

ARCHITECTS' LIEN RIGHTS:

A NATIONAL CONVERSATION, A LOCAL IMPERATIVE

Part one – Overview

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Well-written, signed contracts for professional services are critical for any architectural practice. They set the scope of our professional services, manage client expectations and, in most states, are a legal requirement. However, collecting on unpaid contracts can be a hardship requiring a review of possible collection tools and rights.

Beyond collection services, small claims, lawsuits, mediation, arbitration, and implied threats, typically Architects also have lien rights, and yet most do not realize it. All states include lien rights for Architects, by either statute or case law, except one: Ohio. Based upon a poorly defended court case, Ohio Architects lost this right in 1931.

Without lien rights, Ohio Architects cannot legally tie services to the project-created land-value as others can; our rights are limited to our client agreement. What happens when we cannot afford to file a lawsuit to enforce our contract? What happens to our contract-rights when our client disappears or the company dissolves, which is not unusual for developer site-specific limited-liability-companies? When one brings value to land, lien laws recognize that those who created that value have a right to be paid. This is called a mechanic's lien. In Ohio, real estate agents, construction managers and contractors have recourse through a perfected lien. Ohio Architects are missing this right because we are legally seen as "not bringing value to the site." Not only are we missing an important debt-collection tool, but we also have lost a perception of value at the statehouse. We need to win back our lien rights in Ohio, and again have the rights that Architects enjoy across the country.

Lien rights are both a national issue and a states-issue. Each state determines its specific lien rights – and its steps to assert and perfect a lien – however, these rights are based in nation-wide common-law legal distinctions. The national AIA can bring together national allies and support awareness, education, and the shared impact of best practices, but advocacy will need to occur at the state level, at our Ohio statehouse. The AIA Ohio board, last month, created a state-wide task force to newly investigate our options towards re-gaining our lien rights.

To help this cause, we need your stories. We are looking for those of you who have compelling stories, about the hardship of not having lien rights or the successes that lien rights from other states have brought to your firm. Send these stories to christopher@architects-llc.cc. See part two in this series on lien rights for more on this topic.

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Part two – Share your compelling story with us

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Most business owners, including local architectural firm owners, suffered through the last great recession of the late 2000s. We had previously dependable clients coming up short on cash, we had clients drifting into bankruptcy, we had institutions with a lack of cash flow and funding, and we had such restrictions on credit that new and ongoing projects were put on hold. Limited Liability Companies who hired us were disappearing. We always had a contract in hand, but many of these weren't worth the paper they were printed on. In other states, architectural firms were filing liens, but in Ohio, we have no lien rights. We then pursued lawsuits, in order to try to recover what we earned, but desperate clients reacted in anger by newly questioning the quality of our work. Too often won-judgments were not recoverable. We then needed to layoff valued staff and some of them ended up leaving the profession; my business partner was one of these.

Times were hard not too long ago. I bet you have a story or two like this. If you do, share these with us, and eventually, we'd like our legislators to hear about them. If you do not have such a story, you were then among a minority of architectural firms to slip through the recession unscathed.

Three, of many, short, compelling stories to share: one about utilizing lien rights.

"Our firm does work regionally. Before the recession, we had a second office in South Bend, Indiana. Through our Cleveland office and our South Bend office, leading into the recession, we faced a number of clients who weren't paying their bills. One suburban-Chicago Indiana-client comes to mind. He withheld payment on his contract with us for ten facilities while we were working on the second, but then his accounting firm mailed us a check, overpaying us on our then open invoices. The client said the accountant made a mistake and demanded his money back, including that which we had already earned. We let him know that we were using the money towards his open balance and putting the rest into escrow, and that we would be paying ourselves out of escrow to close out the second project, per our agreement. We completed a new building that we were proud of with exemplary services and the client chose not to continue with us on the third through tenth buildings. We heard that he changed accounting firms and didn't pay the next architect. Without the accountant's mistake, we didn't know what to do. We did not know that we had lien rights in Indiana. We were disappointed by the lost work but not disappointed to lose a deadbeat client."

“For a local client, after a successful housing project in Shaker Heights, Ohio, we were hired to design a large townhouse development in western Michigan. We created a master plan, obtained approvals, created prototypes, and started working drawings on a number of buildings, completing the first set. Our client then decided not to pay us. We filed our lien, as we could in Michigan, ahead of a number of subcontractors and the bank. We proceeded through mediation and into arbitration while construction continued, including on buildings that were not submitted for permit. We won in arbitration and turned this into a judgment in the Michigan courts. As units were being sold, money to cover the liens was placed into escrow (bonded off) to shield the new homeowners from the project’s liens. Our client’s LLC filed bankruptcy and the bank took over the project. Four years later, we collected our lien amount but not our judgment amount. Without these lien rights, even though we had a contract, we would not have been able to collect on a bankrupt and dissolved company.”

“On smaller Ohio projects, then and now, we have sometimes chosen to walk away from an earned amount owed, and it has hurt. We would prefer to file liens.”

What about you? What stories do you have? Without naming names, we invite you to send your stories to the AIA Ohio Lien Rights Task Force via email: christopher@architects-llc.cc . With your support and a feasible path, we will then create a strategic legislative campaign to advocate for our/your lien rights. We’d like to utilize your stories, and possibly your testimony, to convey the importance of lien rights for Architects in Ohio.

In creating a strategic legislative campaign, it is important to understand how we lost our lien rights in Ohio and how we became known as “not bringing value to the site.” For this, see part three in our series on lien rights.

ARCHITECTS' LIEN RIGHTS: A NATIONAL CONVERSATION, A LOCAL IMPERATIVE

Part three: How we lost our rights

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In 1791, Washington DC was slowly being constructed. Its contractors and artisans (including architects) were worried about being paid. In order to alleviate these concerns and to expedite construction, the first mechanic's lien statute in the United States was enacted by the General Assembly of Maryland, by the recommendation James Madison and Thomas Jefferson. This statute gave builders and artisans a degree of security to insure payment for the work performed and to dispel anxieties about the landowners' credit, and thus supported the development of our nation's early economy.

The City of Cincinnati enacted lien rights in 1823, and that State of Ohio followed in 1843, allowing those who perform labor or furnish materials under contract to the landowner to lien upon real property to secure payment of said work and services. In 1894, these rights were expanded in Ohio to laborers and subcontractors – those who worked for those in contract with landowners or their agents. A dispute regarding priority had the courts find the law unconstitutional, until “public pressure and judicial inconsistency” led to an amendment of the Ohio Constitution in 1912 giving the legislature power to establish mechanic's lien laws. In 1913 and 1915, these laws were passed, to include contractor, architects and subcontractors.

In 1929 or 1930, at the start of the great depression, a Cleveland architectural firm of Robert V. Clapp Company was hired by George Fox of the Cleveland law firm of Fox, Duthie and Foose to furnish plans and specifications on ten in-fill single-family houses and ten garages, and then to build them in Shaker Heights. The contract design fee was 4% of a proposed construction cost of \$118,875. With six houses substantially complete, another almost complete and three yet to be begun, the architects finally sued their client for non-payment, utilizing their lien rights. They had only been paid \$414.52 and a lien was filed for \$4,340.54. (Three of the ten houses in question are shown in the images above.) The architects lost the court case regarding this lien. The defendants, a high-powered legal firm, argued that architects do no work at the site and thus bring no value to the site: that the building arm of the company could file a lien but the architectural arm of the company could not. The state legislature, based upon the outcome of this case, changed the lien rights in Ohio to remove architects in 1931. Based upon a poorly defended Cleveland court case in 1931, all Ohio architects and their consultants have since been refused lien rights in Ohio. Based upon a poorly defended Cleveland court case in 1931, all Ohio architects and their consultants have since been seen as “not bringing value to the site.” Since we do bring value to the site, it is time we created a legislative campaign to re-gain these rights; the same rights that architects across the country enjoy. We are looking for those of you who have compelling stories, about the hardship of not having lien rights or the successes that lien rights from other states have brought to your firm. Send these stories to christopher@architects-llc.cc.

Contrary to Ohio's “no value” position keeping Ohio architects from having lien rights, there are a number of states, in recognition of the value architects bring to the site, grant lien rights to architects when they start work, and not when construction begins. Thus, architects leading rezoning and/or planning and/or creating drawings have lien rights, as this work is occurring. These progressive states that have “Design Professional Lien Rights” include California, Massachusetts and North Carolina.

Most architects across the country do not know that they have lien rights. Why then do most architects not know that they have lien rights? Who has benefited most by architects in Ohio not having lien rights and by architects elsewhere not asserting their lien rights? For more on this, see part four in this series on lien rights.

ARCHITECTS' LIEN RIGHTS:

Part four – It's just business

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“Priority” is the basis of the politics around lien laws. When a deal goes bad and a site needs to be liquidated to pay creditors, priority is the question of who is in line first, second, etc. Being first is important, especially when equity is limited. In most states, priority is set by timing; those providing value first get to be paid first, and architects are often working on a project before a mortgage is set and the contractor begins work.

Then, what if architects (and other early-project-working professionals) didn't have lien rights or forgot to file the appropriate paperwork? Then who would be first in the priority list? Banks.

Although a “mortgage” on a property is a different legal distinction related to clouding a title and not about encumbering land value, banks utilize liens that force foreclosures as their most effective collection device. Although our fees are usually a fraction of the value of a mortgage, banks have quietly opposed lien rights for architects and their allies (engineers, contractors, surveyors, real estate brokers, lawyers, accountants, etc.) because bankers do not want anyone else to have priority in the “first lien position.” If an Architect creates plans before a mortgage is assigned, then typically an Architect would be in a first priority position, unless an Architect does not have lien rights. When banks defend their lien positions and architects don't, it's just seen as “business.” Contractors see their lien rights as a business issue and commonly defend their lien rights. Others are not going to defend our lien positions. Architects need to stand up and work with our allies to defend, and if possible expand, our lien rights for professional services. Attorneys then need to decide if they are bank-friendly or architect-friendly; we need to be aware that it is not in the interest of bank-friendly attorneys to remind architects of their lien rights.

Lien rights for architects are currently under attack by banks in other states. Banks are not seeing lien rights as a states-issue. Maryland architects have lost lien rights on commercial projects. Massachusetts architects lost and then re-gained their lien rights. Lien rights for architects in Michigan are currently under attack. Ohio does not currently give lien rights to architects. With the loss of legal rights, architects lose political rights and public value. We are petitioning the national AIA to actively support the advocacy within states needing to defend or regain their lien rights. We are petitioning the national AIA to actively support the advocacy to expand lien rights, as they have done in California, Massachusetts and North Carolina. We are petitioning the national AIA to review its contract language to support lien rights, including advocating for a standard notice of commencement and architects' lien waiver. And we suggest that architects work with a local attorney to proactively strengthen state-specific lien rights within their contract, where they have lien rights.

We are looking for those of you who have compelling stories, about the hardship of not having lien rights or the successes that lien rights from other states have brought to your firm. Send these stories to christopher@architects-llc.cc.

Keep your eyes out for future installment articles on lien rights.