



**OLD REPUBLIC**

**National Title Insurance Company**

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## Bulletin

**To:** All Agents, Direct Operations and Attorneys for the State of Texas

**From:** David W. Rhodes

**Date:** May 28, 2003

**Re:** Priority of Mechanic's and Materialmen's Liens

The priority of competing liens is normally determined by the order in which they were recorded. For example, Deed of Trust No. 1 is recorded on June 1, 2003. Deed of Trust No. 2 is recorded on June 30, 2003. Deed of Trust No. 1 is first in priority and a foreclosure of Deed Of Trust No. 1 will wipe out or cut off Deed of Trust No. 2. Another example would be that after D/T No. 1 is recorded, there is an Abstract of Judgment recorded on July 1, 2003. Once again, a foreclosure of Deed of Trust No. 1 would wipe out the Abstract of Judgment.

Mechanic's Lien Affidavits must be treated a little differently. Our title policies contain preprinted language which gives the insured protection against the... " lack of priority of the lien of the insured mortgage over any statutory or constitutional mechanic's, contractor's or materialman's lien for labor or material having its inception on or before Date of Policy". Some attorneys are making the argument that if a MML is recorded after the date of the recording of a Deed of Trust or other lien securing a valid indebtedness against the property we should not require it to be released because it is inferior to the Deed of Trust. They also argue that a foreclosure of the Deed of Trust will wipe out a subsequently recorded MML.

There are two reasons why this is dangerous and should not be waived from your title commitment. First, there are statutes and a long line of case law that deal with the concept of "inception of the lien" of the MML. Sec. 53.124 of the Property Code defines inception of the lien as the commencement of construction or delivery of materials to the property. It is not unknown for a contractor or a sub to do some dirt work or pour the slab or deliver a load of lumber to the property before the recording date of the Mechanic's Lien Contract or the Deed of Trust. If they don't get paid for their work or the materials they furnished and file a MML after the date of the recording of the security instrument, they will still have priority over that lien because their MML relates back to the date that work commenced or materials were furnished. A subsequent foreclosure would not wipe out the MML. This is the reason that we are so concerned when work commenced in construction situations that come to us for closing. There is a provision in the Property Code under Sec. 53.124 ( d ), which allows an owner and the original contractor to file an affidavit of commencement stating the date that work actually commenced or that materials were furnished. That date then becomes the date of the "inception of the lien" of any MML that would be filed. If your Deed of Trust is filed before the date of commencement stated in the affidavit of commencement, we can be fairly certain that any subsequently filed MML will be inferior to the Deed of Trust that we are going to insure. If no affidavit of commencement is filed, then you may have to ask the lender for a copy of their inspection report done prior to the commencement of work on the site to determine priority.

The second reason that you should not automatically eliminate a MML from your requirement for a release is a concept in the law called "Removables". There is a long line of cases that say if materials that have been furnished for improvements to property can be removed from the improvement without substantial or material damage to the improvement, a MML filed because a subcontractor did not get paid for these materials will not be cut off by a foreclosure. This will take some independent investigation because it will not always be readily apparent from the recorded MML if an item is a "removable" or not. If you are not sure, call your Underwriter and let us help you make the determination.