

The information contained in this document is an interpretive summary of the private and public works construction lien statutes and new regulations impacting construction in various states and is subject to change without notice. Levy · von Beck & Associates, P.S. This document is provided as a courtesy and, as such, Levy · von Beck & Associates, P.S. accepts no liability in connection with reliance thereon or any loss sustained by anyone using or relying on the information contained herein. The intended use of this document is to provide a framework for understanding and dealing with the construction lien statutes.

## **LIEN LAW CHANGES AS OF JANUARY 1, 2006**

### **ALABAMA**

In the past, case law held that the supplier on a private works project should try to obtain a judgment against its client BEFORE giving notice to the owner, and that if this is not done the owner may, upon receiving notice of the intent to claim a lien, pay the outstanding balance to the general contractor, leaving the supplier unprotected. This language in the case was recently overturned, however, and now, once the notice has been given to the owner, the owner must hold on to the unpaid funds for the benefit of the lien claimant. Valley Joist, Inc. v. CVS Corp., 954 So.2d 1115 (Ala.Civ.App., 2006).

### **ARIZONA**

In 2006, a case clarified the law in the situation where a lien discharge bond is recorded before a claimant files his or her foreclosure suit. In that case, the claimant must file suit against the bond within 90 days after being served with a copy of the bond. If the claimant is not served with a copy of the bond, then he or she must start the suit within 6 months after learning of the bond, but in any event less than 2 years after the bond was recorded. Where no lien discharge bond was recorded, the claimant must file suit within 6 months after recording his or her lien. (2006).

The statutes were recently amended to provide that in all contracts in excess of \$1,000, anyone contracting directly with the owner must include specific information primarily as to the contractor, the estimated dates of the work, a description of the work, the amounts paid in advance and progress payments to be made, and that the owner has a right to file a complaint against the contractor.

A different case addressed the rights of licensed and unlicensed subcontractors on both private and public projects. There, the court decided that where an unlicensed subcontractor supplies materials, and a licensed contractor installs them, the unlicensed sub is allowed to recover the cost of the materials from the bond or the lien. An unlicensed subcontractor that does no installation work is exempt from the registration requirements. (2006)

### **ARKANSAS**

The statutes pertaining to final notices recently changed to require (a) the accounting in the final notice be “just and true”, and (b) the notice must now also include a sworn statement demonstrating compliance with the preliminary and interim notice requirements, and (c) a copy of each notice (preliminary and interim) must now be attached to the final notice. (2007)

### **CALIFORNIA**

On a private works project in California, an unlicensed subcontractor or other who is supposed to be licensed *cannot* bring a claim for labor performed *or* for materials provided. Furthermore, a contractor who is unlicensed when entering into a contract, but licensed when the work begins *will* have lien rights, but a contractor who starts the work without a license but obtains a license *during* the project will *not* have lien rights for the project.

A recent change in the statutes defines a 'home improvement contract' as a contract exceeding \$500, whether written or oral, between a contractor and an owner or tenant, regardless of the number of units in the building.

On public works projects, a recent case has held that if a public entity fails to ensure that the contractor on a public works project provides a payment bond with a valid insurer, then the public entity itself will be liable to unpaid subcontractors. Another case has held that where the project is on public property leased to a private entity, and the contract is with the private entity and not the public body, then there are no lien rights. (2006)

## **COLORADO**

Note that a recent case has held that where a lien release bond is provided, a claimant must timely bring a foreclosure action against it in order to enforce its claim. (2006)

Contractors and subcontractors are required to hold all payments they receive on a project in trust for the payment of their subcontractors, suppliers, etc. Failure to do so may be theft. In addition, an unpaid claimant may bring a claim against the contractor or subcontractor in order to collect from these trust funds. It is not necessary to have filed a lien claim to bring a claim against the trust funds, and such a claim may not be dischargeable in bankruptcy. (2007)

## **CONNECTICUT**

A recent case in Connecticut has held that not only must each owner of the real property be served with a notice of lien, but even if the owners are a married couple living together, **EACH PERSON MUST BE SERVED**. (2006)

Recent changes to the lien statute have affected the preliminary notice form on new home construction projects, thus the summary should make sure your form still complies with the statute. (2006)

Note that lien claims are limited to the amount of the owner's contract with the party through whom the claimant claims. (2007)

A new statutory provision authorizes attorney's fees where a bond is substituted for the real property in a mechanic's lien case. (2007)

## **FLORIDA**

On a Florida private works project, only the owner or the owner's agent is allowed to sign a Notice of Commencement. Note, however, that the lender can be the owner's agent for this purpose. (2006)

The copy of the notice to owner that a claimant serves on a lender must be in writing, must be served by personal service, actual delivery, registered or certified mail, by overnight or second-day delivery with evidence of delivery, and shall be addressed to the persons designated, if any, and to the place and address designated in the notice of commencement. (2006)

According to a recent case, the final payment affidavit must be delivered before a claimant can foreclose on a lien, *even if the contract was terminated before completion*. In addition, if a claimant signs an unconditional lien release for a final payment but is not in fact paid, the claimant will lose their lien rights. It is thus recommended that subcontractors and suppliers add a line at the end of the final release conditioning it upon the payment of the check, unless there is a bond for final payment. (2006)

A Notice of Commencement must now include the tax folio number for the property. The NOC may now be amended in certain circumstances, to extend the time, correct errors, or add previously omitted information. The amended NOC must reference the old one by book and page, and must be served on the contractor and other lienors. If there is a new contractor, however, there must be a new NOC. (2007)

On residential projects performed pursuant to oral or implied contracts, the warning notice must be given by separate document. (2007)

A recent case has held that a lienor who recovers any damages in excess of any counterclaim in a lien foreclosure action is entitled to attorney's fees, but if the lien foreclosure is dismissed or otherwise denied, then the court will award attorney's fees to the claimant who prevails on the "significant issues." (Gale Industries, Inc. v. Trytek; --- So.2d ----, 2007 WL 1789266 (Fla.App. 5 Dist.,2007.)

Where the owner demands certain information from a lienor, the lienor must now timely provide the information *under oath*. (2007)

There are several important changes to the Notice of Commencement form and the Preliminary Notice form. (2007)

Note that on public works projects, on a construction-management or design-build contract, if the public owner does not include in the bond amount the cost of design or other non-construction services, the bond may not cover these services, or the bond may exclude from its coverage the people providing these services. (2007)

In addition, on public works projects, the date of last delivery or final furnishing is NOT determined by the issuance of a certificate of occupancy or a certificate of final completion, and the date of final furnishing does NOT include the correction of deficiencies in the claimant's previously performed work or materials delivered. (2007)

## **GEORGIA**

Note that according to a recent case, where the developer on a private project is also acting as general contractor, a claimant should treat the developer as the owner; in other words, unless claimant's contract is directly with the developer AS THE DEVELOPER, assume the contract is with the general contractor, and give notice to the developer.

Note also that according to a change in the statute, any work or materials provided to an easement or public right-of-way adjacent to the subject property ARE lienable, where the work or materials are within the scope of the owner's contract for improvements to said real estate. (2006)

A court recently held that filing a proof of claim against a bankrupt debtor qualifies as filing an action, just as filing a complaint, cross-claim or counterclaim does. Action Concrete v. Portrait Homes-Little Suwanee Point, LLC, --- S.E.2d ----, 2007 WL 1586126 (Ga.App. 2007).

## **IDAHO**

On private works projects, all contractors and subcontractors must be licensed and registered to have lien rights. If a subcontractor is registered but the general contractor is not, then the sub will still have lien rights as long as the sub didn't know that the general contractor was unlicensed. Suppliers selling to unlicensed contractors or subs have lien rights as long as they did not know their customer was unlicensed. (2006)

## **ILLINOIS**

Like California, there is now case law in Illinois providing that if the public body letting a contract fails to require the contractor to provide a payment bond, the claimant may be able to sue the public body directly. (2006)

The private works lien statute was recently changed to grant lien rights to those providing services, fixtures, apparatus or machinery, or forms or form work. Another new statute requires general contractors and those subs and suppliers furnishing services, fixtures, apparatus, machinery, or forms or form work to an owner-occupied single-family dwelling to give a preliminary notice, and the language of this notice has changed slightly. The general contractor's prelien notice on all jobs must now include a list of everyone providing labor, materials, services, fixtures, apparatus or machinery, or forms or form work. (2006)

The lien statute now requires that a general contractor's lien notice must include a brief statement of the claimant's contract; it also allows a contractor to file a lien at any time after entering into the contract. (2006)

There were a couple of statutory changes that address the question of when and whether lien rights can be waived. The statute now provides that lien rights may be waived in advance, but only if the subcontractors or suppliers have actual notice that there is a waiver or subordination provision in the contractor's contract with the owner, AND if the waiver or subordination provision is included in its entirety, in writing, in the contractor's contract with the subcontractor or supplier. In addition, where a party requests or requires a lien waiver in exchange for a payment, the owner, contractor, etc. requesting or requiring the waiver must hold the funds received in trust for the person who is entitled to the payment, and is liable for damages if they fail to do so. (2006)

On a public works payment bond claim, if the payment bond itself provides for a longer period of time to sue, then the bond provision will control. The statute provides the minimum time frame. (2007)

## **INDIANA**

A recent case has held that on private works projects, for a claim against the contract funds, there is no explicit limit as to tier of subcontractor or supplier who can bring a claim against the funds. Furthermore, in at least one case, a supplier to a sub-sub-contractor was allowed to bring a claim against the contract funds owed by the owner to the general contractor, regardless of whether anything was still owed to the sub-subcontractor. (2006)

A recent case has clarified that the deadline for giving the final notice against a payment bond on a public works project is calculated as of the last furnishing of labor or materials by *anyone*. (2006)

In Indiana there are two kinds of public works projects - Title 4 projects and Title 5 projects. The former involve the construction or improvement of state public works projects solicited by the Indiana Department of Administration, but do not include projects for the Indiana Commission for Higher Education, state educational institutions, Military and armory boards of the state, the State Fair Commission, certain entities that have the power to issue bonds, and the Department of Transportation. Title 5 covers the projects that are not covered by Title 4. For potential bond claimants, the main differences between the two types of projects pertain to the giving of the final notice, and are as follows:

(1) For Title 4 projects the notice must be given within 60 days after the last work or materials were provided by *anyone*, whereas for Title 5 Projects the notice must be given within 60 days after the last work or materials were provided by *the claimant*.

(2) For Title 4 projects, the notice is given both to the public body and the surety, but for Title 5 projects the notice is given in duplicate to the public body, and the public body delivers it to the surety.

(3) On a Title 5 project, the notice must be verified and is only required to include the amount due and owing, while there are a few more requirements for a Title 4 notice. (2006)

A recent case involving a public works project ruled that where a subcontractor is unpaid and the public body pays another contractor more than the retainage amount to complete the contract upon the general contractor's default, the subcontractor may not be allowed to recover from the retainage. (2007)

A plaintiff or lienholder who recovers a judgment in any amount is entitled to recover attorney's fees, which are to be awarded by the court as part of the judgment. If, however, the property owner has already paid the full contract amount for the claimant's work, then the claimant may not recover attorney's fees from the owner. (2007)

The minimum amount for a public works project to require a bond has been increased to \$200,000.

## **IOWA**

On public works projects in Iowa, there is a new notice that a contractor may give on a bridge, highway or culvert project. If it is given, the contractor may obtain early release of its retainage upon substantial completion of the project. First, the contractor must give notice to all known subs, sub-subs and

suppliers, and ten days later the contractor must give notice of this request to public body, along with a sworn statement that notice was given to subs, sub-subs and suppliers ten days earlier. A copy of the Notice to be given to the subs, sub-subs and suppliers is now attached to the Iowa lien law summary as Form C. If, however, at the time a contractor requests early release of retainage, there are labor and materials yet to be provided, the governmental entity may withhold an amount equal to 200% of the value of the labor and materials yet to be provided. Upon receiving the request, the governmental entity is required to release all or part of the retained funds at the time of the next monthly payment or within 30 days, whichever is sooner. Once the retainage is paid, the contractor must release the retained funds to the subs, and so on down the line. (2006)

The statute was recently changed to limit lien rights to people who contract with the owner, contractor or sub; the provision authorizing lien rights to those contracting with the owner's agent or trustee has been deleted. In addition, provisions relating to the final notice have been changed in several ways. Now, in all cases the claimant gives the final notice to the owner, rather than having the clerk provide it to the owner in some circumstances. In addition, the deadline for giving the final notice has been extended to two years and ninety days after the last delivery. The claimant's claim, however, is limited to the amount the owner owes to the general contractor at the time claimant serves his or her notice on the owner, unless the general contractor or the claimant's customer posted a bond, in which case the claim is for the full amount found to be due. In addition, if the claimant files his or her lien within the 90- day period following final delivery of materials or performance of labor on the project, then any payment made by the owner to the contractor during that 90-days period will not reduce the owner's liability to the claimant. Note that the final notice must include the dates of delivery, including the first and last dates of delivery or performance. The notice must now also include a legal description of the property, and the notice must be sent to the owner, *not* the owner's agent. (2007)

Changes to the statute also clarified that construction mortgage liens have priority over all mechanics' liens of claimants who commenced their work after the date the construction mortgage lien was recorded. Furthermore, liens filed by the general contractor, subs and suppliers within ninety days after the claimant last furnished labor or materials take priority over all liens except those liens on record before the claimant first commences work or deliveries. As to other mechanic's and material liens, priority is based on the order of filing notice of claim. A purchaser or other person who acquires interest in the property in good faith and for consideration, but without notice of any recorded liens, take priority over contractors, subs and suppliers who perfect their liens more than 90 days after the claimant last furnishes labor or materials. Finally, a lender who obtains an interest in the property by assignment of a mortgage retains the priority of the original mortgagee. (2007)

Finally, now only the owner – not the contractor or the owner's agent – can give the claimant a written demand to commence legal action. (2007)

## **KANSAS**

On a private works project, a claimant's final notice must include a verified signature of an authorized representative of the claimant, and it must be clear that the signor is signing in his or her representative capacity. A recent case held that a slash mark between the name of the contractor's manager and the name of the contractor itself is NOT sufficient to establish that the manager signed the lien statement in a representative capacity, and thus the lien was not valid. Presumably had the manager signed it stating "for" or "by", the lien would have been adequately verified. (2006)

In 2005, Kansas passed the Fairness in Private Construction Act, which applies to all private projects except single- and multi-family residential projects of four units or less. According to the Act, an owner must pay its contractor all undisputed amounts within 30 days after receiving a timely, properly completed, undisputed request for payment. If the owner fails to do so, he or she will be liable for 18% interest per year. The contractor must then pay his or her subcontractors within 7 days of receiving payment from the owner, as long as the sub provided a timely, properly completed, undisputed request for

payment, or be liable for interest at the rate of 10% per year. The same applies for subcontractors and their subs. If an undisputed payment is not made within 7 business days after it is due, the unpaid contractor or sub shall, upon seven business days' written notice to the owner and contractor, be entitled to suspend further performance of its contract or subcontract without affecting any other available remedy, until payment, including interest, is made. The contract completion time for each contract affected by the suspension will be extended, and the contract sum for each affected contract is to be increased by the suspending party's reasonable costs of demobilization, delay and remobilization. (2006) According to a recent case, a company that supplies skilled laborers to a private project will have lien or bond claim rights. (2006)

Recent changes to statutes and a recent case have clarified that attorneys fees and prejudgment interest may be allowed in certain situations. (2007)

On public works projects, conditional lien waivers in exchange for payment in the amount waived are the only waivers allowed. In addition, attorney's fees will be allowed in certain cases. Also, the Fairness in Public Construction Act was passed, which is very similar to the Fairness in Private Construction Act, requiring, among other things, that the owner makes payment of all undisputed amounts to its contractor within 30 days after receiving a timely, properly completed, undisputed request for payment. If the owner fails to do so, he or she will be liable for interest at the rate of 18% per year. The contractor must then pay his or her subcontractors within 7 days of receiving payment from the owner, if the sub provided a timely, properly completed, undisputed request for payment, or be liable for interest at the rate of 18% per year. The same applies for subcontractors and their subs. (2007)

## **KENTUCKY**

A recent case clarified that a preliminary notice on a private works project must be given within 75 days of *the claimant's* last delivery. Another case emphasized that mailing the final notice to the owner must occur within 7 days AFTER filing the lien. If the notice is given before filing, it may be considered inadequate notice. (2006)

A recent statutory change provides that after a contractor obtains a judgment against a contracting entity for failure to make timely payments, the contractor has 60 days from the date of judgment to file a lien, except on residential projects. (2007)

Another change provides that lien waivers are not allowed in the contract, except that partial lien waivers in exchange for progress payments are acceptable. These rules, however, apparently do not apply to residential projects. (2007)

There are also new rules that require prompt payment of undisputed pay requests, with interest penalties for late payments. (2007)

## **LOUISIANA**

Note that a recent case has held that where a claimant's contract is in excess of \$500, it needs to be in writing. If it is not a written contract, it may be difficult to establish the existence of the contract, and thus the lien may be difficult to enforce. (2006)

On a private project, where a claimant wishes to assign his or her claim, the claimant must first file the lien and *then* they may assign it. The assignee cannot pay the claimant and then file the lien, as the claimant no longer has any lien rights to assert. The case that decided this dealt with the claims of laborers, but it would be safest to assume it applies to all claimants. (2007)

On public works projects, a court recently ruled that that claims filed after the 45-day filing period are considered and timely enforceable if they were filed before the funds and obligations of the public entity were entirely paid out and the public entity had knowledge of the claims. The ruling is somewhat counter-intuitive, so it is not recommended to wait more than 45 days to give notice in reliance on this case. (2007)

## **MARYLAND**

Note that where a lien is against a condominium, notice must be given to all condominium owners before the lien can be established against the entire building. (2006)

A recent case has held that a claimant has lien rights only where the building *or project* is improved to the extent of *at least* 15% of its value. Previously the statute was understood to apply only to buildings, but now it will clearly apply to non-building-type projects – for example the repair of a golf cart path in a golf course. (2006)

The erection or construction of a machine may be covered by the lien laws, where the machine itself is not incorporated into the building or land, but remains immobile yet movable. A dredge is a potential example of such a machine. (Jacksonville Machine and Repair, Inc. v. Kent Sand and Gravel, LLC, --- A.2d ----, 2007 WL 1501108 (Md.App. 2007)

## **MICHIGAN**

Please note that in Michigan a Notice of Commencement must include an affidavit of the owner or lessee or the agent of the owner or lessee. Neither the statute nor the case law, however, addresses who may be considered an agent of the owner or lessee. (2006)

The statutes recently changed to require that only LICENSED contractors and subcontractors can record liens on residential property, and contractors and subs (except plumbing, electrical and mechanical subs) are required to be licensed as either a residential builder or a residential maintenance and alteration contractor. If they are unlicensed, they will be liable to the owner for all actual damages, costs, and attorney's fees resulting from the wrongly filed lien, and may be guilty of a misdemeanor or felony. (2007)

There are several new requirements that a claimant must follow in order for a supplier to collect from the Home Construction Lien Recovery Fund. For example, where a supplier is seeking to recover from the fund, each retail location that is seeking recovery must have paid the required fees and renewal fees for fund membership prior to entering into the contract on which the supplier seeks to recover. (2007)

Another new requirement for a supplier seeking to recover from the fund applies where the supplier has not done business with the contractor or subcontractor within the last year. In that case, before providing the materials on credit, the supplier must obtain a credit report on the customer or the customer's owner, partner, etc., and to have that credit report be clean. The exact details are set out now in that section of the summary. (2007)

Another new requirement is that the claimant will not be able to recover from the fund if the claimant's customer is delinquent for a period longer than set out in the statute, which begins at 180 days in 2007 and reduces by 30 days/year until 2010, when it stays at 90 days. A claimant will also not be able to recover from the fund if the customer was indebted to the supplier in an amount equal to or more than the credit limit established by the supplier for the contractor or subcontractor at the time the material or equipment was supplied. (2007)

In addition, the amount recoverable from the fund was raised from \$75,000 to \$100,000. (2007)

There is a new requirement in Michigan applicable whenever a contractor or subcontractor seeks payment. With each payment request a general (and sometimes a sub) has been required to provide the owner with a sworn statement listing the subs and suppliers to whom payments are due and unpaid on the project. Now, once the owner, lessee or their designee receives the sworn statement, he or she must notify each sub, supplier and laborer who has provided a Notice of Furnishing of the receipt of the Sworn Statement. The notification must be either in writing, by telephone, or personally. If the Notice of Furnishing is excused, then the owner, lessee or designee must so notify each sub, supplier and laborer named in the Sworn Statement. If a sub, supplier or laborer who provided a Notice of Furnishing or who is named in the Sworn Statement requests it, the owner, lessee or designee must provide a copy of the Sworn Statement within ten business days after receiving the request. An explanation of these requirements has been added to the form of the Sworn Statement itself. (2007)

The statute pertaining to lien waivers has been revised, requiring that that an owner, lessee, or designee must not rely on any lien waiver provided by a person other than the lien claimant named in the waiver if the lien claimant either has filed a notice of furnishing or is excused from filing a notice of furnishing,

unless the owner, lessee, or designee first verifies the authenticity of the lien waiver with the lien claimant either in writing, by telephone, or personally. Thus it is probably most efficient for the claimant sign the waiver for himself or herself. (2007)

Some changes have been made to the various waiver forms, most noteworthy that a paragraph was added near the end of the waiver, instructing the owner, lessee, or designee that if he or she received the waiver from someone other than the claimant, AND if the claimant either provided a notice of furnishing or was not required to provide a notice of furnishing, then the owner, lessee or designee may not rely on the waiver without contacting the claimant either in writing, by telephone, or personally, to verify that the waiver is in fact authentic. Make sure that your forms comply with these. (2007)

Where construction site improvements take place before a mortgage is recorded, construction liens will take priority over the mortgage. Construction site improvements can include the removal of trees, grubbing, and the demolition of houses. (2007)

### **MISSISSIPPI**

A recent case has addressed the issue of a claim against the funds owed to the contractor, which is the only source of recovery for a claimant who does not have a contract directly with the owner. The court ruled that if no funds are owed to the contractor at the time the claimant's notice of claim is given, the claimant has no right of recovery against the owner. The case also held that a joint check agreement will not obligate an owner to pay a supplier's or subcontractor's bills. (2006)

### **MISSOURI**

The statutes were recently changed to provide that the *user* of rental equipment or machinery now has lien rights, in addition to the lessor of the equipment or machinery. (2007)

Where the claimant's contract is not with the general contractor, the general contractor is not a necessary party to a mechanic's lien foreclosure action. Iowa Steel & Wire Co., Inc. v. Sheffield Steel, --- S.W.3d ---, 2007 WL 1852505 (Mo.App. W.D.,2007).

### **MONTANA**

A recent case has clarified that a claimant cannot give its lien notice before substantially completing its contract, unless the claimant is prevented from fulfilling its obligations because of the fault of *the owner* or another person. (2006)

A recent case has held that attorney fees are not required to be reduced proportionally where the judgment is for a lesser amount than was claimed in the lien. LHC, Inc. v. Alvarez, -- P.3d ----, 2007 WL 1549054 (Mont. 2007).

### **NEBRASKA**

In Nebraska, only the contracting owner is allowed to sign a Notice of Commencement, , unless the owner doesn't file one, in which case a claimant may do so, and then the claimant must sign it. (2006)

### **NEVADA**

The private works statutes were recently changed to provide that trust funds, including those for fringe benefits, are considered "laborers" and have lien rights. (2007)

### **NEW JERSEY**



Note that a recent case has held that the lien against contract funds on a private works project will be limited to the LESSER of the amount due to the general contractor, the subcontractor, or the supplier making the claim. (2006)

In the last year New Jersey passed a prompt payment statute, applying to both private and public works projects. Under this law, bills submitted to owners on private projects are deemed approved twenty days after submission if no written statement of the amount withheld and reason for withholding are provided in that time. The bills are then to be paid within 30 days after their submission. It also allows contractors, subs, and sub-subs to suspend performance on a contract (after 7 days' notice) where they haven't been paid. On a public project, the time frame is somewhat different -- if the public body requires that the bills be voted on, then the time frame for payment becomes after the next regularly scheduled meeting, and then payment during the public body's next payment cycle. (2006)

## **NEW MEXICO**

On a private works project, a claimant contracting with the general contractor is not required to give the preliminary notice. In addition, retainage is no longer allowed. (2007)

Note that on a public works project, the statute now requires subcontractors whose contract is for \$50,000 or more to provide a performance and payment bond. (2006)

Note that on public works projects, retainage is no longer allowed. (2007)

## **NEW YORK**

According to a recent case, if a general contractor lacks a home improvement contractor's license, even if only a small portion of the project is residential, then the contractor can neither foreclose on a mechanic's lien nor sue for breach of contract or quantum meruit. In fact, where the general contractor does not have a home improvement contractor's license, neither the general contractor nor his or her subcontractors has lien rights. (2006 – 2007)

Another case has held that on a private works project, where a claimant has no direct relationship with a general contractor, the claimant must, within 35 days, file proof of service of the lien on the *general contractor*, as well as the owner, or the lien will be invalid. Also, note that a court may deny a request for an extension of the time to file a foreclosure action, so one must not assume that an extension will be allowed. (2006)

Another recent case has held that if the contractor defaults, resulting in no funds being owed to the contractor, the subcontractor has no right to claim against those funds.

On public works projects, a recent case held that a subcontractor's assignee now has standing to sue on a payment bond. (2006)

A third recent case has held that improvements to a single apartment in a cooperative building may be considered work on a single-family dwelling, and the shorter time period for filing a lien will apply. (2007)

On a public works project, a case recently held that the parties may be permitted to use their contract to shorten the statute of limitations for bringing a suit on the payment bond, provided the shorter time is reasonable. The case that held this had some difficult facts, so it may not be a great precedent, but it is good to be aware of this possibility, and be careful what one signs. (2007)

## **NORTH CAROLINA**

Note that where a lender forecloses on a deed of trust that is superior to the claimant's lien claim, the lien claimant still needs to begin its foreclosure action within the required time, in order to have the right to claim against any surplus funds remaining after the lender's claim was paid in full. (2007)

## **NORTH DAKOTA**

The public works statutes changed somewhat, and were renumbered. Now it appears that suppliers of labor and materials to general, first-tier or second-tier sub are covered, though presumably suppliers to suppliers are not protected. The changes also clarified that if the claimant does not have a contract *with the contractor providing the bond* then they must give the final notice prior to suing on the bond. Note also

that the one-year deadline for bringing a claim against the bond does not limit the right of a claimant who has provided labor, supplies or materials to a subcontractor to enforce its claim against the sub. (2007)

## **OHIO**

An Ohio court recently held that large machinery and the work to install it may be considered may be considered lienable improvements to real property. (2006)

Note that a Notice of Commencement on a private works project in Ohio must be verified by the affidavit of the owner, part owner, or lessee or the agent of the owner, part owner, or lessee. There is no discussion or explanation, however, as to who may be the agent of the owner. Where the owner, etc. fails to timely file a Notice of Commencement, the mortgage holder or contractor may file it on behalf of the owner, etc. If the notice is filed by a mortgage holder or an original contractor on behalf of an owner, part owner, or lessee, that fact must be included on the notice or amended notice, and presumably the party filing the notice must sign the affidavit. (2006)

As to the Notice of Commencement on a public works project, the statute does not address who must sign it. (2006)

Note that if a lien does not state the date of the claimant's first delivery, the lien may be determined to be invalid. (2007)

The statute addressing Notices of Commencement has changed, so that now, a Notice of Commencement is not required to be given on a home construction contract unless the lender requires it. No prelien is required on owner-occupied 1- and 2-family dwellings and condos, though it is advisable to give the preliminary notice on such a project where a Notice of Commencement is recorded and it lists only one original contractor. If the NOC states that there are "multiple original contractors" then no preliminary notice is required. Furthermore, a Notice of Commencement expires six years after it is filed, unless the Notice itself or amendments to it specify otherwise. (2007)

The statute pertaining to one- and two-family dwellings or condos changed recently to require that if the owner (or part owner, purchaser or lessee) notifies the claimant in writing that, prior to the owner (or part owner, etc.) receiving a copy of the claimant's lien, either (a) the original contractor was paid in full, or (b) the cost to the owner of completing the contract exceeded, or is reasonably expected to exceed, the balance due to the contractor under the original contract, then the claimant must release the lien within 30 days of receiving this notice. If the claimant fails to timely release the lien, the claimant will be liable to the owner (or part owner, etc.) for all damages arising from the claimant's failure to release the lien. The damages include, but are not limited to, court costs and attorney fees incurred in any litigation between the owner and the claimant who refuses to release the lien. (2007)

Note that the Notice of Furnishing for public projects has been revised to delete all gender-related language, replacing "materialman" with "material supplier", and "he" with "the undersigned". (2007)

The statutes also provide that where a subcontractor or supplier timely submits an invoice, and properly performs the contract, he or she may sue his or her customer and recover interest at the rate of 18% per year, plus costs and attorney's fees. Suppliers to suppliers are covered by these provisions. For these provisions to apply, the claimant must have submitted his or her invoice or application or request for payment to the claimant's customer in sufficient time to allow the customer to include the application, request, or invoice in the customer's own pay request submitted to the contractor. (2007)

It is important to timely file one's lien claim, even where the claimant's contract or subcontract contains a pay-when-paid clause, in order to protect one's lien rights. (2007)

In Ohio, many lien waivers are unenforceable, on both public and private projects. For example, a construction contract or agreement that waives rights under a surety bond is void and unenforceable, because it is against public policy. A contract provision that waives liability for delay damages or other remedies when the delay is the result of the owner's act or failure to act will also be unenforceable. In addition, a subcontract provision that waives liability for delay damages or other remedy when the delay is the result of the owner's or contractor's act or failure to act will be unenforceable. (2007)

Note that on owner-occupied 1- and 2-family dwellings and condos, no prelien is required, but it is advisable to give the preliminary notice on such a project anyway where a Notice of Commencement is recorded and it

lists only one original contractor. If the NOC states that there are “multiple original contractors” then no preliminary notice is required. (2007)

### **OKLAHOMA**

Note that according to a recent case, a lien can be perfected by EITHER giving notice OR filing a lawsuit within 4 months of claimant’s last work or delivery. On public works projects, there are now statutes requiring prompt payment, as well as specific notice requirements in the event that the public body or a contractor or subcontractor pays its lower-tiered subs less than the invoice they have received. (2006)

### **OREGON**

Like California and Illinois, where an Oregon public agency or official fails to require the posting of a valid payment bond on a public works project, the public agency or official may be held liable. (2006)

Privately owned property that is leased by a public agency is not covered by the public works bond requirements. (2007)

On private works projects, a contractor or subcontractor’s lien is now limited to their contract amount. On a private commercial project, the only claimants who are required to give a preliminary notice to the owner are those who both do not contract directly with the owner AND who only supply materials or specially fabricated materials. (2006)

### **PENNSYLVANIA**

If there is any doubt as to whether a private works project is new construction or alterations and repairs, give the prelien. (2006)

The lien statutes in Pennsylvania have been changed to clarify that claimants contracting with a first tier sub will have lien rights if they entered into their contract on or after January 1, 2007. Other changes have done away with the preliminary notice on a private works project, where the contract was entered into on or after January 1, 2007. The interim notice requirement, for the notice of intention to claim a lien, remains in effect. (2006)

Another statutory change has deleted the requirement of attaching a copy of the preliminary notice to the interim notice, and it is no longer required to include within the interim notice the date of the notice was served. Another important change is that now, the lien claim notice must be given to the prothonotary within **six** months after the claimant’s last furnishing of work or materials, instead of the four months previously required. (2006)

A recent case requires that a claimant on a private works project must complete its contract in order to file a lien. If claimant’s customer breaches the contract and the claimant does not complete its contract, the claimant’s cause of action will be a breach of contract, not a lien. (2006)

In some circumstances, where the total of liens exceeds the unpaid contract balance owed to the contractor at the time a subcontractor begins supplying labor or materials, the lien claims will be limited to a pro rata share of the amount owing on the contract at the time the first notice of intention to file a lien is given to the owner. (2006)

A recent case has held that private property which is used for a purely public purpose will be exempt from the mechanic’s lien laws. Buildings which have been ruled exempt include the Humane Society and a hospital. (2007)

### **RHODE ISLAND**

There have been many changes in the private works lien laws in Rhode Island. For example, as of October 1, 2006, all work performed, including labor and materials, in excess of \$1,000 must be accompanied by a written contract, which must also include certain consumer education materials. There are also new rules pertaining to licensing and registering of contractors, and pursuing actions against them or their bonds. Another change is that the 120-day time limits for giving the both the preliminary and final notices were replaced with 200-day time limits. This and other changes were made in the Notice of Intention form itself. As to the final notice, the lien is no longer invalid as against bona fide purchasers for

value if it is not filed within 40 days after last delivery. NOTE, however, that while the deadline for giving the notice has been significantly extended, the deadline for foreclosing has been reduced, in comparison – the foreclosure must now be started within forty (40) days after filing the notice of intention. Note also that the statute has been revised to require that, if the owner, lessee or tenant bonds around the lien, or puts up a cash deposit, the claimant must amend its complaint to include the surety or deposit within 60 days of receiving notice of the existence of the bond or deposit. (2006)

In addition to all of this, there is now a new preliminary notice that must be given by all contractors contracting directly with the owner, tenant or lessee. Material suppliers, however, are not required to give this notice. NOTE THAT where the general contractor fails to give this notice, they must indemnify and hold harmless the owner, tenant, etc. from the claims of subs and suppliers, unless the owner, tenant, etc. has not paid the general contractor. The property description in the preliminary notice must now be either (1) by metes and bounds description and street address; (2) by the assessor's plat and lot designation and street address, or (3) by stating the book and page of the mortgage and the street address. (2006)

There is also now a statute enabling an owner or contractor to contest the validity of a lien or a notice of intention on a private works project. (2006)

## **TENNESSEE**

On private works projects, note that the preliminary notice, which is a notice of nonpayment, is to be given by the claimant within 90 days after EACH month in which a claimant supplied labor and materials, when the labor or materials remain unpaid. (2006)

The lien statutes were recently changed, pertaining to the development of a lease pertaining to oil, gas or other minerals. Now, anyone who performs labor or furnishes materials, supplies, fixtures, machinery or other things of value to a lessee holding or owning a leasehold pertaining to the development of the oil, gas or mineral rights, and who does so by contract with or by the written consent of the owner or the agent or representative of the owner of the leasehold, OR who is performing pursuant to a written request or by written consent of any contractor or subcontractor, or the agent of either., has lien rights. These rights cover the leasehold or the entire interest of the lessee, including oil or gas wells, machinery and equipment. (2006)

Lien rights were recently granted to claimants responsible for the placement of tile for drainage of a lot; excavation; removal of hazardous materials; landscaping; excavating; surveying; and architectural and engineering work, as well as those who supply machinery, and equipment. (2007)

Another statutory change provides that if, prior to any work, labor, supplies, etc. being provided to a project, the owner or the owner's agent provides a payment bond to benefit remote contractors (which includes suppliers), in the amount of 100% of the prime contract, then remote contractors (which includes suppliers of materials, services, equipment or machinery, as well as subcontractors) must bring a claim against the bond, and must not file a lien. (2007)

The preliminary notice on a private project now must include the claimant's address to which one may send communications. It must also include a general description of the work, labor, materials, services, equipment, or machinery provided, and must now include the amount owed as of the date of the notice, as well as the last day the claimant performed work and/or provided labor or materials, services, equipment, or machinery in connection with the improvements. Furthermore, the notice must now be served on the owner, not the owner's agent or attorney. (2007)

Note that on projects that do not involve oil or gas, the amount of the lien should not include any interest, service charges, late fees, attorney fees, or other amounts that are not actually part of the improvement. The amount claimed can include tools, equipment, and machinery for the reasonable rental value for the period of actual use and any reasonable period of non-use, and for the purchase price of the tools, equipment or machinery, but only if the tools, equipment, or machinery were purchased for use in the course of the particular improvement and have no substantial value to the lienor after the completion of the improvement on which they were used.

The statute has been revised to allow claimants other than the prime contractor to file their contract

instead of a lien notice, as long as it has been acknowledged by the owner, or in lieu of the owner's acknowledgment it is sworn to by the prime contractor as to its execution by the owner, and as long as it is in writing and states contract price, and describes the property with reasonable certainty. There is now a statutory lien form. (2007)

## **TEXAS**

Note that a recent case has clarified that an individual's homestead is determined as of the date the contract is entered into, thus if the owners live in one home and enter into a contract to build another, the existing home is the homestead at the time the contract is entered into, NOT the new home. (2006)

Perfected liens take priority over all subsequent mortgages. (2007)

Where there is a general contract, a lien will relate back to the date the general contract was executed. If, however, there is no general contract, then each lien will only relate back to the date that that claimant's work or materials were first provided. (2007)

Where a general contractor files bankruptcy, subs and suppliers will not have priority over the general contractor's secured creditors to the secured assets; for example, they will not have priority over a bank account where the bank itself has a security interest in the account. This is so even where the subs and suppliers have perfected their lien rights. (2007)

## **UTAH**

Note that on a private works project in Utah, the statute has been revised to provide that where a permit is not issued, the general contractor *or owner-builder* has the *option* of filing a Notice of Commencement. Previously only the general contractor could do so, and filing the notice was required. (2006)

Take note that the statute has changed, and now a claimant's prelien must include the building permit number for the project, or the number assigned to the project by the designated agent. (The original contractor is required to provide this, if the claimant does not otherwise have it.) The statute has also been changed to require that final notice must be recorded within 90 days after the day a Notice of Completion is filed, or, if no Notice of Completion is filed, then within 180 days after final completion of the project. This seems to potentially conflict with another section of the statute which could limit the deadline to 90 days after final completion, thus it is recommended that the notice be given sooner rather than later if there is any question. (2006)

The laws pertaining to lien waivers on private projects have been changed, effective May 1, 2007. Among other changes, a waiver printed on the back of a payment may now be enforced. (2006)

The statute was recently rewritten to slightly shift the dates for giving final notice. As of April 30, 2007, final notice must be given within 180 days after the date of final completion of the original contract if no Notice of Completion is filed, or, if a Notice of Completion is filed, then within 90 days after that filing. (2007)

If a claimant provides labor, services, equipment or materials before the Notice of Commencement is filed, and the Notice of Commencement is filed more than 15 days after the claimant began working on or supplying to the project, then the claimant is not required to file a preliminary notice. It is probably safest to file a notice in any event, however. (2007)

Note that for purposes of filing a lien notice, repair and warranty work cannot be used to extend the date of final completion of a project. (2007)

Lien rights will be waived only if the lien claimant: (a) executes a waiver and release signed by either the claimant or the claimant's authorized agent, and the claimant receives payment of the amount identified in the waiver and release, OR, (b) if the payment was made with a restrictively endorsed check, then the claimant or the claimant's authorized agent must sign the restrictive endorsement; AND the endorsement must be in the form set out in the form included in the summary, AND the claimant receives payment of the amount identified in the restrictive endorsement, including payment by a joint payee check, and for a progress payment, only to the extent of the payment. (2007)

Note that the waiver and release forms have had some changes made, so be sure that you are using forms that conform to the statutory requirements. (2007)

Per a recent case, where the claimant is enforcing his or her claim via counterclaim against the owner, rather than with a complaint, or where the owner has no rights under the Lien Recovery Fund Act, it is not necessary to submit the notice regarding the Act, though it is always safest to submit the notice anyway. Sill v. Hart, --- P.3d ---, 2007 WL 1650139, 579 Utah Adv. Rep. 18, 2007 UT 45 (Utah 2007)

## **VIRGINIA**

According to a recent case, a general contractor must, *at the time of filing the lien*, file a certification of mailing of a copy of the lien on the owner of the property at the owner's last known address. (2006)

## **WASHINGTON**

A recent case has held that on a private works project, where the general contractor authorizes a subcontractor to perform work, including by a change order beyond the scope of the contract or subcontractor, and without permission from or a signature by the owner, the subcontractor will still be allowed to claim a lien against the property. The contractor is the owner's construction agent, and thereby exposes the owner's property to the lien. It is, of course, always safest to have any change order signed by the owner.

Another case confirmed that an authorized agent of the claimant, such as a lien service, may sign a lien. (2006)

Another case held that where a project is a private project on public land, the lien will attach only to the improvement, and not to the realty. (2007)

In yet another case, the court held that for purposes of priority against a deed of trust or a mortgage, a lien claim will relate back to the date of first performance of labor or services, or the first delivery of materials or equipment. (2007)

On public works projects, recent statutory changes have established a requirement that anyone entering into a public works contract demonstrate that they satisfy certain responsibility criteria. In addition, a general contractor must verify that each of the contractor's subs satisfies the criteria, and each sub must verify that all of his or her subs also satisfy the criteria. This verification requirement and the responsibility criteria must now be included in all public works contracts. This law takes effect July 22, 2007.

The rules determining who qualifies as a contractor, and therefore must register as such, have broadened in Washington. Now, developers, cabinet installers, some consultants and tree removal services are all considered contractors. So is someone who does all work personally without employees or specialty contractors. It is also now a gross misdemeanor for a contractor to subcontract to or use an unregistered contractor. (2007)

## **WEST VIRGINIA**

On private projects, as of June 6, 2006, all final notices must be given to the owner and filed within 100 days of the claimant's last delivery or the completion of the claimant's contract. This is an extension of the deadline, which was previously limited to 75 days. (2006)

## **WISCONSIN**

Recent changes to the private works lien statutes apply to projects that visibly commenced after April 11, 2006. These changes are numerous, and did the following:

- Broadened the coverage of the statute, now granting lien rights to anyone who furnishes *or procures* labor, materials, *services, plans or specifications*, regardless of tier.

- Did away with the prelien requirement whenever a project is partly or wholly non-residential, regardless of the size.

- Required that a prime contractor who fails to give the preliminary notice will lose all lien rights unless he or she pays all his or her subs, suppliers and service providers, and either (a) the time for those potential claimants to give preliens has elapsed without any preliens being given, or (b) all of the prime contractor's subs, suppliers and service providers have waived all lien rights.

- Requires that a copy of the lien notice be given to the property owner within 30 days after filing.

There were also changes to the public works statutes, so that now, every person who performs, furnishes or procures labor, services, materials, plans or specifications to the prime contractor or a first-tier sub will have the right to bring a claim against the bond. Previously it simply stated that those providing labor or materials were covered. (2006)

### **WYOMING**

New statutes were added to the private works lien laws, providing that cooperative utilities are entitled to liens for the materials or services provided to a member where the amount due to the utility is greater than \$5,000 and has been unpaid for more than ninety days. The utility must file its final notice within 180 days after the debt has been unpaid for more than 90 days. The member and the utility can agree to extend this time for up to 360 days total time for filing (thus an additional 180 days), as long as the extension complies with the requirements stated previously in the section. The priority of the claim by the utility, however, is determined by the date and time the lien is filed, and does not have priority over prior perfected liens or mortgages. (2007)

### **FEDERAL LAW – THE MILLER ACT**

According to a recent case, a subcontractor on a federal public project may be allowed to recover delay costs against a Miller Act surety, at least when the government or the contractor is responsible for the delay. In addition, “pay when paid” or “pay if paid” clauses are generally not valid defenses to a valid Miller Act lawsuit and generally are not enforced. (2006)

A different case has held that where a general contractor defaults and its bonding company takes over the project and hires a contractor to complete the project, unless that contractor provides a payment bond, that contractor’s subs are considered second-tier subcontractors and must give the bond company the notice of claim if they are unpaid. (2006)

A Florida court recently held that, while bad faith will trigger an award of attorney’s fees, the bad faith in question must occur during the course of the litigation; prelitigation bad faith will not justify attorney’s fees. (2007)

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