



CHICAGO BULL

VOLUME 1, EDITION 37

Mechanics' and Materialmen's Liens Construction Advice for the Closing Attorney

During the past year Chicago Title has experienced a dramatic increase in the number of claims made and paid as a result of a mechanics' claim of lien being filed against title to property we have insured. As the real property market continues to slow, we expect this increase in claims of lien to continue. This climate makes the need to obtain an effective lien waiver from the appropriate party(ies) essential to our ability to insure title. As a result, we have modified our Owner/Borrower/Contractor Affidavit and Indemnification Agreement (the "Agreement") in order to simplify and clarify its use. A copy is attached. Our software programs (DocPrep for Windows and DocPrep Online) are in the process of being updated to include this Agreement.

The Parties section of the Agreement clearly identifies who should execute the form. It also emphasizes that there can be more than one Contractor dealing with a property owner and that all Contractors must be named and execute the Agreement. Contractors include, but are not limited to, those providing architectural, engineering, landscaping, and surveying services prior to visible evidence of construction.

The Agreement addresses three potential mechanics' and materialmen's liens scenarios. This first step in determining who needs to execute the Agreement involves determining which scenario currently applies to the property. The scenarios are as follows:

1. No Recent or Contemplated Construction (Within 120-Day Lien Period);
2. Construction Recently Completed (Within 120-Day Lien Period);
3. Construction Contemplated But Not Commenced or Construction in Process.

The box next to the applicable scenario should be checked or initialed. *Failure to check a box will result in the provisions of the Agreement which actually apply to the situation being deemed selected and fully operative.* The Agreement should be executed as follows:

If scenario #1 above applies, then the Owner(s) of the property must execute the Agreement.

If scenario #2 above applies, then the Owner(s) of the property and any Contractor(s) must execute the Agreement. This section includes a Waiver of Liens by the Contractor(s).

If scenario #3 above applies, then the Owner(s) of the property and any Contractor(s), must execute the Agreement. Additionally, if a loan with future advances is being made to the Buyer(s)-Borrower(s), the Buyer(s)-Borrower(s) must execute the Agreement. This section includes a Subordination of Liens by the Contractor(s).

The importance of having the contractor waive or subordinate all lien rights cannot be stressed enough. For example, most contractors are agreeable to executing a waiver or subordination agreement at the time of closing as they recognize the need for the waiver or subordination in order for the owner to obtain the funds to pay their invoices. After closing, with funds already in the owner's hands, contractors have no such reason to waive or subordinate their lien positions.

Another area of great concern is when the property owner is the builder of the improvements on the property. In this scenario, the owner is not a "contractor" under North Carolina lien law (sometimes referred to as general contractor). Anyone who contracts with the owner is a contractor and has the ability to file a direct claim of lien against the property. All such contractors are required to execute the Agreement.

If an owner or contractor involved in a transaction has any history of claims of lien being filed against them, please contact your local Chicago Title office or include as informational matter when submitting your opinion on title. Even if such claims are all dismissed or involve completely different property, this could be an indication of a claims risk which we must consider. This not only helps us avoid claims, but will help your client (the buyer) avoid considerable headaches. In addition, RPC 210 and 97 FEO 8 raise ethical considerations for an attorney if he/she represents both a developer/seller and buyer at closing with any knowledge that the developer/seller may be experiencing financial difficulties.

Anyone who is a fan of the TV program This Old House knows the saying "Measure Twice - Cut Once". This advice also works for real property closings. When there is any chance of construction or repairs involved with the property at your closing, ask two questions. First, do I know whether or not construction has occurred or is even contemplated with regards to this property. Second, do I have all the correct parties, including those who have a potential lien interest, executing the proper agreement, waiver and/or subordination. If you can answer "yes" to both of those questions, then you will likely only have to deal with this closing file once.

We invite you to view this and previous Chicago Bulls at
WWW.NORTHCAROLINA.CTT.COM

CHICAGO TITLE INSURANCE COMPANY
OWNER/BORROWER/CONTRACTOR AFFIDAVIT AND INDEMNIFICATION AGREEMENT

PARTIES: All parties identified in this section must execute this Agreement. (Indicate marital status of an individual Owner or Buyer-Borrower.)

If a Sale:

Seller(s) (hereinafter "Owner") _____

Buyer(s)-Borrower(s) (hereinafter "Buyer-Borrower") _____

(NOTE: Buyer-Borrower execution required only if acquisition loan with future advances and if construction contemplated or in process.)

If a Refinance or Loan (including modification of loan) Subsequent to Acquisition/No Sale:

Current Owner(s)/Borrower(s) (hereinafter "Owner") _____

If Construction of an Improvement Contemplated, In Process, or Recently Completed (within 120-Day Lien Period):

Contractor(s) (hereinafter "Contractor") _____

(NOTE: There can be more than one contractor dealing with an owner. All contractors, as defined below, must be named and execute this Agreement.)

REAL PROPERTY: _____

(insert street address or brief description) and/or as described on Exhibit "A" attached (hereinafter "Property").

AGREEMENT: Owner, Buyer-Borrower, and Contractor first being duly sworn, depose and say: (Representations set forth herein being made by Buyer-Borrower or Contractor are only deemed to apply if they are identified as Parties above and have executed this Agreement.)

1. **Definitions:** As used herein, the following terms shall have the following meanings:

- **Agreement:** This Owner/Borrower/Contractor Affidavit and Indemnification Agreement.
- **Improvement:** All or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property as defined in NCGS Chapter 44A.
- **Labor, Services or Materials:** Labor or professional design (including architectural, engineering, landscaping) or surveying services or materials or rental equipment for which a lien can be claimed under NCGS Chapter 44A.
- **contractor:** Any person who performs or furnishes labor or professional design (including architectural, engineering, landscaping) or surveying services or furnishes materials or rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an Improvement thereon. An owner is a person who has an interest in the real property improved (including a person with rights to purchase under a contract) and for whom an improvement is made and who ordered the improvement to be made; and includes successors in interest of the owner and agents of the owner acting within their authority. (Note that services by architects, engineers, landscapers, and surveyors are often provided before there is visible evidence of construction.)
- **120-Day Lien Period:** The 120-day period within which to file a claim of lien prescribed by NCGS Chapter 44A, Article 2.
- **Owner, Buyer-Borrower and Contractor:** The party or parties identified as "Owner", "Buyer-Borrower" and "Contractor" respectively in the Parties section above.
- **Property:** The property described in the Real Property section above or on attached Exhibit "A".
- **Company:** Chicago Title Insurance Company, a Nebraska corporation, and/or its affiliates.
- **Owner, Buyer-Borrower, Contractor, Improvement, and Property** shall include the singular, plural, masculine, feminine or neuter as required by context.

2. **Ownership:** Owner is the record owner of the Property.

3. **Identification of Contractor:** Owner and/or Buyer-Borrower certify that every contractor with whom they have dealt or contracted for Improvements within the 120-Day Lien Period is identified above. To the best of the knowledge and belief of Contractor named above and executing this Agreement, all parties that have dealt or contracted with Owner and/or Buyer-Borrower for Improvements made within the 120-Day Lien Period are identified above. If no Contractor is identified above, Owner certifies that any Improvements to the Property made within the 120-Day Lien Period were made by Owner without the assistance of a contractor.

4. **Construction:** (If no box is checked or the Deed of Trust is not fully described, the provisions of this Agreement which actually apply to the situation will be deemed selected and fully operative.)

NO RECENT or CONTEMPLATED CONSTRUCTION (WITHIN 120-DAY LIEN PERIOD)

AFFIDAVIT

Owner certifies that at no time within the 120-Day Lien Period have any Labor, Services or Materials been furnished in connection with a contract, express or implied, for an Improvement to the Property.

CONSTRUCTION RECENTLY COMPLETED (WITHIN 120-DAY LIEN PERIOD)

AFFIDAVIT AND WAIVER OF LIENS

Owner and Contractor certify that construction of Improvements to the Property made within the 120-Day Lien Period has been fully completed and accepted by Owner. Owner and Contractor certify that all persons, firms and corporations providing Labor, Services or Materials for construction of Improvements have been paid in full except those parties claiming by, through or under Contractor that will be paid promptly and in full contemporaneously with disbursement of funds and closing of the transaction for which this Agreement is being executed. Owner and Contractor certify that (i) there are no mechanics' or materialmen's liens on the Property; (ii) they have not received a notice of claim of lien on funds due to contractor; and (iii) there are no other type claims outstanding which would entitle the holder thereof to claim a lien on the Property including no outstanding retention of title agreements or security interests for any materials, appliances, fixtures, or furnishings placed upon or installed in the Property.

Contractor hereby waives and releases his right (and that of anyone claiming by, through, or under him) to file a mechanic's or materialman's lien on the Property. Contractor further warrants that he has not assigned and will not assign his claim for payment or right to perfect a potential lien on the Property and that he has the right to execute this waiver. To the extent of any post-closing punch list or other post-closing Labor, Services or Materials furnished or provided by Owner or Contractor for an Improvement to the Property, they (for themselves and those claiming by, through, or under them) do hereby subordinate in favor of any lender(s) and the Company, their respective claims regarding a potential lien or right to a claim of lien on the Property.

CONSTRUCTION CONTEMPLATED BUT NOT COMMENCED or CONSTRUCTION IN PROCESS

AFFIDAVIT AND SUBORDINATION OF LIENS

Construction of an Improvement to the Property is contemplated but not commenced or is in process. Buyer-Borrower (if a sale) or Owner (if a refinance or loan, including modification of loan, subsequent to acquisition) has obtained a loan from _____

("Lender") with loan proceeds to be advanced in the future, said loan evidenced or to be evidenced by a promissory note(s) in the principal amount of \$ _____ secured by a deed of trust(s) (as modified or to be modified as of the date of execution of this Agreement, if applicable) encumbering the Property ("Deed of Trust") which will be recorded or is recorded in Book _____, page _____, _____ County Registry.

Buyer-Borrower or Owner and Contractor do hereby certify that (i) prior to recording of the Deed of Trust, no Labor, Services or Materials have been furnished in connection with a contract, express or implied, for construction of the proposed Improvements to the Property; OR (ii) prior to recording of the Deed of Trust, certain Labor, Services or Materials have been furnished for construction of Improvements to the Property by Contractor (and parties claiming by, through or under him).

Buyer-Borrower or Owner and Contractor certify that (i) there are no mechanics' or materialmen's liens on the Property; (ii) they have not received a notice of claim of lien on funds due to contractor; and (iii) there are no other type claims outstanding which would entitle the holder thereof to claim a lien on the Property including no outstanding retention of title agreements or security interests for any materials, appliances, fixtures, or furnishings placed upon or installed in the Property.

Contractor hereby subordinates to the lien of the Deed of Trust his right (and that of anyone claiming by, through, or under him) to file a mechanic's or materialman's lien on the Property. Contractor agrees that the Deed of Trust shall constitute a superior and paramount lien for all amounts which have been or may hereafter be advanced thereunder. Contractor further warrants that he has not assigned and will not assign his claim for payment or right to perfect a potential lien on the Property and that he has the right to execute this subordination.

5. **Possession or use:** Owner certifies that there are no persons in possession of or using any portion of the Property other than pursuant to a recorded document.
6. **Taxes, assessments and association dues:** Owner certifies that there are no unpaid or delinquent real estate taxes or assessments (including deferred taxes or rollback taxes) against the Property; nor are there any unpaid or delinquent water, sewer or other utility service charges or homeowners association dues. Also, Owner has not received notice of, nor does Owner know of any recent or future planned improvements (such as street paving, sidewalks, street lighting, surface drainage, etc.) that will or might result in a special assessment against the Property.
7. **Mobile/manufactured/modular home:** Owner and Contractor certify that no home is located on the Property which was constructed elsewhere and moved onto the Property such as a mobile, manufactured, or modular home.
8. **Burial grounds:** Owner certifies that he has no knowledge of any burial grounds located on the Property.
9. **Rules, regulations and restrictions:** Owner and Contractor certify that the Property and use thereof are in compliance with applicable laws, zoning ordinances, subdivision or building regulations, rules, covenants and restrictions affecting the construction, occupancy, use and/or operation of the Property; and Owner and/or Contractor have not received any notice to the contrary.
10. **Matters of Record and Gap:** Owner and Contractor certify that they have not created, suffered, assumed or agreed to any defect, lien, encumbrance, or adverse matter affecting title to the Property except matters of record and matters disclosed herein as of the date of execution of this Agreement; and that they will promptly defend, remove, bond, or otherwise dispose of any defect, lien, encumbrance, adverse claim, or other matter, if any, created, first appearing in the public records, or attaching subsequent to the effective date of any commitment for title insurance issued by Company or the date of execution of this Agreement (whichever bears the earlier date) but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage therein.
11. () **ADDITIONAL INFORMATION PERTAINING TO ANY NUMBERED ITEM(S) ABOVE IS SET FORTH ON ATTACHED EXHIBIT.**

This Agreement is made to induce the purchase of and/or a loan secured by the Property described herein and the issuance of a title insurance policy or policies by Company insuring title to the Property without exception to matters represented in this Agreement. The provisions of this Agreement shall survive the disbursement of funds and closing of this transaction and shall be binding upon Owner, Buyer-Borrower, and Contractor (and anyone claiming by, through or under them).

Owner, Buyer-Borrower, and Contractor, jointly and severally, agree to indemnify and hold any buyer, lender, and Company harmless of and from any and all loss, cost, damage and expense of every kind, including attorney's fees, which the buyer, lender or Company shall or may incur or become liable for, directly or indirectly, as a result of reliance on the respective representations made herein. Notwithstanding the foregoing, no party to this Agreement assumes liability for certifications made by another party.

PROVIDING A FALSE AFFIDAVIT IS A CRIMINAL OFFENSE (NCGS 44A-24)

EXECUTION BY OWNER

_____ By: _____ Printed or Typed Name/Title: _____ By: _____ Printed or Typed Name/Title: _____	State of _____ County of _____ Signed and sworn to (or affirmed) before me this day by _____ [insert name(s) or principal(s)]. Date: _____ My Commission Expires: _____ Notary Public _____ (Affix Official/Notarial Seal) Notary's Printed or Typed Name
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EXECUTION BY CONTRACTOR (IF CONSTRUCTION CONTEMPLATED, IN PROCESS, OR RECENTLY COMPLETED)

_____ By: _____ Printed or Typed Name/Title: _____ By: _____ Printed or Typed Name/Title: _____	State of _____ County of _____ Signed and sworn to (or affirmed) before me this day by _____ [insert name(s) or principal(s)]. Date: _____ My Commission Expires: _____ Notary Public _____ (Affix Official/Notarial Seal) Notary's Printed or Typed Name
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EXECUTION BY BUYER-BORROWER (IF ACQUISITION LOAN WITH FUTURE ADVANCES AND IF CONSTRUCTION CONTEMPLATED OR IN PROCESS)

_____ By: _____ Printed or Typed Name/Title: _____ By: _____ Printed or Typed Name/Title: _____	State of _____ County of _____ Signed and sworn to (or affirmed) before me this day by _____ [insert name(s) or principal(s)]. Date: _____ My Commission Expires: _____ Notary Public _____ (Affix Official/Notarial Seal) Notary's Printed or Typed Name
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NOTE: ATTACH ADDITIONAL SIGNATURE SECTIONS IF THERE ARE MULTIPLE OWNERS, CONTRACTORS, OR BUYERS-BORROWERS