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# Minnesota Mechanic's Lien Update 2013

November 13, 2013

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## **Big Lake Lumber vs. Twenty First Century Bank (2013)**

**....A tour through the law of mechanics lien  
priority disputes between unpaid lien claimants,  
banks and purchasers.**

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## I. **Big Lake Lumber and DesMarais versus Twenty-First Century Bank**

- § Builder Hilde buys forested lot, hires excavator Wruck to clear a home site
- § 2005, Wruck cleared the lot, leveled a pad, and graded an earthen driveway sufficient for construction equipment to enter.
- § Hilde looked around for financing and in the spring of 2006, Hilde asked DesMarais to bid work as a framing subcontractor.
- § DesMarais visited the site, and sees that clearing, grubbing, grading and leveling had been completed, according to Big Lake Lumber's plans.



- § Hilde sells lot to investors, agrees that Hilde would build the house that had been designed by Big Lake Lumber for them.
- § 21<sup>st</sup> Century Bank Records mortgage October 2006.
- § DesMarais begins framing in November 2006 and completes the home
- § Investors default and Bank refuses to pay



- § DesMarais asserts that liens date from Wruck's work in 2005
- § Bank claims that “the improvement” is different because it was built for the investors, not Hilde
- § And that the prior improvement was “abandoned”
- § District Court rules for DesMarais and Lumber, but Court of Appeals reverses
- § Court of Appeals fashions “newly integrated analysis” says improvement changed when Hilde decided to sell to investors



## II. **What is the Lien For:** Lien statute section 514.01:

- A. **Contribution to the Improvement of Real Estate:** Whoever performs engineering or land surveying services with respect to real estate, or contributes to the improvement of real estate
- B. **Shall Have a Lien** upon the *improvement*, and *upon the land* on which it is situated or to which it may be removed, that is to say,
- C. **Statute Lists improvement activities for which a lien can be had:** for the erection, alteration, repair, or removal of any building, fixture, bridge, wharf, fence, or other structure thereon, or for grading, filling in, or excavating the same, or for clearing, grubbing, or first breaking...



***Attachment from first item furnished:*** 514.05 subd. 1. “**All liens**, as against the owner of the land, **shall attach and take effect from the time the first item** of material or labor is furnished upon the premises for the beginning of the improvement...”

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- ✓ **Priority: Disputes between Lien Claimants and Recorded Mortgages.**
- ✓ **Liens generally beat Mortgages and purchasers if the “actual and visible beginning” predates recordation.**
- ✓ **As against a mortgagee... without actual or record notice, no lien shall attach **prior to the actual and visible beginning of the improvement** on the ground...**



- ∨ Anything that is lienable under section 514.01 (see above) qualifies as a first visible beginning, as long as it is visible and begins the “improvement”.
- ∨ Except that: Section 514.05 subd. 2 says “visible staking, engineering, land surveying, and soil testing services....” cannot qualify as a first visible beginning.

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- ✓ See also *Kraus-Anderson Construction Company vs. Superior Vista* asbestos abatement done prior to the demolition of the old building to make way for the construction of the new building was a visible beginning of the improvement).
- ✓ Sometimes it is said that Section 514.05 "in effect imposes a duty on a purchaser or encumbrancer to examine the premises for the beginning of any actual and visible improvements before a sale or mortgage transaction is completed."



V. **Common priority questions**

A. **First Item:** What is the first item of improvement? Was it visible?

B. **Separate Improvement:** Was the work performed before mortgage recordation part of the same improvement as the work performed after the mortgage was recorded?

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- § What if: the project is started, but not finished, and then restarted after a delay. The lien claimants contend that they have a lien for all work dating from the very first commencement of the project.
- § What if: The project is started, and by all appearances, completed, and then a bank finances more work. The bank contends that lien notices were not filed soon enough to cover the work apparently completed. The lien claimants contend that all of that work was contemplated from the very first, so it is all one improvement.



## What determines what the improvement is?

Construction work is considered a single improvement if it is done for the same general purpose, or if the parts, when gathered together, form a single improvement." *Kahle v. McClary*, 255 Minn. 239, 241, 96 N.W.2d 243, 245 (1959)).

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**Complicated projects involving multiple lots, multiple contractors , and multiple starts and stops.** (Poured Concrete) "A project consists of separate improvements if there is little or no interrelationship between the contracts under which the project was performed." *Id.* In evaluating projects, this court focuses on "the parties' intent, what the contracts covered, the time lapse between projects, and financing." *Poured Concrete Found., Inc. v. Andron, Inc.*, 529 N.W.2d 506, 510 (Minn. App. 1995), review denied (Minn. May 31, 1995).

**What determines abandonment?** Objective manifestation of intent to abandon the project. In a lien-enforcement action to determine whether a mechanic's lien relates back to the start of a construction project or terminates because of abandonment of that project, the intent to abandon is determined under an objective standard.

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1. *Superior Construction Services v. Latoria Belton*, 749 N.W.2d 388 (Minn. App. 2008). Home construction from external appearances was complete and home occupied. No labor and materials performed for two years. Nothing in the physical appearance of the property suggested an ongoing construction project. New work was on internal cabinets, counter tops, and heat registers. Despite being unpaid for this length of time, the lien holders made no effort to enforce their liens. An objective inspection of the property could not have put one on notice that there was unfinished work.

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2. *Langford Tool & Drill Co. v. Phenix Biocomposites, LLC*, 668 N.W.2d 438, 443 (Minn. App. 2003). This case is based upon a factual determination by the District Court, after trial, and the Court of Appeals found that it was not an abuse of discretion to determine that there was abandonment. The work on the project had stopped, the **place was barricaded**, and there were **no trespassing** signs posted on the property. The new lenders wanted to be sure all former liens were paid off, which they did.



*E.H. Renner & Sons, Inc. v. Sherburne Homes, Inc.*,  
458 N.W.2d 177, 179 (Minn. Ct. App. 1990) (streets,  
curbs and gutters).

The paving of **streets, curbs and gutters** does not directly relate to the construction of the two dwellings. Moreover, the parties agree that the work performed by Valley Paving was done on the city right-of-ways.

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## I. DEFINITION - ADVANTAGES.

1. Mechanics' Lien - secures payment of a claim arising from improvement to real estate.

A. The improved property secures payment and can be foreclosed and sold to pay the debt.

2. Advantages.

A. Priority over other liens.

B. Security for payment in case of refusal or inability to pay, Bankruptcy, abandonment of job, etc.

C. Informs mortgage company or title company of claim.



D. Hinders the sale of property until you are paid.

E. Gives the Contractor or subcontractor leverage to pressure the owner into paying.

F. Allows recovery of interest and attorneys' fees.

3. Note: Mechanic's Liens are not valid against public property (i.e., schools, city hall, state buildings, municipal road projects, etc.)

A. "Bond Claims" under Minn. Stat. §574.26 protect payment to subcontractors and suppliers.



B. But, property held by a municipality for purposes of economic development as a non-public commercial business site is not exempt from Mechanic's Liens.

## II. THREE GENERAL REQUIREMENTS.

1. Pre-Lien Notice: Give Pre-Lien Notice to all property owners that a Mechanics' Lien may be filed against the property.

A. If you are a contractor, you must include a Pre-Lien Notice with your written contract or, if you have an oral agreement, you must serve the owner with Pre-Lien Notice within 10 days after the work is agreed upon. (Exhibit A)

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B. If you are a subcontractor, you must serve all owners with a Pre-Lien Notice within 45 days of your first work or delivery. (Exhibit B)

2. Mechanic's Lien Statement: File with the County Recorder and serve all property owners with a Mechanics' Lien Statement within 120 days of your last item of work or delivery of materials. (Exhibit C)

3. Foreclosure: Start a lawsuit to foreclose the Mechanics' Lien within one (1) year of your last item of work or delivery as shown on the Mechanics' Lien Statement.



4. In enforcing a Mechanics' Lien, Courts pay particular attention to the Pre-Lien Notice requirement, but are a little more flexible on the formalities of the Mechanics' Lien Statement and the lawsuit. All time deadlines are strictly enforced.

A. A subcontractor will not lose its lien if it makes a “good faith effort” to comply with the pre-lien notice requirement. This does not apply to a general contractor.

B. Only the attached Pre-Lien Notices may be used (Exhibits A and B).



C. Mechanic's Liens on an owner's property will be reduced by payments made by the owner to the contractor prior to the owner's receipt of the subcontractor's pre-lien notice.

### III. CONTRACTOR'S PRE-LIEN NOTICE.

If you are the general contractor (i.e. have a direct contract with the property owner and intend to use subcontractors or material suppliers), you must give the Contractor's Pre-Lien Notice to each property owner (Exhibit A). The Pre-Lien Notice must be included in the written contract with the owner. If there is no written contract, it must be personally delivered or sent by certified mail upon the owner...

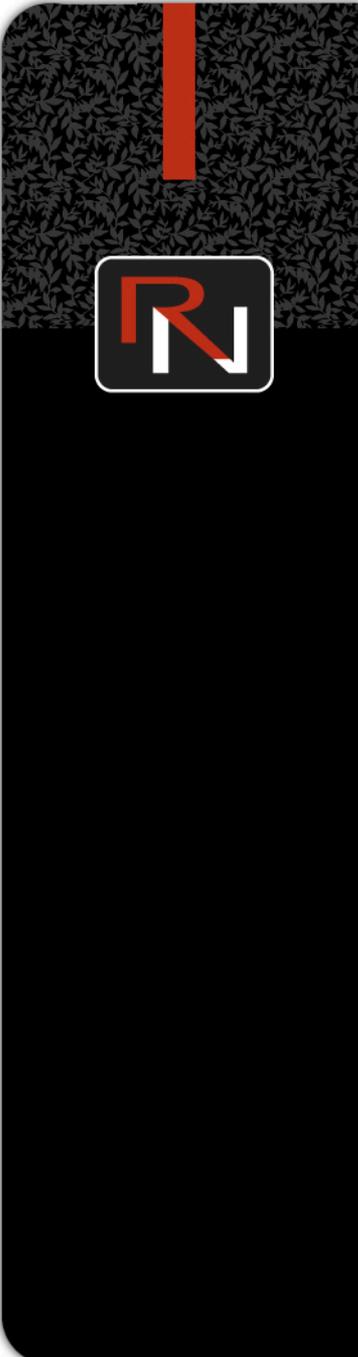
...within ten (10) days of the date of your agreement.  
(Not date of your first work or delivery.)



i. **Strict Compliance is Required.** The statute makes it clear that a person who fails to provide the contract's notice is not entitled to a mechanic's lien. In fact, even if the notice is given, the right to a mechanic's lien can be lost by failing to strictly comply with the notice requirements. Here are two examples:

(1) **Boldface Type.** Even where it is clear that the Pre-Lien Notice was provided to the owner, the contractor's lien rights were lost because the Pre-Lien Notice was not in **10-point** boldface type as required by the statute.

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ii. A contractor's Pre-Lien Notice need not be given if the contractor directly contracts with the owner and is not using subcontractors or material suppliers.

iii. Examples:

A. Sam, a builder, contracts with Mary and Joe, who own a vacant lot, to build a home for them on the lot. Sam will subcontract the plumbing, heating and electric and purchase the materials from Smith Lumber. Sam must include the Contractor's Pre-Lien Notice in his written contract with Mary and Joe. If Sam does not have a written contract, he must personally deliver or send by certified mail a Pre-Lien Notice to both Mary and Joe within ten (10) days of the date they reach an agreement to build the house.

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B. Sam contracts with Mary and Joe to remodel the basement in their home. Mary and Joe will purchase all of the materials and Joe's brother will do the electrical and plumbing work. Sam agrees only to do the labor himself and does not intend to contract with any material suppliers or subcontractors. Because Sam is not using subcontractors or suppliers, Sam need not give Pre-Lien Notice to Mary and Joe.



C. Smith Lumber contracts with Howard to build a pole barn on Howard's land. Smith Lumber will supply all of the labor and materials, but Smith Lumber will subcontract the manufacturing of the trusses. Because of the subcontract for the trusses, Smith Lumber must provide the Contractor's Pre-Lien Notice in its written contract with Howard, or, if there is no written contract, Smith Lumber must serve Howard with the Contractor's Pre-Lien Notice within ten (10) days of the date of its oral agreement with Howard.



D. Central Builders has given Betsy and Brian several proposals to build a home. The proposals all include the Contractor's Pre-Lien Notice. When the parties finally agree, a contract is signed, which does not include the Pre-Lien Notice. Central Builders has no lien rights because the final, signed contract did not include a Pre-Lien Notice.

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E. Sam, the owner of Minnesota Builders, is something of a computer whiz and is proud of his new word processing computer system. He goes to a seminar and learns that he must include a Pre-Lien Notice in his contracts. He has an expensive printer to go with his computer system, and chooses an *Italicized* type. He prints up the Pre-Lien Notice using the *Italicized* type and attaches a copy to his contract. The Pre-Lien Notice may not be valid. Minnesota law requires that the lettering of a Pre-Lien Notice be capitalized if typed, or at least 10-point bold type, if printed. The moral of the story, do not get fancy and only use the notices provided in attached Exhibits A and B.

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F. At the next seminar, Sam listens a little more carefully and uses the notice shown in Exhibit A. Sam is a general contractor who sometimes uses written contracts, and sometimes on smaller jobs simply does the work. In all cases, Sam sends Pre-Lien Notice by regular mail. Sam's attempt to give Pre-Lien Notice is fatal and his Mechanic's Lien rights are not valid. The Pre-Lien must be part of the written contract when Sam is using written contracts. When he does not have a written contract, the Pre-Lien Notice must be sent by certified mail, and not regular mail.



G. Central Builders orally agrees to remodel a building which Michael intends to use for a restaurant. Before starting the work, Central Builders learns that Michael is purchasing the property on a Contract for Deed, but Central does not know the identity of the Contract for Deed seller. Central served the Pre-Lien Notice on Michael by certified mail, but not the Contract for Deed seller. Central later is not paid, files a Mechanic's Lien and starts a lawsuit. Central's Mechanic's Lien is not valid against the Contract for Deed seller.



iv. If only one spouse or owner signs the written contract containing the Pre-Lien Notice, you should serve the other spouse or owner with Pre-Lien Notice within 10 days of the contract date by certified mail.

v. *Special Note:* The Residential Contractor Licensing Law requires that all contracts for residential work be in writing.

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#### IV. SUBCONTRACTOR'S PRE-LIEN

NOTICE. Subcontractor's Pre-Lien Notice (Exhibit B) must be personally delivered or sent by certified mail to all "owners" within 45 days after the earlier of the subcontractors first work on the property or delivery of materials to the property, or the first day the owner/builder picks up materials for the property, or the subcontractor's first other contribution to the improvement of the property.

1. Owners. Both the husband and wife should be served with a separate Pre-Lien Notice. If the property has been sold under a Purchase Agreement prior to the time of your first delivery or you start work, you must send separate Pre-Lien Notices to both the sellers and the purchasers.

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A. If the Purchase Agreement is signed after your first delivery or date your work started, you need not give a Pre-Lien Notice to the new buyers.

B. Owners including Sellers and Buyers under a Contract for Deed.

2. Examples:

A. Joe and Mary, husband and wife, own a vacant lot and have hired Ace Builders to build a home on the lot. Ace Builders subcontracts with Smith Lumber to supply the materials for the job. Smith Lumber must give both Joe and Mary each a separate Subcontractor's Pre-Lien Notice...

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...within 45 days of the earlier of Smith Lumber's first delivery of materials to the property, or the first day the contractor picks up materials, or the first day Smith Lumber makes any other contribution to the improvement of the property.

B. Same as Example A, except Ace Builders owns the vacant lot and has entered into a Purchase Agreement with Joe and Mary to sell them the lot and to build their new home. Smith Lumber learns of the Purchase Agreement before it begins delivery of materials. Smith Lumber must give Joe and Mary each a separate Subcontractor's Pre-Lien Notice within 45 days of Smith's first contribution to the home.

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C. The same as Example A, except Bill and Sue are selling the vacant lot to Joe and Mary under a Purchase Agreement, but they have not closed on the sale of the lot. Ace Builders starts building the new home on the lot for Joe and Mary, and Smith Lumber delivers materials before the closing of the sale of the lot. Smith Lumber knows of the Purchase Agreement between these parties before its first delivery. Smith Lumber must serve Joe, Mary, Bill and Sue with a Subcontractor's Pre-Lien Notice within 45 days of Smith's first delivery to the home. Ace Builders should also include in its contract and serve the Contractor's Pre-Lien Notice on Joe, Mary, Bill and Sue.

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D. Joe and Mary own a home and have contracted with Ace Builders to remodel the basement. Ace Builders contracts with Smith Lumber to supply materials for the job. Smith Lumber learns that Joe and Mary live in the home across the street and Mike and Linda live in the home being remodeled. Smith Lumber must serve Joe and Mary with a Subcontractor's Pre-Lien Notice, and should serve Mike and Linda, the occupants, with a Pre-Lien Notice. Ace Builders should also include the Contractor's Pre-Lien Notice in their contract with Joe and Mary.



E. Smith Lumber, a subcontractor, mails the Pre-Lien Notice by regular mail within the 45 day period. Smith is not paid, files a Mechanic's Lien and starts a foreclosure lawsuit. The owner counters that the Pre-Lien Notice was not properly served. Tough luck for Smith. It is an absolute requirement that the Pre-Lien Notice be sent by certified mail. Regular mail, even if Smith Lumber approves that the homeowner received the Notice within the 45 days, it does not count.

## V. GENERAL COMMENTS, PRE-LIEN NOTICE

1. How to determine the “owners” of the property.

Contractors:

A. ALWAYS ask the owner whether any other person or entity has any ownership interest in the property.

B. ALWAYS verify the information given you by the contractor with your own investigation.

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C. **ALWAYS** take the legal description of the property to the County Recorder and check the property tract index to see that the claimed owner is named on the last deed filed. Generally, the County or City Zoning Office can give you the legal description of the property if you have the street address, and vice-versa.

D. **Subcontractors: ALWAYS** watch the Builder's order form to see if anyone is named as a buyer,. i.e. "the Meyers job" or "Ken Olson - Buyer". If someone has come into your business to select items, that person is probably the buyer and should get a Subcontractor's Pre-Lien Notice.

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2. *Additional observations.*

A. **ALWAYS** serve all occupants of the improved property with a Pre-Lien Notice.

B. If you know the name of one party living on the property, but are unsure of their marital status, send a separate Pre-Lien Notice to a Mr. or Mrs. \_\_\_\_\_. For example, you know John Smith owns the property, but do not know if he is married. Send one Pre-Lien Notice, certified mail, to John Smith, and a second Pre-Lien Notice, certified mail, to Mrs. John Smith.



C. Request that your delivery truck drivers or workmen let you know of any discrepancies between the addresses on the delivery tickets and the address where the materials are delivered. Tell them to let you know of anything unusual about the delivery or job.

D. You must be particularly concerned if the builder has two projects going on the same area that materials shipped to one location are not used by the contractor at the other location. Monitor the shipments to insure that the amount and type of material going to a particular project is consistent with the type and size of home being constructed.

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E. Contractors are obligated under Minnesota Law to provide subcontractors with the name and address of the property owner. The failure of the contractor to provide the owner's name makes the contractor liable to the subcontractor for damages. In most cases, the law is meaningless because the subcontractor would not be enforcing their lien rights if the contractor could pay them.

F. Only give a Pre-Lien Notice on the projects where you want to be paid.



G. Giving the subcontractors pre-lien notice when you are the general contractor (when you have a direct contract with the owner) will not preserve your lien rights. When in doubt, give both pre-lien notices (general contractor and subcontractor) within ten (10) days of your first date of work.

H. PRE-LIEN NOTICE IS NOT A MERE TECHNICALITY. MECHANIC'S LIEN CLAIMS ARE REGULARLY DISMISSED BY COURTS BECAUSE OF NO PRE-LIEN NOTICE OR THE PRE-LIEN NOTICE GIVEN WAS NOT IN PROPER FORM OR NOT PROPERLY SERVED. IT IS TOO LATE TO THINK ABOUT A PRE-LIEN NOTICE WHEN YOU REALIZE THAT YOU ARE NOT GOING TO GET PAID.

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3. Time Period. If you are a General Contractor, the Pre-Lien Notice must be included in all written contracts or, if you have an oral contract, it must be hand delivered or mailed by certified mail to all owners within ten (10) days of your agreement. If you are a subcontractor, the Pre-Lien Notice must be mailed by certified mail or hand delivered within forty-five (45) days of your first improvement.

A. Request from the post office and keep in your file the certified mail white receipt stamped by the Post Office on the date you deliver the letter to the Post Office, and keep the green return card in your file when it is returned to you by the Post Office. The date of receipt by the owner is the key to the 10 or 45 day period.

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B. Keep a photocopy of each Pre-Lien Notice you send. Staple the white receipt and green certified mail card to your Pre-Lien Notice copy.

C. Time limits are strictly enforced by the courts.

D. Do not wait until the 44th day to send. It appears that it must be delivered (or attempt to be delivered) within 45 days.

#### 4. Exceptions to Pre-Lien Notice.

Generally, Pre-Lien Notice is not necessary:

- A. If the contractor is managed or controlled by the same person(s) who own the property, or
- B. If you have a direct contract with all of the property owners and you do not use subcontractors or material suppliers, or
- C. If the property is not agricultural land and is at least partially nonresidential and the project involves, adds or contains over 5,000 square feet of floor space, or
- D. If the project consists of providing four or more family residential units.





E. If the land exceeds 5,000 square feet and does not include new construction of a building or an improvement to an existing building;

F. If an owner acts as their own general contractor (limited exception);

G. Pre-lien Notice must always be given if the improvement is to agricultural land.

H. However, to be safe, always give Pre-Lien Notice. At a minimum, it identifies you to the owner and lets the owner know that you must be paid.



## 5. Special Subcontractor Rights.

A. The owner may pay a subcontractor directly and deduct the payment from the amount due the general contractor.

B. Similarly, the owner or General Contractor may pay a lower tier subcontractor and deduct the payment from the first subcontractor. Example: A general contractor hires a cement contractor to do the garage floor, and the cement contractor buys the ready mix. The owner or General Contractor may pay the ready mix company directly, and deduct the payment from the amount due the cement contractor.



### C. VERY IMPORTANT NOTE:

The amount an owner must pay to satisfy mechanic's liens is reduced by the amount the owner paid to the contractor prior to the owner's receipt of a Pre-Lien Notice.

ADVICE: Do not wait to serve the Pre-Lien Notice. In some cases, the only protection may be to contact the owner prior to doing work or supplying materials.

D. NOTE: A Minnesota Court of Appeals decision held that a Union Employee Benefit Fund had mechanic's lien rights. It now appears that all subcontractor employees (and even builder's own employees) have mechanic's lien rights.

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**VI. MECHANICS' LIEN STATEMENT.** The Mechanics' Lien Statement must be filed with the County Recorder or Registrar of Titles and served upon an owner or the Contractor within 120 days of your last improvement. This time limit is the same for both Contractors and Subcontractors. (Exhibit C)

1. Use the last \$100.00 (plus) delivery to avoid “screen door” problems.
2. Contact your attorney or a lien service no later than 90 days after your last \$100.00 item. This can save you money, and does not necessarily mean that the lien will or must be immediately filed.
3. Once the matter is referred to an attorney, instruct all personnel in your office not to discuss the case with the owner/builder/debtor.

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4. The Lien Statement must both be recorded at the county recorder's office and service attempted within the 120 days.

A. Central Builders contract with Michael to improve a restaurant contains the proper Pre-Lien Notice. The work is done, but Central is not paid. Central's owner finds an old Mechanic's Lien statement form, fills it out and runs to the courthouse where he files it, but does nothing more. The lien is not valid because it is not served on the owner of the property.



B. Same example, but this time Central drops a copy of the Notice in the mail to the homeowner on the 118th day, and has his secretary sign an affidavit, which is notarized, stating that the Lien Statement was mailed on the 118th day. The lien is still not valid because it must be either personally served or served by certified mail.

C. Same example, except this time on the 119th day Central properly files the Lien Statement with the county recorder and mails a copy to the property owner by certified mail. The first attempt to deliver the certified letter is two days later, on the 121st day. The lien is not valid because service must be attempted within the 120 day period.

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## **VII. FORECLOSING THE MECHANICS' LIEN.**

1. You must start a lawsuit to foreclose the lien within one (1) year of the date of your last work as shown on the Mechanics' Lien Statement.

A. The lien expires and can be ignored by a title examiner if you fail to start or join a lawsuit to foreclose the lien within the one-year period.

B. Central Builders properly files and serves its Mechanic's Lien Statement. 13 months later, Central's owner drives by the home and sees a new family living there. Central's owner calls his lawyer to find out how that can happen.

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The lawyer tells Central that because Central's owner did not file a lawsuit to foreclose its lien within one year of its last day of work, that the lien has expired.

C. Same example except Central's owner understands it must start the lawsuit within one year. The homeowner calls Central 11 months after the last item of work and asks for an additional 60 days to refinance the home to pay off Central. Central goes so far as to have the homeowners to sign a "Extension" of the one year. To no one's great surprise, the homeowners financing falls through and Central attempts to foreclose its Mechanic's Lien by starting its foreclosure lawsuit 13...

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... months after its last item of work. Central learns the hard fact that even with the homeowner's consent, the Court is "without jurisdiction" to hear to the Mechanic's Lien lawsuit. Even if the Court does not figure out that the one year is past, Central can be assured that the existing mortgage company and anyone else with a claim in the property will figure it out.

2. Foreclosure Process: Start the lawsuit, file a Notice of Lis Pendens, trial, sheriff's sale of property, six (6) month redemption.

## **VIII. MECHANICS' LIEN WAIVER - CLOSING.**

1. Do not sign a Lien Waiver unless you get paid.
2. A facsimile or copy of a signed Lien Waiver is as valid as an original. (Do not believe the myth that faxing or giving a copy of a Lien Waiver to a closing company and then sending the original after you have actually been paid preserves your rights. Anyone can rely on a copy or facsimile of a Lien Waiver as proof that you have been paid and you are waiving your lien rights. See Exhibit D as one way to preserve your rights if you sign a copy.)



3. Use only the attached form of Lien Waiver which includes protection against NSF and stop payment checks. (Exhibit D)
  
4. Be careful about accepting a personal check from the owner or builder when the owner or builder demands that you immediately give him a lien waiver. Never hold a check for payment until after the closing.
  
5. If the bank or title company will not accept your Lien Waiver, you should sign their Lien Waiver only if you get a check from them written on their account.

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6. Read all lien waivers and contracts, statements, etc., given to you by the owner/builder or the bank to insure that the documents do not contain “hidden language” which could waive future lien rights or subordinate your lien to a mortgage or another lien.

7. The Lien Waiver can also be a receipt. Do not give a “payment in full” lien waiver for partial payment. Cross out and initial all references to “payment in full.”

8. Never accept partial payment at a closing!

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9. Do not take an unsecured Promissory Note or Note and Mortgage at closing and give up your Lien Rights if the owner/builder cannot pay you in full at closing. You lose a tremendous amount of leverage, you lose the priority of your lien and you will end up fighting with the owner/builder for each payment.

10. General contractors and owners should always specify the account and job to which the payment should be credited. Otherwise, a supplier may apply it to the oldest account where there are no lien rights.

## IX. BANKRUPTCY.

1. If your contract is with a general contractor or owner who files for bankruptcy, you can file a Mechanics' Lien, even after a bankruptcy has been filed.
2. Starting a lawsuit against the bankrupt estate or debtor to foreclose the lien is forbidden without the Court's prior permission.
3. Generally, if you do not have a valid Mechanics' Lien and the owner/builder files bankruptcy, you will not get paid. If you have a valid Mechanics' Lien, the property can be sold to pay some, if not all, of the money you are due.

## **X. RESIDENTIAL CONTRACTOR LICENSING.**

1. Unlicensed persons who knowingly violate the Residential Contractor Licensing law lose their Mechanic's Lien rights.

A. This does not affect material suppliers and properly licensed contractors.

(1) What does “knowingly” mean?

(2) William is a concrete contractor who does not have a residential contractor or remodeler license because he considers himself a “specialty contractor” who usually only works in masonry. Katherine and her husband hire William to install new foundation blocks, insulate the...

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...outside basement walls, install a drain tile and do other concrete work, along with repairing a rear deck and stairway. William and Katherine get into an argument about halfway through the job, William quits, files a Mechanic's Lien and starts a lawsuit. At trial, William argues that about "95%" of the job was masonry, but he did admit putting up sheetrock on some walls, installing a window, a door, shelving, cabinets and a stairway. Close does not count and William does not have Mechanic's Lien rights. The moral of the story: never do work outside your specialty unless you have a contractor/remodeler license.

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2. Other consequences of violating the Residential Contractor Licensing Laws.

- a. Guilty of a misdemeanor.
- b. Not only lose mechanic's lien rights, but can lose right to enforce the contract.
- c. Enforcement action and fines levied by the Minnesota Department of Labor and Industry.

## **XI. MISCELLANEOUS.**

### 1. Contract for Deed.

A. If you are doing work for a contract vendee (purchaser), your Mechanic's Lien will not attach to (be a lien against) the vendor's (seller) interest if the seller is not aware that the work is being done. The seller must have actual notice that you are doing work.

Firmly Committed.



B. Michael is selling a restaurant to William on a Contract for Deed. Michael wants to change the “theme” of the restaurant to a coffeehouse. William is generally aware that Michael is going to make improvements, but has no idea who is doing the work or the extent of the improvements. Michael hires Central to do the work. The work gets done, Michael opens the restaurant and goes broke within a few months. Central is not paid, files a Mechanic’s Lien and starts a lawsuit against Michael and William. Since William had only a “general awareness” that Michael was making improvements to the property, and no idea who was doing the work, the Mechanic’s Lien is not valid against William’s interest. The same result would happen if William were the landlord and Michael was a tenant.



C. The seller can prevent Mechanics' Liens from attaching to the seller's interest in the property by sending the contractor/ subcontractor notice that he will not be responsible for payment for the improvement or by posting a notice on the property.

D. Make sure that the seller is aware of your work. If you see such a notice on the property or receive a notice stating that the owner will not be responsible for payment for the work, stop working until you are satisfied that you will get paid.



## 2. Payment into Court.

After a lawsuit to foreclose the Mechanics' Lien is commenced, the owner or a mortgagee can pay the amount of the lien, plus interest and attorney fees into Court, and have the Lien released from the property. The Mechanics' Lien then “attaches” to the money held in the Court.

## 3. Contractor Theft.

If an owner pays a builder for work done on the owner's property, and the builder fails to pay the subcontractors, the builder can be fined up to \$3,000.00 and jailed for up to one (1) year.

A. A builder must pay the subcontractors before he pays himself or takes his profit.



B. Either the owner or subcontractor should send the builder written notice of the unpaid work and balance due. If the builder does not respond or pay within 15 days, the law assumes this money was used for purposes other than payment of the subcontractors.

C. Either the owner or subcontractor may ask the city or county attorney in which the property is located to enforce this law.

D. This is also grounds for suspension or loss of a Residential Contractor's License.

E. Owners, officers, and directors can lose the corporate liability shield.



F. Williams Builders, Inc. is a corporation whose only shareholder, member of the Board of Directors and president is William. William Builders, Inc. is hired by the Mark family to remodel their home. Mark gives William a \$5,000.00 down payment check payable to William Builders, Inc. William promptly heads to the casino and loses all the money in one fast night. William starts the work, purchases lumber and other materials on credit, and hires the electrician to do the work. At the end of the job, there is not enough money to pay everyone, but William has his profit and walks away. The Marks go to the local county attorney who brings a charge against William under the contractor to theft statute. In Court, William...

*Firmly Committed.*



...defends saying that the corporation contracted with the Marks, and he is only the president and officer, of the corporation. The Court finds William guilty as an “aider and abetter,” along with the corporation of a crime, and of conspiracy (William conspired with the corporation) to commit theft.

G. A perfected Security Agreement (UCC-1 filed) prevails over the Trust provisions of Minnesota Statutes Section 514.02.

#### 4. Leasehold Improvements.

A. Generally, the interest of a lessor (Landlord) who does not have knowledge of the improvement is not subject to a Mechanic’s Lien.



B. A Mechanic's Lien does not attach to the lessor's interest if the work constitutes a "repair", as opposed to an improvement.

C. If the work was performed in connection with "trade fixtures", the lessor's interest is not subject to a Mechanic's Lien.

i. "Trade fixtures" may include tables, decorations, special lighting, refrigerators, built-ins, etc.

#### 5. Amount and Extent of Lien.

A. The total of all liens on a property is reduced by the amount of money the owner pays the contractor prior to receiving a subcontractor's Pre-Lien Notice.

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- B. Liens are limited to:
- i. 80 acres.
  - ii. In the case of homesteaded agricultural land, 40 acres.

## **XII. CONSTITUTIONAL LIENS.**

1. Generally, a money judgment will not attach to a homestead and the homestead cannot be sold to satisfy a judgment.

A. **EXCEPTION:** A homestead can be sold to satisfy a judgment where the judgment debt arose out of an improvement to the homestead.



2. If you do not have Mechanics' Lien rights, but you have a direct contract with the owner, you can sue the owner of the property and ask that the home be sold to satisfy your bill.

A. If you are a subcontractor, you do not have a contract with the owner. If you do not have Mechanics' Lien rights, you will not be able to directly sue the owner and obtain a Constitutional Lien.

B. Under very special circumstances, a subcontractor may be entitled to recover from a property owner by showing that the owner was "unjustly enriched" by the work.



3. There are a number of disadvantages of a Constitutional Lien vs. a Mechanics' Lien.

A. The priority of the Constitutional Lien is determined after the lawsuit when the Judgment is docketed, not when the first work is done on the property.

B. There is no protection in the event the owner files bankruptcy.

C. You will not be able to collect attorney's fees or a higher rate of interest.

4. A Constitutional Lien is still better than no lien. At a minimum, you may be able to force the owner to sell his home if he refuses to pay.



5. The following language may be used in Small Claims Court, for example, to get a constitutional lien:

A. “I am owed \$\_\_\_\_\_ for materials and/or labor used in the construction/remodeling of defendant’s homestead. Any judgment awarded in this case should be a specific lien against defendant’s homestead. The legal description for defendant’s homestead is as follows: ...”

### **XIII. UNJUST ENRICHMENT/ CONVERSION.**

1. The Mechanic's Lien law was recently amended to allow subcontractors to recover money against a homeowner who has been "unjustly enriched" by the subcontractor's work. "Unjust enrichment" means that one person should not be permitted unjustly to enrich themselves at the expense of another. This would not apply where the homeowner has paid the contractor, and the contractor failed to pay the subcontractor. The homeowner, in that case, has already paid for the labor or materials.



A. A recent Minnesota Court of Appeals decision denied a claim for “unjust enrichment” where the contractor failed to provide a Contract for Deed seller with a Pre-Lien Notice. The Court said “an unjust enrichment claim does not lie merely because one party benefits from the other’s efforts or obligations; rather ‘it must be shown that a party was unjustly enriched in the sense the term unjustly could mean illegally or unlawfully.’” The Court went on to say that absent evidence that a property owner committed a fraudulent or illegal act, just because a contractor improved property does not mean that, absent a Mechanic’s Lien, that a Contract for Deed seller has to pay for the work if they did not actually know about the work or authorize the work.

*Firmly Committed.*



2. A Minnesota Court of Appeals decision allowed a material supplier to recover against a property owner under a theory of “conversion” where the property owned used trusses delivered for the first contractor. The first contractor started the work and ordered the trusses from the lumber yard. The first contractor then went broke and failed to pay the suppliers. The lumber yard failed to give the pre-lien notice, and, therefore, did not have a Mechanic’s Lien. The Court of Appeals decided that because the owner used the trusses in connection with the construction with the second builder, that the owner had “converted” the property and was liable to the lumber yard for payment.

## **XIV. PRIORITY.**

1. If the mortgage is filed with the County Recorder/Registrar of Titles before the first visible improvement on the ground, the mortgage is prior to all mechanic's liens. If you have actual knowledge of the mortgage before you begin work, the mortgage also has priority.

A. Survey and engineer work do not count.

B. If at the time the mortgage is filed the mortgage company has actual notice of you and your work, your lien will be prior to the mortgage.

i. Example: Architect or engineer.





C. If work is done prior to the recording of the mortgage, all mechanic's liens are prior to the mortgage.

i. All mechanic's liens have equal and coordinate priority, except in the example of "B" above.

D. First visible improvement on the ground can be complicated.

i. Single improvement.

ii. Interrupted improvement.

iii. Site preparation.

iv. The test of whether "visible" is whether a person inspecting property for that purpose would have been exercising "reasonable diligence".

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2. If your mechanic's lien is subordinate to the mortgage, you have the right to purchase the property by redeeming it from the mortgage foreclosure sale.

Firmly Committed.

Firmly Committed.

*NOTICE: This outline and presentation is only for informational purposes. It is not legal advice.*



RINKE NOONAN – David J. Meyers

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**EXHIBIT A**

**GENERAL CONTRACTOR PRE-LIEN NOTICE TO OWNER**

\_\_\_\_\_, 20\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

YOU HAVE ENTERED INTO A CONTRACT WITH THE UNDERSIGNED FOR CONSTRUCTION OF A \_\_\_\_\_ AT \_\_\_\_\_, MINNESOTA. WE ARE AUTHORIZED TO PROVIDE YOU WITH THIS NOTICE. YOU ARE THEREFORE NOTIFIED THAT:

(A) ANY PERSON OR COMPANY SUPPLYING LABOR OR MATERIALS FOR THIS IMPROVEMENT TO YOUR PROPERTY MAY FILE A LIEN AGAINST YOUR PROPERTY IF THAT PERSON OR COMPANY IS NOT PAID FOR THE CONTRIBUTIONS.

(B) UNDER MINNESOTA LAW, YOU HAVE THE RIGHT TO PAY PERSONS WHO SUPPLIED LABOR OR MATERIALS FOR THIS IMPROVEMENT DIRECTLY AND DEDUCT THIS AMOUNT FROM OUR CONTRACT PRICE, OR WITHHOLD THE AMOUNTS DUE THEM FROM US UNTIL 120 DAYS AFTER COMPLETION OF THE IMPROVEMENT UNLESS WE GIVE YOU A LIEN WAIVER SIGNED BY PERSONS WHO SUPPLIED ANY LABOR OR MATERIAL FOR THE IMPROVEMENT AND WHO GAVE YOU TIMELY NOTICE.

Sincerely,

Firmly Committed.

<>, INC.

By \_\_\_\_\_

Its \_\_\_\_\_

Contractor License No. \_\_\_\_\_

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Firmly Committed.



**EXHIBIT B  
PRE-LIEN NOTICE TO OWNER BY SUBCONTRACTOR**

\_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

THIS NOTICE IS TO ADVISE YOU OF YOUR RIGHTS UNDER MINNESOTA LAW IN CONNECTION WITH THE IMPROVEMENT TO YOUR PROPERTY.

ANY PERSON OR COMPANY SUPPLYING LABOR OR MATERIALS FOR THIS IMPROVEMENT MAY FILE A LIEN AGAINST YOUR PROPERTY IF THAT PERSON OR COMPANY IS NOT PAID FOR THE CONTRIBUTIONS.

WE \_\_\_\_\_  
(name and address of subcontractors)

HAVE BEEN HIRED BY YOUR CONTRACTOR \_\_\_\_\_  
(name of your contractor)

TO PROVIDE \_\_\_\_\_ OR \_\_\_\_\_ for  
(type of service) (materials)

THIS IMPROVEMENT. TO THE BEST OF OUR KNOWLEDGE, WE ESTIMATE OUR CHARGES WILL BE \_\_\_\_\_.  
(value of service or material)

IF WE ARE NOT PAID BY YOUR CONTRACTOR, WE CAN FILE A CLAIM AGAINST YOUR PROPERTY FOR THE PRICE OF OUR SERVICES.

YOU HAVE THE RIGHT TO PAY US DIRECTLY AND DEDUCT THIS AMOUNT FROM THE CONTRACT PRICE, OR WITHHOLD THE AMOUNT DUE US FROM YOUR CONTRACTOR UNTIL 120 DAYS AFTER COMPLETION OF THE IMPROVEMENT UNLESS YOUR CONTRACTOR GIVES YOU A LIEN WAIVER SIGNED BY ME (US).

WE MAY NOT FILE A LIEN IF YOU PAID YOUR CONTRACTOR IN FULL BEFORE RECEIVING THIS NOTICE.

Sincerely,  
\_\_\_\_\_, INC.

By \_\_\_\_\_  
Its \_\_\_\_\_

**Firmly Committed.**



## EXHIBIT C



### MECHANIC'S LIEN STATEMENT

By Business Entity

State of Minnesota, County of <>

DATE: <month/day/year>

**The undersigned hereby gives notice to the public and states as follows:**

1. I am acting at the instance of the Claimant, <>, a <> under the laws of the State of <> as its <> and have knowledge of the facts stated herein.

2. The Claimant hereby gives notice of intention to claim and hold a lien upon the real property in <> County, Minnesota, legally described as follows (the “**Property**”):

**Insert legal description**

*Check here if all or part of the described real property is Registered (Torrens) ;*

3. The name and mailing address (and license number, if applicable) of the Claimant are as follows:

4. The amount of the lien claimed is <words & figures> Dollars (\$<>) and is due and owing to the Claimant for labor performed or skill, material or machinery furnished to the Property (the “**Work**”).

5. The Claimant performed or furnished the following: <insert description of Work>

6. The Work was performed or furnished from <insert first date of Work> to <insert last day of Work>, for or to the following person(s): <insert name of person authorizing Work>

7. The name of the present owner of the Property (the “**Owner**”), according to the best information Claimant now has, is:

8. The Claimant acknowledges that a copy of this statement must be served personally or by certified mail on the Owner, the authorized agent of the Owner, or the person who authorized the Work within one hundred twenty (120) days of doing the last Work.

9. Notice as required by Minn. Stat. § 514.11, subd. 2, if any, was given.

**Firmly Committed.**

Dated: \_\_\_\_\_, 20<>

<CORPORATION NAME>

By \_\_\_\_\_

Its \_\_\_\_\_

License No. <>

**UNLESS YOU DISPUTE THE VALIDITY OF THE DEBT, OR ANY PORTION THEREOF, IN WRITING, WITHIN THIRTY (30) DAYS OF THE DATE YOU RECEIVE THIS LETTER, THE DEBT WILL BE ASSUMED TO BE VALID. IF YOU DISPUTE THE AMOUNT OF THE DEBT AND SEND WRITTEN NOTICE OF THE DISPUTE WITHIN THIRTY (30) DAYS, VERIFICATION WILL BE PROVIDED TO YOU. IF THE CREDITOR TO WHICH YOU ORIGINALLY OWED THIS DEBT IS DIFFERENT FROM THE CREDITOR IDENTIFIED ABOVE, WE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR IF YOU REQUEST IT WITHIN THIRTY (30) DAYS.**

**THE PURPOSE OF THIS COMMUNICATION IS TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

STATE OF MINNESOTA )

) SS

COUNTY OF \_\_\_\_\_ )

<>, being duly sworn, on oath, says that <he/she> is the <> of <>, the corporation which is the claimant in the within statements, that <he/she> has knowledge of the facts stated in said statement by reason of the following facts, to-wit: <he/she> is familiar with the situation; that <he/she> makes said statement at the instance of said corporation claiming said lien; and that the statement is true of <his/her> own knowledge.

\_\_\_\_\_  
<>

Subscribed and sworn to before me this  
\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Notary Public

**THIS INSTRUMENT DRAFTED BY:**

Rinke Noonan (</>)</>  
1015 W. St. Germain St., Suite 300  
P.O. Box 1497  
St. Cloud, MN 56302-1497  
(320) 251-6700  
File No. <>

Firmly Committed.



**AFFIDAVIT OF SERVICE BY CERTIFIED MAIL**

STATE OF MINNESOTA )  
 ) SS  
COUNTY OF <> )

<>, of the City of <>, County of <>, State of Minnesota, being duly sworn, says that on the <> day of <>, 2013, <he/she> served the foregoing Mechanic's Lien Statement on <>, <the owner therein named> <the authorized agent of the owner therein named> <the person who entered into the contract with the contractor> by mailing to said <> a copy thereof by certified mail, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at St. Cloud, Minnesota, directed to said <> at <>, <his/her/its> last known address.

Subscribed and sworn to before me this  
\_\_\_\_ day of \_\_\_\_\_, 2013.

\_\_\_\_\_  
Notary Public

**REDEMPTION NOTICE REQUEST**

That pursuant to Minnesota Statutes Section 580.032, and other applicable law, this Mechanic's Lien Statement creates a redeemable interest in the above described real property. The undersigned hereby request that Notice of any Mortgage Foreclosure Sale by Advertisement, notice of any reduction of the Mortgagor's redemption period, notice of any voluntary mortgage foreclosure, pursuant to Minn. Stat. §582.032 and §582.32, and also a Notice of Cancellation of Contract for Deed be mailed to the following:

Attn: <>  
<corporation name>  
<street address or PO Box>  
<city, state & ZIP>  
Dated: \_\_\_\_\_, 2013

<atty>, Esq.  
Rinke Noonan  
P.O. Box 1497  
St. Cloud, MN 56302-1497

<CORPORATION NAME>

By \_\_\_\_\_  
Its \_\_\_\_\_

**Firmly Committed.**





**EXHIBIT D**

<For Contractor and Subcontractor>

**RECEIPT AND WAIVER OF MECHANIC'S LIEN RIGHTS**

**\*NOTICE-A COPY OR FACSIMILE OF THIS LIEN WAIVER IS NOT VALID UNLESS INITIALED AND DATED BELOW\***

\_\_\_\_\_, 20\_\_

\_\_\_\_\_ acknowledges having received payment of

\_\_\_\_\_ Dollars (\$\_\_\_\_\_) in (full or partial)

payment of all materials and/or labor by the undersigned delivered or furnished to, or performed

at \_\_\_\_\_(Property), and for value received hereby

waives all rights which may have been acquired by \_\_\_\_\_ to file

mechanics' liens against the Property for labor, skill or material furnished to the Property prior to

\_\_\_\_\_, 20\_\_. **IF PAYMENT HAS BEEN OR IS TO BE MADE BY**

**CHECK, THIS LIEN WAIVER IS NOT VALID UNTIL THE CHECK HAS CLEARED**

**ALL BANKS.**

UNLESS THE FOLLOWING LINE IS INITIALED AND DATED, ONLY AN

ORIGINAL SIGNATURE ON THIS LIEN WAIVER IS VALID.

\_\_\_\_\_, 20\_\_ A COPY OR FACSIMILE SIGNATURE ON THIS  
(INITIAL) (DATE)

LIEN WAIVER WILL ONLY BE AS VALID AS AN ORIGINAL IF THIS LINE IS INITIALED AND DATED. OTHERWISE, A COPY OR FACSIMILE SIGNATURE ON THIS LIEN WAIVER IS NOT VALID.

\_\_\_\_\_

**Firmly Committed.**





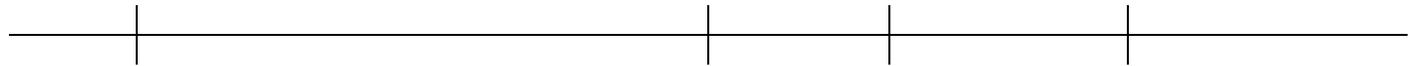
## MINNESOTA MECHANIC'S LIEN TIMELINE

General Contractor and Owner sign Contract or agree to terms if no written Contract 10 days from date of agreement

45 days from Subcontractor's first date of work

120 days from last date of work

1 year from last date of work



General Contractor must include a Pre-Lien Notice in the Owner's Contract, or serve one within 10 days of the date the agreement to do the work was made if no written contract

Last date for Subcontractor to give Pre-Lien Notice

Last date to serve and file Mechanic's Lien Statement

Last date to start a lawsuit to foreclose the Lien

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# Thank you!

Contact Rinke Noonan and David J. Meyers  
if you need any additional information.

[www.RinkeNoonan.com](http://www.RinkeNoonan.com)

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