



**TITLE COMPANY**  
of the rockies

## **Primer on Mechanic Lien Coverage Issues for Construction Lenders, Builders, and Developers (P.S. it's not 2007 anymore)**

### **BACKGROUND**

A mechanic's lien is a statutory lien provided for in Colorado Revised Statutes Section 38-22-101 et seq. It is a lien available to people who provide labor, services, or materials for the improvement of real estate. The lien is essentially "security" for payment of a debt that can attach to the property being improved. Colorado has very unique rules that create substantial risks for anybody involved in the construction process, especially lenders and the owners of the property. Colorado maintains a "Relate Back to 1<sup>st</sup> Work" right that has the potential for any and all lien claimants to perfect their lien rights, in time, back to when design plans were initially handled by an architect. That fact almost always puts an ensuing construction lender in a precarious position regarding the pledged real estate collateral. Owners may also have personal liability to their contractors, and also be at risk of foreclosure for such a lien. Lenders should also note the Colorado Disburser statutes at C.R.S. Sections 38-22-102, 126. Accordingly, it is crucial that all parties involved in a construction project understand the risks and pitfalls regarding mechanic lien exposures, especially when hoping to obtain title insurance coverage related to mechanic lien matters.

Mechanics' liens most often arise due to underfunded, poorly planned or otherwise troubled construction projects. Mechanic's lien risk is always present in the context of construction loans or where work or improvements (including tenant improvements because unpaid work or materials can give rise to mechanics' liens attaching to the fee estate) have recently been completed or are continuing. It is hypercritical that meticulous records are kept upon the commencement of a project through completion of the project that maintain all submitted invoices and payment of such invoices for any activity affiliated with the improvement of the property. Lien waivers must be secured in conjunction with any and all such payments including payments made (directly or indirectly) to suppliers and subcontractors. Without securing proper lien waivers it is almost certain that the underlying construction loan will not have priority over any presented mechanic's lien. Once lost, that priority rarely can be regained and result in unintended (if not fatal) consequences for the entire construction project.

### **MORE ABOUT COLORADO MECHANICS' LIENS**

- Mechanics' liens must be filed within 2 months after completion of work for day/piece laborers and within 4 months after completion of work for all others. See, C.R.S. 38-22-109.
- If construction is not complete within 1 year after recording the mechanic's lien, the lien claimant may record an affidavit within 30 days after each annual anniversary of filing stating that the improvements are not completed. The effect is that mechanics' liens can be valid for a period of 13 months after date of recording.
- Foreclosure of a mechanic's lien must commence within 6 months after completion of construction of the entire project or after last work is performed or materials furnished. See, C.R.S. 38-22-110.
- A foreclosing lien claimant must also record a Lis Pendens in the real property records.
- A corporate surety bond in the amount of 150% of the lien plus costs may be filed with the clerk of the district court where the real property is located. Upon the Court's approval of the bond, the clerk will issue a Certificate of Release to record against the property. That bonding process then discharges and releases the mechanic lien(s) and any associated Lis Pendens filed against the real property. See, C.R.S. 32-22-131 & 38-22-132. Consequently, dispute resolution can continue with the mechanic lien(s) parties regarding non-payment or payment disputes without affecting title to the real property through this bonding process.



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## TITLE INSURANCE COVERAGE FOR MECHANIC LIEN EXPOSURES

Mechanic's liens are a significant source of claims to Title Insurance Underwriters. Since realizing the Great Recession, Title Insurance Underwriters have become much more risk adverse when being requested to provide insurance coverages affiliated with mechanic's lien risk. Before the Great Recession, such coverage was more routinely available. Great scrutiny is now the rule before an underwriter will grant such coverage for a new construction project. Be prepared to provide us detailed information regarding the overall project including, but not limited to, a copy of the construction contract. Cardinal Rule: Title Company of the Rockies should be involved with your project before project commencement.

If proactive coverage is being sought, you should expect to provide financial statements for the project and the parties involved. Certain Indemnity Agreements will likely be required by underwriting in conjunction with that financial and project risk analysis. For projects exceeding one million dollars, you should expect several levels of reviews and approvals before mechanic lien coverage might be approved. Most underwriters now maintain a very comprehensive and lengthy Mechanic Lien Risk Assessment Form that must be completed by us that contains a myriad of questions and supporting information to submit with the initial mechanic lien coverage request. Retrospective "Date Down" coverage remains available for most projects, subject to the provision of all construction project records, including all payment records, roster of all contractors, subcontractors, and suppliers to the property, and direct confirmation that all payments to all contractors, subcontractors, and supplies resulted in those same parties giving back a properly executed Lien Waiver Form affiliated with each and every payment made to them.

At Title Company of the Rockies we are very proud to represent six nationally renowned Title Insurance Underwriters. We will work hard finding the "right fit" for your particular construction project for overall title underwriting and affiliated mechanic lien coverages. No other title company in our region maintains an equivalent stable of underwriters that yield the national strength and underwriting support we can apply to your construction or overall real estate development efforts. If you have any additional questions, please feel free to contact us to discuss your project. To learn more about our title agency dedicated to the Colorado High Country for over 30 years and our growing family of title companies, see [About Us](#).

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*Project work for adjoining counties is available on a pre-approved basis. Title insurance is available on a statewide basis. Closing services can be provided throughout the State of Colorado and Nationally.*