, return receipt requested.[44] There are exceptions to the pre-lien notice requirement, but it may be a good idea to send the notice regardless. The lien statement must be filed within ninety (90) days.[45] If the owner pays the contractor within 90 days, the owner suffers the risk of loss; that is the risk that the contractor will not pay the subcontractor or materialman. The owner may protect himself by withholding payment for 90 days, or by

[38] *American Tank & Equip. Co. v. T. E. Wiggins*, 42 P.2d 115, 1934 OK 661
[39] 42 O.S. § 142
[40] 42 O.S. § 142.4
[41] 42 O.S. § 142.6(B)(1)
[42] 42 O.S. § 142.6(B)(1)
[43] 42 O.S. § 142.6(B)(5)(a)
[44] 42 O.S. § 142.6(B)(5)(c)
[45] 42 O.S. § 143

making a joint payee check to the contractor and the materialman/subcontractor.[46]

Lien Statement Contents

A lien statement, whether on behalf of a contractor or subcontractor, must include: (1) a statement setting forth the amount claimed and identifying the material or labor supplied; (2) the name of the owner or owners, contractor and claimant; (3) the description of the property subject to the lien; and (6) a verification of the lien by affidavit.[47] You should attach invoices or other itemized statements setting forth the amount claimed. Subcontractors must also file a notarized affidavit verifying compliance with the pre-lien notice requirements.[48]

Pre-lien Notice

Some nationwide general contractors and materialmen send a pre-lien notice as a matter of course, whether or not the property owner is in default. If you have such a client, consider this tactic.

In this writer's experience, most mistakes occur with the pre-lien notice, either by subcontractors that take a "do-it-yourself" approach or attorneys that do not follow the statute. The pre-lien statute provides:

> A. For the purposes of this section:
>
> 1. "Claimant" means a person, other than an original contractor, that is entitled or may be entitled to a lien pursuant to Section 141 of this title; and
>
> 2. "Person" means any individual, corporation, partnership, unincorporated association, or other entity.
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> B.
>
> 1. Prior to the filing of a lien statement pursuant to Section 143.1 of this title, but no later than seventy-five (75) days after the last date of supply of material, services,

[46] *Roofing & Sheet Metal Supply Co. of Tulsa v. Golzar-Nejad Khalil, Inc.*, 925 P.2d 55, 1996 OK 101
[47] 42 O.S. § 142
[48] 42 O.S. § 142.6(C)

labor, or equipment in which the claimant is entitled or may be entitled to lien rights, the claimant shall send to the last-known address of the original contractor and an owner of the property a pre-lien notice pursuant to the provisions of this section. Provided further, no lien affecting property then occupied as a dwelling by an owner shall be valid unless the pre-lien notice provided in this section was sent within seventy-five (75) days of the last furnishing of materials, services, labor or equipment by the claimant.

2. The provisions of this section shall not be construed to require:

a. a pre-lien notice with respect to any retainage held by agreement between an owner, contractor, or subcontractor, or

b. more than one pre-lien notice during the course of a construction project in which material, services, labor, or equipment is furnished.

A pre-lien notice sent in compliance with this section for the supply of material, services, labor, or equipment that entitles or may entitle a claimant to lien rights shall protect the claimant's lien rights for any subsequent supply of material, services, labor, or equipment furnished during the course of a construction project.

3. Except as otherwise required in paragraph 1 of this subsection, the pre-lien notice requirements shall not apply to a claimant:

a. whose claim relates to the supply of material, services, labor, or equipment furnished in connection with a residential project. For the purposes of this subparagraph, the term "residential" shall mean a single family or multifamily project of four or fewer dwelling units, none of which are occupied by an owner, or

b. whose aggregate claim is less than Ten Thousand Dollars ($10,000.00).

4. The pre-lien notice shall be in writing and shall contain, but not be limited to, the following:

a. a statement that the notice is a pre-lien notice,

b. the complete name, address, and telephone number of the claimant, or the claimant's representative,

c. the date of supply of material, services, labor, or equipment,

d. a description of the material, services, labor, or equipment,

e. the name and last-known address of the person who requested that the claimant provide the material, services, labor, or equipment,

f. the address, legal description, or location of the property to which the material, services, labor, or equipment has been supplied,

g. a statement of the dollar amount of the material, services, labor, or equipment furnished or to be furnished, and

h. the signature of the claimant, or the claimant's representative.

5. A rebuttable presumption of compliance with paragraph 1 of this subsection shall be created if the pre-lien notice is sent as follows:

a. hand delivery supported by a delivery confirmation receipt,

b. automated transaction pursuant to Section 15-115 of Title 12A of the Oklahoma Statutes, or

c. certified mail, return receipt requested. Notice by certified mail, return receipt requested, shall be effective on the date mailed.

6. The claimant may request in writing, the request to be sent in the manner as provided in paragraph 5 of this subsection, that the original contractor provide to the claimant the name and last-known address of an owner of the property. Failure of the original contractor to provide the claimant with the information requested within five (5) days from the date of receipt of the request shall render the pre-lien notice requirement to the owner of the property unenforceable.

C. At the time of the filing of the lien statement, the claimant shall furnish to the county clerk a notarized affidavit verifying compliance with the pre-lien notice requirements of this section. Any claimant who falsifies the affidavit shall be guilty of a misdemeanor, and upon conviction thereof may be punished by a fine of not more than Five Thousand Dollars ($5,000.00), or by imprisonment in the county jail for not more than thirty (30) days, or by both such fine and imprisonment.

D. Failure of the claimant to comply with the pre-lien notice requirements of this section shall render that portion of the lien claim for which no notice was sent invalid and unenforceable.[49]

Consider whether provisions of the Fair Debt Collections Practices Act apply to the notice. This writer routinely adds the "mini-Miranda" to all notices to individual debtors. Likewise, attorneys will add the mini-Miranda to foreclosure petitions to individual defendants.

[49] 42 O.S. § 142.6

Filing the Lien Statement

The lien must be filed with the county clerk of the county in which the property is located. After the lien is filed, the county clerk mails a copy of the lien statement (or a statement of lien filing) via certified mail to the lien debtor.[50] Some scallywags will not accept certified mail. So, remember to check with the county clerk to ensure that the green card, confirming receipt was returned to the clerk. If the card was not received, consider sending a process server to deliver the lien statement.

Foreclosure

If the lien debtor does not pay the amount owed, then one is required to foreclose on the Mechanics and Materialmen's Lien within one year of filing the lien statement.[51] Frequently, the lien debtor has more than one Mechanics and Materialmen's Lien filed against the property. In such case, the attorneys for the various lien claimants will discuss strategy and share information, and the attorney representing the lien claimant with the largest claim will typically take the lead in the foreclosure action, unless of course a lien claimant is in danger of missing the one-year deadline.

If an attorney is confident in her case, she may elect to foreclose soon after the lien statement is filed, reasoning that she now is entitled to attorneys' fees even if the dispute is resolved by settlement. Remember to add both *in rem* (foreclosure of lien) and *in personam* (breach of contract) causes of action to the foreclosure petition in the event the *in rem* action fails. And, consider filing a *lis pendens* notice of the foreclosure in the county clerk's records.

Priority

Often, questions of priority exist between a mortgage lien, a judgment lien and others that have filed Mechanics and Materialmen's Liens. Regarding the mortgage lien and judgment lien, the Mechanics and Materialmen's Lien refers back and applies from the date the first labor or

[50] 42 O.S. § 142
[51] 42 O.S. § 172

material is furnished to the project. Thus, if the work began on the project prior to the recording of a mortgage or judgment lien, then the lien of the contractor, subcontractor or supplier is superior.[52]

If others hold perfected Mechanics and Materialmen's Liens, then they stand in equal status toward each other. In other words, the lien claimant who supplies material at the end of a project will be equal in priority to the lien claimant, such as an engineer or surveyor, who provided services at the beginning of the project. That being said, this writer will only cooperate with other lien claimants after determining that a lien claimant's lien statement is perfected.

Releasing the Lien

A lien claimant can neutralize the Mechanics and Materialmen's Lien by depositing with the county clerk either an amount of money equal to 125% of the lien amount, or a bond (called a lien-release bond) in an amount equal to 125% of the lien amount.[53] This tactic is typically used when the lien debtor disputes the charges or for some other reason feels that the charges are unjustified. In such case, the lien claimant's attorney will foreclose on the bond surety.

Amending the Lien Statement

The lien statement cannot be amended for the amount claimed.[54] So, check and double-check the math before the lien statement is recorded. If an error does occur in the amount claimed, consider releasing the erroneous lien and refiling, provided of course the time-to-file has not expired. Besides the amount claimed, in most instances defects in the lien statement can be remedied even when the time for filing has expired.[55]

Materialmen

A materialman makes a prima facie case of being entitled to a lien by showing (1) the material was sold to the contractor with knowledge of a contract between the owner and the contractor,

[52] *American-First Title & Trust Co. v. Ewing*, 403 P2d 488, 1965 OK 98
[53] 42 O.S. § 147.1
[54] 42 O.S. § 172
[55] *Corbett v. Logan*, 20 P.2d 894, 1933 OK 140

(2) delivery of the materials to the site, and (3) use of the materials in the project.[56]

Work on Leased Property

Construction projects on leased property (tenant improvements) can be significant. A restaurant build-out in a shopping mall can easily cost more than $300,000, for example. Yet, in this type of project, the construction professional may not enjoy the full benefits of the lien. If the professional does not have privity with the property owner, then the lien attaches to the buildings and improvements on such property separately from the real estate.[57]

Construction Trust Fund

The amount payable under any building or remodeling contract shall be held as trust funds for the payment of all lienable claims due and owing or to become due and owing by such contractors or subcontractors by reason of such building or remodeling contract.[58] If the party receiving any money is an entity having the characteristics of limited liability pursuant to law, such entity and the natural persons having the legally enforceable duty for the management of the entity shall be liable for the proper application of such trust funds.[59] Persons subject to punishment shall be the managing officers of a corporation and limited liability company.[60]

Lien Checklist

1. Who is the lien claimant?
2. Who is the debtor?
3. What is the date labor last performed or materials last supplied (not invoice date; not punch list items)?
4. Where is the project?
5. Does the debtor have any counterclaims?

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[56] *Roofing & Sheet Metal Supply Co. of Tulsa v. Golzar-Nejad Khalil, Inc.*, 925 P.2d 55, 1996 OK 101

[57] 42 O.S. § 141 See *Bell v. Tollefsen*, 782 P.2d 934, 1989 OK 149

[58] 42 O.S. § 152

[59] 42 O.S. § 153

[60] 42 O.S. § 153

6. How much is the lien claimant owed?
7. What steps have you taken to collect the debt?
8. When and what was the last conversation with debtor?
9. Written contract? Any COs?
10. Do you want future business from the debtor?
11. Would you consider property in lieu of cash?
12. Typically, I make a "last call" to the debtor. What are your thoughts?
13. Sometimes, I send a pre-lien notice even if the law doesn't require it. Thoughts?
14. Is there a bond on the project?
15. Prevailing party awarded attorneys' fees.

With the above questions, the attorney can assess whether he wants or is able to represent the lien claimant.

Before Filing Lien

1. Is the lien claimant in good standing the Oklahoma Secretary of State?
2. Is the lien claimant current with its licenses?
3. All permits obtained?
4. Check the county records for other lien claimants? Assess their lien statements.
5. Check the assessor records and or county records for property descriptions.
6. Check OSCN and Pacer for court records.
7. Check OK County for UCC liens.
8. What about bonds?
9. Can I use other liens?

Construction Bonds

Construction bonds (also known as surety bonds) are frequently used in Oklahoma as means of protecting parties in a construction contract. A party seeking a bond must supply financial and other information related to experience and reputation to the bond underwriter.

A performance bond is an instrument in which a surety guarantees that a contractor will perform its contractual obligations to the property owner. A payment bond, in contrast, guarantees that persons that perform work or supply materials on a project will be paid. Typically, construction bonds are both performance and payment. Examples of how construction bonds are used:

1. Owner requires contractor to provide a performance bond on a project. Owner is assured that the project will be completed by the contractor (or another contractor if the original contractor defaults).
2. School district requires contractor to provide payment bond. If subcontractors on the project are not paid by the contractor, they may attach the bond.
3. General contractor requires subcontractor to provide payment bond on a project, ensuring that all sub-subcontractors are paid.

If one seeks payment on a construction bond, then she needs to file a Bond Claim Notice with the surety. This notice must be delivered within a certain time after the work was completed.

After receiving a Bond Claim Notice, the surety will require the claimant to complete a "Proof of Claim Affidavit" which is similar to a bankruptcy proof of claim. The surety is required to thoroughly, independently, investigate the claim.[61]

[61] For a detailed discussion of Bonds, see Construction Litigation Handbook, James Acret and Annette Davis Perrochet, Thomson Reuters, Ch. 20; for a discussion of public bonds, see Legal Issues in Construction Law, Bonds and Sureties, Oklahoma Bar Association CLE, April 2010, John E. Harper