
Lien and Bond Claims in the 50 States: 2019

Published by:



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Acknowledgments

Thank you to the construction law attorneys who prepared the state updates for the 2019 edition of *Lien and Bond Claims in the 50 States*. The name of the attorney(s) who prepared each respective update appear(s) on the upper-right corner of each state listing. A contributors list, with contact information, is provided in Appendix B. We appreciate the efforts of these attorneys in providing this important reference for subcontractors and suppliers. We also want to recognize the contributions of Kegler Brown Hill + Ritter summer associates John Osinski and Jessica Skelly to this publication.

About ASA and FASA



The American Subcontractors Association amplifies the voice of and leads trade contractors to improve the business environment for the construction industry and to serve as a steward for the community. The ideals and beliefs of ASA are ethical and equitable business practices, quality construction, a safe and healthy work environment, integrity and membership diversity.



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Preface

A **lien** is a claim against property to secure a debt. Liens that secure payment of debts owed to construction subcontractors for the value of work performed, and materials furnished, on a construction project, are quite common in the United States, and generally arise by operation of state law based on the consent of the land owner to have his or her land improved. A lien may be one of several legal tools at a subcontractor's disposal to ensure payment, but a lien is generally the most effective tool because it encumbers the improved real estate in much the same fashion as a mortgage or a judgment, effectively preventing resale.

While all liens include the legal right to have a debt satisfied by forced sale of the property serving as security for the underlying debt, the procedure to "perfect" a lien, that is, to make the lien legally enforceable, varies greatly from state to state. Those differences cannot be ignored, for the courts generally require strict compliance with the applicable lien statutes if the lien is to be valid; "substantial compliance" does not suffice. For these reasons, there is probably not an attorney in the country who would claim to be an expert on all of the lien laws of each of the 50 states and the District of Columbia.

A **bond** is a three-party instrument by which one party (the surety) guarantees or promises a second party (the owner or prime contractor) the successful performance of contract obligations owed to the second party by its principal (the contractor or subcontractor). A bond also serves as a

prequalification device, because the surety effectively represents that it has examined the principal and found the principal qualified to complete the obligation or undertaking in question, and thus worthy of the surety's guarantee.

Three kinds of bonds are common to construction: bid bonds, performance bonds and payment bonds.

- A bid bond guarantees that the bidder will enter into a contract for the bid amount.
- A performance bond guarantees to the owner that a prime contractor will perform according to the contract referenced in the bond.
- A payment bond assures the owner that the prime contractor will pay its subcontractors and suppliers, who might otherwise file liens against the owner's property.

Performance and payment bonds can be separate documents or may be combined. Just as lien laws vary, statutes governing public project bonds vary from state to state.

This publication is designed as a summary of the basic requirements of state law, but is not a comprehensive legal treatment of the statutes in the states. *It does not contain legal advice.* Because individual circumstances may vary widely and state laws are constantly changing, readers should consult their local attorneys for specific advice. For easy reference, a roster of contributors appears as an appendix.

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Federal Government

By Lawrence M. Prosen, Esq.

Private Work

Not applicable – Private Parties Cannot Lien Federal Property.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: Persons who have furnished labor or material for performance of the work under the prime contract for which a payment bond is supplied pursuant to the Miller Act [40 U.S.C. § 3131 *et seq.*] and who have not been paid in full before the expiration of 90 days from the date that labor or materials were last supplied by claimant to the project for which the claim is made.

Type/Amount of Bond: Payment bonds are required for all federal construction projects exceeding \$100,000.00. The payment bond amount must be equal to the total amount payable under the prime contract's terms, unless the contracting officer makes a written determination, with specific findings that the bond amount is impractical, in which case the contracting officer shall set the bond amount. In no event, however, shall the payment bond penal amount be less than that of the performance bond provided for the project (i.e., an amount the contracting officer considers adequate to protect the government).

For projects exceeding \$25,000 but not more than \$100,000, other forms of payment security may be acceptable.

Required Notice and Timing: Persons having a contract with a subcontractor, but not directly with the prime contractor, must first give written notice to the prime contractor within 90 days from the date on which the claimant last performed its labor or furnished/supplied materials for which the claim is made. This notice must state with "substantial accuracy" the amount sought and the name of the party to whom the labor or material was provided. This notice must be served by any means that

provides written, third-party proof of service to the contractor at any location where it maintains an office or conducts business; or at the prime contractor's residence or in any other manner in which the U.S. marshal for the district in which the public improvement is located may effectuate service of a summons.

Suit Filing: All suits are to be filed in the name of the "United States for the use and benefit of (the claimant)," in the U.S. District Court in the district where the contract is being performed, regardless of the amount sought. Suit may not be filed until the expiration of 90 days from the date on which the claimant's labor was last performed or materials/services were supplied; but must be filed no later than one year from that date.

Contractual Waivers:

1. The Miller Act does not allow prospective waivers of bond rights, as discussed below.

2. The Miller Act does not discuss contingent payment clauses. The Prompt Pay Act [31 U.S.C. § 3901 *et seq.*] does not require payment to a subcontractor until seven days after a prime receives payment from the agency. As such, the best practice is to assume pay-if-paid clauses are enforceable and might waive bond rights.

Waivers After Commencement of Work: Bond rights may not be waived prior to performance of one's work, but there are other, limited circumstances in which one's Miller Act bond rights may be waived. A waiver of the right to sue on a payment bond is void unless it is:

- In writing.
- Signed by the person whose rights are waived.
- Executed after that person has furnished labor or materials for use on the prime contract.

However, waivers of bond rights are not required to be conditioned on payment.

Special Warnings: As indicated above, notice must be timely and provided by any means that provides written, third-party proof of service to the contractor at any location where it maintains an office or conducts business; or its residence or in any other manner in which the U.S. marshal for the district in which the public improvement is located may effectuate service of a summons.

Alabama

By Edward P. Meyerson, Esq.

Private Work

Rights Available: Mechanics and materialmen lien.

Who May Claim: The contractor, subcontractor, materialman, laborer and lessor of machinery and equipment. (Foreign corporations not qualified to do business in Alabama may not enforce a lien in Alabama courts.)

Required Notice and Timing: Every person, except the original contractor, must give written notice to the owner prior to filing the verified lien statement that sets forth the amount claimed, what is being claimed, and from whom. After such notice, any unpaid balance in the hands of the owner is subject to such a lien.

Notice is unnecessary if, prior to furnishing materials for the project, a person has notified the owner in writing that such material, at a specified price, would be provided. In this event, the supplier would have a lien for the full purchase price if the owner does not notify supplier that it will not be responsible.

Lien Filing:

1. The original contractor must file a verified lien statement within six months after its last performance of labor or after last furnishing materials.
2. Journeymen and day laborers must file a verified lien statement within 30 days after they last performed work on the project.
3. All other claimants must file a verified lien statement within four months after their last performance of labor or after last supplying materials on the project.

Suit Filing: Any action for the enforcement of a lien must be commenced within six months after the maturity of the entire indebtedness secured by the lien.

Lien Waivers: Lien rights can be waived in a contract, and partial waivers may waive security for uncompleted work, retainage, extras and claims. There is a refutable presumption that the right to lien exists if the claimant has complied with lien statutes.

Special Warning: Subcontractors, laborers, materialmen and lessors of machinery and equipment have liens only to the extent of the unpaid balance due the contractor from the owner at the time of notice unless, prior to furnishing work or materials, the claimant notified the owner in writing of its intent to furnish certain specified materials at specified prices.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: The subcontractor, materialman, laborer or any other person who furnishes labor, materials or supplies on a public project.

Type/Amount of Bond: A payment bond is required for all contracts of \$50,000 or more in an amount not less than 50 percent of the contract price. A performance bond is required in the full amount of the contract price.

Required Notice and Timing: No civil action shall be instituted on said bond until after 45 days' written notice by registered or certified mail to the surety of the amount claimed and the nature of the claim.

Suit Filing: Suit must be filed not later than one year from the date of final settlement of the contract.

Lien Available: No.

Alaska

By James T. Yand, Esq.
and Jessica Robert, Summer Associate

Private Work

Rights Available: Mechanics' lien is the exclusive remedy for unpaid labor or goods invoices. Alaska Stat. § 34.35.050. In the case of past-due invoices, a stop-lending notice is also available. Alaska Stat. § 34.35.062.

Who May Claim: Prime contractor, subcontractor, laborer, trustee of employee benefit trust for the benefit of laborer, materialman, equipment-man, and planner/surveyor/architect/engineer. Alaska Stat. § 34.35.050.

Required Notice and Timing: Before performance, the notice of right to lien may be given to the owner of record or the owner's agent. The written notice must include:

- (1) a legal description sufficient for identification of the real property;
- (2) the name of the owner;
- (3) the name and address of the claimant;
- (4) the name and address of the person with whom the claimant contracted;
- (5) a general description of the labor, materials, services, or equipment provided or to be provided;
- (6) a statement that the claimant may be entitled to record a claim of lien; and
- (7) the statement provided in AS § 34.35.064(a)(7). Alaska Stat. § 34.35.064.

Upon request from an owner, lender, or prime contractor, the claimant must provide the following within 5 days: (1) the most recent accounting of the amount due and unpaid under the terms of the contract; and (2) a description of the labor, materials, services, or equipment the claimant anticipates furnishing. Alaska Stat. § 34.35.064(b).

Lien Filing: Lien must be filed within 120 days after last performance if no advance notice of completion was filed as provided in AS§ 34.35.071 , or within 15 days if notice was recorded. Alaska Stat. § 34.35.068(a)(b)(1).

Suit Filing: Suit must be filed within 6 months after the lien is recorded, unless an extension notice is

recorded within the period above, granting an additional 6 months. Alaska Stat. § 34.35.080(a). A lien with an extended duration is void as against a person who acquires an interest in the subject property after the commencement of the action, unless notice of the action has been duly filed before the person's conveyance. Alaska Stat. § 34.35.080(c).

Lien Bonds: Lien bonds are allowed at 1.5 times the amount claimed. A lien bond must be recorded to discharge the lien and, if the lien claimant so recovers, the lien claimant's reasonable costs in the action. Alaska Stat. § 34.35.072.

Contractual Waivers: Best practice is to assume lien rights may be waived in a contract before performing any work and to assume that a pay-if-paid clause may prospectively waive lien rights. A written waiver of lien or stop-lending notice, signed by a claimant, requires no consideration to be valid and binding. Alaska Stat. § 34.35.117(a). The waiver may not relate to labor, materials, service, or equipment furnished after the date the waiver is signed by the claimant. Alaska Stat. § 34.35.117(a). Only contractors, and not individuals actually performing labor, may waive lien rights. Alaska Stat. § 34.35.117(b). A waiver of lien rights of an individual or a class of individuals is void. Alaska Stat. § 34.35.117(b).

Waivers after Commencement of Work: Best practice is to assume that lien rights may be waived in a contract after performing the work and to assume that a pay-if-paid clause may waive all lien rights. Waivers are permitted, but they must be in writing. Waivers apply only to preexisting claims, and require no consideration. Alaska Stat. § 34.35.117(a).

Special Warning: Stop-lending notice is available to the construction financier, but only when payment for a project is past due. Alaska Stat. § 34.35.062(a). A stop-lending notice must:

- (1) instruct the lender to stop disbursing, advancing, or otherwise providing construction financing for the project;
- (2) be verified by the claimant;
- (3) state the claimant's name, address, and telephone number;
- (4) describe the labor, material, service, or equipment furnished by the claimant, and state the name of the person to whom furnished;

- (5) describe the real property improved and the name of the person the claimant believes to be the owner; and
- (6) state the amount due and unpaid to the claimant. Alaska Stat. § 34.35.062(a).

The stop-lending notice is binding upon a lender from the time the lender receives it and has reasonable opportunity to act until it is expired or revoked. A notice expires on the 91st day after it is received by the lender unless the claimant has brought a claim before that day and has notified the lender of the claim in writing. Alaska Stat. § 34.35.062(b). Within 10 days of receiving the stop-lending notice, the lender must send the claimant a verified statement showing all construction financing by date and amount. Alaska Stat. § 34.35.062(d). In the case of two or more claimants, the lender may require the claimants to interplead their claims. Alaska Stat. § 34.35.062(e).

Public Work

Rights Available: Suit on “Little Miller Act” payment bond. All contracts in excess of \$100,000 require payment and performance bonds under the Act. Alaska Stat. § 36.25.010.

Who May Claim: First-tier subcontractor and materialman, second-tier subcontractor (i.e. subcontractor not in privity with the prime contractor, but with the first-tier subcontractor), materialman, and laborer. Alaska Stat. § 36.25.020.

Type/Amount of Bond: Payment depends on the amount of the prime contract. If the contract is less than \$1 million, the bond equals one-half the total amount payable. If the contract is greater than \$1 million, but less than \$5 million, then the bond equals 40 percent of the total amount payable. If the contract is greater than \$5 million, then the bond equals \$2.5 million. Alaska Stat. § 36.25.010(a)(2).

Required Notice and Timing:

1. First-tier: no notice is required.

2. Second-tier: written notice of claim must be sent to the prime contractor by registered mail, or by any manner a peace officer is authorized to serve summons, within 90 days of last performance. Alaska Stat. § 36.25.020(b).

Suit Filing: Not less than 90 days after performance, and no more than one year after final settlement of the prime contract. Alaska Stat. § 36.25.020(a)(c).

Bond Waiver: Waiver of contractor's bond is permissible if the governor has proclaimed an economic disaster. Alaska Stat. § 44.33.300. In the event of an economic disaster, the requirement of a contractor's bond may be waived if the contract does not exceed \$100,000. Alaska Stat. § 44.33.300(1). A municipal waiver, by ordinance of its governing body, exempts contractors from compliance with AS § 36.25.010(a) if the estimated cost of the project does not exceed \$400,000, and (1) the contractor has been licensed for two years prior to the contract and its principal office is in Alaska; (2) the contractor certifies that it has not defaulted on a contract awarded three years preceding the contract; (3) the contractor submits a financial statement; and (4) the total amount of all contracts anticipated for the term of performance does not exceed the net worth of the contractor per the financial statement submitted. Alaska Stat. § 36.25.025.

Special Warning: The second-tier notice must state, with substantial accuracy, the amount being claimed and the person for whom labor/material was performed/furnished. Alaska Stat. § 36.25.020. Under certain circumstances, a prime contractor on a municipal project that does not exceed \$400,000 may not have to post a payment bond. *See* Alaska Stat. § 36.25.025.

Lien Available: No.

Private Work

Rights Available: Mechanics and materialmen lien; stop notice.

Who May Claim: Every person who provides labor, professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of a building or other improvement generally is entitled to claim a lien. However, there are certain limitations. A.R.S. § 33-981(A).

1. A material supplier supplying materials to another material supplier may have no lien rights. A.R.S. § 33-981(B).
2. An unlicensed contractor has no lien rights if the contractor's license statutes require a license for the type of work performed. A.R.S. § 33-981(E).
3. On "owner-occupied" residential construction, a claimant has lien rights only if it has a direct written contract with the owner-occupant. A.R.S. § 33-1002.

Required Preconditions for Perfecting Lien Rights: To be entitled to record a lien, all persons (other than those performing actual labor for wages) must give a written preliminary 20-day notice to the owner, the prime contractor, the construction lender, and the person with whom the claimant has contracted. A.R.S. § 33-992.01(B). The preliminary notice must substantially follow a statutory form. Professional notice services commonly are used to prepare and mail such notices.

The preliminary notice should be given no later than 20 days after the lien claimant first furnished labor, professional services, materials, machinery, fixtures or tools to the job site. A.R.S. § 33-992.01(C). Failure to meet this deadline is harmful but not necessarily fatal to a lien claim. If the preliminary notice is given later than 20 days after the lien claimant first furnished labor, materials or professional services, a lien can still likely be claimed, but only for the labor, materials or professional services furnished within 20 days prior to the date the preliminary notice was given and thereafter. A.R.S. § 33-992.01(E). The claimant's lien rights are lost for any labor, materials or professional services furnished earlier than 20 days before the preliminary notice is given.

The preliminary notice must include several statutorily prescribed categories of information, including an

estimate of the total price of materials, labor, professional services, machinery, fixtures or tools furnished or to be furnished. A.R.S. § 33-992.01(C)(1)-(5). A second preliminary notice must be given when the estimated price for the labor, professional services, materials, machinery, fixtures or tools exceeds by 20 percent or more the total price set forth in any prior preliminary notice. A.R.S. § 33-992.01(G).

All preliminary notices must be given either (a) by first-class mail with a certificate of mailing, (b) by registered mail, or (c) by certified mail. The notice must be sent postage prepaid and should be addressed to the person to whom notice is to be given at his or her residence or business address. A.R.S. § 33-992.01(F). A preliminary notice may *not* be personally served.

A potential claimant may send a written request to an owner or other interested party seeking a written statement containing a legal description of the property, the name of the owner, the name of the original contractor, the name of the lender, and if any payment bond has been recorded. A.R.S. § 33-992.01(I). The owner or other interested party receiving such a notice, or receiving a preliminary lien notice, has the duty to notify the sender in writing within 10 days of the requested information and to correct any inaccuracies in certain information included on the notice. A.R.S. § 33-992.01(I).

If the owner "or other interested party" fails to furnish this information, then the owner is prevented from raising as a defense to a subsequent lien claim any inaccuracies of such information in a preliminary notice, provided the notice otherwise complies with the statutory requirements. A.R.S. § 33-992.01(J). If the correct information is received by the claimant after the claimant has given the preliminary notice and the notice is inaccurate, the claimant has until 30 days after receipt of the information to amend the notice. A.R.S. § 33-992.01(J).

Defects in the information included or excluded on a preliminary notice or the failure to give the notice to the proper parties may subsequently invalidate the lien. Although contractors are required to strictly perform all of the statutorily-required steps, compliance with any particular step may be performed in some cases by substantial (rather than literal) compliance. *See MLM Constr. Co. v. Pace Corp.*, 172 Ariz. 226, 229, 836

P.2d 439, 442 (App. 1992); *Fagerlie v. Markham Contracting Co., Inc.*, 609 Ariz. Adv. Rep. 27 (App. 2011).

Lien Filing: Every person with lien rights must record a notice and claim of lien within 120 days after “completion” of the building, structure or improvement unless a notice of completion is properly recorded and served. (Notices of completion are discussed below.) If a notice of completion has been recorded, then a lien claimant must record its lien within 60 days after recordation of such notice. A.R.S. § 33-993.

The triggering date for computing the lien recording deadline is “completion” of the entire project. The time period begins to run upon completion of the prime contractor’s contract; it does not commence when a particular subcontractor or supplier completes its portion of the work. A.R.S. § 33-993(A).

Completion for lien purposes means the earliest of: (a) 30 days after final governmental inspection and acceptance (generally, the issuance of a final certificate of occupancy); or (b) cessation of labor for a period of 60 consecutive days. A.R.S. § 33-993(C). Therefore, when a notice of completion is not recorded, a lien claimant has 150 days after the final certificate of occupancy (or other “written final acceptance”) is provided by the governmental body that issued the building permit to record its notice and claim of lien. If no building permit is issued or if the governmental body that issued the building permit does not issue final inspections and written final acceptances, then “completion” for lien purposes means “[c]essation of labor for a period of sixty consecutive days, except where such cessation of labor is due to strike, shortage of materials or act of God.” A.R.S. § 33-993(C)(2).

A notice of completion is defined as “a written notice which the owner or its agent may elect to record at any time after completion of construction” as completion is defined in the lien statutes. A.R.S. § 33-993(E). A copy of a recorded notice of completion (on a statutory form) must be sent to all claimants who sent a preliminary notice within 15 days after recording. A.R.S. § 33-993(I). If a notice of completion is properly recorded and served in accordance with the statute, then the time periods for recording a lien are shortened to 60 days after the notice of completion is recorded. A.R.S. § 33-993(A).

The notice and claim of lien must include: 1) the legal description of the land; 2) the name of the owner (or reputed owner) and name of person who employed the lienor; 3) a statement of the terms of the contract (if oral) or a copy of the contract (if written); 4) a

statement of the lienor’s demand; 5) statement of the date of completion; and 6) a statement of the date the preliminary lien notice was given, with proof of mailing. A.R.S. § 33-993(A)(1)-(6). Attorney fees and other reasonable expenses (recording fees and lien filing fees) are recoverable in lien foreclosure actions. A.R.S. § 33-998(B). A lien for tenant improvements usually is against the tenant’s interest in the subject property only, and not necessarily against the landlord’s interest.

Within a reasonable time after recording, the lien must be served on the owner of the land if the owner can be found in the county in which the lien is recorded. A.R.S. § 33-993(A). Ownership should be checked for any recent transfer of title.

Suit Filing: A lawsuit to foreclose the lien must be filed within six months after the lien is recorded. A.R.S. § 33-998(A). A notice of pendency of action (*lis pendens*) containing the legal description of the property must be recorded within five days after the lien foreclosure suit is filed. A.R.S. § 12-1191(A). The notice is a warning that the title to the property is in litigation. Failure to timely record the *lis pendens* voids the lien.

Equitable Subrogation: In *The Weitz Company L.L.C. v. Heth et. al*, 235 Ariz. 405, 333 p.3d 23 (2014), the Arizona Supreme Court concluded that Arizona’s lien statute, § 33-992(A), allows “assignment by equitable subrogation of a lien that attached before construction began on the project at issue.” The bank holding deeds of trust by subrogation (or substitution) was allowed to move ahead of the contractor to foreclose against the remaining value in the property. The Supreme Court disagreed and established the following principles for the future of Arizona lien law: (1) “When equitable subrogation occurs, the superior lien and attendant obligation are not discharged but are instead assigned by operation of law to the one who paid the obligation.” (2) “Because an equitably subrogated lien ‘attaches’ when the superior lien was recorded, § 33-992(A) does not require that an intervening mechanics’ lien be given priority.” (3) “[N]othing in § 33-992(A) suggests that the legislature intended to preclude equitable subrogation in the mechanics’ lien context. ... When a lien that is superior to a mechanics’ lien is assigned to another through equitable subrogation, the mechanics’ lien remains in the same position it occupied before subrogation.” (4) “[P]ermitting equitable subrogation of a lien that is superior to a mechanics’ lien is consistent with the legislature’s treatment of junior lienholders’ interests in foreclosure actions.” (5) “[A] prospective subrogee is required to discharge only the portion of an obligation that is

secured by the property at issue.” All of these principles culminated in the Supreme Court’s summary holding “that when a single mortgage is recorded against multiple parcels, a third party is not precluded from attaining equitable subrogation rights when it pays the pro rata amount of the superior obligation and obtains a full release of the parcel at issue from the mortgage lien.” Further and more recent discussion regarding equitable subrogation can be found in *US Bank, N.A. v. JPMorgan Chase Bank, N.A.*, ___ P.3d ___, 2017 WL 2806249 (Ariz. June 29, 2017).

Lien Bonds: The owner may require that the prime contractor furnish a payment bond in lieu of lien rights. If the payment bond is recorded with a copy of the general contract and a legal description of the land, no lien is allowed to be recorded on the project after the date the bond is recorded except by a person who contracts in writing directly with the owner. A.R.S. § 33-1003(A). To assert a claim against the payment bond in lieu of lien rights, the claimant must comply with the notice requirements in Arizona’s public works bond statute (see “Public Work” below).

An owner or other interested party also has a statutory right to bond around a specific recorded lien by recording a discharge of lien bond in the amount of 150 percent of the demand set forth in the notice of claim. A.R.S. § 33-1004(B). Once the bond is recorded, any monies withheld in response to a stop notice or bonded stop notice claim pursuant to A.R.S. §§ 33-1051 *et. seq.* shall promptly be released. A.R.S. § 33-1004(C).

After recording the bond the owner or other interested party shall serve a copy of the recorded bond on the lien claimant within a reasonable time. A.R.S. § 33-1004(C); *Hanson Aggregates Arizona, Inc. v. Rissling Construction Group, Inc.*, 212 Ariz. 92, 94, 127 P.3d 910, 912 (App. 2006). Failure to serve the claimant with the bond does not prevent the bond from discharging the lien, but changes the date by which the claimant must assert a claim against the bond. *Hanson*, 212 Ariz. at 94-95, 127 P.3d at 912-13.

Typically, the lien claimant must commence an action against the bond within the time requirements of A.R.S. § 33-998. A.R.S. § 33-1004(D)(1); *Hanson*, 212 Ariz. at 94, 127 P.3d at 912. However, if the bond is served “within less than ninety days from the date claimant would be required to commence his action pursuant to § 33-998, then the claimant shall have ninety days from the date he receives a copy” of the bond. A.R.S. § 33-1004(D)(2). If a foreclosure action had already been filed, the claimant has 90 days to add the principal and surety of the bond to the existing

action. A.R.S. § 33-1004(C). In addition, if the owner or other interest party fails to serve the claimant a copy of the bond *after* it is recorded, the claimant has six months to file an action against the bond from the date it discovered the bond, except “that no action may be commenced on such bond after two years from the date it was recorded.” A.R.S. § 33-1004(F); *Hanson*, 212 Ariz. at 94, 127 P.3d at 912.

Any judgment obtained by the claimant against the bond shall not exceed the penal sum of the bond. A.R.S. § 33-1004(E). If the amount awarded to the claimant, including interest, expenses, costs, and attorney fees exceeds the penal sum of the bond, then the claimant is entitled to a judgment against the principal for any excess amount. A.R.S. § 33-1004(E).

Non-statutory payment bonds also may be provided on projects.

Lien Waivers: Arizona’s law prescribes four types of lien waiver forms to be used under appropriate circumstances: (a) a conditional waiver and release for a progress payment; (b) a conditional waiver and release for final payment; (c) an unconditional waiver and release for a progress payment; and (d) an unconditional waiver and release for final payment. A.R.S. § 33-1008(D).

An owner or contractor cannot by any term of the contract, or otherwise, waive or impair the lien rights of others. A.R.S. § 33-1008(B). It is unclear whether a party can prospectively waive its own lien rights by contract before performing any work.

After work commences, a lien claimant can only waive or release its rights by executing a lien waiver which follows substantially one of the statutory forms. Any lien waiver that does not substantially follow one of the forms is ineffective and invalid. A.R.S. § 33-1008(B). If subcontractors and suppliers are not paid at the time the lien release is executed, they should only sign conditional releases. If a conditional release is used, it only becomes effective when there is “evidence of payment.” If a claimant has in fact been paid, then he or she should sign an unconditional release.

Both the conditional and unconditional waiver forms for progress payments provide that the release covers all labor, services, equipment or materials furnished to the project through a particular date. Even though the form also includes a blank for the amount paid, the extent of the release is tied to the stated effective date rather than the amount paid or the amount due at the time the release is signed.

The progress payment forms also expressly state that the release does not cover “any retention, pending modifications and changes or items furnished” after the effective date of the release. However, it is not clear what is included within the phrase “pending modifications and changes.” A.R.S. § 33-1008(D). Claimants must be cautious to expressly reserve any pending claims on the face of the release itself.

Stop Notice: The Arizona District Court, in an unpublished order in *Stone v. Midfirst Bank* dated February 24, 2010, held that Arizona’s Stop Notice Claim Statute is preempted by the Home Owner’s Loan Act of 1933 with respect to any requirement forcing a lender to disperse funds. Accordingly, the requirements of the Stop Notice Claim Statute relating to lenders may not be enforceable.

The stop notice is a distinct remedy, separate and apart from lien rights or claims on payment bonds. The remedy is available to any person who has mechanics lien rights under Arizona law. A.R.S. § 33-1053. A claimant is allowed to serve a stop notice on the owner or construction lender stating that the claimant has not been paid and, under certain circumstances, the holder of the construction funds is required to withhold payment up to the amount of the claim. A.R.S. § 33-1055(A). The stop notice effectively creates a lien on un-disbursed construction funds held by the owner or construction lender. A.R.S. § 33-1057(A). To serve a stop notice, a claimant must give a preliminary notice in accordance with Arizona’s lien statutes. A.R.S. § 33-1056(B). A stop notice can be served during construction if the claimant is owed monies. The last date for serving a stop notice is any time “before the expiration of the time within which to record a claim of lien.” A.R.S. § 33-1055(A).

A claimant may serve either a bonded or un-bonded stop notice on a lender. A.R.S. § 33-1058(B). A bonded stop notice requires the claimant to include with the stop notice a bond in the amount of 150 percent of the amount of the claim to the construction lender. A.R.S. § 33-1051(1). If the stop notice is bonded, the lender must withhold funds from the borrower or anyone else sufficient to pay the claimed amount. A.R.S. § 33-1058(A). If the stop notice is not bonded, the lender may ignore it.

If the owner receives a stop notice (bonded or not bonded), the owner is required to withhold from the original contractor sufficient monies due or to become due to that contractor to answer that claim. A.R.S. § 33-1057. To enforce the stop notice, a lawsuit can be filed during the period from 10 days after the stop notice is served until three months after the deadline

expires for recording a lien. A.R.S. § 33-1063. If the owner sends a written demand to a potential claimant to make a stop notice claim, the recipient has 30 days to do so or the claimant will lose its stop notice rights. A.R.S. § 33-1054.

Similar to the lien bonds provided for in A.R.S. § 33-1004, an owner, construction lender or other contractor that disputes a stop notice (bonded or non-bonded) may file a bond to release any monies withheld due to the stop notice. A.R.S. § 33-1062(A). The bond filed in response to the stop notice must be in an amount equal to 150 percent of the claimed amount in the notice. A.R.S. § 33-1062(A). Filing a bond to discharge a lien pursuant to A.R.S. § 33-1004 can also satisfy the bond requirements to release monies withheld pursuant to a stop notice. A.R.S. § 33-1062(B).

Contractors’ License Bonds: All licensed commercial and residential contractors are required to furnish contractors’ license bonds. A.R.S. § 32-1152(A). Unpaid subcontractors and material suppliers may have a right to recover against a residential contractor’s license bond but not against a commercial contractor’s license bond. A.R.S. § 32-1152(E).

Any person furnishing labor, materials or construction equipment used in the direct performance of a residential construction contract is a proper claimant against a residential contractor’s license bond. A.R.S. § 32-1152(E). As a general rule, a claimant against a residential contractor’s license bond must provide a preliminary 20-day notice and file suit to recover against the bond within two years of furnishing the labor or material on which the suit is based. A.R.S. § 32-1152(E).

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: Persons who supply labor or materials to the contractor or its subcontractors.

Professional services providers are not proper claimants.

Type/Amount of Bond: A payment bond for the full amount of the general contract is required on most Arizona public works projects. Arizona’s public works payment bonds are modeled after the federal Miller Act bonds. A.R.S. § 34-222(A).

Required Notice and Timing: While the notice requirements for payment bond claimants are similar to the federal Miller Act, there is one additional requirement. A.R.S. § 34-223(A).

1. A claimant in direct contractual relationship with the prime contractor is not required to file or serve any notice before filing suit against the bond.
2. A claimant with no direct contractual relationship with the prime contractor, but only with a subcontractor, must provide two notices: A.R.S. § 34-223(A).
 - a. A preliminary 20-day notice as required under Arizona’s lien statute to the prime contractor (this is not required under the federal Miller Act).
 - b. A 90-day notice of claim served on or mailed to the prime contractor by certified or registered mail within 90 days from the date claimant last performed work or supplied material to the project for which claim is made. Arizona law requires that the prime contractor must receive this notice within the 90-day period. The notice must state that the claimant is looking to the prime contractor for payment, the amount claimed, and the name of the claimant’s customer.

No controversy over what the notices must state or to whom they need to be delivered. However, in *Cemex Construction Materials South, LLC v. Falcone Brothers & Associates, Inc.*, 237 Ariz. 236, 349 P.3d 210 (App. 2015), the Arizona Court of Appeals addressed the statutory requirement of method of delivery. The statute states, after the description of the second notice, that “such notice shall be served by registered or certified mail, postage prepaid”. In this case, Falcone argued that the registered or certified mail requirement applied to both notices, the preliminary twenty day notice and the post 90 day notice. Cemex, on the other hand, argued that because the preliminary notice requirement followed A.R.S. § 32-992.01, that the same statute should apply to the delivery method, which, for lien notices, can be sent by first class mail with a certificate of mailing, or by registered or certified mail. The Court interpreted A.R.S. § 34-223 to require both notices to be served by registered or certified mail in order for the payment bond claim to be effective.

In response, the Arizona legislature amended A.R.S. § 34-223 of the Little Miller Act. The amendments provide that the preliminary notice can be sent by any method provided in A.R.S. § 33-992.01(F), which

allows the notice to “be given by mailing the notice by first-class mail sent with a certificate of mailing, registered or certified mail, postage prepaid in all cases, addressed to the person to whom notice is to be given at the person's residence or business address.” The subsequent 90-day notice also required by the Little Miller Act can now “be given by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business, or at the contractor's residence.” 2016 Ariz. Legis. Serv. Ch. 237 § 1 (H.B. 2268).

Suit Filing: The claimant must wait 90 days after the date that the last labor or materials were supplied by the claimant before filing suit on the payment bond. A.R.S. § 34-223(A).

Suit must be filed against the payment bond before the expiration of one year from the last date that the claimant supplied labor or materials for which claim is made. A.R.S. § 34-223(B).

Arizona law requires that both the payment bond surety and the bond principal/prime contractor be named as defendants in the payment bond complaint unless the bond principal/prime contractor cannot be located by the use of reasonable diligence, is dead or is insolvent.

Contractual Waivers: Arizona courts have not considered whether bond rights can be prospectively waived in the contract.

An Arizona appellate court enforced a pay-if-paid clause to prevent a subcontractor from recovering on a public works payment bond. *See L. Harvey Concrete, Inc. v. Argo Const. & Supply Co.*, 189 Ariz. 178, 181, 939 P.2d 811, 814 (1997). However, since the *L. Harvey* court never considered or decided the specific issue whether a pay-if-paid clause should be applied to bar a claim against a statutory payment bond, this issue remains undecided in Arizona.

Waivers After Commencement of Work: Waivers of bond rights on public works projects are permitted only if the lien/bond waiver forms are in substantial compliance with the forms prescribed in Arizona’s lien waiver statute.

Lien Available: No.

Arkansas

By Allen C. Dobson, Esq.

Private Work

Rights Available: Mechanics and materialmen lien. The materialman's lien attaches not only to the subject of the contract, but also to the land on which it rests.

Who May Claim:

1. For a lien on buildings, land, or boats: Every contractor, subcontractor, or material supplier who supplies labor, services, material fixtures, engines, boilers, or machinery for construction or repair. [Ark. Code Ann. § 18-44-101(a)].

2. For a lien on real estate upon which drainage pipe or tile is placed: Every contractor, subcontractor, or material supplier who furnishes soil or drain pipe or tile. [Ark. Code Ann. § 18-44-104(a)].

3. For land, building, erection, or improvement: Every architect, engineer, surveyor, appraiser, landscaper, abstractor, or title insurance agent who is under written contract with the owner or the owner's agent. [Ark. Code Ann. § 18-44-105(a)]

4. For railroads: Every mechanic, contractor, subcontractor, builder, artisan, workman, laborer, or other person performing work or causing to be performed any work or labor, or who furnishes any materials, machinery, fixtures or other things toward the building, construction or equipment of any railroad. [Ark. Code Ann. § 18-44-401(1)].

5. For charitable property: Persons providing labor or material for the repair, alteration or erection of any building, structure or improvement (exceeding \$1,000) for a church, religious organization, or charitable institution, when the owner fails to provide a bond. [Ark. Code Ann. § 18-44-504(a)].

Required Notice and Timing:

1. With the exception of railroad lien claimants:

a. A lien for construction of or improvements to *residential real estate* may not be acquired unless notice is given to the owner pursuant to Ark. Code Ann. § 18-44-115(a)(7). Specifically, a residential contractor must provide the pre-construction notice. [Ark. Code Ann. § 18-44-115(a)(3)] Notice must be given prior to supplying any materials or supplies. However, notice pursuant to the statute is not required

if (i) the contractor supplies a performance and a payment bond or (ii) the transaction is a direct sale to the property owner. [Ark. Code Ann. §18-44-115(a)(8)(A)]. A sale is a direct sale only if the property owner orders materials or services from the lien claimant and the lien claimant is not a home improvement contractor as defined by Ark. Code Ann. §17-25-502(2) or a residential building contractor as defined by Ark. Code Ann. §17-25-502(3). [Ark. Code Ann. §18-44-115(a)(8)(B)(ii)]. Act No. 808 of 2017, § 1, which added subsection (a)(8)(B)(ii) to Ark. Code Ann. §18-44-115, reflects the Legislature's clarification of the direct sale exception and to, intentionally or unintentionally, overrule the Arkansas Court of Appeals decision in *Hammerhead Contr. & Dev., LLC v. Ladd*, 2016 Ark. 162 (holding that the residential contractor met the direct sale exception and was not required to provide a pre-construction notice to the owner).

b. To obtain a lien on *commercial real estate*, a subcontractor, service provider, material supplier, or laborer must notify the owner that the property is being improved and that the supplier or laborer is entitled to payment, but has not been paid. [Ark. Code Ann. § 18-44-115(b)(4)] The notice must be sent by registered mail, return receipt requested and restricted to addressee only, by an authorized officer, or by any means that provides written, third-party verification of delivery, e.g. overnight delivery service, within 75 days of furnishing the material or labor. [Ark. Code Ann. § 18-44-115(b)(5)] The notice must contain the following information: 1) a general description of the labor, service, or material furnished, and the amount due and unpaid; 2) the name and address of the person furnishing the labor, service, or materials; 3) the name of the person who contracted for purchase of the labor, service, or materials; 4) a description of the jobsite sufficient for identification; and 5) an exact copy of the notice contained in Ark. Code Ann. § 18-44-115(b)(6)(E). The Arkansas Supreme Court has stated that the notice must contain some description of the "labor, service, or material furnished." *Ground Zero Construction, Inc. v. Walnut Creek, LLC, et. al.*, 2012 Ark. 243.

c. For both residential and commercial real estate, all lien claimants must provide the property owner a written Notice of Intent to File a Lien 10 days before filing a lien. Notice may be served by personal service by an authorized officer or any person who would be a

competent witness, any form of mail with a return receipt requested restricted to addressee or agent of the addressee, or means that provides written third party verification of the delivery at any place where the owner of the building or improvement maintains an office, conducts business, or resides. [Ark. Code Ann. § 18-44-114].

2. No notice requirements exist for liens on railroad property.

3. A case decided under earlier law supports the proposition that notice requirements for charitable property and religious organizations are the same as requirements for commercial real estate set forth above. Ark. Code Ann. § 18-44-504; *St. Matthews Church v. White*, 172 Ark. 1152, 291 S.W. 977 (1927) (case decided under earlier law, but holding in the case, requiring compliance with notice requirements, remains valid law); see *Southern Central District of the Pentecostal Church of God of America, Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980).

Lien Filing:

1. With the exception of railroad lien claimants, after at least 10 days from furnishing Notice of Intent to File a Lien to owner (and contractor, if applicable) a lien claimant must file a Verified Statement of Account and Claim of Lien with the circuit court clerk of the county in which the building, erection or other improvement is located within 120 days after last date on which the claimant furnished the materials or labor. [Ark. Code Ann. § 18-44-117(a)] The filing must contain a correct description of the property to be charged with the lien, verified by affidavit. An Affidavit of Notice must be attached to the Verified Statement of Account and Claim of Lien. [Ark. Code Ann. § 18-44-117(a)(1)(B)] The Verified Statement of Account and Claim of Lien must be notarized, and must contain a description of the property, the amount due, the identity of the property owner, and the identity of the lien claimant. Copies of invoices or statements should be attached to the document as well. The Affidavit of Notice must contain a statement under oath stating that the claimant complied with the notice provisions of Ark. Code Ann. §§ 18-44-114 to 18-44-116 (even though all of those statutes may not necessarily be applicable) and a copy of each notice the claimant provided under Ark. Code Ann. §§ 18-44-114 to 18-44-116.¹ The circuit clerk is required to refuse to file a Verified Statement of Account and Claim of Lien that does not contain the Affidavit of Notice and required attachments. [Ark. Code Ann. § 18-44-117(b)(3)].

¹ Act 810 of 2007; Ark. Code Ann. § 18-44-117(a)(3)(A) & (B).

2. Despite this express limitations period, the Arkansas Supreme Court has carved out a narrow tolling exception to the statutory limitations period, applicable when a materialman furnishes a builder with supplies on an “open” or “running” account. Under this exception, if a materialman (1) begins to furnish supplies:

without any specified agreement as to the amount to be furnished, or the time within which they were to be furnished, and [(2)] there was reasonable expectation that further material would be required of him, and he was afterwards called upon, from time to time, to furnish the same, he should file [the accounting] within 90 days [now, 120 days] after the last item was delivered.

Kizer Lumber Co. v. Mosely, 56 Ark. 544, 519, 20 S.W. 409, 410 (1892); The Arkansas Supreme Court has clarified that the last material is “furnished” upon delivery of the material at or near the construction site, not when it is actually incorporated into the structure. *Van Houten Lumber Co. v. Planters’ Nat’l Bank of Hughes*, 159 Ark. 535, 540, 252 S.W. 614, 615-16 (1923).

a. In *Central Lumber Company v. Braddock Land & Granite Company*, the Arkansas Supreme Court held that if a materialman delivers the material at or near the site of the structure’s erection or repair, and the finished structure is composed of materials resembling those delivered, then there is prima facie evidence that the materialman’s supplies were actually used, and the burden of rebutting this presumption then shifts to the builder or subsequent owner, their “means of information and opportunities to know such fact being superior.” 84 Ark. 560, 105 S.W. 583 (1907). As the rationale for its rule in *Central Lumber*, the Arkansas Supreme Court explained that “[w]hen materials are furnished under a single contract for buildings to be constructed upon two or more lots, it cannot be expected of the materialman to know how much is used upon each lot.”

3. There is no lien-filing requirement for liens on railroad property.

4. The lien of an architect, engineer, surveyor, appraiser, abstractor, title insurance agent or landscaper attaches only after the lien is filed. [Ark. Code Ann. § 18-44-105(b)(1)].

Suit Filing:

1. With the exception of railroad lien claimants, a person must file suit within 15 months after filing the lien. Claimants must include the contractor as a necessary party [Ark. Code Ann. §18-44-119] and must simultaneously file a *lis pendens* [§18-44-119(b)(2)].

2. To enforce a lien on railroad property, a person must file suit within one year after the claim has accrued. [Ark. Code Ann. § 18-44-403].

Contesting a Lien:

1. Any person wanting to contest a lien may file a bond for the amount of the lien or an action under Ark. Code Ann. § 18-44-118(f). [Ark. Code Ann. § 18-44-118(a)(1)(A)-(B)] If a bond is filed, the claimant must contest the bond within three days, or the lien will be discharged. [Ark. Code Ann. § 18-44-118(b)(2)(A) & (B)].

2. In addition, an action under Ark. Code Ann. § 18-44-118(f) to contest a lien may be filed in the circuit court of the county where the lien is filed, and may allege improper filing, notice, and/or service violations of Ark. Code Ann. §§ 18-44-114, 18-44-115, or 18-44-117. In addition to the summons, the sheriff will serve the named defendant(s) with the notice identified in Ark. Code Ann. § 18-44-118(f)(3)(A). The prevailing party to an 18-44-118(f) action is entitled to reasonable attorney fees and costs. [Ark. Code Ann. § 18-44-118(f)(6)].

Special Warnings:

1. The property owner has the right to require the contractor to furnish a bond equal to the contract price. [Ark. Code Ann. § 18-44-505].

2. While notice by certified mail need not be signed, it is implied that a notice served personally might need to be.

3. There is a possible exception to the notice requirement when statutory notice to the property owner has not been given. Where no notice has been given, a lien may be in substantial compliance with the lien statute requirement when one claiming a lien files an action against necessary parties within 120 days after the last item of material was furnished or work done. *Wiggins v. Searcy Federal Savings & Loan Ass'n*, 253 Ark. 407, 486 S.W.2d 900 (1972); *See Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005).

4. An Arkansas case calls into question the scope for the claim of unjust enrichment in the construction context. *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005).

The Arkansas Supreme Court seemed to narrow the scope of unjust enrichment by asserting when an express contract exists, the concept of unjust enrichment has no application.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim:

1. Contracts executed by the Arkansas State Highway and Transportation Department are exempt from bond requirements. [Ark. Code Ann. § 18-44-502].

2. Otherwise, all persons furnishing labor and materials may claim on a bond provided by a contractor.

Type/Amount of Bond:

1. The contractor must furnish a bond equal to the contract price on all public work for \$20,000 or more. [Ark. Code Ann. § 18-44-503].

2. The contractor must furnish a bond equal to the contract price on any contract with a religious or charitable organization exceeding \$1,000. [Ark. Code Ann. § 18-44-504(a)].

3. If a bond is not filed with respect to religious or charitable organization contracts exceeding \$1,000, any person performing labor or furnishing material, other than the principal contractor, has the right to a lien on the property for the unpaid amount of the claim. [Ark. Code Ann. § 18-44-504(b)(3)].

Suit Filing:

1. If bonded on a contract with religious or charitable organization, a person must file suit within six months of the completion of the project. [Ark. Code Ann. § 18-44-504(b)(2)].

2. On all other public projects, a person must file suit in Arkansas within 12 months from the date on which the Building Authority Division of the Department of Finance approves final payment on the contract. [Ark. Code Ann. § 18-44-503(b)].

Special Warnings:

1. Suit on a bond cannot be brought outside of Arkansas. [Ark. Code Ann. § 18-44-508(b)].

2. With respect to public projects, a conflict exists between two Arkansas statutes with regard to the time limit for filing suit on the bond. One statute indicates that the limit is six months [Ark. Code Ann. § 18-44-508], while another indicates that the limit is 12

months [Ark. Code Ann. § 18-44-503(b)]. All subcontractors are strongly advised to file suit on a bond issued on a public project within 12 months of the date on which the Arkansas State Building Services approves final payment on the state contract, or within six months of the date that final payment is made on the contract, whichever is earlier.

3. Under Arkansas case law interpreting Ark. Code Ann. § 18-44-503, the subcontractor must determine if a bond has been posted by the prime contractor for projects on public buildings. A subcontractor does not have a cause of action against the state when a prime contractor fails to perform and the state agency did not require a bond. Therefore, a subcontractor should always check the public records to verify the fact that a bond has been obtained before selling products or performing work for the prime contractor. *See Beebe School Dist. v. National Supply Co.*, 280 Ark. 340, 658 S.W.2d 372 (1983).

4. The Courts distinguish statutory bonds and common law bonds in determining the applicable statute of

limitations. If a bond provides greater coverage than that set out in Ark Code Ann. § 22-9-401, then the bond is a common law bond not covered by statute, and a bond claimant is not bound by the one-year limitation. *United States Fidelity and Guaranty Co. v. Little Rock Quarry Co.*, 309 Ark. 269, 830 S.W.2d 362 (1992).

5. The bonds must be made by surety companies authorized to do business in Arkansas, must be listed on the current U.S. Department of Treasury's Listing of Approved Sureties, and must be executed by a resident agent or nonresident agent licensed by the Insurance Commissioner to represent the surety company executing the bond. [Ark. Code Ann. § 22-9-402].

6. The bond statute covers all surety bonds required by the State of Arkansas, and provides that these bonds shall be liable on all claims for labor and materials entering into the construction, or necessary to or used in the construction of the public improvements. [Ark. Code Ann. § 22-9-401].

Private Work

Rights Available: Mechanic's lien; stop payment notice.

Who May Claim:

1. A mechanic's lien is available to all licensed contractors, subcontractors, material suppliers, architects, engineers, equipment renters, and to all laborers providing labor/materials for incorporation in the work of the improvement of the real property.

2. A stop payment notice is available to all licensed contractors, subcontractors, material suppliers and laborers. The notice is limited to the amount held by the lender as of the date that the notice is presented. The lender is required to hold back the amount of the stop payment notice claim only if a surety bond in an amount equal to 1.25 times the claim accompanies the notice.

Required Notice and Timing: A 20-day preliminary lien notice is required within 20 days of the first delivery of labor/materials to the work of improvement served by the subcontractor or material supplier to the owner, original contractor, and the construction lender by registered or certified mail, or by personal delivery. The 20-day notice may, however, may be given late, but will cover only such labor or materials as were supplied within 20 days of giving the notice, and is a prerequisite to the mechanic's lien and stop payment notice. The Preliminary Notice may be recorded with the county recorder in order to receive a copy of the notice of completion when it is recorded.

Lien Filing: The mechanic's lien must be recorded in the county and judicial district in which the property is located. The subcontractor, material supplier or laborer must record it within 30 days after recordation of notice of cessation or notice of completion. If there is no recordation, then it must be filed within 90 days after actual completion or cessation for more than 60 days. The general contractor must record a mechanic's lien with 60 days after a notice of completion or cessation. The lien must separately state a claim for each separate building. *The property must be accurately identified by the exact address if available and/or deed description and include the claimant's address.*

Stop payment notice may be served any time within the period for the recording a mechanic's lien. However, it is limited to un-disbursed loan proceeds and must be served on the holder of the construction funds by certified mail, return receipt or by personal service. The stop payment notice provides for the successful party to be reimbursed its attorney fees and court costs.

Suit Filing:

1. Mechanic's lien: A person must file suit within 90 days after recordation of the lien. The owner and claimant can agree to extend the time to sue by written agreement, as long as it is recorded within the 90-day time limit. *A person filing suit may waive his or her right to arbitrate unless that right is preserved by special filing when the suit is filed.*

2. Stop payment notice: Suit must be filed at least 10 days after presenting the stop payment notice, but not later than 90 days after expiration of the time to record a mechanic's lien.

Lien Bonds:

1. Mechanic's lien: Yes, a release bond is available. The amount of a mechanic's lien release bond is 1.25 times the amount of the claim.

2. Stop payment notice: Yes, a release bond is available. The amount of a stop payment notice release bond is 1.25 times the amount of the claim.

Waivers Permitted: Waiver of lien rights is permitted, but not at outset by contract discussed below, provided that the waiver or release is in statutorily prescribed form and is properly executed. Note, however, that the lien rights may not be "contractually" waived prior to work being performed. Moreover, pay-if-paid clauses are not enforceable in California so lien rights may not be impliedly waived in a pay-if-paid clause. After commencement of work, there are four permitted types of waivers: conditional waiver and release upon progress payment, unconditional waiver and release upon progress payment (which waives rights through a given date), conditional waiver and release upon final payment, and unconditional waiver and release upon final payment. The progress payment waivers will not release lien rights securing retainage or securing extra work that isn't paid.

The final payment waivers may expressly exclude disputed items.

Special Warnings: The notices must accurately describe the real property and each separate building thereon and state address if available. The preliminary notice must be in exact form as prescribed by statute (*changed effective July 1, 2012*), which contains specific warning to owners in the prescribed format. The direct contractor is required to disclose a property description and ownership of the property to the subcontractors and material suppliers.

The claimant has the burden of proving the materials were actually used in the work of improvement. Rights are strictly construed so that any deviation from strict statutory requirements may lead to loss of the entire claim. A lien has priority only over recordings after commencement of the work of improvement. (A construction loan, properly recorded before commencement, has priority.)

Service of a mechanic's lien on the owner of the property at the time the mechanic's lien is recorded is required. If for some reason the owner cannot be served with the mechanic's lien then the direct contractor or the lender can instead be served.

The lien document itself includes a "Notice of Mechanic's Lien" which provides a brief explanation of the nature of the mechanic's lien and what the property owner might do to address the situation.

Public Work

Rights Available: Stop payment notice; payment bond.

Who May Claim:

1. A stop payment notice is available to all subcontractors and material suppliers as to the undisbursed portion of the general contractor's fee held by a public agency.

2. A payment bond is available to subcontractors and material suppliers on all public contracts that are more than \$25,000. The best practice is for the contractor to obtain a copy of the bond at commencement of the project to verify bond availability.

Type/Amount of Bond: The bond shall be an amount not less than 100 percent of the total amount payable under the contract. This right is separate and in addition to stop-notice rights.

Required Notice and Timing:

1. A 20-day preliminary notice by the subcontractor or supplier to the public agency is required. As a precondition to the claim, the direct contractor must be notified by registered or certified mail, or by personal delivery, within 20 days after delivery of work. The 20-day notice may, however, be given late, but will cover only such labor or materials as were supplied within 20 days of giving the notice, and is a prerequisite to the stop payment notice.

2. The stop payment notice must be served by the claimant by registered or certified mail, or by personal delivery, to the public agency disbursement officer or contracting officer within 30 days after the recording of a notice of completion or notice of cessation. If no notice is recorded, the stop payment notice must be served within 90 days after completion or cessation. The stop payment notice does not need to be bonded.

3. A 20-day preliminary notice is required for a payment bond claim. If the 20-day notice is not given, a bond claim may be enforced by giving written notice to the surety and bond principal within 15 days after the recording of the notice of completion, or 75 days after completion if no notice is recorded (this also applies to payment bonds on private projects), unless the direct contractor has already paid the upstream subcontractor in good faith all progress payment (the Direct Contractor is not forced to pay twice if already paid in good faith).

Suit Filing:

1. Stop payment notice: Suit must be filed in the county and judicial district in which the work of improvement is located within 90 days after the expiration of the period to file stop payment notices. Notice of the suit must be served to the public agency within five days after filing.

2. Payment bond: Suit must be filed in the judicial district in which the work of improvement is located within six months after the expiration of the period to file stop payment notices.

Special Warning: Release bond: The public agency may allow the general contractor to release the stop payment notice by filing a surety bond for 1.25 times the amount of the stop payment notice if the general contractor disputes the stop payment notice.

The claimant can request that the public agency give notice of the expiration of the time to file stop payment notices by written request, accompanied by \$2 fee.

The claimant can request that the public agency give notice of the expiration of the time to file stop notices by written request, accompanied by \$2 fee.

Lien Available: No.

Colorado

By Mark D. Gruskin, Esq.

Private Work

Rights Available: Mechanics lien; claims against the disburser of construction funds.

Who May Claim: Contractors, subcontractors, material suppliers, laborers, those who furnish laborers or equipment, design professionals and surveyors. Second-tier suppliers do not have lien rights.

Required Notice and Timing: Written notice of intent to file a lien statement must be served to the owner and prime contractor at least 10 days before recording of the lien. The notice to the disburser may be served to the disburser at any time.

Lien Filing: A lien must be filed within four months of last furnishing work or materials. The time may be extended to four months after the project is completed or to six months after the extension is recorded, whichever occurs first, if the extension is recorded within four months of the last materials or services provided.

Suit Filing: Suit must be filed within six months after last furnishing labor or materials or after completion of the project, whichever is later; a lien claimant must record a *lis pendens* in connection with filing suit within the same time period.

Lien Bonds: Before commencement of work, optional by the contractor: 1.5 times the amount of the contract. Person must sue on the claim within six months of the completion of the project. After the claimant files a lien, it is 1.5 times the lien. A person must sue within same time limits as with a lien. A mechanics lien substitution bond is allowed. The bond amount must be 150 percent of the principal amount of the mechanics lien.

Contractual Waivers: Mechanics lien rights may be waived by contract. The waiver must be a knowing and intentional waiver by the lien claimant. An agreement to waive lien rights shall contain a statement by the person waiving the lien rights providing in substance that all debts owed to any third party by the person waiving the lien rights and relating to the goods or services covered by the waiver of lien rights have been paid or will be timely paid. A pay-if-paid clause does not, by itself, waive mechanics lien rights.

Waivers After Commencement of Work: Partial and full lien waivers are commonly used after work has commenced. The best practice is to condition all lien waivers on payment.

Special Warning: For *bona fide* purchasers of single- or double-family residences, notice of extension must be filed within one month of the conveyance of property; a lien statement must be filed within two months. The owner/occupier of the single-family residence that was constructed for him or her who can establish that he or she paid the contractor the full purchase price, plus all change orders, has complete defense to liens by subcontractors and materialmen.

Public Work

Rights Available: Suit on a payment bond; a claim against unexpended funds. C.R.S. 38-26-101 to -110 (2014)

Who May Claim: Contractors, subcontractors, material suppliers, laborers, those who furnish laborers or equipment, design professionals and surveyors.

Type/Amount of Bond: For public works contracts (a) more than \$50,000 with any county, municipality, school district or other political subdivision (C.R.S. 38-26-105); or (b) more than \$150,000 with the state of Colorado (C.R.S. 38-26-106), a bond is required in the amount set by the owner. Bond amount must be “not less than one-half of the total amount payable under the terms of the contract” unless the public works contract is greater than \$500 million, in which case the bond is to be “not less than one half of the maximum amount payable under the terms of the contract in any calendar year in which the contract is performed.” The owner may require a bond for contracts less than \$50,000.

Required Notice and Timing: None as to a bond. A person must file a verified claim with the owner prior to the date of final settlement.

Suit Filing: For bonds, file within six months of completion of the project, or the time limitation set forth in the bond if it is greater than six months from completion of the project. For sequestered funds, file suit and serve *lis pendens* on owner within 90 days of the date of final settlement.

Contractual Waivers: Bond rights may be waived by contract. The waiver must be a knowing and intentional waiver by the claimant. A pay-if-paid clause does not, by itself, waive bond rights.

Waivers After Commencement of Work: Partial and full lien and bond waivers are commonly used after work has commenced. The best practice is to condition all lien and bond waivers on payment.

Claim Bonds: A contractor may bond around a verified statement of claim. The bond must be 150 percent of the amount of the claim and an action against the bond must be commenced within the same time as for filing against the withheld funds (90 days from final settlement).

Special Warning: Contact the owner as to the date of final settlement.

Lien Available: No, but claim against unexpended funds is allowed.

Connecticut

By Benjamin J. Berger, Esq.

Private Work

Rights Available: Mechanic's lien

Who May Claim: Any person — i.e., the contractor, subcontractor, materialman or sub-subcontractor — with a claim for more than \$10 that has an agreement with the owner, or has done work or supplied materials with the consent of the owner, or that has an agreement with some person with authority to act on behalf of the owner in procuring work or materials. It is not necessary to a subcontractor's entitlement to a mechanic's lien that the subcontractor have any direct contractual relationship either with the owner or with the prime contractor, all that is necessary is that the defendant consented to have a building erected on its property and that the lien was for materials or services provided in the erection of said building. *When relying on "consent" of the owner, consent to do particular work must have been obtained. Mere granting of permission to do work or knowledge of work in general is not sufficient.*

Required Notice and Timing:

1. A subcontractor claiming under agreement with or by consent of the owner need not give notice.
2. A subcontractor claiming under agreement with or by consent of a person other than the owner must serve notice upon the owner within 90 days after the last day of work or supplying of materials. The subcontractor must serve notice to the contractor within the same time period only if the contractor has, within 15 days after starting construction, filed an affidavit with the town clerk in which the property is located stating the name under which it does business, its business address and a description of the property.

Abode service upon the owner or contractor must be made in person if the owner resides in the same town as the project. If the owner/contractor does not reside in the town in which the project is located, service may be made to the owner's or contractor's agent, or by registered or certified mail. If service by certified mail is returned unclaimed, notice may be given by publication. If there is more than one owner or contractor, notice must be given to each. *Note: Service of notice must be complete and returned to the person giving notice within 90 days of the last day of work or supplying of materials, and not later than 30 days after the lodging of the lien with the Town Clerk.*

Lien Filing: A mechanic's lien is invalid unless:

- It is filed with the clerk of the town in which project is located within 90 days of last doing work or supplying materials. The lien certificate must contain:
 - a. A description of the premises.
 - b. The amount being claimed as of the lien.
 - c. The name(s) of person(s) against whom the lien is being filed.
 - d. The date of commencing work or supplying materials.
- It also must state that the amount being claimed "is justly due, as nearly as the same can be ascertained," and must be signed and sworn to by the claimant.
- The claimant also must serve the owner with a true and attested copy of the certificate within 90 days of last doing work or supplying materials. *Note: Service must be no later than 30 days after filing the certificate in the town hall.*

Suit Filing: A mechanic's lien may be foreclosed in the same manner as a mortgage under Connecticut law. Suit and *lis pendens* must be filed within one year of recording.

Lien Bonds: A person must make application to a superior court for leave to substitute a bond for a lien.

Information Must Be Posted: At or before the commencement of any work under a construction contract, the owner shall post and maintain in a conspicuous place at the construction site:

- The name and address of the owner and any agent authorized to accept service of a certificate of mechanic's lien on behalf of the owner in any action, suit or proceeding for the enforcement of any obligation of the owner arising out of the construction project;
- The volume and page number of the land records of the town in which such property is located; and
- If a payment bond exists, the name and address of the surety that issued the payment bond.

Contractual Waivers: A contractor, subcontractor or supplier engaged to perform services, perform labor or furnish materials under a construction contract may not waive or release the right to claim a mechanic's lien. It is best practice to assume that a pay-if-paid clause also

will not waive the rights of a contractor, subcontractor or supplier to claim a mechanic's lien.

Waivers After Commencement of Work: Any provision in a construction contract or lien waiver that attempts to waive a party's mechanic's lien or bond claims rights for work not yet performed and paid for is unenforceable. It is best practice to assume that the right to claim a mechanic's lien cannot be waived prospectively after the commencement of work.

Subordination of Mechanic's Lien: Agreements to subordinate a mechanic's lien to the lien of a mortgage or security interest are enforceable.

Leasehold Interests: Any person with a claim for more than \$10 who has an agreement with or has done work with or supplied materials with the consent of the lessee of real property or some person having authority from or rightfully acting for such lessee in procuring materials or labor, may lien the leasehold interest of the lessee. *Note: A mechanic's lien may NOT attach to an intangible leasehold interest. C.G.S. § 49-33 is limited to owners of real property.*

Public Work

Rights Available: Suit on a payment bond

Who May Claim: Any person who performed work or supplied materials for which a requisition was submitted to, or for which an estimate was prepared by, the awarding authority and who does not receive full payment for such work or materials within 60 days of the date payment is due; or, any person who supplied materials or performed subcontracting work not included on a requisition or estimate who has not received full payment for such materials or work within 60 days after the date such materials were supplied or such work was performed. Both categories of claimants must provide notice of the bond claim to the surety who issued the bond no later than 180 days of the date when materials were supplied and/or work was performed.

Payment to subcontractors: The contractor must pay its subcontractors, and subcontractors must pay their subcontractors, within 30 days of receiving payment themselves. If payment is not made within 30 days, the person entitled to payment must give notice of claim to the contractor or subcontractor by registered or certified mail. Ten days after receipt of such notice, the contractor or subcontractor will be liable for interest on the claim at a rate of 1 percent per month.

Type/Amount of Bond: The face amount of the bond must be equivalent to the contract price. Bonds are required on any public building or public work involving a contract exceeding \$100,000. Directed suretyship is prohibited.

Performance Bond: When the total estimated cost of work and materials under the contract is more than \$25,000 for the general bid, or \$50,000 for the sub-bid, a performance bond might be required in addition to the payment bond,

Required Notice and Timing: A notice of claim must be served upon the bonding company and the contractor within 180 days of the date that payment is due; or, in the case of a person supplying materials or performing subcontracting work that is not included on a requisition or estimate, a notice of claim must be filed within 180 days after the date that such materials were supplied or such work was performed. The notice must state:

- a. A description of the bonded project;
- b. The amount being claimed with substantial accuracy;
- c. The name of the party for whom the work was performed, or to whom the materials were supplied

Within 90 days after service of the notice of claim, the bonding company must make payment under the bond and satisfy the claim, or any portion of the claim that is not subject to a good faith dispute. The bonding company's failure to discharge its obligations shall not constitute a waiver of defenses, except as to undisputed amounts for which the bonding company and the claimant have reached agreement, but might give rise to an obligation to indemnify the claimant the attorneys' fees and expenses incurred in recovering the payment. The bonding company shall serve a notice on the claimant denying liability for any unpaid portion of the claim. All notices must be served by registered or certified mail or in any manner in which civil process may be served. A payment bond claim for work items that are requisitioned from a contractor to a public project owner is not timely until 90 days have elapsed from the date on which the owner has paid the contractor for the particular work items that are the subject of a claim.

If the bonding company denies liability, suit may be brought in the superior court, and will be given preferential treatment with respect to the assignment for trial. The court shall award the prevailing party the cost for bringing such a proceeding. It shall also allow interest at the rate of interest specified in the labor or materials contract under which the claim arises; or, if no such interest rate was specified, at the statutory rate,

computed from the date of service of the notice of the claim, or if any portion of the claim was due and payable after the date of service of the notice of claim, then computed from the date such portion of the claim became due and payable.

The court may award reasonable attorneys' fees to either party if, upon reviewing the entire record, it appears that either the original claim, the surety's denial of liability, or the defense interposed to the claim is without substantial basis in fact or law. The claimant must bring suit on a bond within one year of the date on which the labor was last performed or materials last supplied.

Contractual Waivers: A contractor, subcontractor or supplier engaged to perform services, perform labor or furnish materials under a construction contract may not waive or release the right to make a claim against a payment bond, for services, labor or materials which have not yet been performed and paid for. The best practice is to assume that a pay-if-paid clause also will

not waive the rights of a contractor, subcontractor or supplier to make a claim against a payment bond.

Waivers after Commencement of Work: The best practice is to assume that bond rights may not be waived prospectively, after starting work. Connecticut expressly forbids the waiver of bond rights for services, labor or materials which have not been performed and paid for.

Lien Available: No.

Special Language for Projects over \$500k: "In the event that the surety assumes the contract or obtains a bid or bids for completion of the contract, the surety shall ensure that the contractor chosen to complete the contract is prequalified pursuant to section 4a-100 of the Connecticut general statutes in the requisite classification and has the aggregate work capacity rating and single project limit necessary to complete the contract."

Delaware

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien for labor and material exceeding \$25 in value for erection, alteration or repair of any structure. Del. Code Ann. tit. 25, § 2702.

Who May Claim: Any person providing labor or material or construction management, who has a contract, express or implied, with the owner, prime contractor or subcontractor. The contract can be oral or written. See *A&E Drywall Svcs, LLC v. Eugene A. Delle Donne & Son, LP, et al.*, 2010 Del. Super. LEXIS 474 (Del. Super. Ct. 2010). However, the requisite time in which the statement of lien must be filed is different for those in privity with the owner. In addition, a contractor in privity with the owner that supplies only labor or materials may still obtain a lien; however, the time in which the lien must be filed is affected. See Del. Code Ann. tit. 25, § 2711. A subcontractor that supplies only labor or only materials can file a mechanics lien. While the protection of the statute has expanded to cover architects and construction managers providing professional services, demolition contractors are specifically excluded from the lien law. *Browning-Ferris, Inc. v. Rockford Enters., Inc.*, 642 A.2d 820 (Del. Super. Ct. 1993). Likewise, Delaware courts have determined that providers of rental equipment are not within the scope of the mechanics lien statute. See, e.g., *Griffin Dewatering Corp. v. B. W. Knox Constr. Corp.*, 2001 Del. Super. LEXIS 176 (Del. Super. Ct. 2001).

Required Notice and Timing:

1. A contractor that has a contract with the owner and provides both labor and materials to the project or construction management services must file its statement of claim within 180 days from any of the following:

- a) The date of purported completion of all work called for by the contract.
- b) The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract, to which phase or segment of work the statement of claim relates, where such date for such phase or segment has been specifically provided for in the contract.

- c) The date when the statute of limitations commences to run in relation to the contract itself where such date has been specifically provided for in the contract.
- d) The date when payment of 90 percent of the contract price, including the value of any work done pursuant to contract modifications or change orders, has been received by the contractor.
- e) The date when the prime contractor submits its final invoice to the owner or reputed owner of such structure.
- f) With respect to a structure for which a certificate of occupancy must be issued, the date when such certificate is issued.
- g) The date when the structure has been accepted, as provided in the contract, by the owner or reputed owner.
- h) The date when the engineer or architect retained by the owner or reputed owner, or such other representative designated by the owner or reputed owner for this purpose, issues a certificate of completion.
- i) The date when permanent financing for the structure is completed. Del. Code Ann. tit. 25, § 2711(a).

2. All other persons must file the statement of claim within 120 days from the date of completion of the labor performed or from the last delivery of materials furnished by them. For purposes of determining when the statutory period commences, a statement shall be timely if filed within 120 days of either the date final payment, including all retainage, is due, or the date final payment is due to the prime contractor (a) that has contracted directly with the owner of the structure, and (b) with whom such person has a contract, express or implied. A contractor that is in privity with the owner but provides only labor or materials would fall into the second category. Del. Code Ann. tit. 25, § 2711(b).

3. If the amount being claimed is due to a fixed-price contract, a true and correct copy of the contract, including all modifications and amendments, must be attached to the complaint. Del. Code Ann. tit. 25, § 2712(b). If the amount is based on an oral contract, “the Plaintiff is required to attach a bill of particulars showing the kind and amount of labor done or materials furnished or construction management services provided.” *A&E Drywall*, 2010 Del. Super. LEXIS 474 at p. *11. The bill should contain a detailed

fact statement and set forth the facts supporting the claim with “sufficient particularity so that the interested parties can have no doubt as to the details of the claim.” *Deluca v. Martelli*, 200 A.2d 825, 826 (Del. Super. 1964).

4. Because the statute offers several specifications for determining when the statutory period commenced, the claimant must specify in the statement of claim the method that is being relied on to determine the statutory period.

Lien Filing: Lien claim should be filed in the superior court of the county in which the project is located. A personal action by claimant does not affect or bar a lien claim. The existence of a mandatory arbitration clause in the contract does not bar the filing of a mechanics lien.

Suit Filing: Enforcement of lien is by writ of *scire facias* to be filed and served as provided by Delaware Superior Court.

If a subcontractor is bringing suit to foreclose its lien, the prime contractor is an essential party to the suit. If the claimant is a sub-subcontractor, its customer (the subcontractor) is similarly an indispensable party. Those who contract out to other parties are also essential to suits brought by those other parties. See *A&E Drywall*, 2010 Del. Super. LEXIS 474 at p. *14.

Lien Bonds: No bonding requirements are provided; however, owner may withhold funds from contractor in amount equal to lien claim by subcontractor, and use withheld proceeds to satisfy any judgment obtained by subcontractor pursuant to lien. Owner/occupier of a single family residence who is without notice of a subcontractor’s claim may avoid subcontractor lien for work performed on residence by paying prime contractor in full and obtaining executed certification from prime contractor that all subcontractors and suppliers were paid. If owner/occupier does not qualify for statutory exception, lien may be filed only up to the amount that the owner/occupier still owes the prime contractor. Del. Code Ann. tit. 25, § 2707.

Contractual Waivers: Waivers of lien rights as consideration for receiving a contract are void as against public policy. There is no implied waiver of lien rights resulting from a pay-if-paid clause. Lien waivers given in exchange for partial or final payments are not affected. Del. Code Ann. tit. 25, § 2706.

Waivers After Commencement of Work: The mechanics lien statute provides that lien waivers are enforceable only if executed and delivered

simultaneously with or after payment for the labor performed and the materials supplied [25 Del. C. § 2706(b)]. Thus, lien waivers are effective only to the extent they reflect payment for services and materials. See *Middle States Drywall, Inc. v. DMS Properties-First, Inc.*, Del. Super., C.A. No. 95L-01-41, Quillen, J. (May 10, 1995) Let.Op. at 3.

Public Work

Rights Available: Suit on a payment bond. Delaware bond law is similar to other jurisdictions in that a bond is a contract whereby one party (the surety) agrees to perform the obligations of another party (the obligor) if the obligor fails to perform its obligations to the obligee. Delaware requires that a surety contract be reduced to writing and signed by the party against whom the surety contract will be charged.

Who May Claim: “Every person furnishing materials or performing labor under the contract” 29 Del. C. § 6927(f). However, unless the surety agreement specifically includes parties such as the suppliers or employees of subcontractors, or the contractor has a separate contractual relationship with such parties, these parties will not be able to maintain an action against the surety. This result reinforces the importance of carefully drafting the surety agreement.

Required Notice and Timing: Suit must be brought within three years of the date of the last work done on the contract 29 Del. C. § 6927(f). However, the statute of limitations may be shortened to not less than one year in the agreement.

Suit Filing: Suit must be brought within three years of the date of the last work done on the contract 29 Del. C. § 6927(f). However, the statute of limitations may be shortened to not less than one year in the agreement. *Id.*

Contractual Waiver: The state may, at its discretion, waive the bond requirement if a contractor posts an irrevocable letter of credit with the state. The letter of credit must be valid for three years subsequent to the date of delivery of the materials or services 29 Del. C. § 6927(g). The best practice is to assume that bond rights may be waived because bonds executed pursuant to Delaware’s public works projects statute will always be construed by the courts to provide for the minimum coverage required by the statute. See *Certain-Teeds Prods. Corp. v. United Pac. Ins. Co.*, 389 A.2d 777, 779 (Del. Super. 1978).

For the potential obligee/subcontractor, the terms of the agreement will govern if, how, and how much the subcontractor will recover if the obligor fails to pay the subcontractor. See *Rumsey Elec. Co. v. University of Del.*, 358 A.2d 712, 714 (Del. 1976). The best practice is to assume a pay-if-paid clause may prospectively waive bond rights because of the strict construction Delaware courts use when determining bond rights.

Waivers After Commencement of Work: The best practice is to assume that bond rights can be waived

after commencement of work for work that has not yet been performed. Another best practice is to assume that waivers for all work performed through a certain date will be enforceable, even as to retainage, unbilled extra work and unresolved claims.

Lien Available: No.

District of Columbia

By Lawrence M. Prosen, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: Any contractor or person directly employed by the original contractor, whether as a subcontractor, materialman or laborer. D.C. Code § 40-303.01.

Required Notice and Timing: Notice must be filed with the Office of Recorder of Deeds (ROD) in the District of Columbia during construction, or within 90 days after completion of such building, improvements, repairs or additions. Subcontractors or other persons employed by the original contractor must serve notice to the owner. (See special warning, below.) The notice must be filed on the standard form prepared by the ROD. D.C. Code § 40-303.03.

After being served with notice, the owner has an affirmative obligation to refrain from paying the contractor an amount to satisfy the claim. D.C. Code § 40-303.04.

Lien Filing: A mechanic's lien arises when work is performed or materials are provided at the request of a property owner; however, to be preserved, the above-referenced notice must be timely filed. D.C. Code §§ 40-301.02; 40-303.03.

Suit Filing: Suit to enforce a lien must be filed within 180 days of filing the notice with the ROD, and a notice of *lis pendens* must be filed with the recorder of deeds office within 10 days of filing suit. D.C. Code § 40-303.13.

Contractual Waivers: The best practice is to assume lien rights can be waived in a contract, before performing any work. There is no prohibition on waiving a lien except that a prime contractor cannot waive a subcontractor's lien rights in the prime contractor's contract with the owner.

A lien in favor of parties employed by the original contractor shall be subject to the terms and conditions of the contract, if any, between the owner and the original contractor -- except any terms and conditions therein that relate to the original contractor's right to waive liens on behalf of the parties employed. D.C. Code § 40-303.02.

Waivers After Commencement of Work: Similarly, the best practice is to assume lien rights may be waived prospectively, but after starting work, and may waive security to unpaid retainage, unbilled extras and unknown claims.

Special Warning: Effective in November 2005, the D.C. Mechanics Lien Act of 2005, drafted with input by the authors, came into effect. Any mechanics lien is limited to the amount that the owner owes the prime contractor at the time of the filing of notice of mechanics lien with the Recorder of Deeds. It is general practice to file notice of a mechanics lien within 90 days of the date that the lien claimant last performed its work or supplied materials. Also, as a result the 2005 changes to the D.C. Mechanics Lien Act, if the lienor/lien claimant is a home improvement contractor, it must now file several documents at the ROD in addition to the standard notice of mechanics lien form. Those additional documents include: (a) a home improvement contractor's license; (b) certificates of good standing from the D.C. Department of Consumer and Regulatory Affairs; and (c) the contract/work agreement (signed by all parties) under which the mechanics lien is sought. Contracts not involving "home improvement" must file a certificate of good standing issued by DCRA. In this case, if the lienors are not transacting business in the District of Columbia (i.e., a supplier), then it must file a certificate of good standing from their "home states." Failure to provide the ROD with these documents may prevent filing and recordation of the mechanics lien and/or a defective and unenforceable lawsuit to enforce such lien (possibly preventing a lien if time has run out).

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: Persons supplying labor or materials to the contractor or subcontractor. This reaches to second-tier subcontractors and suppliers only if the first-tier is a subcontractor, and not a supplier. D.C. Code § 2-201.02.

Type/Amount of Bond: Payment bonds are required on any District of Columbia construction contract that is estimated to exceed \$100,000.00. The bond amount depends upon the total amount payable under the prime contract, but shall not be less than 50 percent of the

total amount payable under the prime contract. D.C. Code § 2-201.02.

Required Notice and Timing: A person having a contract with a subcontractor, but not directly with the prime contractor, must give written notice to the prime contractor *within* 90 days from the date when such person last performed work or furnished materials. D.C. Code § 2-201.02.

Suit Filing: Suit must be filed after 90 days from when claimant last completed work or furnished materials, but before the expiration of one year from the date of the last labor performed or materials furnished by the claimant. D.C. Code § 2-201.02.

Contractual Waivers: There is nothing in the D.C. Little Miller Act that explicitly precludes any waiver of bond rights. As such, the best practice is to assume such a waiver will be enforceable. Similarly, as the

statute is silent, one must assume that a pay-if-paid clause can prospectively waive bond rights.

Waivers After Commencement of Work: For the same reason, the best practice is to assume that bond rights may be waived prospectively, after starting work at any point in time.

Special Warnings: Notice to the prime contractor must either be personally served upon the prime contractor *or* sent by registered or certified mail, postage prepaid to wherever the prime contractor maintains an office, conducts business, or at the contractor's residence. It also must state, with substantial accuracy, the amount of the claim and the name of the party to whom materials were furnished or for whom labor was performed.

Lien Available: No.

Florida

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Construction liens are available for properly licensed [Fla. Stat. § 713.02(7)] contractors, subcontractors, sub-subcontractors, suppliers, laborers and design professionals.

When the prime contractor furnishes an unconditional payment bond in at least the amount of the contract price prior to the commencement of construction, and a copy of the bond is attached to the notice of commencement recorded by the owner, the debts against the bond are substituted for the lien rights of all lienors other than the prime contractor, who still retains lien rights. [Fla. Stat. §§ 713.02(6), 713.23]. A bond not attached to the Notice of Commencement may nevertheless be used to transfer any recorded lien by recording the bond and serving a Notice of Bond upon the lienor. [Fla. Stat. § 713.13(1)(e)]. If a payment bond is recorded after work has already begun on the project, it will be an effective statutory bond only for lienors working on the job or seeking payment after it was recorded.

The Lien Law also provides for equitable remedies for undisputed sums due for more than 30 days. [Fla. Stat. § 713.346]. The construction lien remedy is in addition to any other legal remedies, such as breach of contract, open account, account stated, goods sold and delivered, etc.

Who May Claim a Construction Lien: Laborers furnishing personal labor on-site; the contractor (dealing with the owner), the subcontractor (dealing with the contractor), the sub-subcontractor (dealing with the subcontractor) and a supplier or equipment lessor to a contractor, subcontractor or sub-subcontractor as well as architects, landscape architects, mappers, surveyors, engineers and interior designers (professional lienors) have lien rights. [Fla. Stat. § 713.01(18)]. A material supplier selling to another material supplier does not have construction lien rights. See *Associated Distributors, Inc. v. Mix*, 440 So. 2d 516, 1983 Fla. App. LEXIS 24109 (Fla. 4th DCA 1983). Unlicensed contractors also lack construction lien rights. [Fla. Stat. § 713.02(7)].

Mandatory Language in Direct Residential Contracts: In any direct contract between an owner and a contractor greater than \$2,500 related to improvements to real property consisting of single- or multiple-family dwellings up to and including four units, an explanation of the Lien Law must be printed in no less than 12-point, capitalized, boldfaced type on the front page of the contract or on a separate page, signed by the owner and dated. The precise wording of the provision is set forth in Fla. Stat. § 713.015.

Required Notice and Timing: Written notice to the owner must be served [Fla. Stat. § 713.18] (personal service or certified mail) by any lienor (except a laborer, contractor or supplier in privity with the owner, or professional lienor) no later than 40 days from the first furnishing of that lienor's services or labor or delivery of materials or before final payment is made by the owner after a final contractor's affidavit has been given, whichever is sooner. A copy of the notice to the owner must be served on everyone in the chain of contracts between the lienor's customer and the owner (if there are such people). [Fla. Stat. §§ 255.05, 337.18, 713.23].

The statutory notice to owner form [Fla. Stat. § 713.06] requires specific language at the top of the form warning the owner of the risk of paying twice for improvements. The notice to owner must be substantially in the form set forth in the statute and must contain the statutory warning. [Fla. Stat. § 713.13].

When a payment bond is given by the contractor (and its surety), a notice of intention to claim against the bond must be served on the contractor either before commencing performance or within 45 days of the first furnishing of labor or services or delivery of materials by any lienor (except a laborer) who is not in direct contractual privity with that bonded contractor. [Fla. Stat. § 713.23]. Provided the payment bond is not conditioned upon payment by the owner to the contractor, this notice to contractor is in lieu of the notice to owner.

Any claimant (including someone contracting directly with the bonded contractor) must also serve a notice of non-payment upon the contractor and surety within 90 days of the last furnishing of labor, services or materials by the bond claimant. [Fla. Stat. § 713.23].

Failure to timely serve any required notice will result in the loss of the bond claim. These notice deadlines may be extended if the bond was not recorded in the public records with the Notice of Commencement and the claimant recorded a lien. The lienor's time limits for serving the bond notices would be calculated, at the lienor's option, from the dates set forth in Fla. Stat. § 713.23 or the date on which the lienor was served with a notice of bond. [Fla. Stat. § 713.13(1)(e)].

If the bond is a conditional payment bond pursuant to Fla. Stat. § 713.245 (a bond incorporating a "pay if paid" clause), then the claimant must perfect both bond and lien rights on the project.

Lien Filing: A claim of lien (form found in Fla. Stat. § 713.08) must be recorded in clerk's office of the county(ies) where the property is located no later than 90 days from the last furnishing of labor, services or materials by the lien claimant, exclusive of punch list or warranty work. A copy must be served upon the owner within 15 days of recording. Failure to record the claim of lien within the 90-day period will result in the loss of the lien. Failure to timely serve the copy on the owner is a defense to the lien claim only to the extent the owner can show an adverse effect from the failure to serve the copy. [Fla. Stat. § 713.08].

The delivery of rental equipment to the site of the improvement is prima facie evidence of the period of the actual use of the rental equipment from the delivery through the time the equipment is last available for use at the site, or two business days after the lessor of the rental equipment receives a written notice from the owner or the lessee of the rental equipment to pick up the equipment, whichever occurs first. [Fla. Stat. § 713.01].

The statutory claim of lien form [Fla. Stat. § 713.08] requires specific language at the top of the form notifying the owner about the duration of the encumbrance created by the lien. The claim of lien must be substantially in the form set forth in the statute and must contain the notification. [Fla. Stat. § 713.08(3)].

Suit Filing:

1. A contractor in privity with the owner must give the owner a final contractor's affidavit [Fla. Stat. § 713.06(3)(d)(1)] at least five days before that contractor may file suit to enforce the lien. A suit to enforce the lien must be filed within one year of the recording of the claim of lien in the county where the property is located or the lien will expire by operation of law. Attorney fees may be recoverable by the

prevailing party for the services in enforcing, or defending against, the lien action. [Fla. Stat. § 713.29].

2. A lien remains effective for one year from the date of recording, unless one of the following occurs: an owner records a notice of contest of lien [Fla. Stat. § 713.22(2)] in which case suit on the lien must be filed within 60 days of the date the court clerk certifies in the notice of contest of lien that a copy thereof was mailed via certified mail to the lienor; or, if the lienor is served with a summons to show cause why the lien should not be enforced or discharged [Fla. Stat. § 713.21(4)], suit on the lien must be filed (usually by counterclaim), within 20 days of service of the summons to show cause.

3. There is no authority to extend the effective duration of a lien. The only ways a lien can be extended are (a) by filing suit to enforce the lien while the lien remains effective (see duration above) and recording a notice of *lis pendens* in the public records, or (b) if the lienor files bankruptcy, the bankruptcy court has a rule extending the statute of limitations on such actions held by the bankrupt lienor to two years. Amended liens, which may only be recorded within the same 90 day period in which original liens may be recorded, will not extend the one year duration of the original lien unless the amended lien reflects a new, later last day of work, in which case the year duration runs from the recording of the amended lien.

4. If there is an exemptory payment bond given by the contractor pursuant to Fla. Stat. § 713.23, suit on the payment bond must be filed within one year of the last furnishing of labor, services or materials by the claimant, except that suit must be filed within 60 days after the contractor serves on the lienor a notice of contest of claim against payment bond. [Fla. Stat. § 713.23(1)(e)].

Contractual Waivers: Pursuant to Fla. Stat. § 713.20(2), the right to claim a lien may not be waived in advance of work performed. Any waiver of the right to claim a lien made in advance is unenforceable.

Further, a pay-if-paid clause does not prospectively waive lien rights. Fla. Stat. § 713.20 contains statutory forms of releases of lien. Parties are free to agree upon their own forms of release, but if they cannot agree, then these statutory forms are the only forms that can be required from lienors. Lienors are statutorily entitled to condition their releases upon receipt and clearance of funds exchanged therefor, in which case the owner can withhold from the contractor the amount of the unpaid check until the condition is satisfied.

Waivers After Commencement of Work: A waiver or release of lien may be effective through the date specified in the waiver or release and not necessarily through the date on which the waiver or release was signed unless stated otherwise. Other forms of release may be effective only to the extent of a designated dollar amount irrespective of the date of the release. Liens securing retainage, unbilled extra work or unresolved claims may be inadvertently waived unless the release expressly excludes those items. Finally, lien waivers may be conditioned on payment. [Fla. Stat. § 713.20].

Special Warnings: “Served” means delivered by certified mail, overnight delivery, actual delivery or, in some circumstances, posting on the job site. See Fla. Stat. § 713.18 for more specifics.

An owner on a non-bonded job or a contractor on a bonded job may serve a request for sworn statement of account upon lienors.

The lienor must respond with a sworn statement disclosing various details about the status of the account as required by Fla. Stat. § 713.16. Failure to furnish a sworn statement of account within 30 days of service of the request is an absolute defense to the lien or bond claim.

Public Work

Rights Available: Persons defined as lienors (except professional lienors) under the Lien Law may claim against the payment bond required of the prime contractor on public projects with a direct contract price (contract between the contractor and public owner) in excess of \$200,000. [Fla. Stat. § 255.05].

The bond claim is in addition to other remedies such as breach of contract, open account, account stated, goods sold and delivered, etc. Publicly-owned property is not lienable. [Fla. Stat. §§713.30, 713.01(23), and (26)].

Who May Claim: Subcontractors, sub-subcontractors, and either suppliers or laborers selling to the contractor, subcontractor, or sub-subcontractor may make bond claims on non-federal public projects.

Type/Amount of Bond: Payment and performance bond must be in the amount of the direct contract price.

Required Notice:

1. Claimants, except someone in direct contract with the bonded prime contractor, must serve a notice of

intention to claim against the bond upon the contractor before commencing work, or no later than 45 days from the first furnishing of labor or services or delivery of materials. [Fla. Stat. § 713.23].

2. All claimants not in privity with the bonded contractor must serve a written notice of non-payment on both the bonded prime contractor and the surety during the progress of the work (but not before 45 days after the first furnishing of labor or materials) or thereafter, but not later than 90 days from the last furnishing of labor, services or materials. [Fla. Stat. § 713.23].

With respect to rental equipment, the notice must be served within 90 days after the date the rental equipment was last on the job site, available for use. Any notice of nonpayment served by a claimant who is not in privity with the contractor must specify the portion of the amount claimed that constitutes retainage.

Suit Filing: Suit must be filed on the bond within one year of the claimant’s last furnishing of labor, services or materials at the project. That time may be shortened to 60 days after service of a “notice of contest of claim against payment bond” provided the claimant is no longer furnishing labor, services or materials. [Fla. Stat. § 255.05(2)(a)(1)].

If all that is sought to be recovered against the bond is retainage, then the deadline for suit is extended pending completion of the project and payment to the contractor, as more specifically described in Fla. Stat. § 255.05(10).

Attorney fees are recoverable by the prevailing party for claims made against the bond. [Fla. Stat. § 255.05(2)(a)(2)].

Contractual Waivers: Pursuant to Fla. Stat. § 255.05, any waiver of bond rights made in advance of work performed is unenforceable. [Fla. Stat. § 255.05(e)].

Waivers After Commencement of Work: A waiver or release of bond rights is effective through the date specified in the waiver or release and not necessarily through the date the waiver or release was signed, unless stated otherwise.

The extent of the release’s effectiveness will be determined by its terms — many releases are effective only to the extent of a specified payment received, irrespective of the dates of the release or payment. Bond waivers may be conditioned upon receipt and clearance of payment.

Special Warning: There is no bond required by statute on projects where the contract price between the contractor and the government is less than \$200,000. In

those cases, the only remedy may be against the unpaid claimant's customer

Georgia

By J. Ben Shapiro, Esq.

Private Work

Rights Available: Mechanics and materialmen lien on real estate, factories, railroads or other property.

Who May Claim: Oral contracts are sufficient to support a claim of lien.

Liens may be claimed by:

- Contractors under direct contract with owner. Subcontractors, including subcontractors not directly contracted to the prime contractor, mechanics, materialmen and laborers. Registered architects, land surveyors and professional engineers.
- Machinists, manufactures of machinery and lessors of machinery, if the machinery is attached as a fixture to the property.
- The furnisher of rental equipment who does not perform any labor on the project.

Notice of Commencement: A Notice of Commencement must be filed by the owner, the agent of the owner or the contractor no later than 15 days after the prime contractor physically commences work on the property. The Notice of Commencement must be filed with the Clerk of the Superior Court in the county in which the project is located. A copy of the Notice of Commencement also must be posted on the project site. The Notice of Commencement must contain certain information including the name and address of the surety for the performance and payment bonds, if any.

The contractor is required to give a copy of the Notice of Commencement to any person who makes a written request. A copy must be given within 10 calendar days of the receipt of a written request for a copy or the Notice to Contractor provisions are inapplicable to the claimant making the request.

Notice to Contractor: Any person providing labor, services or materials for a construction project who does not have a contract with the prime contractor *must* give Notice to Contractor within thirty (30) days following the first delivery of labor, services or

materials to the project, whichever is later. Notice to Contractor must be given to the owner or to the owner's agent and to the contractor at the addresses set forth in the Notice of Commencement. A party that fails to give Notice to Contractor waives its lien rights. Notice must be sent by registered or certified mail or statutory overnight delivery.

Required Notice and Timing: A lien claimant *may* file a preliminary notice of lien rights. If a preliminary notice is filed, then a subsequent contractor's or owner's affidavit that the claimant has been paid or has waived its lien rights will not dissolve the lien. For a valid preliminary notice:

- The claimant must file notice within 30 days after furnishing any materials, labor or services for which a lien may be claimed. The claimant must file notice with the Clerk of Superior Court in the county in which the real estate is located.
- All claimants, with the exception of the contractor, must send a copy of the preliminary notice by registered or certified mail or statutory overnight delivery to the contractor or owner within seven days of filing notice.

The preliminary notice expires three months after the date upon which the last labor, materials or services were furnished on the project.

Lien Filing: A person must file a Claim of Lien in the office of the Clerk of Superior Court in the county in which the property is located within 90 days after either:

- Completion of the claimant's work.
- The last date that lienable materials or services were furnished. Weekends and holidays extend the deadline to the next business day.

The lien must state:

- The amount due.*
- The date upon which the amount became due.
- The name of the lien claimant.
- The name of the present owner.
- A description of the property.
- Notice in 12 point **BOLD FACE CAPITALS** that the lien expires in 395 days if no Notice of Action filed.

The Claim of Lien must comply in substance with the statutory form.

Within two business days of filing the Claim of Lien, the lien claimant must send the Claim of Lien by registered or certified mail to the owner or contractor.

If, after preliminary notice of the lien is filed, the owner or contractor demands that a Claim of Lien be filed, then the claimant must file a Claim of Lien within 10 days of the mailing of the demand, or preliminary notice is dissolved.

Lawsuit Filing: The lien claimant must file a lawsuit, arbitration, or proof of claim in bankruptcy court within 365 days of date Claim of Lien filed. Within 30 days after filing “such an action,” the lien claimant must file a Notice of Action with the Clerk of Superior Court of the county where the lien was filed.

Lien Bonds: The owner or contractor may discharge a lien by filing a bond for double the amount claimed, with the condition that the lienholder file suit within 12 months of the date that the claim becomes due.

Contractual Waivers: Lien rights cannot be waived prior to performing any work. A pay-if-paid clause does not waive any lien rights.

Waivers After Commencement of Work:

1. Lien rights may be waived by signing a lien waiver if the lien claimant does not file an Affidavit of Nonpayment within 60 days of providing the waiver. Waivers are not permitted in advance of the furnishing of labor, services or materials.

2. The owner/contractor may demand an interim waiver and release upon payment, and an unconditional waiver and release upon final payment, with the following conditions:

The waiver and release must substantially comply with the form provided by the statute. If payment is not received by the claimant within sixty (60) days of execution of interim lien waiver, the lien claimant must file an Affidavit of Non-Payment or the lien waiver becomes binding, despite nonpayment. File with Superior Court where property is located. Send copy by registered or certified mail or statutory overnight delivery to owner of property within seven (7) days and to contractor’s address on Notice of Commencement.

3. A sworn written statement from the contractor, owner or person other than the owner or contractor (at whose insistence labor, services or materials were furnished) that the agreed-upon price or reasonable

value has been paid or waived in writing will dissolve the lien, if such a statement was obtained or given as part of a transaction either:

- Involving the conveyance of title in a *bona fide* sale.
- Involving a loan in which real estate is to secure repayment of the loan.
- When final disbursement of the contract price is made by the owner to the contractor, and there was no recorded preliminary notice or Claim of Lien at the time of settlement of the transaction.

Notice of Contest of Lien: Allows the owner or contractor to shorten the time in which a lien action must be commenced. File with the Clerk of Superior Court in county where project is located. Send copy to lien claimant by registered or certified mail within seven days. Lien Claimant must commence action within 60 days.

Special Warnings:

1. If, after preliminary notice of lien is filed, the owner or contractor demands that a Claim of Lien be filed, then the claimant must file a Claim of Lien within 10 days of the mailing of the demand, or preliminary notice is dissolved.

2. When the lien claimant’s contract with a contractor or subcontractor has a pay-if-paid clause, Georgia law relieves the claimant of the necessity of obtaining judgment against the contractor or subcontractor as a prerequisite to enforcing a lien against the owner *under certain circumstances*.

Public Work

Rights Available: Lawsuit on a Payment Bond.

Who May Claim: Laborers, materialmen, subcontractors and suppliers.

Type/Amount of Bond: Performance and Payment Bonds are required for all projects that are more than \$100,000.00. However, local government has the discretion to require Performance and Payment Bonds when the contract price is less than \$100,000.00. Bonds must be for the amount of the contract price. Performance and payment bonds are required for Georgia DOT projects that are more than \$50,000.00.

Notice of Commencement: A Notice of Commencement must be filed by the owner, the agent of the owner or the contractor no later than 15 days

after the prime contractor physically commences work on the property.

Commencement also must be posted at the project site. The owner, its agent or the contractor is required to give a copy of the Notice of Commencement to any person who makes a written request. The copy must be given within 10 calendar days of receipt of the written request for a copy.

Notice to Contractor: Any person providing labor, services or materials for a construction project who does not have a contract with the prime contractor *must* give a Notice to Contractor within 30 days following the first delivery of labor, services or materials to the project, whichever is late. The Notice to Contractor must be given to the owner or the owner's agent and to the contractor at the addresses set forth in the notice of commencement. A party that fails to give a notice to the contractor waives its bond rights. Notice must be sent by certified mail or statutory overnight delivery.

Contractual Waivers: Bond rights cannot be waived in a contract before performing any work. A surety in Georgia can, however, assert a pay-if-paid provision as a defense. Therefore, the best practice is to assume that a pay-if-paid clause may waive bond rights.

The Notice of Commencement must be filed with the Clerk of the Superior Court in the county in which the project is located. A copy of the Notice of

Waivers After Commencement of Work: The best practice is to assume that bond rights may be waived after commencement of the work for the amount of the waiver. Therefore, the best practice is to assume that a pay-if-paid clause may waive bond rights.

Required Notice and Timing: There is no notice requirement for persons with a direct contract with the bonded contractor. Claimants not under direct contract with the contractor must give the contractor written notice of claim within 90 days after labor or materials were furnished.

Lawsuit Filing: Lawsuit must be filed no sooner than 90 days from last date upon which labor or materials were furnished, and no later than one year after completion of the contract and acceptance of the work by the public authority.

Lien Available: No.

Hawaii

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics and Materialmen Lien.

Who May Claim: Anyone who furnishes labor or material in the improvement of real property. Hawaii Revised Statutes (hereinafter “HRS”) § 507-42. “Furnishing materials” includes transportation of materials to the site of the improvement and providing tools, appliances and machinery (other than hand tools). HRS § 507-41. Provision of engineering or architectural services can form the basis for a lien claim if the designs were actually incorporated into the improvement. A specialty contractor who performs licensed and unlicensed work can bring an action to recover payment for the licensed portion of the work. Unlicensed contractors or subcontractors cannot bring a lien claim, nor can subcontractors or sub-subcontractors contracting with unlicensed contractors, however, some courts have recognized exceptions to this general rule. The lien attaches to the owner’s interest in the improvement to real property. An “owner” can be a fee owner, a lessee for a term of years, or a vendee under a contract for the purchase of real property. The fee simple interest of an owner-lessee can also be the subject of a lien claim brought by a lienor who contracts with the lessee if the lease terms require the improvement of the real property. HRS § 507-41. There is no lien against construction on common elements in a completed condominium. HRS § 514B-43. A residential homeowner can contest a lien if the claim was generated due to “unreasonable advancement of credit,” as determined by a judge, or if the contractor failed to provide the required written homeowner disclosures in the parties’ construction contract. HRS § 507-49(a).

Required Notice and Timing: The lienor must file an Application For A Lien not later than 45 calendar days after the date of completion of the improvement against which it is filed. HRS § 507-43(b). “Date of completion” means the date that the owner or prime contractor publishes notice that the project has been completed or abandoned and an affidavit of the publication. HRS § 507-43(f). If no notice is published within one year of actual completion or abandonment, then the date of completion is deemed to be one year after actual completion or abandonment. HRS § 507-43(g). The Application must be returnable not less than three nor more than 10 days after

service of the Application. HRS § 507-43(a). At the return hearing or thereafter, the court will conduct a hearing to determine whether probable cause exists for the lien to attach to the owner’s interest. HRS § 507-43(a). The Application must be served upon the owner and a joint tenant, persons or parties with interest in the property and persons or parties who contracted for the improvements if other than the owner of the property or any person with an interest therein. HRS § 507-43(a). Mortgagees, the holders of encumbrances, and the surety of the prime contractor may also be named. If the amount of the lien is disputed or a set-off asserted, the court must hear and receive all admissible evidence offered and shall only permit the attachment of a lien in the net amount that the court determines is the reasonable probable outcome of any such dispute. HRS § 507-43(a). The Application must include the amount of the claim, a list of the labor/materials furnished, a sufficient description of the property, and any other matter necessary to a clear understanding of the claim. HRS § 507-43(a).

Lien Filing: If an Order Directing Lien To Attach is obtained, then the lienor must file a certified copy in the office of the assistant registrar within seven days after the entry to preserve the lienor’s rights against subsequent encumbrances and purchasers. HRS § 507(b). The lien has equal priority with other mechanics and materialmen liens, and higher priority than other liens not filed prior to “the time of visible commencement of operation,” but has no priority over government liens, mortgages acquired for the purposes of constructing the improvements or recorded judgment liens. HRS § 507-46. This must be filed either by the person who actually performed, the performer’s legal representative or the director of labor and employment (pursuant to statutory requirements). Additionally, this must be filed in the circuit where the property is located. HRS § 507-46.

Suit Filing: If a suit to foreclose the lien is not commenced within three months after the Order Directing Lien To Attach is entered, then the lien expires. HRS § 507-44(e).

Lien Bonds: Any Mechanics and Materialmen Lien may be discharged at any time by a respondent depositing cash or filing a bond in the amount of twice the amount of the sum for which the claim for lien is filed. The undertaking of cash or bond discharge must be conditioned on the

payment of any sum for which the lienor may obtain judgment on the lienor's claim. HRS § 507-45.

Contractual Waivers: Waiver of lien rights in a contract prior to commencement of work is presumably valid in the absence of case law. Implied waivers by subcontractors based on pay-if-paid terms are presumably invalid for lack of clear and unequivocal waiver, in the absence of case law.

Waivers After Commencement of Work: Waivers signed after commencement of work are presumably valid in the absence of case law, so care should be taken to avoid waiver of lien rights for unpaid retainage, unbilled changes or work not yet performed.

Note: Such liens are not encumbered by lessors, vendors, remaindermen or life tenants on the site.

Public Work

Rights Available: Suit against the prime contractor and surety based upon the prime contractor's payment bond.

Who May Claim: Persons supplying labor or materials "to the contractor" for the scope of work in the prime contract, and who have not been paid amounts due therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or material furnished. HRS § 103D-324(d). It is unclear whether bond claimants must have a contractual relationship with the prime contractor to bring a bond action. The definition of the provision of labor and materials is the same as the expansive definition provided in Hawaii's lien statute referenced above. HRS § 103D-324(e).

Type/Amount of Bond: Persons supplying labor or materials may institute an action for the amount, or balance thereof, unpaid at the time of the institution of the action against the contractor and its sureties. This will subsequently be adjusted for change orders to the extent that the contract amount is greater than \$25,000, payments made by the contractor or modifications to the contract that increase the amount. However, the policy board may adopt rules that authorize the head of the purchasing agency to reduce the amount of performance and payment bonds. HRS § 103D-324(d).

Suit Filing: Claimant must give written notice by certified mail, registered mail or another manner authorized by law, to the prime contractor and surety no more than 90 days after the last date on which claimant provided labor/materials. The notice must state "with substantial accuracy" the amount claimed and the name of the party to whom the labor/materials were furnished or supplied. Claimant must file suit against the surety, prime contractor and other parties no more than one year after the last date when the labor/materials were provided, in the circuit where the project is located. HRS § 103D-324(d).

Contractual Waivers: Waiver of bond rights in a contract prior to commencement of work is presumably invalid in the absence of case law. Subcontractors' implied waivers based on pay-if-paid terms are also presumably invalid for lack of clear and unequivocal waiver.

Waivers After Commencement of Work: Waivers signed after commencement of work are presumably valid in the absence of case law, so care should be taken to avoid waiver of bond rights for unpaid retainage, unbilled changes, or work not yet performed.

Lien Available: No.

Idaho

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien; suit on a lien bond.

Who May Claim: Every person otherwise unsecured performing labor, renting or leasing equipment, or furnishing materials, or a professional engineer or licensed architect if requested by the owner or its agent, contractors and subcontractors. Idaho Code Ann. § 45-501.

Required Notice and Timing: A copy of the lien must be delivered or mailed by certified mail to the owner or reputed owner within five business days following the filing of the lien. Idaho Code Ann. § 45-507. For residential projects (up to a fourplex), the prime contractor must notify the owner prior to entering into any contract over \$2,000 of certain rights of the owner, including the right to:

- a) Obtain lien waivers from any subcontractors providing services or materials to the prime contractor.
- b) Proof that the prime contractor has a general liability insurance policy, as required by Idaho law.
- c) Information for the opportunity to purchase an extended policy of title insurance covering certain unfiled or unrecorded liens.
- d) Require, at the homeowner's or residential real property purchaser's expense, a surety bond in an amount up to the value of the construction project. Idaho Code Ann. § 45-525.

Prior to closing or final payment to the prime contractor, the prime contractor must identify to the owner all subcontractors, materialmen, and rental equipment providers with which the prime contractor has entered into contracts of over \$500. The subcontractors, materialmen and rental equipment providers identified are authorized to disclose balances owed to the owner. Idaho Code Ann. § 45-525.

Lien Filing: Lien claimants have 90 days after the date of the claimant's last work or furnishing of materials to file a lien. Idaho Code Ann. § 45-507.

Precedence of the liens are as follows:

- a) All laborers (other than contractors or subcontractors).

- b) All materialmen (other than contractors and subcontractors).
- c) Subcontractors.
- d) The original contractor.
- e) All professional engineers and licensed surveyors. Idaho Code Ann. § 45-506.

Suit Filing: Suit must be filed within six months after the lien has been filed. Idaho Code Ann. § 45-510. When amending a complaint, the "filing of a motion to amend a complaint, rather than the filing of the amended complaint itself, commences proceedings." *English v. Taylor*, No. 42947, 2016 Ida. LEXIS 202, at *19 (July 12, 2016).

Lien Bonds: A bond equal to 1.5 times the lien may be filed by the debtor of the lien claimant or any interested party before or after the lien foreclosure suit is filed. Idaho Code Ann. § 45-519.

Contractual Waivers: Lien rights can be waived in a contract before performing any work, but only if it is clear there is consideration for the waiver. Pay-if-paid clauses may also prospectively waive lien rights, but there must be consideration for the waiver.

Waivers After Commencement of Work: Lien rights may be waived prospectively, after starting work, for the remainder of the project including retainage, unbilled extra work and unresolved claims, but only if there is specific consideration for the waiver. Waivers can be for work performed through the date the lien waiver is signed, again if there is consideration for the lien waiver. Lien waivers must be supported by consideration, so a lien waiver must be conditioned on payment.

Special Warning: A lien against the lessor's interest is not permitted if the work is ordered by a tenant or lessee of the property without the authorization of the lessor. Attorney fees are allowed as costs of suit.

If such action is sought, the only interest subject to the lien is the interest of the person in control of the immovable items and property, who is not the full owner.

In filing a lawsuit on a lien, be sure to name all lenders or other lien claimants, as the person entitled to a lien may lose its rights against parties that are not named,

even if the lawsuit is timely filed. *See Parkwest Homes, LLC v. Barnson*, 2013 Ida. LEXIS 132 (Idaho 2013).

Public Work

Available: Suit on a payment bond or suit against a public body that fails to obtain the required bond. Idaho Code Ann. § 54-1927.

Who May Claim: Every person, association, co-partnership or corporation which supplies labor or materials, or rents or leases or otherwise supplies equipment to the contractor or a subcontractor. Idaho Code Ann. § 54-1927.

Type/Amount of Bond: Payment and performance bonds not less than 85 percent of the contract amount. Idaho Code Ann. § 54-1926.

Required Notice and Timing: Second-tier subcontractors and material suppliers — i.e., those that have no express or implied contractual relationship with the prime contractor — must give notice to the prime contractor within 90 days of last performance or date of supply. Idaho Code Ann. § 54-1927.

Notice must be given by certified or registered mail. There is no notice requirement for anyone having a direct contractual relationship, either express or implied, with the prime contractor.

Suit Filing: All suits must be filed within one year after last performance or supplying of materials, with

the exception of subcontractors, which have one year from the date that final payment was due. Suits against a public body must be filed within one year of providing the labor or materials. Idaho Code Ann. § 54-1927.

Retainage: Retainage is limited to 5 percent of total contract amount as to contractor and subcontractors if a performance or payment bond in excess of 50 percent of the total contract price is required. Retainage must be released for portions of work that are accepted within 30 days of acceptance. Subcontractors must be paid retainage within 30 days after completion of subcontract. Idaho Code Ann. § 54-1926.

Contractual Waivers: The best practice is to assume bond rights can be waived in a contract before performing any work and prospectively under a pay-if-paid clause.

Waivers After Commencement of Work: The best practice is to assume bond rights may be waived prospectively, after starting work, for the remainder of the project, including for retainage, unbilled extra work or unresolved claims. A waiver may be effective through the date it is signed, rather than the date of last work, unless the waiver clearly provides when it is effective. The best practice is to assume waivers of bond rights need not be conditioned on payment.

Special Warning: The prevailing party is awarded reasonable attorney fees. Idaho Code Ann. § 54-1929.

Lien Available: No.

Illinois

By Michael J. Roth, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: The contractor, subcontractor, materialman and a lessor of construction equipment.

Required Notice and Timing:

1. Prime Contractor: No notice requirements.

2. Subcontractor/materialman may give written notice of a claim to the owner and lender at any time after the contract is entered into, but must give notice to the owner and lender within 90 days after last performance. Notice must be sent by registered or certified mail, return receipt requested, or by personal delivery. Then, the subcontractor/materialman must wait 10 days before filing a lien or suit. Notice should contain the amount of the claim, the identity of the parties and a description of the property. If a subcontractor/materialman fails to deliver a 90-day notice, it may be able to rely on an amount shown as then due in a prime contractor's sworn statement given to the owner.

Lien Filing: A lien may be filed at any time after the contract is entered into, but must be filed within four months after last performance (as against third parties and subsequent owners), or within two years after last performance (as against the original owner). The recorded lien claim must include the information contained in the 90-day notice and must identify the last date of performance.

Suit Filing: Suit must be filed within two years after last performance. The costs of the suit may be taxed against the losing party. Attorney fees may be assessed against the owner that failed to pay in full without just cause.

Lien Bonds: An owner or other interested party may file a petition with the court to substitute a lien bond for the property subject to the lien claim. The bond must be issued by an approved surety company meeting certain financial tests and the amount of the bond must equal 175 percent of the amount of the lien claim, exclusive of interest and attorney fees.

Milestone Alerts: Contractor must file a lien within four months from last date of performance in order to be effective against third parties and subsequent owners. In order to be effective against the original

owner, a contractor must bring suit within two years after last performance.

Subcontractor/materialman must give notice of a claim to owner and lender within 90 days after last date of performance in order to be effective against original owner and lender, and must file lien within four months after last date of performance in order to be effective against third parties and subsequent owners.

Contractual Waivers: An agreement to waive lien rights in advance is prohibited if such agreement is in anticipation of and in consideration for the awarding of a contract to improve real estate.

Illinois statutes provide that subordination of mechanic lien rights is void as against public policy, except that a construction mortgagee can request subordination to the lien of the construction mortgage if the agreement to subordinate is made after more than 50 percent of the construction loan has been disbursed.

Any provision in a contract conditioning payment by a contractor to a subcontractor or supplier upon receipt of payment from any other party, including a private owner, shall not be a defense by the contractor in a lien claim action.

Waivers After Commencement of Work: As long as an agreement is not entered into in anticipation of and in consideration for the awarding of a contract to improve real estate, a waiver may be given prospectively for work yet to be completed or payments yet to be made and will be enforceable. Waivers may, but are not required to, be conditioned upon payment; no such condition is deemed to exist unless specifically stated in the waiver.

Any contractor (or if the contractor is a corporation, any officer or employee thereof) who with intent to defraud induces a subcontractor to execute and deliver a waiver for the purpose of enabling the contractor to obtain payment under its contract and upon the representation that the contractor will, from such payment, pay the subcontractor the amount due the subcontractor, and who willfully fails to pay the subcontractor in full within 30 days after such payment shall be guilty of a Class A misdemeanor.

Special Warning: For owner-occupied single-family residences only, the subcontractor/materialman must

notify the owner of a potential lien within 60 days from the first date of performance.

Public Work

Rights Available: Suit on a payment bond and lien on unexpended funds for project.

Who May Claim: Subcontractor/materialman.

Type/Amount of Bond: The contractor may choose the type of bond, irrevocable letter of credit or letter of commitment in an amount equal to or greater than 110 percent of the bid. This is subject to the approval of the public authority. There is no statutory minimum.

Required Notice and Timing: A person must send a written verified notice of bond claim to the public authority within 180 days after the date of last work, which must be personally delivered or sent by certified mail, return receipt requested. The notice must contain certain information specified by the statute. Also, a copy of the notice must be sent to the contractor within 10 days thereafter.

Suit Filing: Suit may not be brought unless the required notice has been served as described above, and in any case may not be brought more than one year after the last date of work.

Lien Available: Yes, there is a lien on unexpended funds due the contractor. To preserve the lien, written notice of the potential claim, including a sworn statement identifying the contract, the work performed and the total amount due and unpaid, must be sent to the public authority and contractor prior to the payment of funds. Notice must be provided to the clerk or secretary, as the case may be, of the local government unit.

Contractor can force the subcontractor to file its claim for lien by giving notice to subcontractor and if subcontractor fails to file its lien claim within 30 days of notice, the lien is lost. The suit must be filed within 90 days after filing the notice of claim. The suit must make the prime contractor and any intermediate subcontractor defendants. Notice of the suit must be sent to the public authority within 10 days of filing the complaint. Also, when the state is the authority, the suit

must be filed not less than 15 days before the date that the state appropriation (from which the money is to be paid) will lapse.

Contractual Waivers:

Lien Rights:

An agreement to waive lien rights in advance is prohibited if such agreement is in anticipation of and in consideration for the awarding of a contract to improve real estate.

Any provision in a contract conditioning payment by a contractor to a subcontractor or supplier upon receipt of payment from any other party, including a public owner, shall not be a defense by the contractor in a lien claim action.

Bond Rights:

It is unlikely that a contractual waiver of bond rights will be enforceable. Such contractual waiver may, however, be enforceable where there is specific and clearly recited consideration for such waiver or where the party waiving such rights is an indemnitor of the bonding company.

A pay-if-paid clause will not operate to waive a party's bond rights.

Waivers After Commencement of Work:

Lien Rights:

As long as an agreement is not entered into in anticipation of and in consideration for the awarding of a contract to improve real estate, a waiver may be given prospectively for work yet to be completed or payments yet to be made and will be enforceable. Waivers may, but are not required to, be conditioned upon payment; no such condition is deemed to exist unless specifically stated in the waiver.

Bond Rights:

As with a contractual waiver of bond rights, a prospective waiver of bond rights is unlikely to be enforced. However, such waiver may be deemed valid where there is specific and clearly recited consideration therefor or where the party waiving such rights is an indemnitor of the bonding company.

Special Warnings: Note different requirements for service of notice on state projects and local government projects.

Indiana

By Mark A. Voigtmann, Esq.

Private Work

Rights Available: Mechanics lien / personal liability notice to the owner.

Who May Claim: The contractor, subcontractors, materialmen, lessors of equipment and laborers. Construction managers that are not also constructors are not entitled to liens.

Required Notice and Timing:

1. *Residential projects:* Any person providing materials, labor services, equipment or machinery on credit for the original construction of a single- or double-family dwelling for the intended occupancy of the owner of the real estate or for the construction, alteration or repair of any real estate or improvements, must provide the owner with written notice of the delivery or work and of the existence of lien rights, and file a copy of the written notice with the county recorder, within 10 days from the date of first delivery or labor performed [32-28-3-1(i)].

2. Non-residential projects: No prior notice is required.

Lien Filing:

1. *Residential projects:* Lien must be filed with county recorder within 60 days after the last labor or materials were furnished by the person filing the lien [32-28-3-3(b)].

2. *Non-residential projects:* Lien must be filed with county recorder within 90 days after the last labor or materials were furnished by the person filing the lien [32-28-3-3(a)].

Suit Filing: Suit must be filed to foreclose a lien within one year after the lien is filed, or within 30 days after receipt of a written notice from the owner to commence suit [32-28-3-6, 32-28-3-10]. The one-year deadline may be extended upon the recording within that period of a written credit agreement [32-28-3-6(c)]. A lienholder sued by another lienholder in a foreclosure action is advised to file its foreclosure counterclaim and cross-claim within the one-year lien foreclosure deadline regardless of the date when the other foreclosure action was filed.

Lien Bonds: In proceedings to foreclose on a lien, the owner may compel the release of a lien from the

property by filing a bond assuring payment of any judgment [32-28-3-11].

Contractual Waivers:

1. Lien rights may not be contractually waived on most commercial construction projects (the exception is commercial utility projects). No-lien provisions appearing in commercial construction contracts are void [32-28-3-16]. Pay-if-paid and pay-when-paid clauses do not prevent the recording or foreclosing of liens on non-utility commercial projects [32-28-3-18].

2. Waivers of lien rights are permitted in written no-lien contracts between the owner and prime contractor for work on utility facilities used for the transmission of light, heat, power, etc., as long as a notice to that effect or the contract itself is filed with the county recorder no later than five days after execution of the no-lien contract [32-28-3-1(e-f)]. The impact of pay-if-paid clauses in the utility context is uncertain.

3. Such waivers are also permissible in connection with single and double-family residential construction provided that a written no-lien contract between the owner and prime contractor or a notice to that effect is filed with the county recorder no later than five days after the contract's execution [32-28-3-1(e-f)].

Waivers After Commencement of Work: While the language of the lien statute would certainly suggest that lien waivers before payment are ineffective, they are nonetheless used. Accordingly, the more conservative practice is to assume that such waivers have real consequences. One common practice is the use of "conditional" lien waivers that link the relinquishment of rights to the actual receipt of payment (even though arguably this protection duplicates what is already provided by the law).

Lien waivers would appear to be effective as to work done on residential and utility projects.

Special Warnings:

1. An award of attorney fees to a successful lien claimant is mandatory, [32-28-3-14]; *Clark v. Hunter*, 861 N.E.2d 1202 (Ind. Ct. App. 2007), except where the lien claimant is a subcontractor and the owner has paid the prime contractor in full.

2. Personal liability notices (retainage liens) to owners [32-28-3-9] can be filed at any time. Such claims may be made by subcontractors, materialmen and laborers, and are allowable on all sums due or those that may become due to the prime contractor by the owner. Serving such a notice makes the owner personally liable for all amounts paid to the prime contractor after the date of the notice.

3. The mortgage of a lender has priority over all liens recorded after the date the mortgage was recorded to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate, on non-residential and non-public utility projects [32-28-3-5(d)].

4. No contract for a non-residential and non-public utility project may require a subcontractor, materialman or laborer to waive lien rights or a claim on a payment bond before the subcontractor, materialman or laborer is paid for the labor or materials furnished [32-28-3-16].

5. When a contract for a non-residential and non-public utility project conditions the right of a subcontractor, materialman or laborer to receive payment upon its obligor's receipt of payment from a third person with whom the subcontractor, materialman or laborer does not have a contractual relationship (e.g., there is a "pay-when-paid" clause), that in no way limits, or is a defense to the right of a subcontractor, materialman or laborer to file or foreclose on a lien [32-28-3-18].

6. No contract for improvement to real estate may make the contract subject to the laws of any other state except Indiana or require that any litigation, arbitration or any other dispute resolution process take place in a state other than Indiana [32-28-3-17].

7. Where the underlying debt has been paid, owners may demand and receive a release of a lien within 15 days [32-28-6-1] or the contractor becomes liable for actual or liquidated damages.

8. Something other than "inactive or passive" consent of the landowner is required for a lien to attach to the real estate itself (e.g. as opposed to a leasehold interest in that real estate) *R.T.B.H, Inc. v. Simon Property Group*, 849 N.E.2d 764 (Ind. Ct. App. 2006).

9. Liens involving railroad corridor have somewhat different rules [32-28-3-12].

Public Work

Rights Available: There are four main public construction statutes, each with its own set of payment bond and retainage requirements. The statute applicable to local, school and municipal public works [36-1-12-3 *et seq.*] permits claims against payment bonds [36-1-12-13.1] and retainage [36-1-12-12]. Similar remedies are available to contractors working on state public works [either 4-13.6-7-1 *et seq.* or 5-16-5-1 *et seq.*] and state highway projects [8-23-9-1 *et seq.*]. The scope of the remedies available in each statutory context are intended to be similar [*see Alberici Contractors, Inc. v. Ohio Farmers Ins.*, 866 N.E.2d 740 (Ind. 2007)]. Consult counsel.

Who May Claim: First or second tier subcontractors or material suppliers, laborers or those furnishing services. *Alberici*, 866 N.E.2d 740. Equipment lessors are not included [*see Dow-Par Inc. v. Lee Corp.*, 644 N.E.2d 150 (Ind. App. 1994)].

Type/Amount of Bond:

1. A payment bond by the contractor in the amount of the contract price is required when the project cost is \$200,000 or more [36-1-12.13.1 (local and school projects); 4-13.6-7-6 (state projects other than universities with some exceptions); 5-16-5-2 (certain types of state projects, including universities)]. The state highway statute requires a combined performance/payment bond collectively called "performance bond" [8-23-9-8].

2. A performance bond by the contractor in the amount of the contract price is required when the project cost is \$200,000 or more [36-1-12-14 (local and school projects); 4-13.6-7-7 (state projects other than universities with some exceptions); 5-16-5.5-4 (certain types of state projects, including universities)]. The state highway statute requires a combined performance/payment bond collectively called "performance bond" [8-23-9-8]. The Indiana stadium and building authority has the flexibility not to require a performance bond in certain circumstances. [36-1-12-14].

Required Notice and Timing:

1. *Retainage claims:* The governing body is required to withhold final payment to the contractor until the contractor has paid, or provides proof of payment to, all subcontractors, materialmen and laborers. To receive payment from the retainage, a person must file a claim with the governing body within 60 days

of the last labor performed or materials supplied by the claimant [36-1-12-12 (local projects); 4-13.6-7-10 (state projects other than universities with some exceptions); 5-16-5-2 (certain state projects, including universities)] or within 60 days of the last labor performed or materials supplied, but no later than 30 days after final acceptance of the project [8-23-9 (state highway projects)].

2. *Payment bond claims:* A person must file notice of the amount owed with the governing body within 60 days of completion of the labor or service, or within 60 days after the last item of material was furnished [36-1-12-13.1 (local projects); 4-13.6-7-10 (state projects other than universities with some exceptions); 5-16-5-2 (certain state projects, including universities)] or on state highway projects within one year after acceptance of the labor, materials or services [8-23-9-10 (statute provides for combined performance/payment bond collectively called “performance bond”)].

Suit Filing:

1. *Retainage claims:* No deadline except 90-day time limitation for filing suit following notice of contract proceeds claim or its rejection [8-23-9-29 and 8-23-9-34 (state highway projects only)].

2. *Payment bond claims:* An action against the surety on a payment bond cannot be brought until 30 days

after filing with the governing body the notice of the amount owed. Suit must be filed within 60 days after the date of the final completion and acceptance of the project by the governing body [36-1-12-13.1 (local projects)] or within one year after final settlement with the contractor [4-13.6-7-11 (state projects other than universities with some exceptions)] or the earlier of 60 days after the date of final completion and acceptance of the public work if a retainage claim has been made, or one year following the completion of the work or service in question. [5-16-5-2 (certain state projects, including universities); *see Aetna Cas. & Sur. v. Mesker Steel*, 223 N.E.2d 768 (Ind. Ct. App. 1967)] or within 18 months after acceptance of the labor, materials or services on state highway projects [8-23-9-11 (statute provides for combined performance/payment bond collectively called “performance bond”)].

Contractual Waivers: The ability to waive the protection of a bond provided pursuant to statute has not been explicitly addressed.

Special Warning: With four main and a handful of ancillary statutory schemes for public construction existing in Indiana, the deadlines are not consistent between them and the boundaries between schemes may at times be unclear and can be a trap for the unwary. Consult counsel.

Iowa

By Donald W. Gregory, Esq.
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Private Work

Rights Available: Mechanics lien.

Who May Claim: Every person who furnishes materials (including rental) or performs labor upon any building or land for purposes of improvement, alteration or repair. Iowa Code § 572.2 No person who takes any collateral security on a contract either before the formation of the contract or during the progress of the work shall be entitled to a mechanics lien. Iowa Code § 572.3 (effective until July 1, 2018). The taking of security after completion of the work shall not affect the right to establish a mechanics lien unless that security is, by express agreement, given and received in lieu of such a lien. Iowa Code § 572.4.

Required Notice and Timing: A prime contractor who has or will contract with a subcontractor shall provide the owner with an owner notice in writing in boldface type of a minimum size of ten points as outlined in Iowa Code § 572.13. Failure to do so prevents remedy. The verified statement or account shall be filed with the clerk of the District Court by a principal contractor or subcontractor within 90 days from the date on which the last of the materials were furnished or the last of the labor was performed. When a lien is claimed upon a railway, the subcontractor has 90 days from the last day of the month in which the labor was performed or the materials were furnished to file. Iowa Code § 572.12. The clerk (read “claimant”) is to mail copies of the lien to the owner, agent or trustee.

Lien Filing: A subcontractor may perfect a mechanics lien by posting to the mechanics notice and lien registry internet site a verified statement of account of the demand due the person, after allowing all credits. The statement of account shall be posted by a prime contractor or subcontractor within two years and 90 days after the date on which the last of the material was furnished or the last of the labor was performed. Iowa Code § 572.9. Upon posting of the lien, the administrator shall mail a copy of the lien to the owner. Iowa Code 572.13B. A prime contractor or a subcontractor may perfect a mechanics lien beyond 90 days after the date on which the last of the material was furnished or the last of the labor was performed by posting a lien to the mechanics notice and lien registry

internet site and giving written notice thereof to the owner. Iowa Code § 572.10.

Special Notice — Owner-Occupied Dwellings: In the case of an owner-occupied dwelling, the original contractor must provide in the contract, or by separate notice provided no later than 10 days after the commencement of work, a warning that parties may have a lien claim against the property for unpaid contributions to the property. Otherwise, a perfected mechanics lien is enforceable only to the extent of the balance due from the owner to the principal contractor at the time of written notice. Subcontractors are required to provide separate notice of potential liens or find their recovery limited to the balance due from the owner to the principal contractor.

Special Notice — Sub-Subcontractors: A person who furnishes labor or material to a subcontractor is not entitled to a lien unless the person notifies the principal contractor in writing by ordinary mail of the name of the subcontractor to whom such labor or materials were furnished. The notice must be sent within 30 days of first furnishing of labor or materials. A certified statement of compliance must be provided to claim the lien. The requirements of this paragraph do not apply to residential property.

Suit Filing: An action to enforce a mechanics lien, or an action brought upon any bond given in lieu of a mechanics lien, may be commenced after the lien is perfected in the District Court in the county in which the property is located. Iowa Code § 572.24. An action to enforce a mechanics lien may be brought within two years from the expiration of the 90 days for filing the claim. Iowa Code § 572.27. It should still be filed within 90 days to have priority over other liens and purchasers for value, and to avoid the limit on funds still in the hands of the owner. However, the owner or original contractor may make a written demand that suit be commenced within 30 days or the lien is forfeited. Failure to commence foreclosure action within 30 days results in forfeiture of the lien. Iowa Code § 572.28.

Special Warning: Priority exists in the order of the filing of the statements or accounts. Iowa Code § 572.17. Liens of record prior to the time of the original commencement of work or improvement have priority over mechanics liens.

Public Work

Rights Available: Suit against a payment bond.

Who May Claim: Any person, firm or corporation that has, under a contract with the principal contractor or with subcontractors, performed labor or furnished materials, service or transportation in the construction of a public improvement project may have a claim. Iowa Code Ann. § 573.6. However, a person furnishing only materials to a subcontractor is not entitled to a claim against the retainage or bond. Iowa Code Ann. § 573.7.

Type/Amount of Bond: When a contract for the construction of a public improvement equals or exceeds \$25,000, it shall be accompanied by a bond. Iowa Code Ann. § 573.2. Bond may be required for contract prices less than \$25,000. A cash deposit may be used in lieu of bond.

The bond shall run to the public corporation in an amount not less than 75 percent of the contract price. However, in contracts in which no part of the contract price is paid until after completion of the improvement, the amount of the bond may be fixed at not less than 25 percent of the contract price. Iowa Code Ann. § 573.5.

Claim Filing: Claims may be filed with the proper public authority within 30 days after completion and final acceptance of the project. Claims may also be filed at any time after the 30-day period if the public corporation has not paid the full contract price, and if there is no action pending to adjudicate rights in and to the unpaid portion of the contract price (or unless specially permitted by court order otherwise). Iowa Code Ann. § 573.10.

Highway Improvements: In case of highway improvements by a county, the claims shall be filed with the county auditor of the county awarding the contract. However, in case of contracts on the farm-to-market highway system paid from the farm-to-market funds, claims shall be filed with the auditor of the Iowa Department of Transportation. Iowa Code Ann. § 573.8

Suit Filing: The public corporation, the principal contractor, any claimant for labor or materials who has filed a claim, or the surety on any bond given for the performance of the contract, may bring action in equity in the county in which the improvement is located. This action may be brought any time after 30 days, but not later than 60 days, following the completion and final acceptance of the improvement. Iowa Code Ann. § 573.16.

Lien Available: No.

Kansas

By Richard A. Stockenberg, Esq.
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Private Work

Rights Available: Mechanic's Lien.

Also, subcontractors without lien rights may under limited circumstances be able to assert claims directly against owners even though there is no privity of contract. *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166 (1996).

Who May Claim: 1. Contractors, but not their employees. *Isbell v. Payne*, 158 Kan. 298, 147 P.2d 718 (1944). 2. Subcontractors, sub-subcontractors, architects, and engineers. 3. Suppliers to contractors and subcontractors, but a supplier to a supplier has no lien rights. *J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738 (1988). 4. Likewise, a supplier to a sub-subcontractor has no lien rights. *Wichita Sheet Metal Supply, Inc. v. Dahlstrom and Ferrell Const. Co., Inc.*, 246 Kan. 557, 792 P.2d 1048 (Kan. 1990).

Liens are for labor, equipment, materials or supplies and the cost for their transportation that are (a) used or consumed for the improvement of real property (b) under contract with the owner or with the owner's trustee, agent, or spouse (c) at the site of the property subject to the lien. K.S.A. 60-1101. Liens are not available for waste removal. *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166 (1996). Citing this case, at least one bankruptcy court has suggested under some conditions "repairs" may not be lienable. *In re Fakhari*, 545 B.R. 303, 308 (Bankr. D. Kan. 2016).

To reach the interest of the owner/lessor where the contract is with the lessee, the lessee must be the agent of the lessor. *Kansas City Heartland Const. Co. v. Maggie Jones Southport Café, Inc.*, 250 Kan. 32, 824 P.2d 926 (1992).

Lien Filing:

1. Prime Contractor:

A contractor whose contract is directly with the owner has 4 months after the date upon which the last labor, material, equipment, or supplies were performed or furnished to file its lien. K.S.A. 60-1102.

The 4 month filing period may be extended to 5 months for non-residential property by filing a notice of extension in the office of the district court within the above 4 month period. The notice of extension must be mailed by certified and regular mail to the owner. K.S.A. 60-1102 (c).

2. Subcontractor/Sub-subcontractor/Supplier:

Lien statements must be filed within 3 months after the date equipment, material, or supplies were last furnished or labor performed by the claimant. K.S.A. 60-1103(a)(1). The 3 month time limit may be extended - for non-residential property only - to 5 months by filing a notice of extension in the office of the district court within the 3 month time limit. The notice of extension shall then be mailed by certified and regular mail to the prime contractor or construction manager and a copy to the owner by regular mail, if known. K.S.A. 60-1103(e).

The lien claimant must cause a copy of the lien statement to be personally served upon and mailed by restricted mail to (a) any one owner (b) any holder of a recorded equitable interest and (c) any party obligated to pay the lien. If the address of any one owner, or if such party is unknown and cannot be ascertained with reasonable diligence, the lien statement shall be posted conspicuously at the job site. K.S.A. 60-1103(c).

Rules for Residential Property:

A "warning statement," as prescribed in K.S.A. 60-1103a(c), is required to be given by a subcontractor/supplier to one of the owners of the residential property by mail. However, if the claimant possesses a copy of a statement signed and dated by any one owner stating that the prime contractor or the claimant had given to any one owner the prescribed warning statement then the lien claimant need not mail the warning statement.

For purposes of a lien by a sub-contractor/supplier on a pre-existing structure, "residential property" generally means an owner-occupied structure (residence) which is not used or intended to be used as a residence for more than two families or used for commercial purposes. For complete and accurate definitions, refer to K.S.A. 60-1103a(a).

A different section (K.S.A. 60-1103b) requires contractors/subcontractors/suppliers to file a “notice of intent to perform” before the owner takes title to “new residential property.” Improvements to a pre-existing structure or construction of any addition, garage or appurtenance thereto are not considered “new residential property.” A notice of intent to perform is no longer effective unless the contractor/subcontractor/supplier files its lien within 18 months from the date of filing of the notice of intent to perform. K.S.A. 60-1103b(f).

No action to foreclose a lien against residential real property may proceed or be entered against residential real property unless the holder of a recorded equitable interest was served with notice as required by K.S.A. 60-1103(c).

Priority: A mechanic’s lien will be preferred to all other liens and encumbrances which are after the commencement of the work. When there are multiple lien claimants the preference of the liens shall be measured by the commencement date of work by the earliest *unsatisfied* lien. K.S.A. 60-1101.

Suit Filing: A lien foreclosure action must be filed within one year from the time the lien statement was filed, but if a promissory note has been attached to the lien statement in lieu of an itemized statement, the action shall be commenced within one year from the maturity of the note. K.S.A. 60-1105.

Lien Bonds: Yes. *See* K.S.A. 60-1110. Either the contractor or the owner may execute a bond to the State of Kansas for the use of all lien claimants. The amount of the bond shall be a sum not less than the contract price. When the bond is approved/filed, no lien attaches and pre-existing liens are discharged. Suits on the bond have a 5 year period of limitation. A lien claimant does not have to prove that the lien was perfected; instead, the lien could have been perfected had the bond not been filed. *Bob Eldridge Const. Co. v. Pioneer Materials, Inc.*, 235 Kan. 599, 684 P.2d 355 (1984); *Wagner Interior Supply of Wichita, Inc. v. Dynamic Drywall, Inc.*, 389 P.3d 205 (Kan. 2017).

Contractual Waivers: A contract clause at any tier down to a sub-subcontractor purporting to waive, release, or extinguish statutory lien rights before work is performed is void and unenforceable. K.S.A. 16-1803(b)(2) and 16-1802(b).

A “pay-if-paid” clause is no defense to a lien or bond claim. K.S.A. 16-1803(c).

Waivers after Commencement of Work: Lien waivers are specifically permitted as contractual conditions for payment, but only to the extent of the amount of payment received. There is no distinction made between partial and final payments. K.S.A. 16-1803(b)(2).

Public Work

Rights Available: Mechanic’s liens may be filed against public property. However, once a statutory bond is filed and approved, no lien shall attach and if filed, shall be discharged. When a public owner enters into a contract in excess of \$100,000, the owner is required to obtain from its contractor a payment bond to protect subcontractors. K.S.A. 60-1111.

Query: For contracts below \$100,000 where there is no payment bond, do subcontractors have mechanic’s liens rights?

Who May Claim: Subcontractors, sub-subcontractors, and suppliers, but not suppliers to suppliers or suppliers to sub-subcontractors. *J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738 (1988); *Wichita Sheet Metal Supply, Inc. v. Dahlstrom and Ferrell Const. Co., Inc.*, 246 Kan. 557, 792 P.2d 1043 (Kan. 1990).

Type/Amount of Bond: A payment bond is required to be posted by the prime contractor for contracts greater than \$100,000 for “the purpose of making any public improvements” or constructing a “public building” (broadly defined). The bond is filed with the district court clerk of the county in which the improvement is made. When the bond is filed/approved, no lien can attach and any lien filed is discharged. K.S.A. 60-1111. As an alternative, the director of purchases may accept a certificate of deposit (“CD”) payable to the state in lieu of a bond. The CD shall be in an amount at least equal to the contract amount and shall be held for at least 6 months after acceptance. K.S.A. 60-1112.

For contracts for the highway system in excess of \$1,000 a payment bond is required to be filed with the Secretary of Transportation for not less than the amount of the contract. K.S.A. 68-410.

Suit Filing: Suit on a payment bond must be brought within 6 months of completion of the project, not the last day of the claimant’s work. K.S.A. 60-1111(b).

Suits on the highway bond must be brought within one year from completion of the contract, but first the claimant must, within 6 months after completion of the contract, file with the Secretary of Transportation an itemized statement of the amount of the indebtedness. K.S.A. 68-410.

Contractual Waivers: On public works projects (other than roads/bridges), contract clauses purporting to waive/release bond rights are void and unenforceable. K.S.A. 16-1903(b)(2).

Waivers after Commencement of Work: For public works projects (other than roads/bridges), a potential claimant cannot be required to waive bond rights for more than the amount of the payment received in exchange for the waiver. K.S.A. 16-1903(b)(2).

Kentucky

By John Dwyer, Jr., Esq.
and Lawrence J. Zielke, Esq.

Private Work

Rights Available: Mechanics and materialmen liens.

Who May Claim:

1. Any person performing work or supplying materials for construction under direct contract with the owner or its agent.
2. Subcontractors, laborers, materialmen and suppliers of rental equipment with no direct contract with the owner.
3. Any person performing work or supplying materials on additions or improvements to the leased land under contract with the lessee has a lien on the additions or improvements to the extent that they can be removed without injury to the previous additions or improvements to the property.
4. Any person who furnishes work, supplies and equipment to the lessee of oil, gas or other minerals leases has a lien on the lessee's interest in the property.
5. Engineers, architects, landscape architects, real estate brokers and surveyors who perform professional services related to a particular parcel and have a direct contract with the owner.

Required Notice and Timing: Following are the requirements for persons with no direct contract with the owner:

1. For work on property other than owner-occupied single- or double-family dwellings or contiguous agricultural property, the claimant must give notice in writing to the owner of his or her intent to file a lien, and amount for which lien will be claimed:
 - a. For claims that are less than \$1,000, notice must be given within 75 days of the last date upon which labor or materials were supplied on the project.
 - b. For claims that are \$1,000 or more, notice must be given within 120 days from the last date upon which labor or materials were supplied on the project.
2. When the work is in the nature of improvements to a single- or double-family dwelling or appurtenances or additions thereto, or improvements to the real property

for personal or agricultural use, or real property adjacent to and held by the same owner if the owner-occupant's dwelling is located thereon:

- a. A person must give notice of the delivery of materials, performance of labor, intent to hold property liable and the amount for which the lien will be claimed within 75 days of the last date that labor or materials were furnished on the project.
 - b. However, no lien exists if the owner-occupant of the single- or double-family dwelling (or otherwise described property) has, prior to the receipt of the notice, paid the contractor, subcontractor, architect or authorized agent for work performed or materials furnished.
3. Claimants can obtain priority over subsequent mortgages by filing notices of intent, even prior to performing work.

Lien Filing:

1. All lien claimants must file a subscribed and sworn statement of the amount due in the office of the county clerk in the county in which the project is located within six months after the claimant ceases to supply labor or materials. The statement must identify the property to be charged with the lien.
2. The lien shall not be for an amount in the aggregate greater than the contract price of the original contract. Should the aggregate amount of the liens exceed the price agreed upon between the original contractor and the owner, there shall be a *pro rata* distribution of the original contract price among the lienholders. (This appears to be an exception to the normal priority rules.)
3. The lien claimant must mail a copy of the statement of lien to the owner, by regular mail, within seven days after the statement is filed.

Suit Filing: Suit must be filed within 12 months after filing the statement of lien.

Lien Bonds: The owner, claimant of the property or any person contracting with the owner or claimant of such property for furnishing improvements or services for which a lien is created, or any subcontractor thereof, may, before a judgment is rendered enforcing the lien, file bond for double the amount of the lien claimed to discharge the lien. The action may then be commenced or proceed against the surety directly.

Contractual Waivers: Lien waivers are generally prohibited in Kentucky other than in construction contracts with regulated utilities, pursuant to KRS § 371.405.

Waivers After Commencement of Work: Partial lien waivers can bar lien rights for the amount of money that has been received or for all work performed through the date of the partial lien waiver. Final lien waivers can bar lien rights against the property *in toto* as of the date of the final lien waiver.

Special Warnings:

1. A person who does not have a direct contract with the owner waives his or her lien if he or she fails to give notice of intent to file a lien within the prescribed time period.
2. The lien expires 12 months after filing the statement of lien if no suit to enforce the lien is filed within that period.
3. If a copy of lien is not sent to the owner within seven days of filing, the lien is dissolved.
4. Liens must be “sworn” to, and not merely acknowledged, or they will be invalid.
5. KRS § 376.070 makes prime contractors directly liable to lower-tier subcontractors to the extent that the prime contractor has received money from the owner.
6. The lien must be released 30 days after satisfaction, or the lienholder may be subject to damages.

Privately Owned Public Work

Rights Available: Lien on privately-owned public improvements, not owned by the state, a subdivision thereof, a county, city or other governmental entity.

Who May Claim: Any person, firm or corporation that performs work or furnishes materials or supplies (including rental equipment) for the construction, maintenance or improvement of any canal, railroad, bridge, public highway or other public improvement by contract with the owner or by subcontract shall have a lien thereon and upon all the property and franchises of the owner. This lien shall be for the full contract price of the labor, materials and supplies furnished and shall be superior to all other liens created thereafter.

Required Notice and Timing:

1. Any person undertaking or expecting to furnish labor and materials or supplies may acquire a lien by filing in the clerk’s office (of each county in which he or she has undertaken to furnish labor and materials or supplies) a statement in writing that he or she is undertaking and expects to furnish labor and materials or supplies, and the price at which they are to be furnished. The lien for labor, materials or supplies furnished thereafter shall relate back and take effect from the date of the filing of the original statement. In all cases of original construction, the lien shall be prior to all liens theretofore or thereafter created, on the part so constructed and on no other part.
2. The lien shall not be for an amount in the aggregate greater than the contract price of the original contract. Should the aggregate amount of the liens exceed the price agreed upon between the original contractor and the owner, there shall be a *pro rata* distribution of the original contract price among the lienholders. (This appears to be an exception to the normal priority rules.)
3. The lien shall be dissolved unless the person who furnishes the labor and materials or supplies — within 30 days after the last day of the month in which any labor or materials or supplies were furnished — files a statement in the county clerk’s office of each county in which the labor and materials or supplies were furnished. The statement must be in writing (verified by affidavit of the claimant or his or her authorized agent or attorney), setting forth the following — the amount due for which the lien is claimed; the date upon which the labor, materials or supplies were last furnished; and the name of the canal, railroad, bridge, public highway or other public improvement upon which it is claimed.

Suit Filing: Any lien shall be enforced by proper proceedings in equity, to which other lienholders shall be made parties. The proceedings shall begin within six months from the filing of the claim in the county clerk’s office.

Lien Bonds: Liens can be bonded off in a manner similar to private liens.

Contractual Waivers: Lien waivers are generally prohibited in Kentucky other than in construction contracts with regulated utilities, pursuant to KRS § 371.405.

Special Warnings:

1. Although the language of the statute appears to make the initial statement filed with the county clerk

optional, there is case law indicating that it may be mandatory.

2. There is little modern law on the application of this section, and it is best paired with a lien under KRS § 376.010, as a potential way to attach more assets, and to avoid dispute over whether a private project is a public improvement.

Lien Available: Yes.

Publicly Owned Public Work

Rights Available: Lien on contract proceeds due prime contractor on projects built on property owned by the state, a subdivision or agency thereof, or by any county, city or municipality.

Who May Claim: Any person, firm or corporation that performs labor or furnishes materials or supplies (including rental equipment) for the construction, maintenance or improvement of any canal, railroad, bridge, public highway or other public improvement in the state by contract, express or implied, with the owner or by subcontract thereunder, shall have a lien on the funds due the contractor from the owner of the property improved. The lien shall be for the full contract price of labor, materials and supplies furnished and shall be superior to all other liens created thereafter.

Type/Amount of Bond: Performance and payment bonds are required when construction contracts are with the state, its agencies or other public agencies that have adopted the Kentucky Model Procurement Code, 45A.190.

Lien Bonds: Liens can be bonded off in a manner similar to private liens, thus releasing the contractor's funds.

Required Notice and Timing: For liens on funds due the contractor from the owner of the property improved (property owned by the state, county, municipality, etc.):

1. Any person undertaking or expecting to furnish labor and materials or supplies for the improvement of any public highway or the public property owned by the state or by any city, county or municipality, may file a statement in writing, even before commencing work, in the county clerk's office of the county in which the seat of government of the owner of the property is located. The statement should show that he or she has undertaken and expects to furnish labor and materials

or supplies and the price at which they are to be furnished.

2. Within the later of 60 days after the last day of the month in which any labor, materials or supplies are furnished, or by the date of substantial completion, the lien claimant must file a statement in the county clerk's office of each county in which labor and materials were furnished. The statement shall be verified by affidavit of the claimant or its attorney, setting forth the amount due for which the lien is claimed, the date on which labor and materials or supplies were last furnished, and the name of the public improvement upon which the lien is claimed.

3. Upon filing the statement of the lien, the claimant must deliver an attested copy to the public authority making the contract for improvement. Also, the claimant must file with the public authority a signed copy of a letter addressed to the contractor or subcontractor at its address given in the contract with a post office receipt showing that an attested copy of the lien statement has been sent by the lien claimant to the contractor or subcontractor by certified mail, return receipt requested, or by registered mail. Once these steps have been taken, the claimant shall have a lien superior to any lien subsequently perfected on any unpaid balance due the contractor under the contract of improvement.

Suit Filing:

1. When an attested copy of the lien statement and proof of the delivery of an attested copy are delivered to the public authority that has contracted for the construction or improvement of any bridge, public highway or other public property owned by a state, county, city or municipality, the public authority shall endorse on the attested copy the date of its receipt, file a copy, and deduct and withhold the amount thereof, plus the county clerk's filing fee, from any amount then due the contractor. If a sufficient amount is not then due the contractor, the public authority shall deduct and withhold the amount from the next payments, when due.

2. The contractor may file a written protest with the public authority within 30 days from the date of the delivery of the attested copy, putting in issue the correctness of the amount due the lien or the liability of the fund for payment thereof.

a. If no such protest is filed by the contractor, then the amount withheld shall be paid by the public authority to the lien claimant and charged to the amount of the contractor, whose payment shall operate as a *pro tanto* release of the public

authority for any claim of the contractor under the contract for the amount so paid.

- b. If the contractor files a written protest, then the public authority shall endorse the date of its receipt and promptly send written notice of the protest to the claimant, by certified mail, return receipt requested. The public authority shall not pay to the lien claimant any of the money withheld until authorized to do so by the contractor or until directed to do so by an order or judgment of the court.
3. If a protest is filed, the lien claimant must institute a suit for the enforcement of the lien and serve a summons on the public authority within 30 days after the written notice of the protest is mailed to the claimant. If suit is not instituted and summons served within 30 days, the lien automatically shall be released, and the funds withheld pursuant to the filing of the lien statement shall be released and promptly paid to the contractor. If the suit is filed and summons served within the time provided, the payment of the funds shall be withheld until it is ordered to be released or paid by an order or judgment of the court.
4. All suits for the enforcement of the lien on public funds shall be instituted in the Circuit Court of the county in which the improvements have been made, except for improvements to public universities, for which suit shall be instituted in the county containing the main campus of that university.

Contractual Waivers: Lien waivers generally are prohibited in Kentucky other than in construction contracts with regulated utilities, pursuant to KRS § 371.405.

Special Warnings: The suit filing provisions of the Kentucky statute are unique in that not only must suit be filed within 30 days, but also the summons must be served within the same 30-day period.

The filing in the county clerk's office of the county in which the seat of government of the property owner is located shall be considered constructive notice to the contractor of the filing of a lien claim. Liens must be "sworn" to, and not merely acknowledged, or they will be invalid.

If any person filed a statement asserting a lien against any contractor or any fund due the contract for an amount in excess of the amount actually due, the person filing the lien shall be liable to any person damaged thereby to the extent of such damage, including reasonable court costs and attorney fees incurred by the injured party. Any such claim for damages may be asserted and prosecuted in the county in which the lien statement was filed.

Lien Available: Yes.

Louisiana

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available:

A lien called a “privilege,” or else a claim against a payment bond if the owner timely files notice of contract and requires the contractor to give a payment and performance bond in the amount of:

- a. 100 percent of the contract price, if the contract is \$10,000 or less.
- b. 50 percent of the contract price, if the contract is \$10,000 to \$100,000, but not less than \$10,000.
- c. 33 percent of the contract price, but not less than \$50,000, for contracts between \$100,000 and \$1 million.
- d. 25 percent of the contract price, but not less than \$333,333, for contracts that are greater than \$1 million.

La. Rev. Stat. Ann. § 9:4812.

Who May Claim:

1. Persons with direct contract with the owner, including:

- a. Contractors for the price of their work.
- b. Subcontractors or laborers and employees of the contractor or subcontractor.
- c. Sellers of movable property that become component parts of immovable property, or are consumed in the machinery and equipment used at site of the immovable property.
- d. Lessors for the rent of movable property used at the site of the immovable property and leased to the owner by written contract.
- e. Registered or certified surveyors or engineers, or licensed architects or their professional subconsultants.

La. Rev. Stat. Ann. § 9:4801.

2. Persons who do not have a contract with the owner, including:

- a. Subcontractors, laborers or employees of the contractor or subcontractor.
- b. Sellers of movable property that was sold to contractors or subcontractors that becomes component parts of immovable property, or is consumed at the site of the immovable property, or is consumed in the machinery or equipment used at the site of the immovable property.
- c. Lessors, for rent of the movable property used at the site of the immovable property and leased to

the contractor or subcontractor by written contract.

- d. Prime consultant, registered or certified surveyors or engineers or their subconsultants employed by the contractor or subcontractor.

La. Rev. Stat. Ann. § 9:4802.

Required Notice and Timing:

1. The prime contractor must file written notice of contract before work begins if the stipulated or estimated price of the work exceeds \$25,000, or there is no privilege. La. Rev. Stat. Ann. § 9:4811. *Under the statutory definition, a subcontractor may be considered a prime contractor in some instances.* La. Rev. Stat. Ann. § 9:4803.

Notice should include:

- a. Signatures of the owner and contractor.
- b. Legal property description if immovable.
- c. Names and addresses of parties.
- d. The price for the work and, if not fixed, the method of calculation and an estimated cost.
- e. When payment is due.
- f. General terms of work to be done.

La. Rev. Stat. Ann. § 9:4811.

2. To maintain privilege against immovable property, the lessor of movables must deliver notice to the owner and contractor no more than 10 days after the movables are first placed on the site of the immovable property. The notice shall contain the name and mailing address of the lessor and lessee and a description sufficient to identify the moveable property placed at the site of the immovable for use in the work. The notice shall state the term of rental and terms of payment and shall be signed by the lessor and lessee. La. Rev. Stat. Ann. § 9:4802.

3. The subconsultant must give notice to the owner within 30 working days after the subconsultant enters into a written contract of employment. La. Rev. Stat. Ann. § 9:4802.

Notice must include:

- a. Name and address of prime consultant or professional subconsultant.
- b. Name and address of his employer.
- c. General nature of work to be performed.
4. The seller of movables shall deliver a notice of non-payment to the owner at least 10 days before filing a statement of its claim and privilege. The

notice shall be served by registered or certified mail, with return receipt requested. It shall contain:

- a. The name and address of the seller of movables.
- b. A general description of the materials provided.
- c. A description sufficient to identify the immovable property against which a lien may be claimed.
- d. A written statement of the seller's lien rights for the total amount owed, plus interest and recordation fees.

La. Rev. Stat. Ann. § 9:4802.

5. A notice of lien rights in statutory form must be signed by the owner for improvements to property occupied by the owner as a single-family dwelling. La. Rev. Stat. Ann. § 9:4815.

6. Before any person with a direct contractual relationship with a subcontractor, but no contractual relationship with the contract, has any right to action, said person must record his claim and give written notice to the contractor within 30 days from the recordation of notice of termination of the work, stating with substantial accuracy:

- a. The amount claimed.
- b. The name of the party to whom the material was furnished/supplied or service was done/performed.

La. Rev. Stat. Ann. § 9:4822.

Lien Filing:

1. If the owner has timely and properly filed notice of contract, the prime contractor that has a direct contract with the owner must file a lien within 60 days after filing the notice of termination of work. La. Rev. Stat. Ann. § 9:4822.

2. If the owner has timely and properly filed notice of contract, persons with no direct contract with the owner must:

- a. Deliver a copy of the statement of lien to the owner.
- b. File a statement of lien within 30 days after filing the notice of termination of the work.

La. Rev. Stat. Ann. § 9:4822.

3. For persons with no direct contract with the owner, if no notice of contract is filed and persons other than the prime contractor are under direct contract with the owner, the lien must be filed within 60 days after the later of:

- a. Filing the notice of termination of work.
- b. Substantial completion or abandonment of work (if the notice of termination is not filed).

La. Rev. Stat. Ann. § 9:4822.

4. The seller of movables used for residential purposes has 70 days. La. Rev. Stat. Ann. § 9:4822.

5. Registered or certified surveyors, engineers or licensed architects, or their professional subconsultants, must file a lien within 60 days after the later of:

- a. Filing the notice of termination of work for which the services giving rise to the lien were rendered.
- b. Substantial completion or abandonment of work (if the notice of termination was not filed).

La. Rev. Stat. Ann. § 9:4822.

Suit Filing: Suit must be filed within one year after the expiration date for filing a lien or privilege to preserve such.

- a. Further, delivery of the authorization to cancel a lien must come within 10 days after a written request for it is received by the person filing claim or privilege.
- b. The failure to file notice of pendency of action in accordance with Article 3752 of the Code of Civil Procedure does not extinguish the privilege against the owner, but makes any privilege as to third parties ineffective.

La. Rev. Stat. Ann. § 9:4833.

Lien Bonds: A lien bond may be filed in the amount of 125 percent of the amount of the claim. La. Rev. Stat. Ann. § 9:4835.

Contractual Waivers: Lien rights may be waived in a contract before commencement of work. Implied waivers by subcontractors based on pay-if-paid terms are presumably invalid for lack of clear intent to waive lien in the absence of case law.

Waivers After Commencement of Work: Waivers signed after commencement of work are valid, so care should be taken to avoid waiver of lien rights for unpaid retainage, unbilled changes or work not yet performed.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim:

1. Any person who, pursuant to the written and recorded contract with the owner, contractor or subcontractor on a public project, performs labor, furnishes materials or supplies for construction, furnishes materials or supplies for use in machines

used in construction, or transports such materials and supplies to a job site in connection with building of any public work.

2. Lessors of movable property used at site of immovable property and leased to owner by written contract.

3. Any architect, consulting engineer or professional subconsultants employed by the contractor or subcontractor in connection with building of any public work.

Type/Amount of Bond:

1. The amount of the bond shall not be less than the following amounts or percentages of the price of the work stipulated or estimated in the contract:

- a. If the price is not more than \$10,000, the amount of the bond shall be 100 percent of the price.
- b. If the price is more than \$10,000 but not more than \$100,000 the amount of the bond shall be 50 percent of the price, but not less than \$10,000.
- c. If the price is more than \$100,000 but not more than \$1,000,000 the amount of the bond shall be 33 1/3 percent of the price, but not less than \$50,000.
- d. If the price is more than \$1 million, the amount of the bond shall be 25 percent of the price, but not less than \$333,333.

La. Rev. Stat. § 9:4812.

Required Notice and Timing:

1. The lessor of movable property must deliver a copy of the lease to the owner no more than 10 days after the movables are first placed at the site of the immovable property for use in work.

- a. The claim or privilege granted the lessor of the movables is limited to and secures only the part of the rentals accruing during the time the movable is located at the site of the immovable for use in a work, and is no longer considered at the site when:
 - i. The work is substantially completed or abandoned.
 - ii. The notice of termination of the work is filed.
 - iii. The lessee has abandoned the movable, or is no longer necessary and the owner or contractor gives notice to the lessor of completion or abandonment.
- b. Also, a prime contractor must be notified of non-payment on or before 75 days from the last day of the month when the material was delivered, regardless of any circumstances.

2. Any claimant may file and record a sworn statement of claim within 45 days either:

- a. After recordation of acceptance of the work by the government authority.
- b. After notice of default of the contractor or subcontractor.

3. Any claimant under contract with the subcontractor, but lacking direct contract with contractor, must either file a statement of claim or give written notice of contract to the contractor within 45 days either:

- a. From recordation of the notice of acceptance of work by the governing authority.
- b. From notice by the owner of default.

La. Rev. Stat. § 38:2242.

4. Notice of *lis pendens* must be filed within one year after filing a statement of claim.

Suit Filing: If claimant has filed the required 45-day notice of claim, action must be brought against the surety/contractor within one year from recordation of acceptance of work or notice of contractor's default. Failure to pay within 30 days of amicable demand to the surety and principal shall entitle the claimant to the full amount of the claim and 10 percent of attorney fees. *See* La. Rev. Stat. § 38:2242.

Special Warning: The bond must be recorded no later than 30 days after work has begun, or the government authority is liable to the same extent as the surety would have been.

Contractual Waivers: Waiver of bond rights in a contract prior to commencement of work is presumably invalid in the absence of case law. Implied waivers by subcontractors based on pay-if-paid terms are presumably invalid for lack of clear and unequivocal waiver.

Waivers After Commencement of Work: Waivers signed after commencement of work are presumably valid in the absence of case law, so take care to avoid waiver of lien rights for unpaid retainage, unbilled changes or work not yet performed.

Lien Available: No.

Maine

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien. Me. Rev. Stat. tit. 10, § 3251.

Who May Claim:

1. Contractor, subcontractor, and materials vendor.
 2. Surveyor, engineer, and architect.
 3. Real estate licensee.
 4. Owner-renter or owner-lessor.
 5. Owner-supplier of equipment.
- Me. Rev. Stat. tit. 10, § 3251.

Required Notice and Timing: Contractor must file either notice of lien or notice that labor or materials will be furnished and that lien may be claimed in the registry of deeds prior to the sale to a *bona fide* purchaser. Me. Rev. Stat. tit. 10, § 3255(2).

Subcontractor and materials vendor must file either notice of lien or notice that labor or material will be furnished and that then may be claimed in the registry of deeds prior to the sale to a *bona fide* purchaser, whether the property is residential or commercial. With residential property, they also must give notice to the owner prior to the owner's payment to contractor in order to avoid the defense of payment. Me. Rev. Stat. tit. 10, § 3255.

Lien Filing:

1. For a contractor, filing is not required if the contract is with the owner. Otherwise, the contractor must file notice in the registry of deeds within 90 days of last performance.
2. A subcontractor or materials vendor must file a lien within 90 days of last performance or supply.

Suit Filing: Suit must be filed within 120 days of last performance or supply. If suit is not filed, lien will be lost. Me. Rev. Stat. tit. 10, § 3255.

Contractual Waivers: It is not decided whether lien rights can be waived by contract before work is performed, whether expressly or by implication of a "pay-if-paid" clause. In general, a private party's statutory right to lien can be waived, whether by contract or conduct inconsistent with that right, as long

as the waiver demonstrates voluntary and knowing relinquishment of it. Maine law generally permits parties to contract for what they desire, but a "pay-if-paid" clause might be challenged successfully using Prompt Payment Statute, Me. Rev. Stat. tit. 10, § 1118, which purports to limit circumstances when a prime contractor can rightfully withhold funds from a subcontractor. The mechanics lien statute permits owners to prevent subcontractors from liening property by notifying them in advance that owner will not be responsible for paying them.

Waivers After Commencement of Work: It is not decided whether lien rights can be waived prospectively for the remainder of a project after starting work. The extent and scope of a written waiver of lien, in terms of effective time period and affected payments, is determined by language of waiver. A waiver, whether prospective or retroactive, is likely to be found valid if it constitutes voluntary and knowing relinquishment of the statutory right to lien for the time period in question and for the payment claimed. Maine law permits parties to contract for what they want, generally, but see above discussion about the prompt payment statute. It is not decided whether lien waivers must be conditioned on payment, but courts presumably will expect *quid pro quo* to enforce a waiver.

Public Work

Rights Available: Mechanics lien against cities, towns, counties, school districts or other municipal corporations. State and political subdivision projects require payment and performance bonds for full amount of contract if more than \$125,000, Me. Rev. Stat. tit. 14, § 871, unless no bonded bidders. Me. Rev. Stat. tit. 5, § 1745. At discretion of State or other contracting authority, an irrevocable letter of credit is acceptable in lieu of payment or performance bonds.

Who May Claim:

1. Contractor, subcontractor and materials vendor.
2. Surveyor, engineer and architect.
3. Real estate licensee.
4. Owner-renter or owner-lessor.
5. Owner supplier of equipment.

Whoever performs labor or provides materials has mechanics lien rights. Whoever performs labor or

provides materials may sue on the payment bond whether or not it has a contract with the contractor, with proper notice. Me. Rev. Stat. tit. 14, § 871.

Required Notice and Timing: Mechanics lien notice given in Private Work section. Payment bond notice for subcontractor or materials vendor having no contract with the contractor must be served on contractor by certified or registered mail within 90 days of last performance or supply. Me. Rev. Stat. tit. 14, § 871.

Suit Filing: Mechanics lien suit filing given in Private Work section. Payment bond suit must be filed after 90 days, but within one year, of last performance or supply. If amount due on materials is undetermined, materials vendor may sue within one year from date on which final quantity estimates are determined. Suit filed in county where work is located. Me. Rev. Stat. tit. 14, § 871.

Contractual Waivers: Statute is silent as to the ability of a public contracting authority to waive liens or

bonding requirements, and no court decisions exist on the point. Statute for bonding phrased in mandatory terms. However, an irrevocable letter of credit is an option in lieu of a bond. If no bonded bidders for project, then the public owner may accept non-bonded contractors.

Waivers After Commencement of Work: Statute is silent as to the ability of a public contracting authority to waive liens or bonding requirements, and no court decisions exist on the point. Statute for bonding phrased in mandatory terms. However, letter of credit is an option in lieu of bond. If there are no bonded bidders for the project, then they may accept non-bonded contractors.

Lien Available: Yes, mechanics lien against cities, towns, counties, school districts or other municipal corporations. Liens are not available against property owned by the State of Maine.

Maryland

By Lawrence M. Prosen, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: All persons furnishing labor/materials on new buildings and all persons furnishing labor/materials on a building improved to 15 percent of its value. Md. Code, Real Property Art. §§ 9-102, see also, 9-111.

Required Notice and Timing: Claimants other than the prime contractor must serve the owner with a notice of intention to claim lien within 120 days of when the claimant last performed work or supplied materials. See Md. REAL PROPERTY Code Ann. § 9-104.

Lien Filing: Proceedings to “establish” and “enforce” a lien must be commenced in the Circuit Court for the county where the land is located. Md. Code, Real Property Art. § 9-105.

Suit Filing: Suit must be filed within 180 days after the claimant last performed work or furnished material. Claimants other than the prime contractor also must give the owner notice within 120 days of last work or furnishing materials, which notice must set forth certain statutorily prescribed information. Md. Code, Real Property Art. §§ 9-104, 9-105.

Milestone Alert: A lien must be “enforced” within one year of the day that the petition to establish the lien was first filed. Md. Code, Real Property Art. § 9-109.

Contractual Waivers: Lien rights may not be waived in an executory contract at any time, both for mechanics lien rights and to sue on a contractor’s bond. Similarly, provisions in an executory contract between a prime contractor and subcontractors which relates to construction and which conditions payment to the subcontractor on receipt of payment from an owner or other third party may not abrogate or waive the subcontractor’s right to claim a mechanics lien or sue on a bond.

Waivers After Commencement of Work: Note that the pre-commencement waivers are on an executory contract. It is not clear if a post-commencement work for an uncompleted project would constitute work under an “executory contract.” The best practice is to have contractors sign partial releases of lien as the subcontractor is paid for work. Generally, those partial

releases are enforceable in Maryland. Note that there have been instances where a subcontractor is in the midst of performance and it waives all rights, even for work not yet performed. The defense of waiver is routinely raised in such an instance.

Neither lien nor bond rights may be waived in executory contracts. An executory contract that conditions payment to the subcontractor upon receipt of payment from the owner, or any other third party (i.e., a pay-if-paid clause), may not waive or abrogate lien or bond rights.

Special Warning: A contractor has full rights against the owner (no amount limitations) for all private projects, with the exception of a single-family owner’s residence, where the owner’s liability may not exceed the sum due under the contract at the time that notice is given.

Also note that Maryland has a Construction Trust Fund Act available to unpaid contractors and subcontractors, located at Md. Code, Real Property Article §9-201 *et seq.*, but only on non-federal and other exempt contracts.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: Persons supplying labor or materials to the prime contractor, subcontractor or sub subcontractor. This reaches to third tier subcontractors/suppliers. Md. Code, State Finance and Procurement Art. § 17-108.

Type/Amount of Bond: A bond is mandatory for public construction projects that are more than \$100,000. Bonds are discretionary for the county, city or other subdivision of the state if between \$25,000 and \$100,000, as long as the security does not exceed 50 percent of the contract amount. Md. Code, State Finance and Procurement Art. § 17-103.

Required Notice and Timing: A party supplying labor or materials (defined as the “supplier”), which includes a sub subcontractor, which has a contract with the subcontractor, or with any sub subcontractors, must give written notice to the prime contractor within 90 days from the date upon which such claimant last performed work or furnished materials for which claim

is made. Md. Code, State Finance and Procurement Art. § 17-108.

Suit Filing: Suit must be filed after 90 days when claimant last performed work or furnished materials, but before the expiration of one year from the date of final acceptance of the work performed under the prime contract. Md. Code, State Finance and Procurement Art. §§ 17-108, 17-109.

Suit is to be filed where the contract executed and performed or where the contractor has its primary place of business (presumably in the State of Maryland). Md. Code, State Finance and Procurement Art. §17-109.

Contractual Waivers: The Maryland Mechanics Lien Act states that an executory contract cannot waive, among other things, suits/claims against a contractor's bond. It is not clear whether this "lien act" section applies to the state's Little Miller Act. Md. Code, State Finance and Procurement Art. § 17-108.

Similarly, Maryland's Mechanics Lien Act also states that contingent payment clauses are unenforceable in executory contracts, and it is not clear whether this clause applies to the state Little Miller Act.

Waivers After Commencement of Work: The Little Miller Act is silent on whether bond rights may be waived after starting work. The best practice is to assume that such rights may be waived, certainly to the extent of payment, but also for non-payment.

An executory contract between a *supplier* and prime contractor or subcontractor may not waive or require the *supplier* to waive its bond rights.

Special Warnings: Notice must state the amount being claimed (with substantial accuracy) and name the party to whom the material was furnished or for whom the labor was performed. It also must be sent by certified mail to the contractor's residence or where the contractor has an office or does business.

Lien Available: No.

Massachusetts

By James M. Anderson, Esq.

Private Work

Rights Available: Mechanics lien under Mass. General Laws, c. 254.

Who May Claim: A prime contractor, subcontractor, material supplier or licensed design professional (architect, engineer, surveyor, etc.) having a *written* contract enforceable under the laws of Massachusetts (c. 254, §§2, 2C, 2D, and 4). Design professionals who are sub-consultants to the owner's design professional (such as an engineer hired by the architect), must also be approved in writing by the owner.

Required Notice and Timing:

1. Upon substantial completion of a project, owners and prime contractors may jointly record in the Registry of Deeds where the property is located a Notice of Substantial Completion, in the form prescribed by c. 254, § 2A, and mail a copy of it by certified mail, return receipt requested, to all of the prime contractor's subcontractors and all others who have recorded a Notice of Contract or sent a Notice of Identification pursuant to c. 254, § 4 (*see below*). If the prime contract is terminated, the owner may record a Notice of Termination in the Registry, in the form prescribed by c. 254, § 2B, and mail a copy by certified mail, return receipt requested, to the prime contractor and to all subcontractors and material suppliers who have recorded a Notice of Contract. The prime contractor should in turn mail the Notice of Termination to all of its subcontractors and anyone who sent a Notice of Identification.

2. A prime contractor, subcontractor, material supplier or design professional may record a Notice of Contract in the Registry of Deeds where the property is located in the form prescribed by c. 254, § 2 (for prime contractors), § 2C (for design professionals contracting with the owner or owner's representative), § 2D (for design professionals who are sub-consultants to the owner's design professional), or § 4 (concerning subcontractors, material suppliers and design professionals contracting with a prime contractor or subcontractor). Contractors, subcontractors and suppliers must file this document no later than the *earliest* of: (a) 60 days after recording of Notice of Substantial Completion under c. 254, § 2A; (b) 90 days after recording of a Notice of Termination under c. 254, § 2B; or (c) 90 days after the last labor and/or

materials are furnished by anyone working under the prime contract. Design professionals contracting with the owner or who are sub-consultants to the owner's design professional must file the Notice of Contract by the *earlier* of (a) 60 days after recording of a Notice of Substantial Completion, or (b) 90 days after the last services are rendered by the claimant, by the design professional with whom he contracted or by anyone working under that design professional. For design professionals contracting with a prime contractor or subcontractor, filing deadlines are the same as outlined above for prime contractors and subcontractors. The furnishing of labor, materials and/or design services need not commence before a Notice of Contract is recorded.

3. Liens under c. 254, § 2D and § 4 do not become effective until the subcontractor/supplier/design professional gives *actual* notice to all owners of record that the Notice of Contract has been recorded.

Lien Filing:

1. Prime contractors, subcontractors, material suppliers and design professionals who have recorded a Notice of Contract pursuant § 4 must thereafter record in the Registry an accurate Statement of Account identifying the contract price, agreed upon and pending extras, credits, disputed amounts, adjusted contract price, payments received and amount currently due. The Statement of Account must be filed not later than the *earliest* of: (a) 90 days after the recording of a Notice of Substantial Completion; (b) 120 days after the recording of a Notice of Termination; or (c) 120 days after the last labor and/or materials are furnished by anyone working under the prime contract. Design professionals who file under § 2C or § 2D must record their Statement of Account within 30 days after the last day that they could have recorded their Notice of Contract (c. 254, § 8).

2. The amount of a first-tier subcontractor or material supplier's lien cannot exceed the amount due or to become due the prime contractor as of the date the owner receives notice of the lien's recording. The amount of a second-tier design professional's lien cannot exceed the amount due or to become due the owner's design professional as of the date the owner receives notice of that lien's recording. Liens of second-tier subcontractors and material suppliers cannot exceed the amount due or to become due under the subcontract between the prime contractor and the

subcontractor with whom the second-tier subcontractor/supplier is in privity, *unless* the second-tier sub or supplier has, within 30 days after commencement of its performance, sent the prime contractor a written notice of identification via certified mail, return receipt requested, in the form prescribed by c. 254, § 4.

Suit Filing: Unless a lien bond has been recorded (*see below*), a claimant must file suit to enforce its lien within 90 days after recording the Statement of Account (c. 254, § 11). An attested copy of the complaint must be recorded in the Registry within 30 days after suit is filed (c. 254, § 5).

Lien Bonds:

1. A lien prevention bond may be recorded in the Registry in the form set forth in c. 254, § 12, to prevent mechanics liens under § 2 or § 4 from attaching to the property. In this event, lienors must nevertheless record a Notice of Contract and Statement of Account prior to filing suit on the bond, which suit must be filed within 90 days after claimant files the Statement of Account. Failure to take any of these steps will bar all rights created by the bond.

2. A lien dissolution bond may be recorded in Registry in the form set forth c. 254, § 14, in a penal sum equal to the amount of the lien sought to be dissolved. Notice of the recording accompanied by a copy of the bond must be served on or delivered to the claimant. The claimant enforces the bond by commencing a civil action within 90 days after receipt of (a) the notice of the bond's recording, or (b) its filing of the Statement of Account, whichever is later.

Waivers: Contractual provisions and forms purporting to bar or waive the recording or enforcement of mechanics liens are against public policy, void and thus unenforceable. A prime contractor may deliver to the owner, with each requisition submitted after it has recorded a Notice of Contract, a Partial Waiver and Subordination of Lien pursuant to c. 254, § 32. These documents prevent a lender from withholding funds due to the lien, and maintain the prime contractor's priority to retainage. They do not affect a subcontractor's, material supplier's or design professional's lien.

Special Considerations:

1. Massachusetts courts strictly construe mechanics lien law requirements, thus placing strong emphasis on recording deadlines. Anyone wishing to record a mechanics lien should consult a Massachusetts construction law attorney knowledgeable in this area.

2. Except to the extent a prime contractor subordinates its lien pursuant to c. 254, § 32, mechanics liens have a priority at foreclosure over undisbursed mortgage proceeds, even if the mortgage was recorded before the lien, except that a mortgage recorded before a design professional's Notice of Contract under § 2C or § 2D has priority to the extent that the lien relates to professional services performed before the mortgage was recorded (c. 254, § 7). Because of this, and because liens by subcontractors, material suppliers and sub-consultant design professionals are limited to the amount due or to become due the prime contractor/owner's designer as of the date the owner receives notice of the lien's recording, the earlier a lien is filed, the more security it affords.

3. Regardless of who files first, liens of contractors, subcontractors and material suppliers have a priority over liens filed under § 2D and § 2C by design professionals. (c. 254, § 21).

4. A summary procedure for the quick dissolution of invalid liens is set forth in c. 254, § 15A.

Public Work

Rights Available: Suit against a payment bond under Mass. General Laws, c. 149, § 29.

Who May Claim: Subcontractors and material suppliers of any tier who furnish labor and/or materials to a public construction project.

Type/Amount of Bond: The prime contractor must post a payment bond for at least 50 percent of the contract price for all contracts over \$25,000. (G.L. c. 149, § 29). A prime contractor who is awarded a contract pursuant to G.L. c. 149, § 44E and a construction manager who is awarded a contract pursuant to G.L. c. 149A, § 6 must furnish a payment and performance bond in the full sum of the contract price. (G.L. c. 149 § 44E(4) and G.L. c. 149A, § 7(b)(4)).

Required Notice and Timing:

1. Claimants with a direct contractual relationship with the prime contractor must commence suit in Superior Court within one year after the day on which claimant last performed labor and/or furnished materials to the project.

2. A claimant contracting with a subcontractor, rather than with the prime contractor, must provide written notice of its claim to the prime contractor by certified

mail within 65 days after last performing labor and/or furnishing material, in addition to commencing suit within one year after such last performance/furnishing. See c. 149, § 29 for elements required in the written notice. If this claim is for specially fabricated materials not incorporated into the project, the prime contractor must be given additional written notice of the placement and amount of such order within 20 days after claimant receives final written approval of such materials.

Special Considerations:

1. Subcontractors on public building projects who receive their contracts by filing sub-bids with the awarding authority may be required to furnish a performance and payment bond to the prime contractor. This bond is for the prime contractor's

exclusive benefit. It affords no rights to sub-subcontractors and material suppliers, who can only recover on the prime contractor's bond. (G.L. c. 149, § 44F(3) and G.L. c. 149A, § 8(a)).

2. Successful claimants on the prime contractor's statutory payment bond are entitled to reasonable legal fees based on time spent and results accomplished for prosecuting such suits. See G.L. c. 149 § 29.

3. Upon motion of any party, a court shall advance for a speedy trial any claim for recovery on the prime contractor's payment bond. G.L. c. 149, § 29.

Lien Available: No.

Private Work

Rights Available: Construction lien.

Who May Claim: Prime contractors [MCL 570.1104(6)], subcontractors [MCL 570.1106(5)], suppliers, [MCL 570.1106(6)] and laborers [MCL 570.1104(8)].

Required Notice and Timing:

Non-residential owner or lessee: Must record Notice of Commencement before work starts, containing all information required by MCL 570.1108(2). Failure to record the notice of commencement in compliance with MCL 570.1108 extends the time within which a subcontractor, supplier or laborer must provide a Notice of Furnishing until 20 days after the notice of commencement has been recorded. [MCL 570.1108(10)] Not applicable to “residential structures.” [MCL 570.1108(18)].

Residential owner: Must provide a Notice of Commencement, containing all information required by MCL 570.1108a, to any contractor, subcontractor, supplier or laborer upon written request (certified mail). [MCL 570.1108(a)(1)] Failure to provide the Notice of Commencement shall operate to extend the time within which a subcontractor or supplier may provide Notice of Furnishing until 20 days after the notice of commencement has been furnished to the subcontractor [MCL 570.1108a(9)], and until 30 days after it is furnished to a laborer. [MCL 570.1108a(10)].

Prime contractor: Must provide sworn statement to the owner when requesting payment from owner. [MCL 570.1110(1)(a)] Subcontractors also are required to submit their payment requests to the prime contractor. [MCL 570.1110(3)] Both the prime contractor and the subcontractor must provide sworn statements when a demand statement is “made by or on behalf of the owner.” [MCL 570.1110(1)(b), (2)] Each must comply with the request before either will be entitled to receive any payment or to pursue a lien foreclosure suit. [MCL 570.1110(8), (9)] Residential projects must have a written contract that complies with MCL 570.1114 *et seq.*

Subcontractor:

1. Must provide a Notice of Furnishing within 20 days after furnishing the first labor or material, to the

owner’s designee and to the prime contractor, both named in the notice of commencement, at the addresses in the notice of commencement, either personally or by certified mail. [MCL 570.1109]

2. Must provide a sworn statement to the prime contractor when each payment is due from prime contractor, or when subcontractor requests payment from prime contractor, listing all subcontractors, suppliers, and laborers, in substantially the form set forth in MCL 570.1110. The subcontractor must also provide the sworn statements to owner on demand.

Laborer: Must provide a Notice of Furnishing within 30 days after wages were contractually due but not paid, to the owner’s designee and to the prime contractor, both named in the Notice of Commencement, at the addresses in the Notice of Commencement, either personally or by first-class mail. [MCL 570.1109(2)]

Lien Filing: Within 90 days after lien claimant’s last furnishing of labor or material for the improvement, a claim of lien must be recorded in the office of the register of deeds for each county where the real property for which the improvement was made is located. [MCL 570.1111(1)] Claim must be served within 15 days of recording on the owner’s designee named in the Notice of Commencement, either personally or by certified mail, return receipt requested. [MCL 570.1111(5)] The claimant must also serve, with the claim of lien, the proof of service of any required notice of furnishing. [MCL 570.1111(4)]

Suit Filing: An action to enforce a construction lien must be commenced in the circuit court for the county where the property is located. [MCL 1118(1)] The Construction Lien Act, MCL 570.1101 *et seq.*, provides a one-year statute of limitations for enforcing a lien claim. The limitation period begins to run on the date the claim of lien is recorded. [MCL 570.1117(1)] When the enforcement action is commenced, the lien claimant must record a notice of *lis pendens* in the register of deeds office in the county where the property is located. [MCL 570.1117(2)]

Effect of Pay-When-Paid Provisions on Lien Rights: In Michigan, a contractor that provides an improvement to real property has a statutorily granted “construction lien” on the interest of the owner that contracted for the improvement. [MCL 570.1107(1)]

Statutorily granted lien rights may not be waived in advance of the work performed. [MCL 570.1115(1)] A contract clause purporting to affect such a waiver is deemed by statute to be invalid and contrary to public policy “except to the extent that payment for labor and materials furnished was actually made to the person giving the waiver.” [MCL 570.1115(1)]

A “pay-when-paid/pay-if-paid” clause provides that payment to the subcontractor shall not be made until the contractor receives payment from the owner. Such a clause, when drafted as a condition precedent, transfers the risk of non-payment from the contractor to the financial integrity of the owner. Condition Precedents are disfavored by the courts for policy reasons, which has had the effect of such contractual obligations being strictly construed.

Christman v. Brown Development, 210 Mich. App 416 (1995), is the definitive case in Michigan where the court held that the condition precedent language of “pay-if-paid” was binding on the subcontractor and a valid provision of the contract.

A major issue in this area is the impact of pay-if-paid provisions on lien and bond claims. The argument is that if there is no obligation to pay, a lien or bond claim should not be actionable. In *Westfair v. Aetna*, 872 F.Supp 1212 (SDNY 1994), the court held that a pay-if-paid provision was equivalent to a pre-contract lien waiver that was void for public policy reasons. Michigan law precludes a pre-lien waiver. [MCL 570.1115(1)] See *Citadel Corporation v. Eastbrook Associates*, (unpublished, 2002 Westlaw 31105030). In that case the court afforded weight to the pay-if paid provision for payment under the contract terms, but held that this provision did not preclude the subcontractor from asserting its rights under the Construction Lien Act. **To avoid the problem, as a subcontractor, a provision should be inserted in the contract that a pay-if-paid provision does not prohibit the filing of a construction lien or a claim on a payment bond.**

Prospective Waivers of Lien Rights: As stated above, the Construction Lien Act specifically prohibits any contractual requirement that a prospective lien claimant waive its lien in advance of the performance of the work and declares such requirement to be unenforceable as against public policy. [MCL 570.1115(1)]

Despite the prohibition against contractually-required waivers, there is no restriction on the prospective lien claimant’s voluntary relinquishment of lien rights, either partially or entirely, before or after the work is

performed. A contractor that agrees voluntarily to waive all lien rights as part of its bid would seemingly be allowed to do so. However, if the parties reduce such a willingness to relinquish lien rights to a contractual provision, the Construction Lien Act may be interpreted as rendering that provision unenforceable. Thus, to be enforceable, a voluntary advance relinquishment of lien rights would likely be most effective if given in the form of a full unconditional lien as contemplated by MCL 570.1115(9)(c).

Lien Waivers: For contractors, subcontractors and suppliers providing improvements to property that is a residential structure, the owner may not rely on a waiver of lien provided by a person other than the lien claimant named in the waiver unless the owner first verifies the authenticity of the waiver with the lien claimant either in writing, by telephone or in person. [MCL 570.1115(7), *added by 2006 PA 572, amended by 2007 PA 28*]. The Construction Lien Act requires the waiver forms to include language regarding the owner’s responsibility to verify the authenticity of an agent’s signature.

“If the improvement is provided to property that is a residential structure and if the owner or lessee of the property or the owner’s or lessee’s designee has received a notice of furnishing from [*me / one of us*] or if [*I am / we are*] not required to provide one, and the owner, lessee, or designee has not received this waiver directly from [*me / one of us*], the owner, lessee, or designee may not rely upon it without contacting [*me / one of us*], either in writing, by telephone, or personally, to verify that it is authentic.” [MCL 570.1115(9)(a)–(d)]

Lien Bonds: Liens can be vacated and discharged at any time if a cash or surety bond, in twice the amount of the lien, is filed with the county clerk with a copy to the lien claimant. [MCL 570.1116(1)]

Public Work

Rights Available: Under Michigan law, construction liens are not valid against public projects. *Kammer Asphalt Paving Co v. East China Township Sch.*, 443 Mich. 176; 504 NW2d 635 (1993).

Payment Bond: Two different sets of statutes apply to public contracts. The type of project determines which of the two statutes applies. One public act applies to all government-owned projects, whether state or local (except for state highway projects), and requires the

principal contractor to furnish a labor and materials payment bond on all projects in excess of \$50,000. [MCL 129.201 *et seq.*] The other act applies to state highway department contracts provided by the Michigan Department of Transportation. [MCL 570.101 *et seq.*] MCL 570.101 *et seq.* requires a payment bond to be provided by the principal contractor regardless of the amount of the contract.

Who May Claim: Any person “having furnished labor, material, or both, used or reasonably required for use in the performance of the contract,” may make a payment bond claim. [MCL 129.206] This, however, is not applicable to highway (see MCL 129.211) or Drain Code contracts (see MCL 129.212).

Amount of Bond: Payment bond may not be less than 25 percent of the contract amount. [MCL 129.203]

Required Notice and Timing: Claimant not having direct contractual relationship with the principal contractor (non-highway):

1. Written notice must be served, by certified mail, postage prepaid, on the principal contractor within 30 days after first performance of labor or furnishing of materials. [MCL 129.207]

2. Written notice must be served, by certified mail, postage prepaid, on the principal contractor and governmental unit within 90 days from date when labor and materials were last provided. [MCL 129.207]

No special notice requirements are required for a subcontractor in a direct relationship with the prime contractor (non-highway). [MCL 129.207]

State highway projects: State highway contracts are governed by MCL 570.101 *et seq.*, which requires that

the board of officers or agents of the governmental unit post a payment bond regardless of the amount of the contract. [MCL 570.101] A claimant who provides labor only is not required to furnish prior notice of the claim. However, a subcontractor or supplier must give notice via certified mail, return receipt requested, to the board of officers or agents contracting on behalf of the state (usually the Michigan Department of Transportation) in duplicate, within 60 days after the claimant furnished its last labor or material. [MCL 570.102] The notice must state the job site, the claimant’s capacity, the party with whom the claimant contracted, the amount due and owing, and a statement that the claimant intends to rely upon the bond. [MCL 570.102]

Suit Filing: No action may be commenced more than one year from date on which final payment was made to the principal contractor. [MCL 129.209] (non-highway). Right to sue only arises after expiration of 90 days after the day on which labor was last done or last of material was furnished. [MCL 129.207] (non-highway).

For highway projects: Suit may be filed at any time within one year after completion and acceptance of the project. [MCL 570.104] Subcontractors must “allege and prove” that they have paid all laborers and vendors. [MCL 570.104]

Venue for Actions on Payment Bonds: Venue for litigation regarding a payment bond on government-owned projects is proper “in the appropriate court [generally, the circuit court] in the political subdivision in which the contract was...performed.” [MCL 129.209]. The Highway Projects Act does not identify the proper venue for actions filed under its provisions, so the venue statute for actions against government units, MCL 600.1615, should apply.

Minnesota

By Donald W. Gregory, Esq.
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Private Work

Rights Available: Mechanics lien.

Who May Claim: The contractor, subcontractor, materialman and sub-subcontractor. Minn. Stat. 514.01.

Required Notice and Timing:

1. The contract between the prime contractor and owner must include a notice of potential claims by subcontractors. If there is no written contract, separate written notice of potential subcontractor claims must be submitted to the owner.

2. Subcontractors and material suppliers must send prescribed statutory written notice of potential claims to the owner within 45 days of first performance for residential and small commercial projects (less than 5,000 sq. ft.). Minn. Stat. 514.011.

Lien Filing: A lien must be filed, and notice of the filing must be sent to the owner by certified mail, within 120 days of last performance.

Suit Filing: Suit must be filed within one year of last performance.

Lien Bonds: Accepting a security bond does not waive lien. However, accepting a promissory note with maturity after one year from last performance will waive the lien.

Waivers Permitted: Yes, by express agreement or by conduct implying waiver. However, no lien right can be waived or released without consideration. A lien may not be prospectively waived in the contract.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: The subcontractor, materialman and sub-subcontractor.

Type/Amount of Bond: A performance bond and payment bond are required when the project is more

than \$100,000. Some provisions are prescribed by statute. The minimum amount of each bond is 100 percent of the contract price. Alternate security (e.g., a letter of credit) may be allowed.

Approval and Filing of Bond: Before beginning work, the contractor on whose behalf the bonds were issued must file both bonds with the treasurer, board or officer having financial management of the obligee named in the bonds. The treasurer, board or officer having financial management of the obligee must approve the bonds.

Required Notice and Timing:

1. As a condition precedent to bringing an action upon a performance bond, the public body first must serve written notice of a claim under the contractor's bond personally, or by certified mail upon the surety that issued the bond, and upon the contractor on whose behalf the bond was issued. The notice must specify the nature and amount of the claim, the date of breach or default and the performance requested of the surety.

2. For payment bonds, written notice of a claim must be served personally or by certified mail upon the surety that issued the bond and the contractor within 120 days after completion, delivery or provision of the last item of labor and materials. The form of notice is prescribed by statute.

Suit Filing:

1. For performance bonds, action must be brought within the time permitted under the statute of limitations applicable to the claim.

2. Suit under a payment bond must be commenced within one year from the date of completion, delivery or provision by the claimant of its last item of labor and materials for the public work stated in its notice of claim.

Lien Available: No. If the payment bond is insufficient to discharge all of the claims in full, the amount must be prorated among the parties.

Mississippi

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Contractor's lien; suit on a payment bond.

Who May Claim:

1. The following parties are entitled to a lien: Prime Contractor (contract with owner or lessee), subcontractor (contract with prime), sub-subcontractor (contract with subcontractor), supplier (supplied materials to the prime or a subcontractor), registered architects, professional engineers, and professional surveyors. Miss. Code Ann. § 85-7-403.

2. A subcontractor or supplier to the prime contractor may claim against a payment bond. Lower tiers may be covered if so expressly stated on the face of the bond. Miss. Code Ann. § 85-7-187 (Private).

Required Notice and Timing:

1. Sub-subcontractor and suppliers to subcontractors (second tier) must give written Notice of Lien Rights to contractor, or if no contractor, to the owner within 30 days of first performance of work or delivery of materials setting forth: name; who their contract is with; name of project; description of work performed or materials supplied; and contract price. Miss. Code Ann. § 85-7-407(2).

2. A subcontractor or supplier must file and deliver to the owner an Affidavit of Nonpayment within 60 days from the execution of a partial or final lien waiver if that subcontractor or supplier has not received payment or its lien rights will be waived. Miss. Code Ann. § 85-7-419(5)(b)(iii).

3. A residential lien claimant must provide a Pre-Lien Notice to Owners to a residential owner 10 days before filing a lien. Miss. Code Ann. § 85-7-409(2).

4. No notice is required before or during performance for a suit on a payment bond.

Lien Filing:

1. A Claim of Construction Lien must be filed within 90 days after last work performed or materials provided. Miss. Code Ann. § 85-7-405(1)(b). Section 85-7-405(1)(b) sets forth mandatory language that must

be included in the lien, otherwise the lien is invalid. A contractor can be liable for treble damages for false affidavits, lien waivers, etc. Miss. Code Ann. § 85-7-413.

2. A copy of the lien must be delivered to the owner within two days of lien filing, and if the claimant is not the prime contractor, then to the prime as well. Miss. Code Ann. § 85-7-405(1)(b). A claimant may amend (Amendment to Construction Lien) their lien to increase or decrease the amount claimed. Miss. Code Ann. § 85-7-405(1)(e). Liens can be bonded for 110% of the lien amount. Miss. Code Ann. § 85-7-415.

Suit Filing:

1. The law sets out two causes of action: a Payment Action against the party contracted with (ex. subcontractor files suit against the prime) and a Lien Action (lien claimant against the owner to enforce the lien). A claimant must file a Payment Action against the party it contracted with within 180 days of filing the lien. Miss. Code Ann. § 85-7-405(1)(c). Therefore, a lien is void if no suit is filed within 180 days.

A Notice of Payment and Lien Action shall be filed in the *lis pendens* records at the commencement of the Payment action with a copy to the owner and prime. Miss. Code Ann. § 85-7-405(1)(c). The claimant may file suit against the owner to enforce the lien. Since the lien claimant is seeking to enforce his rights against the property, it is recommended that a claimant file one suit, a Payment Action and a Lien Action, against all of the necessary parties. An owner, contractor or subcontractor can file a Notice of Contest of Lien that will shorten the time for the lien claimant to file suit from 180 days to 90 days.

However, suit is not required if the owner has not paid the contractor or if subcontractor or supplier cannot secure a final judgment against the contractor (or who he contracted with) because: 1) the party (ex. contractor) is bankrupt; 2) the party is dead (an individual); or 3) payment not due because of a contractual condition precedent to payment (ex. pay when paid). Miss. Code Ann. § 85-7-405(1)(d)(i).

Deeds of Trust and construction loans will have priority over construction liens as determined by the recording of the deed of trust. Miss. Code Ann. § 85-7-405(2)(c). An owner can only be liable for the unpaid

contract balance and is entitled to rely on lien waivers submitted by the prime. Miss. Code Ann. § 85-7-405(4); § 85-7-413.

2. Suit on a payment bond must be filed within one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action. Miss. Code Ann. § 85-7-189.

Contractual Waivers: A claimant cannot waive its lien rights in advance of performing work or delivering materials. Miss. Code Ann. § 85-7-419(1).

Waivers After Commencement of Work: The law prescribes the form for partial (Interim Waiver and Release Upon Payment) and final (Waiver and Release Upon Final Payment) lien waivers. Miss. Code Ann. § 85-7-433. A subcontractor, etc. must file and deliver to the Owner an Affidavit of Nonpayment within 60 days from the execution of a partial or final lien waiver if that subcontractor, etc. has not received payment or its lien rights will be waived. Miss. Code Ann. § 85-7-419(5)(b)(iii).

Special Warning: Mississippi's current lien law took effect on April 11, 2014 and as of yet there are no interpretative decisions. The law borrows from Georgia's and Alabama's lien law as well as incorporating previous Mississippi law and compromises reached among the various construction trade groups in Mississippi. Therefore, future interpretations of portions of § 85-7-401 *et seq.* may look to foreign decisions for guidance.

The new law does not prescribe a date certain for what contracts or work are governed by the new law. Therefore, since the law extends lien rights to subcontractors and others for the first time, there could be challenges over whether a lower tier lien claimant has lien rights for work performed or materials provided during this transition from the old to the new law. Nevertheless, the new law has been in effect for four years thus any disputes of whether work is covered by the new law are likely moot.

Public Work

Rights Available: Suit on a payment bond (no minimum amount) and suit on a highway payment bond.

Who May Claim:

1. A suit on a payment bond may be claimed by a subcontractor or supplier to the prime contractor; a

subcontractor or supplier of the first-tier subcontractor; laborers; and the equipment lessor, if the bond provides coverage. Miss. Code Ann. § 31-5-51.

2. A suit on a highway payment bond may be claimed by the subcontractor or supplier to the prime contractor and the subcontractor or supplier to the first-tier contractor. Miss. Code Ann. § 65-1-85(f).

Required Notice and Timing:

1. No notice is required for suit on payment bond for the subcontractor or supplier to the prime contractor. A subcontractor or supplier of a first-tier subcontractor, laborers or equipment lessor (if the bond provides coverage) must give notice to the prime contractor or surety by hand delivery or certified mail within 90 days after last performance or supply of materials. Miss. Code Ann. § 31-5-51.

2. No notice is required for suit on a highway payment bond for the subcontractor or supplier to the prime contractor. Note, however, Miss. Code Ann. § 31-5-31 requires that anyone who leases, rents or sells to any subcontractor any equipment to be used in a road construction contract where a payment and performance bond is required of the prime contractor, must notify the prime contractor that it is extending credit to the subcontractor, stating the terms of the credit agreement. If the subcontractor fails to pay, the equipment supplier must notify the prime contractor within 30 days after payment is due. For the subcontractor or supplier of the first-tier contractor, the statute requires no notice, but the best practice is to give notice as specified in Miss. Code Ann. § 31-5-51.

Suit Filing: Suit on a payment bond, including a highway payment bond, shall be commenced within one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action. Miss. Code Ann. § 31-5-53(b).

Venue on any such suit shall lie in the county in which the contract or some part thereof was performed, or in the county in which the service of process may be obtained upon either the principal or the surety on such bond. Miss. Code Ann. § 31-5-53(c).

Contractual Waivers: The best practice is to assume that payment bond rights can be waived prior to commencement of work. However, payment bond rights cannot be impliedly waived in a pay-if-paid clause.

Waivers After Commencement of Work: The best practice is to assume that waivers of payment bond rights after commencement are enforceable according

to their terms and may waive liens securing retainage, unbilled extra work, and unresolved claims.

Lien Available: No.

Missouri

By Richard A. Stockenberg, Esq.

Private Work

Rights Available: Mechanic's lien [Chapter 429.010 *et seq.* RSMo.]. Also, a subcontractor without lien rights may maintain a direct action against an owner (unjust enrichment) *if* the owner has not paid in full.

Who May Claim:

1. The original contractor, subcontractors, sub-subcontractors, materialmen, architects, professional engineers, landscape architects and land surveyors. There are separate rules for (a) rental equipment and machinery and (b) residential property

2. Contractor's, subcontractor's and supplier's liens are for the reasonable value (including overhead and profit) of improvements to real estate. Liens may be asserted against a tenant's leasehold interest. An owner's (landlord's) fee interest in the real estate (e.g., shopping center) may be subject to a lien where the lease requires the tenant to make improvements to the leased premises regardless of the relative size of the tenant's space compared to the size of the owner's property. *Crafton Contracting Company et al. v. Swenson Construction Company, Inc., et al.*, 495 S.W.3d 178 (Mo. App. E.D. 2016). Design professionals with a contract with the owner may assert a lien for the value of services, even if planned construction is not commenced. Owners can be forced to pay twice.

Required Notice and Timing:

1. Prior to receiving any payment, an original contractor must send a prescribed statutory notice to the owner advising it of potential claims of subcontractors either:

- a) At the time of the execution of the contract;
- b) When materials are delivered;
- c) When work is commenced; or
- d) With delivery of the first invoice.

[§429.012 RSMo.]

2. A subcontractor or materialman must provide prescribed statutory notice to the owner giving notice of intent to file a lien. This notice must be given at least 10 days before filing a lien. [§429.100 RSMo.]

Lien Filing: A lien must be filed within six months after the date on which last work was performed or materials were installed. Warranty work or remedial

repairs do not extend this time. Liens must contain a "just and true account," i.e., *detailed* itemization of labor, materials and other items used on job.

Suit Filing: Suit must be filed within six months after the lien is filed. [§429.170 RSMo.] Bankruptcy tolls the statute, but the time may not be extended by agreement.

Lien Bonds: There is no statutory provision authorizing bonds as a substitute for liens, except for new residential property.

Contractual Waivers: Lien rights cannot be waived in advance in a contract [§429.005 RSMo.]. A pay-if-paid clause cannot impliedly waive lien rights [§431.183 RSMo.].

Waivers After Commencement of Work: After starting work, the best practice is to assume that lien rights may be waived prospectively if there is consideration to support waiver, although §429.005 may void this clause. Waivers through the date the waiver is signed, rather than the date of last work performed and paid, are enforceable, and it is possible to waive lien rights for retainage, unbilled extra work, or unresolved claims. There is no standardized lien waiver form.

Rules for Rental Equipment and Machinery:

1. Claim must exceed \$5,000.
2. Equipment/machinery must be used on commercial property.
3. Claimant must give owner written notice within 15 business days of commencement of use of equipment/machinery. Such notice shall identify the machinery/equipment and the name of the entity renting same.
4. Lien must be filed within 60 days after the date the last equipment/machinery was removed from property.

These rules only apply to those who rent machinery or equipment to others. Contractors/Subcontractors who use rental equipment/machinery may include their rental charges as part of their lien by following basic rules. [§429.010 RSMo.]

Rules for Residential Property:

1. *Owner occupied residences:*

No person, other than an original contractor, who performs any work or labor, or supplies materials for the repair and remodeling of or addition to owner-occupied residential property of four units or fewer, shall have a lien unless an owner of the building or structure, by written contract, has agreed to be liable for such costs in the event that the costs are not paid. [§429.013 RSMo.]

2. *New construction of residential property (broadly defined):*

- a) Lien claimant must record a Notice of Rights at least 5 days before property is transferred to a bona fide purchaser *if* the owner has recorded a Notice of Intended Sale at least 40 days before the transfer.
- b) Owner may bond around the lien with a surety bond, letter of credit or cash.
- c) Special rule limiting enforceability of lien waiver. [§429.016 RSMo.]

Public Work

Rights Available: Suit on a payment bond for state and local government public projects, pursuant to §107.170 RSMo.

(Special Notice: AmerenUE, a utility which provides electricity and other utilities are exempt from mechanic's liens, but subject to the Little Miller Act as a quasi-governmental body.)

Who May Claim: Subcontractors, sub-subcontractors or suppliers to subcontractors. Suppliers to sub-subcontractors do not have bond rights.

Type/Amount of Bond: A payment bond is required for certain public works contracts in excess of \$50,000. Provisions are prescribed by statute. The public authority determines the amount.

Notice Requirements: No statutory notice requirements exist, but courts will uphold notice requirements included within the bond.

Suit Filing: Suits on a bond must be filed within 10 years. Suits against a prime contractor for breach of written contract must be brought within 10 years. For oral contracts, the limit is five years. Public work is subject to the state prompt pay law, including 1.5 percent monthly interest and attorney fees. [§34.057 RSMo.] Bonding companies are liable for statutory penalty and attorney fees for vexatious failure to pay claims. [§375.420 RSMo.]

Lien Available: No.

Public Owner/Private Use

The Supreme Court of Missouri ruled in 2016 that subcontractors do not have lien rights against the owner's fee interest in property owned by a county on a project financed through industrial revenue bonds and leased to a private property for use as a corporate headquarters. The court also ruled that the private developer who was required to act as the county's agent to have the building constructed was not required to obtain a payment bond from its general contractor. This decision is contrary to prior cases, but they were not expressly overruled. The Court did, however, allow a mechanic's lien against the tenant's leasehold interest. This case for the first time leaves subcontractors without lien rights against the owner's fee interest or bond rights on property owned by a governmental body and used for a non-public purpose. *Brentwood Glass Company, Inc. v. Pal's Glass Service, Inc.* 499 S.W. 3d 296 (Mo. 2016).

Montana

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien; suit on a lien bond.

Who May Claim: Any person who furnishes services or materials pursuant to a real estate improvement contract may claim a construction lien, only to extent provided in this section to secure the payment of the person's contract price. Mont. Code Ann. § 71-3-523. Note, however, there are significant limitations on liens for materials supplied. Mont. Code Ann. § 71-3-524.

Required Notice and Timing: If required, notice of the right to claim a lien must be served by certified mail or personal service on the owner within 20 days after the services or materials are first furnished, or within 45 days if payment for the services or materials is made from a secured loan provided by a regulated lender. Mont. Code Ann. § 71-3-531(3) & (4). Notice of right to claim must follow a statutorily-prescribed format. Mont. Code Ann. § 71-3-532. A copy of the notice must be filed with the county clerk and recorder within five business days after serving the owner. Notice is effective for one year, with an additional one year continuation available. Mont. Code Ann. § 71-3-531(6).

Notice Exceptions: Notice of right to claim is not required if the materials or services are furnished directly to the owner (i.e., for prime contractors); if the lien claimant is a laborer; or on commercial projects or dwellings for five or more families. Mont. Code Ann. § 71-3-531(1).

Lien Filing: To be enforceable, a lien must be filed with the county clerk and recorder within 90 days after final furnishing of materials or services, or within 90 days after the owner files a Notice of Completion. A lien filed prior to substantial completion of furnishing of services or materials is not effective unless the claimant's performance is prevented by another person. Mont. Code Ann. § 71-3-535(1) & (4). The lien statement must substantially conform to a statutorily-prescribed content and format. Mont. Code Ann. § 71-3-536. The lien statement must be accompanied by the

claimant's certification that the lien has been served on the owner. Mont. Code Ann. § 71-3-535(3).

Suit Filing: To foreclose the lien or to sue on a bond, suit must be filed within two years from the date of filing the lien. Mont. Code Ann. §§ 71-3-553(2) and 71-3-562.

Lien Bonds: A bond in an amount equal to 1.5 times the lien amount may be filed by the contracting owner after the lien is filed and before the foreclosure suit is filed, or within 30 days of service of the complaint in such suit. Mont. Code Ann. § 71-3-551. Upon filing, the bond shall be substituted for the lien against the real property and the lien shall be discharged and released in full. Mont. Code Ann. § 71-3-552.

Contractual Waivers: A construction contract may not contain provisions requiring a contractor, subcontractor or material supplier to waive the right to a construction lien or a right to a claim against a payment bond before the contractor, subcontractor or material supplier has been paid for the labor, materials or both. Mont. Code Ann. § 28-2-723.

Waivers After Commencement of Work: A construction contract may not contain provisions requiring a contractor, subcontractor, or material supplier to waive the right to a construction lien or a right to a claim against a payment bond before the contractor, subcontractor or material supplier has been paid for the labor, materials or both. Mont. Code Ann. § 28-2-723.

Special Warning: If notice of right to claim is not given within the required time period, the lien is enforceable only for materials and services furnished within the 20-day period before the date on which notice was actually given (or for work funded by secured loans, within the 45-day period before the date of actual notice). Mont. Code Ann. § 71-3-531(3) & (4).

Public Work

Rights Available: Suit on a payment bond or against a public body that fails to obtain the required bond.

Who May Claim: Subcontractors, materialmen, mechanics and laborers.

Type/Amount of Bond: For contracts in excess of \$50,000 (\$7,500 for school districts), a surety bond is required. The public body may permit the deposit of certain securities in lieu of a bond. Mont. Code Ann. § 18-2-201. For state contracts, security in an amount equal to the contract price is required. Contracts with cities and towns require security in an amount equal to at least 25 percent of the contract price. Mont. Code Ann. § 18-2-203.

Required Notice and Timing: Notice of a claim must be filed with the owner within 90 days of completion of the contract and acceptance of the project. Mont. Code Ann. § 18-2-204(1). Materialmen must give written notice to the contractor by certified mail or personal service of right of action on a bond within 30 days of delivering first materials to the subcontractor. Mont. Code Ann. § 18-2-206(1).

Suit Filing: No statutory provisions; it depends upon the terms of the bond.

Special Warning: Obtain a copy of the bond as soon as possible. The prevailing party is entitled to attorney fees, except if the suit is filed less than 30 days after notice is given by a materialman to the contractor.

Contractual Waivers: A construction contract may not contain provisions requiring a contractor, subcontractor or material supplier to waive the right to a construction lien or a right to a claim against a payment bond before the contractor, subcontractor or material supplier has been paid for the labor, materials or both. Mont. Code Ann. § 28-2-723.

Waivers After Commencement of Work: A construction contract may not contain provisions requiring a contractor, subcontractor, or material supplier to waive the right to a construction lien or a right to a claim against a payment bond before the contractor, subcontractor or material supplier has been paid for the labor, materials or both. Mont. Code Ann. § 28-2-723.

Lien Available: No.

Nebraska

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Construction lien.

Who May Claim: A person who furnishes services or materials pursuant to a real estate improvement contract may claim a construction lien. Neb. Rev. Stat. § 52-131(1). Material suppliers, however, are subject to restrictions. A supplier to a subcontractor may claim a lien, while a supplier to a supplier may not. Neb. Rev. Stat. § 52-134; *Blue Tee*, 529 N.W.2d 16 (1995). Status as a “subcontractor” depends on whether an entity “constructs a definite, substantial part of the work of improvement in accord with the plans and specifications of such contract, not that he enters upon the jobsite and does the construction there.” Thus, a steel supplier to an off-site steel fabricator could enforce a lien. *Id.* at 19. Equipment vendors and lessors may also claim liens for “reasonable rental value.” Neb. Rev. Stat. § 52-134.

Required Notice and Timing: Written notice of right to claim a lien must be given to preserve rights against a residential owner who qualifies as a “protected party.” Neb. Rev. Stat. §§ 52-129, 52-135(6). A copy of the recorded lien must be sent to the protected party within 10 days after recording. Neb. Rev. Stat. § 52-135(3).

Lien Filing: A lien must be filed no later than 120 days after final furnishing of services or materials, with priority in the order of attachment. Neb. Rev. Stat. § 52-137(1).

Suit Filing: A construction lien is enforceable for two years after the recording date. Neb. Rev. Stat. § 52-140(1). If a party having an interest in the real estate gives the claimant written demand to institute judicial proceedings to enforce the lien within 30 days, the lien will lapse unless the claimant institutes proceedings within 30 days after receipt of the written demand. Neb. Rev. Stat. § 52-140(2). Judicial proceedings to enforce the lien instituted while the lien is effective extend the lien during pendency of the proceedings. Neb. Rev. Stat. § 52-140(3).

Lien Bonds: An owner or prime contractor may prevent a lien from attaching to real estate by procuring

and recording notice of a surety bond in penal sum of 50 percent of the contract price for contracts not exceeding \$1 million, 40 percent of the contract price for contracts more than \$1 million but not exceeding \$5 million, or \$2.5 million for contracts exceeding \$5 million. Neb. Rev. Stat. § 52-141(2) & (3).

Contractual Waivers: Waiver of lien rights in a contract prior to commencement of work is presumably valid in the absence of case law. Implied waivers by subcontractors based on pay-if-paid terms are presumably invalid for lack of clear and unequivocal waiver in the absence of case law. Neb. Rev. Stat. § 52-144.

Waivers After Commencement of Work: Waivers signed after commencement of work are presumably valid in the absence of case law; therefore, care should be taken to avoid waiver of lien rights for unpaid retainage, unbilled changes or work not yet performed. Neb. Rev. Stat. § 52-144.

Public Work

Rights Available: Suit on a payment bond “in a sum not less than the contract price.” Neb. Rev. Stat. § 52-118.

Who May Claim: Laborers and mechanics for labor. Also material suppliers and equipment lessors who “have a direct contractual relationship with a subcontractor.” Neb. Rev. Stat. §§ 52-118, 52-118.01.

Type/Amount of Bond: A bond in an amount not less than the contract price, excepting state projects of \$15,000 or less, or local projects of \$10,000 or less. Neb. Rev. Stat. § 52-118 (2).

Required Notice and Timing: Anyone not having a direct contractual relationship with the contractor providing the bond must give written notice to the contractor within four months of last labor furnished or material supplied by certified or registered mail or by service in manner of a summons. Neb. Rev. Stat. § 52-118.01.

Suit Filing: All suits must be filed within one year from final settlement of the principal contract, if the

claimant is unpaid within 90 days of its last performance. Neb. Rev. Stat. §§ 52-118, 52-118.02.

Contractual Waivers: A provision that purports to waive, release or extinguish rights to file a claim against a payment or performance bond is void and unenforceable as against public policy, except where such waiver or release is a condition for payment, but only to the extent of the amount of the payment received. Neb. Rev. Stat. § 45-1209.

Waivers After Commencement of Work: A provision that purports to waive, release or extinguish rights to file a claim against a payment or performance bond is void and unenforceable as against public policy, except where such waiver or release is a condition for payment, but only to the extent of the amount of the payment received. Neb. Rev. Stat. § 45-1209.

Lien Available: No. Neb. Rev. Stat. § 52-132.

Nevada

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: “Lien claimant” is defined to include anyone providing labor, materials or equipment, including lessors, with a value of \$500 or more, “to be used in or for the construction, alteration or repair of any improvement.” Nev. Rev. Stat. § 108.2214. A contractor or professional who is required to be licensed to perform the work under Nevada law may only claim a lien if the contractor or professional is so licensed. Nev. Rev. Stat. § 108.222(2).

Required Notice of Right to Claim Lien: To perfect lien rights, all lien claimants, except laborers and prime contractors, must deliver a notice of right to lien in a form prescribed by statute either personally or by certified mail to the property owner at any time after the first delivery of material or performance of work or services under a contract. A lien claimant who is required to and does give such notice has a right to lien for materials or equipment furnished or for work performed in the 31 days before the notice was given and for the materials or equipment furnished or for work performed anytime thereafter until the completion of the work of improvement. Nev. Rev. Stat. § 108.245(6). Furthermore, each prime contractor must inform the owner with whom the prime contractor intends to contract and each participating subcontractor of the provisions of NRS § 108.245. Failure to do so may result in disciplinary proceedings. Nev. Rev. Stat. § 108.246.

Special Warning: Despite the requirement for notice of lien rights to owners, owners have no responsibility to verify use of payments. In an unpublished, September 2005 decision in *Meeks Building v. Wright* (No. 41702), the Nevada Supreme Court upheld the rule of *Sherman Gardens v. Longley*, 491 P.2d 48 (1971), which puts the burden on subcontractors and suppliers to determine the source of funds and to apply those funds to the proper account, even if their customer misleads them as to the source of funds, and even if the owner fails to require lien waivers or otherwise verify use of payments for the project.

Lien Filing: To preserve mechanics lien rights, a lien claimant must record a notice of lien, in a form

prescribed by statute, within 40 days after the owner records a notice of completion. If no notice of completion is recorded, the notice of lien must be recorded within 90 days after the latest of the following occurs: (a) the last delivery of material, furnishing of equipment or performance of work by the lien claimant, or (b) the completion of the work [defined as (i) owner occupancy, (ii) acceptance, or (iii) cessation of labor for 30 consecutive days]. Nev. Rev. Stat. § 108.226.

For some residential construction projects, a lien claimant must also serve a 15-day notice of *intent* to lien (distinguishable from notice of *right* to lien, it includes substantially the same information required in notice of *lien*) upon both the owner and the reputed prime contractor *before* recording a notice of lien. Nev. Rev. Stat. § 108.226(6).

The lien claimant also must serve a copy of the notice of lien upon the property owner or registered agent within 30 days after recording the lien by personal delivery or certified mail. Each participating subcontractor must deliver a copy of each required notice of lien to the prime contractor. Nev. Rev. Stat. § 108.227.

Suit Filing: Suit may not be filed less than 30 days or more than six months after the notice of lien is recorded, unless judicial proceedings are commenced to enforce the lien within that timeframe or an “extension agreement” extending the period to one year is filed during the six-month period and then recorded. Nev. Rev. Stat. §§ 108.233, 108.244.

Lien Waivers: Contractual lien waivers are void and other lien waivers are unenforceable unless in statutorily prescribed form. Nev. Rev. Stat. §§ 108.2453-108.2457 The statutory form waivers for progress payments specifically exclude any waiver of lien rights for retainage, changes pending approval and disputed items and claims.

Public Work

Rights Available: Claim against a prime contractor’s payment bond.

Who May Claim: Materialmen and subcontractors of the prime contractor, and materialmen and subcontractors of the prime contractor's subcontractors.

Type/Amount of Bond: A performance bond or payment bond in an amount fixed by the contracting body but not to be less than 50 percent of the contract amount, or in a larger amount fixed by the state/local government. The practice of directed surety is prohibited. Nev. Rev. Stat. § 339.025.

Preliminary Notice: Any claimant not having a direct contractual relationship with the prime contractor must serve a preliminary written notice, within 30 days of first furnishing materials or labor, by registered or certified mail to the prime contractor at the contractor's place of business or residence. Nev. Rev. Stat. § 339.035(2)(a)-(b).

Demand for Payment: Any claimant not having a direct contractual relationship with the prime contractor must also serve a written demand for payment, by registered or certified mail, to the prime contractor at the contractor's place of business or residence, within 90 days of the last date of furnishing

materials or labor to which the claim applies. Nev. Rev. Stat. § 339.035(2)(b).

Suit Filing: Suit may not be filed less than 90 days nor more than one year after the last date that the claimant furnished work or materials. This must be filed in the court of the political subdivision where the contract for which the bond was given was to be performed. Nev. Rev. Stat. § 339.055.

Contractual Waivers: Waiver of bond rights in a contract prior to commencement of work is presumably invalid in the absence of case law. Implied waivers by subcontractors based on pay-if-paid terms are also presumably invalid for lack of clear and unequivocal waiver.

Waivers After Commencement of Work: Waivers signed after commencement of work are presumably valid in the absence of case law, so care should be taken to avoid waiver of bond rights for unpaid retainage, unbilled changes or work not yet performed.

Lien Available: No.

New Hampshire

*By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.*

Private Work

Rights Available: Mechanics lien. N.H. Rev. Stat. §§ 447:2-447:14.

Who May Claim: Anyone furnishing labor or materials amounting to more than \$15.

Required Notice and Timing: A subcontractor or materialman should give a notice of intent to claim a lien to the owner before delivery of labor or material, but it may be given afterward. N.H. Rev. Stat. §§ 447:5-447:6. Upon 30 days after the notice, and every 30 days thereafter, a written account must also be furnished to the owner; although, courts have excused failure to give the accountings during periods where no amounts are unpaid. N.H. Rev. Stat. § 447:8. No such notice or accounting is required from the principal contractor. The lien continues for 120 days after services are performed or materials furnished. N.H. Rev. Stat. § 447:9.

Lien Filing: None required.

Suit Filing: Suit must be filed and the writ of attachment obtained within 120 days after services are performed or materials furnished.

Lien Waivers: Waivers of lien in a contract are valid. Implied waivers by subcontractors based on pay-if-paid terms are presumably invalid, however, for lack of clear and unequivocal waiver.

Waivers after Commencement of Work: Waivers signed after commencement of work are presumably valid; therefore, care should be taken to avoid waiver of lien rights for unpaid retainage, unbilled changes or work not yet performed.

Public Work

Rights Available: Lien on unpaid amounts under public contract; suit on a payment bond. N.H. Rev. Stat. §§ 447:15-447:18.

Who May Claim: A subcontractor or materialman.

Type/Amount of Bond: A bond in amount equal to at least 100 percent of the contract price is required when the contract is for an expenditure of \$75,000 in behalf of the state or \$125,000 in behalf of a political subdivision. N.H. Rev. Stat. § 447:16.

Required Notice and Timing: To obtain the benefit of the bond, the claimant must file a statement of the claim within 90 days after the completion and acceptance of the project by the contracting party. The claimant must file the statement with a statutorily specified office, which varies depending on the identity of the state contracting party. A copy of the statement must be mailed to the principal and surety. N.H. Rev. Stat. § 447:17. Similarly, liens on unpaid amounts under public contracts must be filed within 90 days after the completion and acceptance of the project by the contracting party. N.H. Rev. Stat. § 447:15.

Suit Filing: Suit must be filed in the county of the project within one year of the claim filing. A copy must be given to the principal and surety. N.H. Rev. Stat. § 447:18.

Contractual Waivers: Waiver of bond rights in a contract prior to commencement of work is presumably invalid in the absence of case law. Implied waivers by subcontractors based on pay-if-paid terms are also presumably invalid for lack of clear and unequivocal waiver.

Waivers After Commencement of Work: Waivers signed after commencement of work are presumably valid in the absence of case law, so care should be taken to avoid waiver of lien rights for unpaid retainage, unbilled changes or work not yet performed.

Lien Available: Yes. Lien on unpaid amounts under public contract.

Private Work

Rights Available: A construction lien is allowed on real estate, but only to the extent of the “lien fund,” i.e., the amount of money from which one or more lien claims may be paid.

Who May Claim: The prime contractor, subcontractor, sub-subcontractor and material suppliers to an owner, prime contractor or subcontractor.

Required Notice and Timing: For all *non-residential work*, prior notice to the property owner is *not* required. For non-residential work, the claimant may choose to file a Notice of Unpaid Balance and Right to File Lien (NUB) to notify subsequent purchasers, mortgages or lien creditors of the possibility of a subsequent lien. *Note, however, that there is an entirely different procedure for residential construction (one- or two-family dwellings, or condominiums or cooperative units).* With these, the claimant first must file (lodge for record) and serve a NUB no later than 60 days after its last date of work, and then commence an arbitration proceeding to determine the validity of the contractor’s claim. Upon receipt of a favorable Arbitration Award, the contractor must file (lodge for record) its lien within 10 days of receipt of the Award, but in no event may the lien be filed more than 120 days after the contractor’s last date of work.

Lien Filing: For *non-residential work*, the construction lien claim may be filed (lodged for record) from the date that payment is due, but in no event later than 90 days following the date on which the last labor, materials or equipment was provided. Service of the lien claim upon the owner and other affected parties must be made within 10 business days of the filing. For *residential work*, the construction lien claim may only be filed after an arbitration award is issued (as indicated above) but in no event later than 120 days following the date on which the last labor, materials or equipment was provided.

Suit Filing: Suit must be filed within one year of the date upon which the last labor, materials or equipment was furnished to the project. However, the claimant may be required to commence suit within 30 days after receiving a notice from the owner or contractor (in the event the lien claimant is a subcontractor), requiring the lien claimant to establish its claim by judgment.

Lien Bonds: A surety bond or deposit with the court may be substituted as security for the lien. The amount of this security must be 110 percent of the construction lien plus \$25.

Waivers Permitted: Waivers of construction lien rights are against public policy, unlawful and void, unless given in consideration for payment for the work, services, materials or equipment provided or to be provided, and such waivers are effective only upon and to the extent that such payment is actually received.

Special Warning: There are substantial penalties for wrongful lien filings. If a lien claim is without basis, willfully over-stated or substantially defective in form, a claimant may be liable for the attorney fees and costs incurred to discharge the lien, may be required to pay any damages that the improper lien costs, and will be prohibited from filing a new lien up to the amount of the invalid claim. If an owner or another party raises a frivolous defense to a lien, that party may be required to pay the claimant’s attorney fees, costs and any other resulting damages.

Public Work

Rights Available: A municipal mechanics lien; a payment bond. The municipal lien claim covers Boards of Education, Towns, Counties and most other public agencies, *with the exception of* projects contracted by the state of New Jersey or any state agency.

Who May Claim: Under the lien law, “any person” furnishing labor or materials to the project may file a claim. However, under the bond law, only first-tier subcontractors, second-tier subcontractors and material suppliers to either of those parties are covered “claimants.”

Amount/Type of Protection: The municipal lien claim attaches only to the funds in the hands of the public owner. Therefore, as the contract amount is paid out, the degree of protection decreases with each payment. Under the bond law, coverage remains at 100 percent of the contract amount. It is decreased only to the extent that the surety actually makes payment on the instrument.

Required Notice and Timing: The municipal lien law requires that any person not having direct contract with

the owner or a prime contractor who seeks to assert a lien must file written notice with the appropriate public agency within 20 days of the first performance of his or her work or the delivery of materials. Failure to provide this written notice will operate as a bar to the lien.

Under the bond law, “any person who may be a beneficiary of the payment bond, and who does not have a direct contract with the contractor furnishing the bond” (i.e., a second-tier subcontractor or a material supplier thereto) must provide written notice with proof of delivery to the prime contractor *before* starting work. If the beneficiary fails to provide the required written notice, the beneficiary shall have bond rights only for labor or materials supplied *after* notice is given. If no such notice is given, the beneficiary presumably forfeits his or her bond rights in their entirety.

Suit Filing: The municipal lien claimant may commence action at any time that he or she wishes to foreclose on the lien provided only that funds remain in the hands of the public owner and 60 days have not passed since the date the prime contractor completed its work or the public agency accepted its work as being completed by resolution. As noted above, the municipal lien claim can attach only to contract funds that remain undisbursed to the prime contractor.

The claimant may start an action any time after the expiration of 90 days from the date upon which the claimant last furnished labor or materials to the project. The suit, however, must be filed no later than one year of the same date upon which labor or materials were last furnished to the project.

Lien Available: Yes (on contracts with towns, counties and most other public agencies but not contracts with the state or state agencies).

New Mexico

By Sean Calvert, Esq.

Private Work

Rights Available: Mechanics lien and stop notice.

Who May Claim: Mechanics lien: The original contractor, subcontractors of any tier, suppliers, architects, engineers, surveyors, miners and equipment haulers, but not anyone supplying labor or materials to a supplier. In order to claim a lien, the contractor must be licensed with the State of New Mexico, Regulation and Licensing Department, Construction Industries Division if licensing is required for the type of work performed by the contractor. This requirement usually does not apply to suppliers or others who do not fall within the definition of contractor under the Construction Industries Licensing Act.

Stop Notice: On residential construction, it is possible to stop payment of construction funds, providing that a series of notices, disclosures, withholding, bonding and release provisions are completed for each pay request. The exceedingly short timetables and onerous other requirements have resulted in only rare attempts to use the option since it was enacted in 1989.

Required Notice and Timing: Persons not dealing directly with the prime contractor on non-residential construction must give notice of the right to file a lien to the owner or prime contractor within 60 days of starting work in order to claim a lien in excess of \$5,000. Notice must be given by certified mail, fax with acknowledgement or personal delivery. A late notice will still preserve lien rights for materials and work performed during 30 days prior to notice and afterwards. The notice must state:

- A description of the property upon which the lien may be filed.
- The name and address of the claimant.
- The name and address of the person to whom the claimant was contracted to furnish labor, materials or equipment.
- A verification of the claim under oath by the person or agent of the person holding the lien.

Lien Filing: A contractor dealing directly with the owner must file a claim within 120 days of completion of its contract. Others must file within 90 days of substantial completion of each structure. On residential

construction, the right to lien is discharged when the owner or its successor pays anyone entitled to payment in full, even if time remains.

Bonding Around a Lien: A contractor or owner may bond around a lien, without notice to the lien claimant, by petitioning the court in the county where the property is located and having the court approve the adequacy and amount of the security. Security to bond around a lien is usually in the form of cash, certificates of deposit or surety bond, and the standard is that the amount must be 150 percent of the face amount of the claim of lien. On approval by the court, the claim of lien is cancelled as to the property and attaches to the security.

Suit Filing: Suit must be filed within two years after the lien is filed in the county in which the property is located.

Attorney Fees: The court shall award attorney fees to the prevailing party.

Contractual Waivers: A contractor may prospectively waive its right to claim a lien where the contractor agrees in the contract to such an explicit waiver. A contingent payment clause, however, will not be presumed to be a waiver of the right to claim a lien. Where the contractor has agreed to a contingent payment clause, the contingent payment clause is not a defense to enforcement of the claim of lien.

Special Warnings:

1. Residential construction includes up to a fourplex.
2. If the lien claimant is required to have a construction license and does not, then it loses the right to lien and the right to suit, and must refund all money paid for the construction.
3. The owner has the right to petition the court to remove the lien from the property onto the security.
4. Suppliers to suppliers do not have any right to claim a lien.
5. A claim of lien may not be enforced for the work of a subcontractor or sub-subcontractor, where the subcontractor or sub-subcontractor is not properly licensed.

Public Work

Rights Available: Suit on a payment bond (modeled after the federal Miller Act).

Who May Claim: Those who provided labor or materials under the original contract or any subcontract. Whether the right to file a claim extends to more remote tiers of subcontractors and suppliers than allowed under the Miller Act remains an unresolved question, but due to changes in the statute, appears unlikely.

Type/Amount of Bond: A payment bond is required only on contracts in excess of \$25,000. The amount of the bond is 100 percent of the contract price, but the owner may reduce it to 50 percent.

Required Notice and Timing: Those who do not have a direct contract with the prime contractor must give written notice by registered mail to the prime contractor within 90 days of completion of the last labor or supply of materials.

Suit Filing: Suit must be filed within one year after final settlement of the contract between the owner and the prime contractor. The claimant must give notice of the commencement of a suit to the obligee on the bond, and may not take judgment until 30 days after that notice.

Special Warnings:

1. Mediation of disputes on public works is a condition precedent to filing any litigation, unless the contract contains an arbitration clause.

2. Unpaid workers compensation premiums are chargeable against the bond.

3. Contractors and subcontractors are required to pay their subcontractors and suppliers within seven working days of receipt of payment or else they must pay an interest penalty of 1.5 percent per month or fraction thereof.

4. In certain limited circumstances, times for filing may be equitably tolled.

5. Proof of incorporation of labor and materials into the project may not be required, but due to a 2015 change in the language of the statute, it is possible that proof of incorporation is necessary for a valid bond claim.

6. The determination of what sums are recoverable under the bond is made based on the terms of the subcontract between the original contractor providing the bond and the first tier subcontractor under whom the materials or labor was supplied. If the subcontract does not provide for recovery of interest, attorney fees, late charges, or contains other limitations on recovery, those may be applicable to bar recovery even by a remote claimant whose agreement provides for recovery of those damages.

Contractual Waivers: While not decided, it should be presumed that bond rights may be waived prospectively by an explicit waiver. Bond rights should also be presumed to be waived by agreement to a contingent payment clause. The Little Miller Act is purportedly to provide protections similar to those provided under the Mechanics Lien statute on public works projects, so the fact that contingent payment clauses are no longer a defense to a valid lien claim, may extend to bond claims. There is no case law on this issue.

New York

By Jordan R. Pavlus, Esq.

Private Work

Rights Available: Mechanics lien; discharge on filing a bond or undertaking.

Who May Claim:

1. The contractor, subcontractors (no limitation to the number of tiers) and materialmen to contractors and subcontractors may claim a mechanics lien.

2. "Liened parties" may discharge on filing a bond or undertaking.

Required Notice and Timing: Notice of lien may be filed at any time during performance, but no later than eight months from the furnishing of the last labor or the last materials on the job (four months for a single-family dwelling). An exception to this limitations period has recently been added for retainage under new New York law. Liens for unpaid retainage (but not progress payments or change order work) may now be filed up to 90 days after retainage was due to be released.

Mechanics Liens are required to be filed with the Clerk of the County within which the property is located and must contain a valid legal description of the property, and not just the property address. The Mechanics Lien should be verified by the lienor and sworn to before a notary. A copy must be served upon the owner and the contractor, subcontractor or sub-subcontractor by whom the lienor was employed. Service must be made within five days before and 30 days after filing the mechanics lien.

Service on the contractor, subcontractor and sub-subcontractor may be made by certified mail, and can be sent to a post office box.

The owner may be served personally or by registered or certified mail to the last known place of residence. The owner also may be served by delivering a copy of the lien to his or her attorney, place of residence in the city or town in which the property is located, including leaving a copy at such locations with a person of suitable age and discretion and, if the owner cannot be found, by leaving a copy of the notice of lien conspicuously on the property.

Proof of service in the form of an affidavit of service must be filed with the clerk with whom the notice of lien was filed within 35 days after filing the lien. If the lienor fails to serve the lien and file proof of service, the lien will terminate.

2. Any interested party may discharge a lien by filing with the County Clerk a bond for 110 percent of the lien amount without prior court approval of the amount of the bond [Lien Law § 19(4)], or by depositing 100 percent of the amount of the lien with the County Clerk, plus interest to the date of such deposit [Lien Law § 20].

Suit Filing:

1. A lien is good for one year, but, except for a lien on a one-family house, may be extended for an additional year, without court order, by filing a notice of extension. A court order is required to extend the lien on a one-family house. The lien may be further extended only by court order for another one-year period. Only two one-year extensions of the lien are allowed for either a single family or a non-single family lien.

Lienors anticipating a second extension should be prepared to instruct their attorneys to renew in the 10th month of the first lien extension, because a court order for subsequent extensions is mandatory. The order extending the lien must be signed by the judge within one year of filing the lien extension or notice of lien (single family). Courts may be reluctant to extend a lien after the first extension if it involves a one- or two-family house.

Action to foreclose a lien must be commenced and notice of pendency filed before the lien expires. Commencement of foreclosure action without filing the notice of pendency will not be effective to continue the lien upon the property (except when the lien was discharged by the filing of a bond). Actions in New York State are commenced by filing a summons and complaint in the county clerk's office where the property is located before service is made upon defendants.

2. Suit requirements for liens discharged by bond are identical to those listed above. The only differences are that the surety is joined in the action, and that the notice of pendency shall not be filed if, prior to action, the lien has been discharged by filing a bond.

Contractual Waivers: Lien rights cannot be effectively waived in a contract, before performing any work. Pay-if-paid clauses are null and void in New York State.

Waivers After Commencement of Work: Subcontractors and materialmen are warned to review language of any lien waivers and releases given to obtain payment to protect rights to pending change orders, delay claims, retainage and rights against sureties. Lien rights may be waived for work performed in exchange for payment. Prospective lienors should carefully examine language of any release documents to make sure that there is no unintended waiver of lien rights, claims for extras, delay, pending change orders, retainage or rights under a payment bond.

Lien waivers prior to commencing work are contrary to public policy and are not permitted. The owner or contractor may file a bond at the beginning of the job to keep the property free of liens. When such a bond is filed, notice of claim must be filed in the office of the county clerk within the time for filing a notice of lien.

Special Warnings:

1. Do not overstate the lien. “Willful exaggeration of the lien” can result in cancellation of the lien and subject the lienor to a potential claim for damages. Claims for “delay” and other consequential damages are not lienable. The party’s labor or materials must have improved the real property. To recover damages for willful exaggeration, however, the contractor or owner must claim for them in an action to foreclose the lien. A lien may include a claim for “extras” which are not confirmed by a writing from the owner.
2. Claims for extras must be set out separately on the lien form.
3. A private owner may require a payment bond, but a bond is not required by statute. A copy should be obtained as soon as possible to determine notice and time provisions.

Public Work

Rights Available: A lien against monies due or to become due to the contractor; discharge on filing a bond or undertaking; suit on a payment bond if labor and material payment bond required (Projects of \$100,000 or more).

Who May Claim:

1. A public improvement lien may be filed by a materialman or subcontractor to a contractor; or sub-subcontractors and materialmen to a subcontractor; but not to a materialman or subcontractor to a sub-subcontractor.
2. If the payment bond gives less protection than statute, statutory protection will be deemed incorporated in the bond.

Required Notice and Timing:

1. For a lien against monies due or to become due to the contractor, notice of lien may be filed any time up to 30 days after completion and acceptance of the project. Notice of lien must be filed with the head of the public agency and the comptroller or chief fiscal officer of the public agency. Public improvement liens are not filed with the County Clerk. Within five days before or simultaneously, a copy must be served by certified mail on the contractor and subcontractor, if applicable. Proof of service of the public improvement lien must be filed or the notice of lien becomes a nullity.

Conditions for a claim on a payment bond:

1. Second-tier claimants on a payment bond must give written notice to the contractor within 120 days from the date upon which the last labor was performed or last materials were furnished. All payment bonds required by statute are deemed to include all statutory conditions for claim and suit required under Section 137 State Finance Law, unless the bond contains more liberal conditions.
2. The notice should contain the amount being claimed, the name of the party to whom the materials were furnished or for whom the labor was performed and a description of such labor or materials. The notice must be given either personally or by registered mail, and not certified mail. Proof of service is required. However, proof of actual notice is sufficient. Check the bond language to make sure that there are no variations from the notice requirements. The subcontractor or direct materialman of the contractor are not required to give the 120 day notice to preserve bond rights under the payment bond.
3. NY General Obligations Law § 5-322.1: Any provision in an agreement in connection with the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances, including moving, demolition and excavating connected therewith, that conditions a subcontractor’s or supplier’s right to file a claim and/or commence an action on a payment bond on exhaustion of another legal remedy (i.e. lien rights) is void and unenforceable.

Suit Filing:

1. A lien against monies due or to become due to the contractor is valid for one year, unless extended by notice of extension for a one-year period. The lien may be further extended by court order. Only two one-year extensions are permitted. An action must be commenced and notice of pendency filed before the lien or any extension of the lien expires.

Maintenance of an action without filing the notice of pendency or an order continuing lien may result in an ineffective foreclosure because the lien may expire prior to the lienor obtaining judgment.

2. If a payment bond is required, suit on the statutory bond must be commenced within one year from the date the public improvement has been completed and accepted by the public owner. A demand for completion date may be made by any subcontractor to the owner at any time pursuant to Lien Law § 11-a. The owner must then provide notice of completion to any subcontractor filing the demand within five days of completion and acceptance.

Discharge of Lien: A contractor or subcontractor may discharge the lien without court approval by filing a bond for 110 percent of the lien amount with the State or the public corporation with which the Notice of Lien is filed. A copy shall be served on the subcontractor or sub-subcontractor or materialman, as the case may be. The Bond is effective when served and filed [Lien Law § 21(5)].

Amount Withheld: Where a contractor is owed a sum of money in an amount at least one and one-half times (150%) in excess of the amount stated to be due in the lien, the State or public corporation shall withhold said 150% amount until said lien is otherwise discharged. [Lien Law § 21(6-a)].

Contractual Waivers: Bond rights cannot be waived in a contract, before performing any work. General Obligations Law prohibits conditioning a bond claim on exhaustion of lien rights.

Waivers After Commencement of Work: The best practice is to assume bond rights may be waived after performing work. Read waiver and release forms required to secure payment from contractor to protect claims on pending change orders, delay claims, surety claims and retainage and make appropriate changes to protect your rights.

Special Warning: Note where an industrial development agency holds title, but the beneficial interest is in the hands of a private party, the lien is deemed to be a private improvement mechanics lien and filed in the County Clerk's Office.

Note further that if a private entity constructs an improvement on public property (no public fund established), Lien Law § 5 requires a labor and material payment bond to be posted by the private entity.

North Carolina

By James P. Laurie, III, Esq.

Private Work

Lien Rights Available:

1. Contractors have a Claim of Lien on the owner's real property per Article X of the North Carolina Constitution.
2. First-, second- and third-tier subcontractors have a traditional subrogation lien through the contractor's lien on the owner's real property.
3. A fourth- or more remote tier subcontractor has a lien only upon funds owed to the party with whom it contracted.
4. Second- and third-tier subcontractors have a lien subrogated directly to contractor's lien referred to as a "Swain" lien.
5. First-, second- and third-tier subcontractors have a lien upon funds of the tier above after proper notice.

Pre-lien Notice Requirement: If Notice to Lien Agent is not given at time of commencement, the amount of recovery by a Lien Claimant is restricted back from the date of lien filing on any lien in excess of \$30,000. Failure to provide notice limits the amount of recovery. Contractors and Owners are required by statute to appoint Lien Agents for notice as part of the building permit application process, which requires listing a Lien Agent. Lien Agents must be an insurance company authorized by the State. Although not required by the statute, all of the insurance companies (statutory lien agents) have pooled their resources and created a private, central Lien Agent database at www.liensnc.com for on line appointment of the lien agent, and for notices to be filed by the Contractor or Owner for the Project. Subcontractors and suppliers can link to these filings and file their own required notices on line for a fee after account set up. No case law has tested this system

Who May Claim: A person who furnishes labor, materials, professional design services, surveying services, or rental equipment for improvement of property pursuant to a contract with the owner, or who does not have a direct contract with the owner (such as a subcontractor).

Required Notice and Timing:

1. *Claim of Lien on Real Property:* Contractor must file a Claim of Lien on Real Property with the Clerk of Superior Court in the County where real property is located within 120 days after the date of last furnishing of labor or materials at the site.
2. *Traditional Subrogation Lien:* If the claimant is a first-, second-, or third-tier subcontractor, a Claim of Lien on Real Property and a Notice of Claim of Lien Upon Funds must be filed with the Clerk of Superior Court in the county where the project is located within 120 days after the date of last furnishing of labor or materials at the site.
3. *Swain Lien:* Second or third-tier subcontractor may also subrogate directly to contractor's Claim of Lien on Real Property, which requires Claim of Lien on Real Property and Notice of Claim of Lien Upon Funds filing as noted above. Subcontractor's Swain Lien right is destroyed by Notice of Contract filed with the Clerk of Superior Court and posted adjacent to the building permit for the project within 30 days of permit issuance by contractor. Second- and third-tier Subcontractors can revive destroyed Swain Lien rights by sending Notice of Subcontract to contractor. Subsequent to Notice of Subcontract, if contractor notifies subcontractor within five days of each payment made to first tier-, then lower tier subcontractor's Swain Lien right is permanently extinguished with no right of revival.
4. The owner's real property is subject to a lien if owner makes any further payment to contractor after receiving notice of a claim of lien upon funds by a subcontractor. There is no statutory time limit, but a lien upon funds is valid only as long as funds are owed. No filing with the Clerk of Superior Court is required for a lien upon funds, but Notice to Obligor must be served in person or by certified mail.

Suit Filing: A lawsuit to perfect a claim of lien on real property, a traditional subrogation lien, or a Swain Lien on real property must be filed within 180 days after the date of last furnishing of labor or materials at the site. A Lien Upon Funds can be enforced only if there has been a wrongful payment after receipt of Notice. To attach to real property, suit for wrongful payment over Lien on funds must be filed within the 180 day deadline for a suit to perfect.

Contractual Waivers: Lien rights can be waived in a contract before performing any work. However, waiver of a lien in anticipation or in consideration for awarding the contract to perform work is void and unenforceable. Pay-if-paid clauses are unenforceable and so cannot impliedly waive lien rights. Pay-when-paid clauses are unenforceable.

Waivers After Commencement of Work: After commencement of work, lien waivers may waive all security including security for retainage, unbilled extra work and unresolved claims

Attorney's Fees: Fees may be awarded in the discretion of the Judge to a "prevailing party", who obtains judgment for at least 50 percent of the lien claimed or who defeats a claim resulting in less than 50 percent of the lien claimed, and there has been an unreasonable refusal to settle. . In practice, if a Defendant has a legitimate counterclaim or set off, Judges are more often unlikely to exercise discretion in favor of awarding attorney's fees.

Public Work

Rights Available: Suit on a payment bond. No liens.

Who May Claim: First-tier subcontractor and lower-tier subcontractors, including third tier subcontractors.

Type/Amount of Bond: A labor and materials payment bond in the amount of contractor's contract is required on each contract when cost of entire project exceeds \$300,000. Owner is required to furnish certified copy of payment bond and contract document covered by payment bond upon ten days written request of a claimant. Contents of the bond are conformed to the language of the statute. Failure of designated official of Owner to obtain bond is a misdemeanor.

Pre-Work Notice Requirement: A Notice of Public Subcontract served on the Contractor is required for a lower tier claim to be made on the Payment Bond for labor or materials provided more than 75 days prior to the claimant's service of the Notice of Public Subcontract to the Contractor.

Required Notice and Timing: No notice is required of first-tier subcontractors. Second-tier or lower subcontractors must give bond claim notice by

registered or certified mail to contractor within 120 days after subcontractor's date of last furnishing of labor or materials to the project. No obligation to provide notice for any claim of \$20,000 or less. For claims exceeding \$20,000, notice is only required for that portion of the claim in excess of \$20,000.

Suit Filing: Subcontractor must file suit no sooner than 90 days, but no later than one year after the date of last furnishing of labor or materials or one year from the date of final settlement with contractor, whichever is later. If a date of final settlement never occurs, then the date shall be the date on which the Owner notifies the Contractor that no further payments will be made.

Contractual Waivers: It is not determined whether payment bond rights can be waived in a contract before performing any work, but such a waiver is likely void as against public policy. Pay-if-paid clauses and Pay-when-paid clauses are unenforceable and so cannot impliedly waive payment bond rights.

Waivers After Commencement of Work: It is uncertain whether waivers of payment bond rights after commencement of work may waive security including security for retainage, unbilled extra work and unresolved claims.

Retainage: On projects of less than \$100,000, there is no retainage by Public Owners. Public Owners may withhold 5 percent maximum on progress payments as retainage. When a project is 50 percent complete, performance is "satisfactory", and Surety consents in writing, no further retainage shall be withheld, and early finishing trades, as identified in the Bid Specifications, may seek 100 percent retainage payment.

Lien Available: No.

Attorney's Fees: Fees may be awarded in the discretion of the Judge to a "prevailing party", who obtains judgment for at least 50 percent of the amount of the bond claim, or who defeats a claim resulting in less than 50 percent of the amount claimed, and there has been an unreasonable refusal to settle. In practice, if a defendant has a legitimate counterclaim or set off, Judges are more often unlikely to exercise discretion in favor or awarding attorney's fees.

North Dakota

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Construction lien.

Who May Claim: Any person that improves the real estate. N.D. Cent. Code, § 35-27-02.

Required Notice and Timing: Written notice that a lien will be claimed must be given to the owner of the real estate by certified mail at least 10 days before the recording of the construction lien. N.D. Cent. Code, § 35-27-02.

Lien Filing: Every person, including original contractors and subcontractors, must record their lien claim with the recorder of the county in which the property to be charged with the lien is situated, within 90 days after the last work or contribution to the property is done. N.D. Cent. Code, § 35-27-13.

Suit Filing: Suit must be commenced and a *lis pendens* must be recorded within three years after the date of recording of the lien, or the lien is deemed satisfied. Written demand must be delivered to the lienor and filed with the county recorder. Within 30 days of delivery of the demand, suit must be commenced and filed and a *lis pendens* must be recorded, or the lien is forfeited. N.D. Cent. Code, § 35-27-25.

Contractual Waivers: The best practice is to assume lien rights can be waived in a contract before any work is performed. N.D. Cent. Code, §§ 35-27-02, 1-01-08, 1-02-28.

Waivers After Commencement of Work: The best practice is to assume lien rights may be waived prospectively after starting work for the remainder of the project.

Priority of Liens: The order of priority of liens is: (1) for manual labor, (2) for materials, (3) subcontractors other than manual laborers, and (4) original contractors. N.D. Cent. Code, § 35-27-22.

Liens for manual labor filed within the 90-day period must share ratably in the security. Liens for manual labor filed after the 90-day period have priority in the order of the filing of such liens. Liens for materials filed within the 90-day period must share ratably in the security and

liens filed after the 90-day period have priority in the order of the filing of such liens. N.D. Cent. Code, § 35-27-22.

Public Work

Rights Available: Suit on a payment bond - 100 percent of the contract price, plus interest. N.D. Cent. Code §§ 48-01.2-10, 48-01.2-23.

Who May Claim: The materialman, laborer and subcontractor. A person having a direct contractual relationship with a subcontractor, but no contractual relationship with the contract furnishing the bond, does not have a claim for relief unless that person has given written notice to the contractor within 90 days of completion of the contribution to the project. N.D. Cent. Code § 48-01.2-11.

Type/Amount of Bond: The bond amount is the contract price, plus interest. A bond is required for contracts that are more than \$100,000. The bond must be conditioned to be void if the contractor and all subcontractors fully perform all terms, conditions and provisions of the contract and pay all bills or claims on account of labor performed and any supplies, and materials furnished and used in the performance of the contract, including all demands of the subcontractors. N.D. Cent. Code § 48-01.2-10.

Required Notice and Timing: Notice of a claim with the principal contractor must be sent by registered mail within 90 days of last performance, to the contractor at any place the contractor maintains an office, conducts business or has a residence. N.D. Cent. Code § 48-01.2-11.

Suit Filing: All suits must be filed within one year of completion and acceptance of the project. N.D. Cent. Code § 48-01.2-12.

Contractual Waivers: Bond rights can be waived in writing. The best practices are to assume that bond rights can be waived before any work is performed and that pay-if-paid clauses can waive bond rights prospectively. N.D. Cent. Code § 1-01-08, 1-02-28.

Waivers After Commencement of Work: Claimants should also assume bond rights can be waived

prospectively after work is started for the remainder of the project. It should also be assumed that the waiver is effective through the date the waiver is signed, and that the waiver affects retainage, unbilled extra work and unresolved claims, unless the language expressly excludes those items. Waivers are contractual, so if the waiver is part of a contract, there must be some consideration for the contract. There probably is no requirement for separate consideration for the waiver.

Ohio

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: The prime contractor, subcontractor, material supplier, sub-subcontractor and construction manager. In the case of residential construction and condominium property, if the owner has paid the prime contractor in full prior to receipt of an affidavit of a mechanics lien, then a subcontractor or material supplier has no right to a mechanics lien. Ohio Rev. Code Ann. § 1311.011(B).

Required Notice and Timing: Subcontractors, sub-subcontractors and material supplier must serve the prime contractor and owner with a notice of furnishing within 21 days of first work. If the subcontractor or material supplier has a contract directly with the prime contractor, only the owner needs to be served with a notice of furnishing. The supplier of materials directly to an owner does not need to serve the owner with a notice of furnishing. Ohio Rev. Code Ann. § 1311.05.

Lien Filing:

1. On single- or double- family dwellings or condominium property, a lien must be filed within 60 days of last work. A copy of the lien must be served to the owner within 30 days of filing. Ohio Rev. Code Ann. §§ 1311.06(B)(1), 1311.07.

2. On gas and oil wells, derricks and pipelines, a lien must be filed within 120 days of last work. A copy of the lien must be served to the owner within 30 days of filing, as well as the purchaser or pipeline carrier. Ohio Rev. Code Ann. §§ 1311.06(B)(2), 1311.07, 1311.021.

3. On railroads, a lien must be filed within 40 days of last work. A copy must be served to the owner within 10 days of filing. A special affidavit is required. Ohio Rev. Code Ann. §§ 1311.42, 1311.43.

4. On all other construction, a lien must be filed within 75 days of last work. A copy must be served to the owner within 30 days of filing, or a copy must be posted on the property, if the owner cannot be found in the county. Ohio Rev. Code Ann. §§ 1311.06(B)(3), 1311.07.

Suit Filing: Suit must be filed within 60 days of receipt of notice to commence suit, but no later than six years after filing the lien. Notice to commence suit may be served by any person with an interest in the lien property or by the contractor or subcontractor that has provided a bond in substitution for the lien. Ohio Rev. Code Ann. §§ 1311.11(A)(1), (B)(3), 2305.07.

Lien Bonds: A lien may be bonded off after application, notice and hearing before the court of common pleas by posting a bond with sufficient surety in an amount equal to double the amount of the claim secured by the lien if the claim is less than \$5,000, or 1.5 times the amount of the lien claim, if the claim exceeds \$5,000. Ohio Rev. Code Ann. §1311.11(C)(1).

Contractual Waivers: Lien rights can be waived upfront in a contract. Although pay-if-paid clauses do not prohibit the filing of a mechanics lien, it is likely the lien rights cannot be enforced (i.e., foreclosed) if the sum never becomes due.

Waivers After Commencement of Work: After commencement of work, lien waivers may waive all security including security for retainage, unbilled extra work and unresolved claims.

Special Warning: Ohio has adopted the Registered Land Statutes (Torrens Law) that have absolute overriding authority over other mechanics lien laws in connection with property that has been registered. A lien on registered land attaches only after the recorder notes the lien of record. Ohio Rev. Code Ann. §5310.02.

An action to foreclose a lien must be filed within six years of the date of the filing of the lien. Ohio Rev. Code Ann. § 2305.07.

Public Work

Rights Available: Lien on public funds; suit on a payment bond.

Who May Claim: The subcontractor, material supplier and sub-subcontractor.

Type/Amount of Bond: Performance and payment bonds shall be issued by a surety company authorized

to do business in Ohio as surety approved by the board, officer or agent awarding the contract on behalf of the state or political subdivision in an amount equal to the amount of the contract.

A bidder must file with its bid a bond for the full amount of the bid, or a certified check, cashier's check or letter of credit in an amount equal to 10 percent of the bid. The bond should follow the form set forth in Ohio Rev. Code Ann. 153.57.

Required Notice and Timing:

1. For a lien on public funds, notice must be filed within 120 days of last labor performed or last materials, fuel or equipment furnished. Lien claim must be served in affidavit form on the public authority. Lien must be filed to the representative of the public authority. Ohio Rev. Code Ann. § 1311.26.

2. Notice to a payment surety is required within 90 days after acceptance of the project by the public authority.

Suit Filing:

1. Suit for a lien on public funds must be filed within 60 days of the mailing of notice to the lienholder to commence suit by the public authority, subcontractor or contractor. Ohio Rev. Code Ann. § 1311.311.

2. Suit on the payment bond must be filed no earlier than 60 days after notice to surety, but not later than one year after acceptance of the project by the public authority.

Contractual Waivers: Payment bond rights cannot be waived in the contract.

Waivers After Commencement: After work has commenced, a bond waiver will presumably be valid according to its terms when based on consideration (i.e. partial payment).

Special Warning: Without a contract with the principal contractor, a sub-subcontractor or material supplier must serve the principal contractor with a notice of furnishing within 21 days of first work and provide a copy of this notice to the public owner when serving a lien claim. Ohio Rev. Code Ann. § 1311.261.

Sub-subcontractors and second-tier suppliers must timely serve a notice of furnishing (the same notice used to preserve lien rights) upon the prime contractor to preserve payment bond rights if their contract amount exceeds \$30,000.

Oklahoma

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics and materialmen liens. Other liens, such as oil and gas liens, mining liens, etc., are not addressed herein.

Who May Claim: Any person who has a contract with the owner of land (contractor), or any person who does not have a contract with the owner of land (subcontractor, supplier, materialman, artisan or day laborer in the employ of the contractor, subcontractor, supplier or materialman) who either:

- Performs labor, furnishes material or leases or rents equipment used on the land for the erection, alteration or repair of any building, improvement or structure.
- Performs labor putting in any fixtures, machinery or attachments to any building, structure or improvements.
- Shall plant any tree, vines, plants or hedges on the land.
- Shall build, alter, repair or furnish labor, material or lease or rent equipment used on the land for building, altering or repairing any fence or footwalk on the land, or any sidewalk in any street abutting such land.

Okla. Stat. tit. 42, § 141 *et. seq.*

Required Notice and Timing: *Pre-Lien Notice:* Prior to filing a lien, a claimant other than the original contractor must send a pre-lien notice to the last-known address of the original contractor and owner of the property. The pre-lien notice must be sent no later than 75 days after the last date of supply of material, services, labor, or equipment in which the claimant is entitled or may be entitled to lien rights. The pre-lien notice shall be in writing and contain certain required information. The pre-lien notice may be sent by hand delivery supported by a delivery confirmation receipt, automated transaction per Okla. Stat. tit. 12A, § 15-115 or by certified mail, return receipt requested. No pre-lien notice is required if the project is a residential project or a claim is for retainage or is less than \$10,000. Notice requirement does not apply to single-family homes or residential projects of four or fewer units or a claim total of less than \$2,500. Only one notice is required during a construction project. The claimant may request in writing that the original contractor provide the name and last-known address of

the owner of the property. Failure of the original contractor to provide the claimant with the information within five days from receipt of the request shall render the pre-lien notice requirement to the owner of the property unenforceable. At the time of filing the lien, the claimant shall furnish the county clerk a notarized affidavit verifying compliance with the pre-lien notice requirements. Okla. Stat. tit. 42, § 142.6.

Lien Filing: The lien shall be upon the whole of said tract or piece of land, buildings and appurtenances in an amount inclusive of all sums owed to the person at the time of the lien filing, including, without limitation, applicable profit and overhead costs. Okla. Stat. tit. 42, § 141.

1. Any person who has a contract with the owner of land (contractor) and claims a lien under Okla. Stat. tit. 42, § 141 must file a verified lien statement with the county clerk where the property is located within four months after labor was last performed and/or materials were last furnished. Okla. Stat. tit. 42, § 142.

2. Any claimant who does not have a contract with the owner (subcontractor or materialman) and claims a lien under Okla. Stat. tit. 42, § 143 must file a verified lien statement with the county clerk where the property is located within 90 days after labor was last performed and/or materials were last furnished.

Suit Filing: Suit to foreclose the lien must be filed within one year of the lien filing. Okla. Stat. tit. 42, § 149. The prevailing party in a suit to foreclose a lien is entitled to attorney fees. Okla. Stat. tit. 42, § 176.

Discharge of Lien: Any property owner or other interested party may discharge the lien by depositing with the county clerk an amount of money or corporate bond equal to 125 percent of the lien claim. The lien claimant has 10 days after a bond is filed to object. The only grounds for objection shall be that: 1) the surety is not authorized to transact business in this state; 2) the bond is not properly signed; 3) the penal amount is less than 125 percent of the claim; 4) the power of attorney of the surety's attorney-in-fact does not authorize the execution; 5) there is no power of attorney attached if the bond is executed by its secretary; or 6) a cease and desist order has been issued against the surety either by the Insurance Commissioner or a court of competent jurisdiction. The only proper parties to an action

against the substituted security are: the party making the cash deposit; the bond principal and surety; the party primarily liable for the indebtedness; and anyone else who may be liable to the lien claimant for the same indebtedness. If the lien claimant fails to file a timely foreclosure, the clerk shall not incur liability to any lien claimant for an inadvertent release of case or bond. At the end of 10 years and after the clerk has attempted written notification to the lien claimant at the address shown on the lien claim, if no foreclosure has been commenced by the claimant or such money has not been withdrawn upon application of the depositing party, the case deposit plus all accrued interest shall be forfeited to the county general fund. Okla. Stat. tit. 42, § 147.1.

Trust Fund Doctrine: Amounts received by a contractor or subcontractor are held as trust funds for the payment of lienable claims. The managing officers of a corporation and the managers of a limited liability company are personally liable for the proper application of trust funds. Knowing misapplication of trust funds are subject to civil and criminal penalties. Okla. Stat. tit. 42, §§ 152, 153.

Contractual Waivers: Most likely, lien rights can be waived in a contract before performing any work. However, Oklahoma law seems to be ambiguous on this subject. The question remains to be definitively answered. See *Metropolitan Water Company v. Hild*, 415 P.2d 970 (Okla. 1966).

Oklahoma apparently has not answered the question whether a pay-if-paid clause prospectively waives lien rights. The best practice is to assume that it will.

Waivers After Commencement of Work: The best practice is to assume that lien rights may be waived through the date the waiver is signed, rather than the date of last work performed and paid. Further, a best practice is to assume that a subcontractor may waive lien rights securing retainage, unbilled extra work or unresolved claims.

However, every lien waiver requires some sort of consideration. Generally, landowners are allowed to rely on lien waivers and enforce an unconditional waiver of lien, voluntarily executed by a subcontractor that furnished materials for the construction of improvements, where the owner relying upon such waiver, has paid the contract price in full to the contractor. See *Antrim Lumber Co. v. Neal*, 44 P.2d 939 (Okla. 1935).

Public Work

Rights Available: Suit on a payment bond. Okla. Stat. tit. 61, §§ 1, 2.

Who May Claim: Subcontractors, materialmen and those under contract with the subcontractors. Okla. Stat. tit. 61, §§ 1, 2.

Type/Amount of Bond: For contracts exceeding \$50,000.00, the person awarded the work must furnish a bond or an irrevocable letter of credit in the amount of the contract. For contracts not exceeding \$50,000.00, in lieu of a bond or irrevocable letter of credit, the contractor shall submit an affidavit certifying payment of all indebtedness related to the contract. Okla. Stat. tit. 61, § 1.

Required Notice and Timing: Any person who performed labor and/or provided materials or parts for a subcontractor must give written notice to the contractor and surety by registered or certified mail within 90 days from the last day that labor was performed, materials were provided or parts were furnished. Okla. Stat. tit. 61, § 2.

Suit Filing: Any person due money for labor, material or repair to machinery or equipment may bring an action within one year from the last day that labor was performed, materials were provided or parts were furnished for which the claim is made. Okla. Stat. tit. 61, § 2.

Lien Available: No.

Oregon

By James T. Yand, Esq.
and Jessica Roberts, Summer Associate

Private Work

Rights Available: Mechanics' lien.

Who May Claim: Prime contractor, subcontractor, and materialman; persons furnishing labor or materials, or renting equipment for use in the preparation of land or construction of any improvement; trustees of any employee benefit plan; architect, landscape architect, land surveyor or registered engineer. Or. Rev. Stat. § 87.010.

Required Notice and Timing:

1. "Information Notice to Owner" applies only to residential construction or improvement contracts exceeding \$2,000. If the construction contract is under \$2,000, but increases during performance, contractor must deliver notice within 5 days upon when he knows, or should have knows, that the contract would exceed \$2,000. Or. Rev. Stat. § 87.093(4). Notice must be given by the original contractor to the owner or an agent of the owner at the time of signing the construction of improvement contract. Or. Rev. Stat. § 87.093(2). Notice must also be given by the original contractor to the first purchaser of the property by personal delivery, registered/certified mail, or first class mail within 75 days of completion of work. Or. Rev. Stat. § 87.093(2)(3). Information notice must include signature lines for the contractor and the property owner. Or. Rev. Stat. § 87.093(1).

2. Subcontractor and materialman must give written notice to owner and mortgagee, delivered personally or by registered/certified mail, at any time during performance and prior to completion. While notice may be given any time during work progress, it protects the right to perfect only after 8 business days before delivery of notice. Or. Rev. Stat. § 87.021(1). Notice need not be given in order to perfect a lien on commercial improvements. Or. Rev. Stat. § 87.021(3).

3. Notice of intent to foreclose must be delivered in person or by registered/certified mail (Or. Rev. Stat. § 87.018(1)) to the owner and mortgagee by all claimants at least 10 days prior to the commencement of a foreclosure suit. Or. Rev. Stat. § 87.057(1).

4. Original contractor may not claim a lien arising from the improvement of real property if the contract

price exceeds \$2,000 and the contractor does not have a written contract. Or. Rev. Stat. § 87.037; 701.305(1). If the price of the contract was initially less than \$2,000, but during the course of performance exceeds that amount, the contractor shall deliver (personally or by registered/certified mail) a written contract to the owner not later than 5 days after the contractor knows, or should reasonably have known, that the contract price will exceed \$2,000. Or. Rev. Stat. § 701.305(1). Failure to have a written contract will not void the contract. Or. Rev. Stat. § 701.305(1).

Lien Filing: Lien must be filed no later than 75 days after the person ceases to provide labor, rent equipment, or deliver materials, or 75 days after the completion of construction, whichever is earlier. Or. Rev. Stat. § 87.035. All claimants must send notice of the lien in writing, delivered in person or by registered/certified mail (Or. Rev. Stat. § 87.018), and written notice of the claim to the owner and mortgagee within 20 days of lien filing. Or. Rev. Stat. § 87.039.

Suit Filing: A suit must be filed within 120 days after the claim of lien is filed. Or. Rev. Stat. §87.055. The prevailing party is entitled to attorneys' fees at trial and on appeal for valid liens that have been foreclosed. Or. Rev. Stat. § 87.060(5). Attorneys' fees are not authorized when a party prevails on grounds that do not pertain to the validity of the lien or the lien's foreclosure. *HGC Ltd. v. Cascade Pension Trust*, 174 Or. App. 464, 470, 26 P.3d 842 (2001). If the claim is not properly filed per ORS 87.035, no award for attorneys' fees is allowed. Or. Rev. Stat. § 87.039(2).

Construction defect, or negligent construction, claims are governed by a two-year statute of limitations under ORS § 12.110(1). The claim must be filed within 2 years of the date that the cause of action accrues. *See Goodwin v. Kingsmen Plastering, Inc.*, 359 Or. 694, 714, 375 P.3d 463 (2016).

Lien Bonds: The owner or interested person can file a bond or money deposit in the amount of 150 percent of the amount claimed or \$1,000, whichever is greater. Or. Rev. Stat. § 87.076(1).

Contractual Waivers: Lien rights may be waived in a contract before performing any work. Or. Rev. Stat. §701.630(2)(b). However, any waiver must be clearly made and will not be inferred through joint checking

arrangements, etc. Best practice is to assume that a pay-if-paid clause may prospectively waive lien rights. *See Mignot v. Parkhill*, 237 Or. 450, 458, 391 P.2d 755 (1964); *Moodhe v. Bailey*, 209 Or. App. 193, 198, 147 P.3d 352 (2006).

Waivers after Commencement of Work: Lien rights may be waived after performing work. Or. Rev. Stat. §701.630(2)(b). However, any waiver must be clearly made and will not be inferred through joint checking arrangements, etc. Best practice is to assume that a pay-if-paid clause may prospectively waive lien rights. *See Mignot v. Parkhill*, 237 Or. 450, 458, 391 P.2d 755 (1964).

Special Warning: Residential purchasers are protected from lien claims that arise before the date on which the sale is complete, but are perfected after the fact, by the property owner of record. Or. Rev. Stat. § 87.007(2). Purchasers of residential property are prohibited from waiving their protection from lien claims that arose prior to their purchase (*see* Or. Rev. Stat. § 87.007(1), as amended), and unlicensed subcontractors are prevented from perfecting a lien claim against owner-occupied residential property. Or. Rev. Stat. § 87.036(1).

Unjust Enrichment Claims: Principals are bound by the actions of their agents resulting in unjust enrichment even if several steps removed from a quasi-contract. *Larisa's Home Care, LLC v. Nichols-Shields*, 362 Or. 115, 404 P.3d 912 (2017).

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: Persons who claim to have furnished labor or materials to a project; any person contracting with a contractor furnishing a bond or a subcontractor, or an assignee of such a person; and any person claiming monies due by the State Accident Insurance Fund Corp., the Unemployment Compensation Trust Fund, or Dept. of Revenue in connection with contract performance. Or. Rev. Stat. § 279C.600(1). Right of action exists only if the aforementioned person has not been paid in full and gives a written notice of claim to the contractor and the contracting agency. Or. Rev. Stat. § 279C.600(1)(a)(b).

Type/Amount of Bond: Payment bond with penal sum no greater than 100 percent of the contract price. Or. Rev. Stat. § 279C.836(1). Contractors can elect not to provide the \$30,000 public works surety bond for

projects with a contract price less than \$100,000. Or. Rev. Stat. § 279C.836(8).

Required Notice and Timing: All claimants must send written notice (hand delivered or by registered/certified mail) to the contractor or subcontractor no later than 180 days after the claimant's last performance of labor or delivery of materials, or 180 days after the day the worker listed as the last day of performance/delivery. Or. Rev. Stat. § 279C.605(1).

Suit Filing: Suit must be commenced within 2 years of claimant's last performance/delivery. Or. Rev. Stat. § 279C.610(3). If settlement is not made within 6 months from the date proof of loss is filed, and if the plaintiff's recovery exceeds the amount of any tender made by the defendant in such action, a reasonable amount to be fixed by the court as attorneys' fees shall be taxed as part of the costs of the action. Or. Rev. Stat. § 742.061(1). If the plaintiff's recovery does not exceed the amount of any tender made by the defendant, a reasonable amount to be fixed by the court as attorneys' fees shall be taxed and allowed to the defendant. Or. Rev. Stat. § 742.061(1).

Contractual Waivers: Bond rights may be waived in a contract prior to performing any work. Or. Rev. Stat. § 279C.380(1). However, any waiver must be clearly made and will not be inferred through joint checking arrangements, etc. Best practice is to assume that a pay-if-paid clause may prospectively waive rights.

Waivers after Commencement of Work: Bond rights may be waived after performing work. Or. Rev. Stat. § 279C.380(1). However, any waiver must be clearly made and will not be inferred through joint check arrangements, etc. Best practice is to assume that a pay-if-paid clause may prospectively waive rights.

Under the Little Miller Act, there is no requirement that a claimant incorporate its contract or quasi-contract claims into its bond claims. *State v. Ross Bros. & Co., Inc.*, 268 Or. App. 438, 448, 342 P.3d 1026, *rev den*, 357 Or. 551, 357 P.3d 504 (2015). A surety's liability is measured by the contractor's debt to the claimant for the labor and/or materials provided. *State v. Ross Bros. & Co., Inc.*, 268 Or. App. 438, 448–49, 342 P.3d 1026, *rev den*, 357 Or. 551, 357 P.3d 504 (2015).

Special Warning: The Oregon False Claims Act imposes civil penalties against contractors that submit "false claims" for payment, and allows for investigation of contractor claims by state attorneys. Or. Rev. Stat. §§180.750– 180.785. The Act imposes liability against

the contractor's company and any individuals participating in prohibited conduct. Or. Rev. Stat. §§ 180.750–180.785.

Lien Available: No.

Pennsylvania

By Andrew B. Cohn, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: The prime contractor, a subcontractor/supplier to the prime contractor or a subcontractor/supplier to a first tier subcontractor/supplier.

Required Notice and Timing: A first or second-tier subcontractor/supplier must give the owner formal written notice of its intention to lien its work at least 30 days before the lien claim is filed. No notice of lien is required of prime contractors. Service of notice must be by first-class, registered or certified mail on the owner or its agent or by personal service on an adult in the same manner as service of a summons. If service cannot be made by the above means, then it must be made by posting a notice on improvement.

Lien Filing: The lien must be filed with the County Prothonotary, a public court official in Pennsylvania, within six months after last provision of the work for which the lien claim is being made. Within 30 days of filing the lien, service of the lien must be made upon the owner in the same manner as service of a summons. If service cannot be made as above, notice of filing must be posted on a conspicuous public part of the improvement. An affidavit of service must be filed within 20 days following service of the lien on the owner.

Prerequisite of Filing a Notice of Furnishing on Certain Projects: For projects commenced after Dec. 31, 2016, a State Construction Notices Directory was established by law. See <https://apps.pa.gov/scnd>. To preserve its lien rights on projects registered with a Notice of Commencement on the Directory, a *subcontractor* (defined as a subcontractor or supplier to the prime contractor, or to a first tier subcontractor) must file with the Directory a “Notice of Furnishing” within 45 days after it first provides labor or material to a project. A subcontractor’s failure to timely file a required Notice of Furnishing will result in a forfeiture of its right to file a lien.

Suit Filing: Suit to enforce a mechanic’s lien claim must be filed within two years from the date on which the lien claim is filed, and a judgment must be obtained within five years following filing of the lien.

Lien Bonds: Upon petition to the Court of the owner or any party in interest, the mechanic’s lien will be discharged by depositing with the court cash equal to the amount of the lien claim, or by providing approved security (usually a bond) in double the amount of the claim. The Court can approve security in any lesser amount.

Lien Waivers: Apart from a partial lien release given in exchange for payment, a potential lien claimant may waive its lien rights in advance *only as follows*: 1) A prime contractor may waive its lien rights in advance for work on new or existing “residential property” on which the height of the “residential property” building is three stories or less (not including any basement level); or 2) a lower tier lien claimant may agree to waive its lien rights in advance for work on non- “residential property” projects where the prime contractor has provided a payment bond protecting the lower tier lien claimant’s right to payment; or 3) a lower tier claimant will be deemed to have waived its lien rights in advance for work on “residential property” where the prime contractor has properly waived its lien rights in writing and notice of such written lien waiver has been provided to the lower tier claimant in advance of its work, or such waiver has been filed and correctly indexed in advance with the court Prothonotary in the county where the project is located.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: The subcontractor (one who provides labor or materials to the bonded prime contractor) and second-tier subcontractors (one who supplies labor or materials to a subcontractor).

Type/Amount of Bond: The law requires a payment bond at 100 percent of the prime contract amount.

Required Notice and Timing: A second-tier subcontractor must give written notice of its bond claim to the prime contractor within 90 days from the date on which it performed the last labor or furnished the last material for which payment is claimed. All such notices should be sent by registered or certified mail, with return receipt requested. Although not

required by statute, copies should be sent to the owner and surety.

Lien Available: No.

Suit Filing: Suit on the payment bond must be filed no less than 90 days, and (based on case precedent) no more than one year plus 90 days after last performance of the work giving rise to the bond claim, even though the applicable public works bond statute requires that suit be commenced within one year of the bond claimant's last work.

Private Work

Rights Available: Mechanics lien. R.I.G.L. 34-28-1 *et seq.*

Who May Claim: Any person furnishing labor, materials, services, etc., may claim a lien on a project. The equipment and rental of equipment is also covered under a lien.

Required Notice Of Lien: Written notice of intention to claim a lien must be sent to the owner(s) of record by certified mail within 200 days of performing the work, furnishing materials, etc. Notice of lien is effective for the value of the work performed within 200 days prior to the filing of the lien.

Retainage: A notice of lien shall be effective as to any retainage earned but not paid for labor, materials and/or equipment and said notice of lien shall be effective from commencement of said work. However, the notice of lien and recording thereof must be recorded within 200 days of performing the work.

Lien Filing: The notice of intention must be recorded at the recorder of deeds where the project is located within 200 days from the date of furnishing the labor, materials and/or equipment. The notice of lien should be recorded simultaneously with the mailing of the notice to the owner(s) of record.

Suit Filing: A complaint to enforce the notice of intention must be filed with the Superior Court in which the project is located within 40 days from date of recording the lien.

The complaint must be filed on the same day as the notice of *lis pendens*, or within seven days thereafter and both the complaint and the notice of *lis pendens* must be filed within forty days of the date of recording of the notice of intention.

Lien Bonds: An owner may “bond off” a lien at any time. The motion and order can be presented *ex parte to the Superior Court*.

Lien Waivers: A provision in a contract in relation to the construction or alteration of a building, including demolition and excavation, which purports to bar the filing of a notice of intention is against public policy and is void. In addition, a lien waiver is void if payment is not received. R.I.G.L. 34-28-1.

Pre-Lien Notice: No person contracting directly with either the owner of the land, lessee, or tenant of the land, or owner of less than the fee simple, other than material suppliers . . . shall be entitled to claim a lien under this chapter unless the person shall have provided those persons notice to those persons, either incorporated conspicuously in a written contract or sent by certified mail return receipt requested, any time prior to commencing work or delivery of materials for construction, erection, alteration or repair as set forth in this chapter. R.I.G.L. 34-28-4.1.

In addition, pursuant to Rhode Island Contractor’s Registration Act (Section 5-65-3(o)) the statutory notice of Mechanics Lien must be placed before the signature clause. Notwithstanding, if a contractor complies with the Contractor’s Registration Act, the contractor need not comply with the above notice.

Public Work

Rights Available: Every public works project involving the state, cities or towns must provide for a payment and performance bond for subcontractor(s) and material supplier(s).

Required Notice And Timing: No notice is required.

Suit Filing: Suit by a subcontractor or supplier must be commenced within two years after the date work was last performed or if the bond requirements provide for a longer period, then the bond provisions govern.

Lien Available: No.

South Carolina

By Daniel T. Brailsford, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: Prime contractors, subcontractors, suppliers and any other persons who have provided labor or materials that were actually used in the erection or alteration of any structure on real estate, including design work, grading, paving and providers of security services.

Required Notice and Timing: Notice must be given to the owner within 90 days of last furnishing the labor or materials. For increased protection, at project commencement, lower-tier providers should have provided certified notice to the prime contractor of their intent to furnish the project.

Lien Filing: A lien must be served and filed within 90 days of last furnishing labor or materials.

Suit Filing: Suit must be served and filed within 180 days of last furnishing labor or materials.

Lien Bonds: Anyone with an interest in the property may file a bond that replaces the real property as security for the claim and discharges the real property from the lien.

Contractual Waivers: Lien rights cannot be waived in a contract, since such waivers are unenforceable except to the extent payment for the labor and materials is actually received. Accordingly, pay-if-paid and other such provisions do not effectively waive lien rights in South Carolina.

Waivers After Commencement of Work: Likewise, lien rights cannot be waived after commencement of work, except to the extent payment for the labor and materials is actually received.

Special Warnings:

1. The mortgagee should be served in order to allow the lien to prevail over future advances on the construction loan. Attorney fees are awarded to the prevailing party in the foreclosure action. The amount of lien should not be overstated.

2. To be fully protected, a lower-tier provider must notify the prime contractor by certified mail of services

provided or to be provided, and the amount of contract. The notice can be given at any time, but should be given as soon as possible.

3. The lien claimant's contractor's license number must appear on the face of the lien. If the lien claimant is not required to be licensed under state law, such a notation must appear on the face of the lien.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: First- and second-tier subcontractors and suppliers.

Type/Amount of Bond: Payment bond in a sum equal to 100 percent of the contract price.

Required Notice and Timing: Written notice to the contractor within 90 days from the last furnishing of labor or materials, by personal service or certified mail.

Special Warning: This notice should also be sent to the public owner. Such notice will protect the claimant in the event the owner has failed to require the proper bond.

Suit Filing: Suit must be filed in the Circuit Court in which the contract was to be performed, within one year of last furnishing labor or materials.

Contractual Waivers: The best practice is to assume that bond rights may be waived in a contract. Pay-if-paid clauses are unenforceable in South Carolina and thus would not effectively waive payment bond rights.

Waivers After Commencement of Work: The best practice is to assume that bond rights generally may be waived after commencement of the work.

Special Warning: To be fully protected, a lower-tier provider should send the prime contractor a "notice of furnishing of labor and materials" by certified mail prior to such furnishing or as soon as possible thereafter. This does not take the place of the 90-day notice of an actual unpaid claim, which is mandatory for lower-tier providers.

Lien Available: No.

South Dakota

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien.

Who May Claim: Anyone furnishing skill, labor, services, equipment or materials. S.D. Codified Laws § 44-9-1.

Required Notice and Timing: A sworn lien account and notice of claim may be served upon the owner at any time, and the owner may withhold payments from the contractor to satisfy the lien claimant.

Lien Filing: The lien statement, with attached proof of service, must be filed within 120 days of last performance. S.D. Codified Laws § 44-9-15. A copy of the lien statement must be mailed to the property owner by registered or certified mail before the lien statement is filed. The post office receipt then must be attached to the lien statement. S.D. Codified Laws § 44-9-17.

Suit Filing: Suit must be filed within 30 days after service of a written demand to commence suit to enforce lien. If no suit has been filed to enforce the lien by the fortieth day, the owner or contractor may request that the lien be cancelled by filing an affidavit with the register of deeds with a copy of the written demand that was served and proof of service. S.D. Codified Laws § 44-9-26.

Waivers Permitted: A special chapter of the code relating to construction lien waiver agreements expressly preserves “all other means presently existing under law by which such liens may be waived,” and so the best practice is to assume contractual and other lien waivers are valid. S.D. Codified Laws § 44-9A-1 *et. seq.*

Public Work

Rights Available: Suit on a payment bond. Also, “public improvement lien” on money due or to become due to the prime contractor. S.D. Codified Laws §§ 5-21-1, 5-22-1.

Who May Claim: Anyone who has furnished labor or material used in the construction of any public improvement. S.D. Codified Laws §§ 5-21-1, 5-22-1, 31-23-1.

Required Notice and Timing: After the completion of work, a contractor may issue a notice specifying the name and address of the public body which caused the improvement to be made and stating that subcontractors must file their claims within 120 days after the notice’s publication. S.D. Codified Laws § 5-22-9. For highway work, written notice of claim must be given within six months from the date work was last performed or material was last supplied. S.D. Codified Laws § 31-23-2.

Type/Amount of Bond: One hundred percent of the contract price. S.D. Codified Laws § 5-21-1.

Suit Filing: Suit must be filed within one year of, but not earlier than six months after, final settlement of the public contract. S.D. Codified Laws § 5-21-6. For highway projects, first-tier subcontractors may not be subject to the six-month waiting period. 29 SD L. REV. 111 (1983).

Lien Available: Yes, a lien is available on monies due or to become due to the prime contractor. Consult with counsel.

Tennessee

By Elizabeth B. Stengel, Esq.

Private Work

Rights Available: Mechanics and materialmen liens.

Who May Claim:

1. All prime contractors, who include land surveyors, persons licensed to practice architecture or engineering, or any person that supervises, performs work or labor, furnishes material, services, equipment, or machinery in connection with the improvement of real property so long as said person is in direct privity of contract with the owner or owner's agent.

2. All remote contractors, who include land surveyors, persons licensed to practice architecture or engineering, or any person that supervises, performs work or labor, furnishes materials, services, equipment or machinery in connection with the improvement of real property under a contract with a person other than an owner.

3. With respect to residential real property, which includes one-, two-, three- or four-dwelling units where the owner intends to make at least one of the units the owner's principal place of residence, only prime contractors have a right to place a lien on said property. But see Who May Claim, paragraph 4 below.

4. Where improvements are being made to a single family dwelling, if the owner is not intending to use such dwelling as the owner's principal place of residence, if the owner and prime contractor are the same person or a person controls both the entity owning the property and a prime contracting business, prime contractors and remote contractors that are in contractual privity with the prime contractor have a right to place a lien on said property.

Required Notice and Timing:

1. All prime contractors must give notice of their rights to a lien prior to beginning work or entering into the contract. Failure to give notice is a Class B misdemeanor, but does not affect lien rights.

2. All remote contractors that have not received payment for work during any monthly period must provide a notice of nonpayment to the owner and prime contractor within 90 days of the last day of each month in which the remote contractor was not paid. Service shall be by registered or certified mail, return receipt requested, hand delivery with a sworn statement that is

properly notarized and confirms delivery of written notice, or any other commercial delivery service or courier so long as a receipt of service is provided. Failure to serve a notice of nonpayment for each month may result in the loss of lien rights for that particular month. However, retainage is exempt from this provision.

The contents of the notice of nonpayment are governed by statute and must include all required information.

3. All remote contractors must serve a written notice of lien upon the owner of the improved property within 90 days of the date the improvement was completed or abandoned. A notice of completion shortens the time to serve a claim. See Special Warnings, below.

Lien Filing:

1. For a prime contractor and those persons with a direct contract with the owner, a lien shall continue for one year after completion or the project is abandoned and until a final decision in any suit filed within the one-year period. If the claimant has not filed an authenticated contract or sworn statement in the register of deeds' office of the county where the real property, or any part affected, lies, and an owner files a notice of completion, claimant must serve on the owner by registered or certified mail, a notice of claim. The owner must receive the notice within 10 days of the filing of the notice of completion on one- to four-unit residential projects, and within 30 days on all other projects.

2. For remote contractors, a claimant must serve a written notice of a claim on the owner:

- a. Within 90 days following the date the improvement was completed or abandoned. A notice of completion shortens the time to serve a claim. See Special Warnings, below.
- b. If an owner files a notice of completion, however, the claimant must serve, and the owner must receive, a notice of claim by registered or certified mail within 10 days of the filing of the notice of completion on one- to four-unit residential projects, and within 30 days on all other projects.
- c. If a remote contractor has provided a prior notice of nonpayment, any party recording a notice of completion shall simultaneously serve a copy of notice on the remote contractor.

3. To maintain priority over subsequent purchasers or other interests in the property:

- a. For prime contractors, they must file and record in the local register of deeds' office an authenticated contract or sworn statement of claim, which includes a reasonably certain description of the real property, within 90 days after completion or abandonment of the building or improvement.
- b. For remote contractors, they must file and record in the local register of deeds' office a sworn statement of claim, which includes a reasonably certain description of the real property, within 90 days following the date the improvement was completed or abandoned.

Suit Filing:

1. Prime contractors must file suit for attachment within one year after completion or abandonment of the improvement. The lien enforcement action shall be enforced in a court of law or equity by complaint and writ of attachment, or in a court of general sessions having jurisdiction by warrant for the sum claimed and writ of attachment, filed under oath, setting forth the facts, describing the property, with process to be served on the person or persons whose property interests the prime contractor seeks to attach. The writ of attachment is issued by the county Clerk and Master.

2. Remote contractors must file suit for attachment within 90 days of serving the notice of claim on the owner and, in the same manner as the prime contractor but the complaint or warrant may be served on the prime contractor or remote contractor in any degree with whom the lien holder is in contractual privity

3. The owner, owner's agent or prime contractor may, upon written demand served upon the lienor and endorsed as to service, require the lienor to commence an action to enforce the lienor's lien within 60 days after service, or the lien shall be forfeited.

Lien Bonds: The owner may record a bond to discharge the lien. In some instances, when a prime contractor or remote contractor has provided a valid payment bond, the payment bond provided may be substituted for a lien bond.

Milestone Alert: If a contract is made with mortgagor, and mortgagee has written notice of the contract before work has begun, then the lien has priority over the deed of trust if mortgagee fails to object in writing within 10 days of receipt of notice. All liens on the project relate back, for purposes of priority, to the visible commencement of work. Visible commencement is a defined term under the statute.

Contractual Waivers: Any contract provision that purports to waive any right to a lien is void and unenforceable as against the public policy of Tennessee. Consequently, a pay-if-paid clause does not prospectively waive lien rights.

Waivers After Commencement of Work: If expressly agreed in writing, lien rights may be waived, but waiver is conditioned upon receipt of a note or notes which evidence the debt. Waiver is valid for all or any part of the amount of the potential lienor's demand. As such, a waiver of lien rights is valid only for that portion of the work previously performed and covered by the demand.

Required Release of Lien: The lien claimant whose lien has been forfeited, expired, satisfied or adjudged against the lienor in an action on the lien must release the lien by entering on the lien book in the office where the lien was filed or recorded a certificate of satisfaction within 30 days after service of written notice demanding release.

Special Warnings:

1. If a notice of completion is filed by an owner, any lien claimant who previously has not filed a notice of claim must serve on the owner a notice of claim by registered or certified mail. This notice must reach the owner within 10 days after the notice of completion is filed on one- to four-unit residential projects, and within 30 days on all other projects. Merely filing the notice of claim after the owner has filed a notice of completion will not satisfy the time requirement.

2. An owner must receive any notice within the time limit prescribed for service of that notice.

3. An owner must give a certified notice of filing of notice of completion to all parties serving a notice of non-payment on the owner.

4. A prime contractor's or remote contractor's use of contract proceeds for purposes other than to pay for labor, materials, services, equipment or machinery used on the project improvement is a Class E felony and is prima facie evidence of the intent to defraud.

5. There shall be no lien authorized or available on residential real property to any person, firm or corporation that performs residential construction and/or home improvements if that person, firm or corporation is not licensed as a Tennessee contractor with the Contractor's Licensing Board.

6. A lien amount cannot include any interest, service charges, late fees, attorneys' fees, or other amounts to which the lienor may be entitled by contract or law that do not result in the improvement to the real property.

7. The claims secured by lien for work, labor, materials, equipment, services, machinery, overhead and profit, shall not exceed the contract price and extras in the contract between the owner and the prime contractor. A lienor shall not recover any lien amount if the lienor willfully and grossly exaggerates the amount for which the lienor claims. The lienor may be liable for any actual expenses incurred by the injured party, including attorneys' fees, as a result of the lienor's exaggeration.

Public Work

Rights Available: Suit on a labor and materials payment bond.

Who May Claim:

1. On non-highway projects, any laborer, furnisher of labor or materials to the contractor or any subcontractor or sub-subcontractor.

2. On state highway projects, a bond guarantees payment for "all materials purchased and all labor employed."

Type/Amount of Bond:

1. For non-highway projects in excess of \$100,000, a prime contractor must provide a labor and materials payment bond in the amount of not less than 25 percent of the contract price.

2. For state highway projects, a contractor under contract with the Department of Transportation must provide a labor and materials payment bond to the department.

Required Notice and Timing:

1. On non-highway projects, written notice of claim must be served on a contractor or public contracting officer by return receipt registered mail or personal service within 90 days after the completion of work. The written notice must include the nature, an itemized

account of the material furnished or labor done, and the balance due, and a description of the property improved.

2. On state highway projects, a claim may be made during the 30-day period after publication of the notice of completion and final settlement of the project but notice is not necessary to protect the right to sue on the surety bond.

Suit Filing:

1. On non-highway projects, suit must be filed within six months after a claimant completed work or last furnished labor or materials for the project.

2. On state highway projects, suit must be filed within 60 days from the date of the last published notice or advertising. The suit must strictly follow the requirements outlined in Tenn. Code Ann. §54-5-124. When claims arise on a construction highway project, they usually include tort and contract causes of action. Each cause of action has a specific limitations of action within which to file suit. But if the "claim" is not timely filed, the remedy on plaintiff's cause of action is barred.

Contractual Waivers: Although the Tennessee courts have not addressed the issue, the best practice is to assume that bond rights cannot be waived prospectively. As a bond is to ensure subcontractor payment, it is presumed that a Tennessee court would take issue with a waiver of bond rights. It is also presumed that a pay-if-paid clause would not prospectively waive any bond rights.

Waivers After Commencement of Work: While there is no authority on the issue, the best practice is to assume that any waiver of lien rights would be for only the portion of work which is already completed. In addition, as Tennessee lien statutes provide that a waiver of a lien is available upon the acceptance of a note evidencing the debt, the best practice is to assume that a similar obligation would arise in this context. By requiring a note evidencing the debt, the Legislature seems to intend to provide an alternative remedy in contract. Further, any waiver of bond rights, if held to be valid, would appear to be conditioned on payment.

Lien Available: No.

Texas

By Fred D. Wilshusen, Esq.
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Private Work

Rights Available: Constitutional construction Lien; statutory mechanics and materialmen lien on property and lien funds held by the owner; suit on a payment bond; priority lien and right to remove personal property on “removeables.”

Who May Claim:

1. For a constitutional construction lien: Original contractor (includes any mechanic, artisan or materialman who deals directly with owner) [Art. 16, § 37, Texas Constitution]. Caution: restrictions apply regarding residential property [Tex. Prop. Code, ch. 41; Art. 16, § 50, Texas Constitution].

2. For a mechanics lien on commercial property: Original contractor (includes any contractor or materialman who contracts directly with the owner), first- and second-tier subcontractors and materialmen for unpaid progress billings, retainage, change orders and specially fabricated material [Tex. Prop. Code, ch. 53].

3. For a payment bond claim on private bonded job: First- and second-tier sub-contractors and materialmen for unpaid progress billings, retainage, change orders and specially fabricated material [Tex. Prop. Code, ch. 53].

4. For a bond to indemnify against lien: Any party wanting to “bond off” a lien filed of record [Tex. Prop. Code, ch. 53, subchapter H].

5. For a priority lien and right to remove personal property (“removeables”): Original contractors, first- and second-tier subcontractors and materialmen.

6. For a mechanics lien on residential property: Original contractor, first- and second-tier subcontractors and materialmen for unpaid progress billings, retainage, change orders and specially fabricated material for a one- to four-unit residential structure that is owned by one or more persons to be used, or intended to be used, as a dwelling by the owner [Tex. Prop. Code, ch. 53, subchapters C and K]. Caution: restrictions apply regarding residential property [Tex. Prop. Code, ch. 41; Art. 16, § 50, Texas Constitution].

7. Architects, engineers, surveyors, landscape contractors and demolition contractors should consult an attorney regarding statutory limitations affecting their rights.

8. It is unclear if a bond to indemnify against lien will successfully “bond off” a constitutional construction lien.

Required Notice and Timing:

1. For a constitutional construction lien: None — self-executing [Art. 16, § 37, Texas Constitution].

2. For a mechanics lien on commercial property:

a. *Original contractor:* None except for optional notice for specially fabricated items (see subsection (e) below). All claimants of statutory liens must send notice of the filed lien no later than the fifth day after the date the notice is filed with the County Clerk. [Tex. Prop. Code, ch. 53, subchapter C].

b. *First- and second-tier subcontractors and materialmen for unpaid progress billings and change orders:* Notice to the owner not later than the 15th day of the third month following each month in which all or part of the unpaid labor was performed or unpaid materials were furnished. Copy to original contractor. Notice must state the amount and contain the following **statutory warning:** “If the bill remains unpaid, the owner may be personally liable and the owner’s property subjected to a lien unless the owner withholds payment from the contractor for payment of the bill, or the bill is otherwise paid or settled” [Tex. Prop. Code, ch. 53, subchapter C]. All claimants of statutory liens must send notice of the filed lien no later than the fifth day after the date the notice is filed with the County Clerk. [Tex. Prop. Code, ch. 53, subchapter C].

c. *Second-tier subcontractors and materialmen for unpaid progress billings and change orders:* Notice to original contractor not later than the 15th day of the second month following each month in which all or part of the unpaid labor was performed or unpaid materials were delivered. *Additional* notice as set forth above to owner not later than the 15th day of the third month following each month in which all or part of the unpaid labor was performed or unpaid materials were furnished as set forth above. Copy to original contractor. Notice to the owner must contain **statutory**

warning above [Tex. Prop. Code, ch. 53, subchapter C]. All claimants of statutory liens must send notice of the filed lien no later than the fifth day after the date the notice is filed with the County Clerk. [Tex. Prop. Code, ch. 53, subchapter C].

- d. *First- and second-tier subcontractors and materialmen for retainage*: Notice to the owner (and original contractor if claimant is second-tier) of contractual retainage not later than the earlier of (i) the 30th day after *claimant's agreement* providing for retainage is completed, abandoned or terminated; or (ii) the 30th day after the date the *original contract* is terminated or abandoned. Notice must state (i) the existence of a contractual retainage requirement, and (ii) name and address of claimant, and (iii) if second-tier, the name and address of the subcontractor with whom you have a contract. [Tex. Prop. Code, ch. 53, subchapter C].
- e. *Original contractor, first- and second-tier subcontractors and materialmen for specially fabricated material*: Notice to the owner (and original contractor if claimant is second-tier) not later than the 15th day of the second month in which claimant received and accepted the order for the material. Notice must contain a statement that the order has been received and accepted, and the price of the order. In addition, if material is delivered or the normal delivery date has passed, provide notice to the owner (and original contractor if claimant is second-tier) for unpaid progress billings as described above. It is unclear if additional notice is required if material was not delivered and normal delivery time has not passed, but a conservative approach would be to send notice as set forth above for unpaid progress billings [Tex. Prop. Code, ch. 53, subchapter C].
Note: This notice is only required if specially fabricated items are NOT delivered to the project [§ 53.058(f)].

3. *For a payment bond claim on private bonded job*: Take all steps set forth above for lien on commercial property (subchapter C perfection); or, in the alternative, provide notice, as set forth above, to the original contractor (if required) and notice to the surety instead of the owner (subchapter I perfection). Notice in this manner must be given in the same time and manner set forth above, but the content need provide only fair notice of the amount and the nature of the claim asserted. The best practice is to do both [Tex. Prop. Code, ch. 53, subchapters C and I].

4. *For a bond to indemnify against lien*: After bond to indemnify is filed, the county clerk must issue notice to claimant and attached copy of bond. Notice and

certificate of mailing must be filed by county clerk. [Tex. Prop. Code, ch. 53, subchapter H].

5. *For a priority lien and right to remove personal property affixed to the realty ("removeables")*: Same as lien on commercial property as set forth in paragraph 2 above. It applies only to "removeables," i.e., items that can be removed without material injury to the structure and the item being removed. A court order is required. However, this right is only applicable against a lender, other mortgage or lien holder.

Hence it is a priority right that is only helpful to make the mechanics lien on the removable items superior to liens and mortgages that would otherwise be given priority over the mechanics lien.

6. *For a mechanics lien on residential property*:

- a. *Original contractors for unpaid progress billings, change orders and retainage*: Claimant must provide a Disclosure Statement to the owner prior to signing construction contract. After signing the construction contract, file it with county clerk's office in the county where property is located. Prior to starting work, provide the owner with list of subcontractors and suppliers who are to provide labor, materials/services to project. This list must be updated within 15 days of adding or terminating any subcontractor or supplier on the project [Statutory requirements for waiving this requirement set forth in § 53.256(d)]. Claimant must provide a Disbursement Statement with each pay application and provide a Final Bills-Paid Affidavit with the final pay application [Requirements for these forms are set forth in Tex. Prop. Code §§ 53.251-53.260].
- b. *First- and second-tier subcontractors and materialmen for unpaid progress billings, change orders and retainage*: See commentary for commercial property above. Notice requirements are the same as for commercial property **except for timing** and form for homestead property must contain additional statutory warning [Tex. Prop. Code § 53.254(g)]. All first- and second-tier subcontractors and materialmen must send notices to original contractor and owner by the 15th day of the second month following each month in which all or part of the unpaid labor was performed or unpaid materials were delivered. Notices for retainage and specially fabricated materials are the same as for commercial property [Tex. Prop. Code, ch. 53, subchapters C and K].

Lien Affidavit Filing:

1. *For a constitutional construction lien*: None. Self-executing. However, execute a statutory lien affidavit

in time and manner described below to potentially defeat a *bona fide* purchaser [Art. 16, 37, Texas Constitution].

2. *For a mechanics lien on commercial property:*

- a. *Original contractor for progress billings, change orders and retainage:* Not later than the 15th day of the fourth month after written termination, completion or abandonment of the contract. Copy to owner not later than five days after filing [Tex. Prop. Code, ch. 53, subchapter C].
- b. *First- and second-tier subcontractors and materialmen for unpaid progress billings and change orders:* Not later than the 15th day of the fourth calendar month after the last day of the last month in which the *claimant* performed labor or provided materials. Copy to owner and original contractor not later than five days after filing [Tex. Prop. Code, ch. 53, subchapter C].
- c. *First- and second-tier subcontractor and materialmen for retainage:* Not later than the earlier of (i) the 15th day of the **fourth** month after the original contract is complete; or (ii) 30 days after the owner demands claimant file its lien affidavit; or (iii) 40 days after the completion date stated in an affidavit of completion timely sent from the owner; or (iv) 40 days after claimant receives notice of termination or abandonment of original contract from the owner. Copy to owner and original contractor not later than five days after filing [Tex. Prop. Code §§ 53.057(f) and 53.103].
- d. *First- and second-tier subcontractors and materialmen for undelivered specially fabricated material:* Not later than the 15th day of the **fourth** month following the last day of the last month the materials were delivered or would normally have been required at the job site or the last day of the last month of any material breach or termination of the original contract by the owner or original contractor of the subcontract under which the specially-fabricated material was furnished. Copy to owner and original contractor not later than five days after filing [Tex. Prop. Code, ch. 53, subchapter C].

Special Warning: *Mandatory requirements for lien affidavit are set forth in Tex. Prop. Code §§ 53.054 and 53.055. Some, but not all, notices and all lien affidavit copies must be sent via certified or registered mail [Tex. Prop. Code § 53.003]. Mandatory minimum penalty of \$10,000 plus court costs and attorney’s fees (exemplary damages discretionary) for knowingly filing a “fraudulent” lien affidavit [Tex. Civ. Prac. & Rem. Code §12.001 et seq.]. Special care should be taken with leasehold estates (or potential leasehold estates).*

3. *For a payment bond claim on private bonded job:* See Comment 3 to **Required Notice and Timing**, above, for recommended practice. *All notices and lien affidavit copies must be sent via certified or registered mail [Tex. Prop. Code, ch. 53, subchapters C and I].*

4. *For a bond to indemnify against lien:* Not applicable.

5. *For a priority lien and right to remove personal property affixed to the realty (“removeables”):* Same as for commercial property set forth in paragraph 2 above. It applies only to “removeables,” i.e., items that can be removed without material injury to the structure and the item being removed. A court order is required. However, this right is only applicable against a lender, other mortgage or lien holder. Hence, it is only helpful to make the mechanics lien on the removable items superior to liens and mortgages that would otherwise be given priority over the mechanics lien.

6. *For a mechanics lien on residential property:*

- a. *Original contractor for progress billings, change orders and retainage:* Not later than the 15th day of the **third** month after written termination, completion or abandonment of contract. Copy to owner not later than five days after filing [Tex. Prop. Code § 53.052(b)].
- b. *First- and second-tier subcontractors and materialmen for progress billings and change orders:* Not later than the 15th day of the third month after the last day of the last month in which the claimant performed labor or provided materials. Copy to owner and original contractor not later than five days of filing [Tex. Prop. Code § 53.052(b)].
- c. *First- and second-tier subcontractor and materialmen for retainage:* Not later than the earlier of (i) the 15th day of the **third** month after the original contract is complete, or (ii) 30 days after the owner demands claimant file its lien affidavit; or (iii) 40 days after the completion date stated in an affidavit of completion timely sent from the owner; or (iv) 40 days after claimant receives notice of termination or abandonment of original contract from the owner. Copy to owner and original contractor not later than five days after filing [Tex. Prop. Code §§ 53.057(f) and 53.103].
- d. *First- and second-tier subcontractors and materialmen for undelivered specially fabricated material:* Not later than the 15th day of the third month following the last day of the last month the materials were delivered or would normally have been required at the job site, or, the last day of the last month of any material breach or termination of the original contract by the owner or original

contractor of the subcontract under which the specially fabricated material was furnished. Copy to owner and original contractor not later than five days of filing [Tex. Prop. Code § 53.053(d)].

Special Warning: *Additional requirements must be met in order to obtain a lien on a homestead.* [Tex. Prop. Code, ch. 41; Art. 16, § 50, Texas Constitution]. *Among other things, the construction contract must be signed by both spouses and contain a mandatory warning [see Tex. Prop. Code § 53.254 for form]. An affidavit for a lien filed on a homestead must contain the following notice in at least 10-point boldface print at the top of the page:*

“NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN”. *Other mandatory requirements for lien affidavit are set forth in Tex. Prop. Code §§ 53.054 and 53.055. Most notices and liens must be sent via certified or registered mail [Tex. Prop. Code § 53.003].*

Suit Filing:

1. *For a constitutional construction lien:* Four years [general limitations statute, Tex. Civ. Prac. & Rem. Code § 16.004] and Uniform Commercial Code (UCC) statute, Tex. Bus. & Comm. Code § 2.725].

2. *For a mechanics lien on commercial property:* Suit must be filed within two years after the last day claimant may file a lien affidavit or within one year after completion, termination or abandonment of work under original contract under which lien is claimed, whichever is later [Tex. Prop. Code § 53.158].

3. *For a payment bond claim on private bonded job:* If the bond is recorded at the time the lien is filed, suit must be filed not less than 60 days, nor more than one year, after perfection of the claim under subchapter(s) C, I and/or K. If bond is not recorded at the time the lien is filed, the time for filing suit is extended to two years [Tex. Prop. Code, § 53.208].

4. *For a bond to indemnify against lien:* Suit regarding the items to be removed must be filed against the surety not more than one year after service of notice of the bond, or after date on which underlying lien claim becomes unenforceable [Tex. Prop. Code § 53.175].

5. *For a priority lien and right to remove personal property affixed to the realty (“removeables”):* Suit must be filed within two years after the last day claimant may file a lien affidavit or within one year after completion, termination or abandonment of work under original contract under which lien is claimed, whichever is later [Tex. Prop. Code § 53.158].

6. *For a mechanics lien on residential property:* Suit must be filed within one year after the last day a claimant may file a lien affidavit or within one year after completion, termination or abandonment of work under original contract under which lien is claimed, whichever is later [Tex. Prop. Code, § 53.158].

Contractual Waivers:

1. *For a constitutional construction lien:* Lien rights may be waived in a written agreement prior to or during the course of construction.

2. *For a mechanics lien on commercial property:* Release or waiver of lien rights must be conditioned upon receipt of payment. [Tex. Prop. Code, chapter 53, subchapter L].

3. *For a payment bond claim on private bonded job:* Release or waiver of lien rights must be conditioned upon receipt of payment. [Tex. Prop. Code, chapter 53, subchapter L].

4. *For a bond to indemnify against lien:* Not applicable.

5. *For a priority lien and right to remove personal property (“removeables”):* Release or waiver of lien rights must be conditioned upon receipt of payment. [Tex. Prop. Code, chapter 53, subchapter L].

6. *For a mechanics lien on certain residential property:* Lien rights may be waived in a written agreement providing for BOTH labor and materials/equipment **prior** to construction, but not in written agreement providing only materials/equipment but no labor. [Tex. Prop. Code, chapter 53, subchapter L, § 53.282].

Waivers After Commencement of Work:

1. *For a constitutional construction lien:* Lien rights may be waived in a written agreement and do not have to be conditioned upon payment.

2. *For a mechanics lien on commercial property:* Release or waiver of lien rights must be conditioned upon receipt of payment with some exceptions. Forms for release are provided in the statute. [Tex. Prop. Code, chapter 53, subchapter L].

3. *For a payment bond claim on private bonded job:* Release or waiver of lien rights must be conditioned upon receipt of payment with some exceptions. [Tex. Prop. Code, chapter 53, subchapter L].

4. *For a bond to indemnify against lien:* bond claim rights may be waived in a written agreement and do not have to be conditioned upon payment.

5. *For a priority lien and right to remove personal property (“removeables”):* Release or waiver of lien rights must be conditioned upon receipt of payment with some exceptions. [Tex. Prop. Code, chapter 53, subchapter L].

6. *For a mechanics lien on residential property:* Waiver or release can only be accomplished in a written original contract or subcontract providing for BOTH labor and materials/equipment **prior** to any labor or materials being provided, but not in written agreement providing only materials/equipment but no labor. Forms for release are provided in the statute [Tex. Prop. Code, chapter 53, subchapter L, § 53.282].

Special Warning: Consult Tex. Prop. Code §53.287 for exceptions before executing waivers.

Public Work

Rights Available: Suit on payment bond for public works contracts exceeding \$25,000.¹

Who May Claim: First- and second-tier subcontractors and materialmen for unpaid progress billings, change orders, retainage and for specially fabricated items. No bond protection for original contractors [Tex. Govt. Code, ch. 2253].

Type/Amount of Bond: The bond shall be in the amount of the prime contract. The governmental entity responsible for obtaining the bond shall be subject to the same liability as the surety would have been if it fails to obtain the payment bond [Tex. Govt. Code §§ 2253.0021(c)(2) and 2253.027].

Required Notice and Timing:

1. *First- and second-tier subcontractors and materialmen for unpaid progress billings:* Notice to the original contractor and to its surety or sureties on or before the 15th day of the third month following each month in which all or part of the unpaid labor was performed or unpaid materials were furnished. Notice must contain:

- a. A sworn statement of account stating: “The amount claimed is just and correct and that all just and lawful offsets, payments, and credits known to affiant have been allowed”.
- b. The amount of retainage applicable to the account that has not become due.
- c. Reasonable description of labor and/or materials.
- d. Name of party to whom labor and/or materials delivered.
- e. Dates of performance/delivery.
- f. Whether the contract is oral or written.
- g. The amount of the contract.
- h. The amount claimed

[Tex. Govt. Code, ch. 2253, subchapter C].

If no written agreement exists, notice must also itemize the amount due and provide invoices or documents identifying the labor or material, the job and the destination of delivery [Tex. Govt. Code § 2253.047].

If written agreement contains unit price agreement, sworn statement of account must also contain statement of those completed and partially completed units. A list of units and unit prices set by the contract must be attached to the statement [Tex. Govt. Code § 2253.045].

2. *Additional required notice and timing for second-tier subcontractors and materialmen for unpaid progress billings and change orders:* Written notice to the original contractor on or before the 15th day of the second month following each month in which labor was performed or materials were delivered. A copy of the statement sent to the subcontractor will suffice. Additional notice, in the form set forth above, to the original contractor and the surety on or before the 15th day of the third month following each month in which all or part of the claimed labor was performed or materials were furnished as set forth above [Tex. Govt. Code, ch. 2253, subchapter C].

3. *Second-tier subcontractors and materialmen for specially fabricated material:* Notice to original contractor on or before the 15th day of the second month after the receipt and acceptance of an order for a specially fabricated item stating that such order has been received and accepted [Tex. Govt. Code § 2253.047].

4. *First- and second-tier subcontractors and materialmen for retainage:* Notice to the original contractor and surety of retainage claim on or before 90 days after completion of prime contract between original contractor and awarding authority. Notice should contain statement of the amount of the contract,

¹ For public works contracts not exceeding \$25,000, see Subchapter J, Chapter 53, Texas Property Code for requirements to perfect lien on money due to public works contractor.

the amount paid, if any, and the outstanding balance [Tex. Govt. Code § 2253.046] See Tex. Govt. Code §2253.041 for additional notice requirements.

5. *Additional required notice and timing for second-tier subcontractors and materialmen for retainage:* Provide notice to the original contractor of terms of agreement to hold retainage not later than the 15th day of the second month following the first month in which labor was performed or materials were delivered following agreement to hold retainage. Notice must indicate generally the nature of the retainage [Tex. Govt. Code § 2253.047]. If this notice is not sent, it is advisable to send periodic notice(s) of unpaid retainage as set forth above for unpaid progress billings. Additional notice for retainage in the form set forth above on or before 90 days after completion of original contract between original contractor and awarding authority [Tex. Govt. Code § 2253.046].

Special Warning: All notices must be sent via certified or registered mail [Tex. Govt. Code § 2253.048]. It is unclear if *additional* notice of claim for specially-fabricated material must be sent by any claimant if

specially fabricated materials are *never delivered* to the project but conservative approach would be to send additional notice in the form for unpaid progress billings and retainage. If the governmental entity fails to obtain a payment bond, notices normally sent to the surety should be sent to the governmental entity [Tex. Govt. Code § 2253.027].

Suit Filing: Suit must be filed not less than 60 days after notice is given and no later than one year after the date of filing the claim [Tex. Govt. Code § 2253.073].

Contractual Waivers: Rights to assert bond claims may be waived in a written agreement prior to or during the course of construction.

Waivers After Commencement of Work: Rights may be waived in a written agreement and do not have to be conditioned upon payment. Special care should be exercised to preserve rights for unpaid progress billings, retainage, unbilled extra work and disputed claims when signing any partial release.

Lien Available: No.

Private Work

Rights Available: Pre-construction services lien, construction lien and suit on a payment bond for commercial projects exceeding \$50,000 or for the owner's failure to require contractor to provide a payment bond.

Who May Claim: Contractors, subcontractors and all persons performing services or furnishing or renting materials or equipment used in construction, alteration or improvement of any building, structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively.

Required Notice and Timing: Lien and bond claimants must file preliminary notice of a right to lien in the State Construction Registry ("SCR") and provide electronic notice of filing to all interested persons who have requested notice. The preliminary notice must be filed within 20 days of starting work. If the preliminary notice is filed late, that will preclude any claim for compensation for work or materials furnished before the expiration of five days after the late filing, and may preclude any claim on a payment bond. Utah law also provides for a specific lien for pre-construction services for design professionals and others. To claim the pre-construction services lien, it is necessary to file a "notice of pre-construction services" within 20 days of starting pre-construction services. Failing to file a timely notice of pre-construction lien as required will prohibit the filing of a pre-construction lien.

Lien Filing: A pre-construction lien claimant must file written notice to the county recorder within 90 days after completion of their services (which will likely occur well before completion). All other construction lien claimants must file a written notice with the county recorder of the county in which the property is located to hold and claim a lien 180 days after final completion of an original contract if *no* notice of completion is

filed with the SCR or 90 days after the day on which a notice of completion is filed with the SCR (but this period will not be extended more than 180 days after actual completion in any case). Within 30 days after filing the notice of lien, the lien claimant must deliver or mail by certified mail a copy of the lien notice to the reputed owner or record owner of the property. A lawsuit to enforce the lien must be filed with 180 days after the day on which the lien claimant filed its notice.

Residence Lien Recovery Fund: A person qualified to file a lien upon an owner-occupied residence who provides qualified services (as defined by statute) under an agreement other than directly with the owner, is ordinarily barred from maintaining a lien against the residence or to recover monies owed for qualified services provided by that person. However, there is a source of recovery through the Residence Lien Recovery Fund (the Fund) and its recovery procedures. ("Residence" means real property used or occupied or to be used or occupied as a primary or secondary detached single-family residence or multi-family residence up to two units.) The language of the Residential Lien Act is very technical, and in order to recover against the Fund, one must file a timely action on the obligation and obtain a judgment against the prime contractor or subcontractor.

Suit Filing: Suit must be commenced:

- Within 180 days from the date of providing notice of lien.
- Within 180 days from the date the lien claimant last performed labor and services or last furnished equipment or materials for a residence. A suit for monies owed on owner-occupied residential construction must be filed within 180 days from the date the qualified beneficiary last provided qualified services.

Payment Bonds: If the work on a "commercial project" exceeds \$50,000, the owner must require the contractor to supply a bond in the amount of the contract for payment of labor and materials, or else the owner is personally liable for the reasonable value of work performed and materials supplied for the project, plus attorney fees. If a bond has been supplied, an action to recover under the bond must be commenced not less than 90 days nor more than one year after the labor was performed or the materials were supplied. If a bond has not been supplied, then a claim against the owner must be made within one year from the last day

labor or service was supplied or the last day materials or equipment was provided. Preliminary notice as set forth in the lien statute must be filed to maintain a suit on payment bond or for failure to provide payment bond. An owner of a residence whose property is subject to the Residence Lien Recovery Fund and its recovery procedures is exempted from obtaining a payment bond.

Milestone Alerts: Twenty days after first work (preliminary notice); 90 days after notice of completion is filed with the SCR or 180 days after final completion if no notice of completion is filed with SCR (lien filing); 30 days after filing the notice of lien, the lien claimant must deliver or mail by certified mail a copy of the lien notice to the reputed owner or record owner of the property. The failure to provide notice to the owner prevents the claimant from receiving any award of costs for attorney fees. A claimant has 180 days from the filing of notice to file suit.

Lien Waivers: Waivers of lien in a contract are valid. A waiver may be implied from pay-if-paid language in a contract. Waivers signed after commencement of work are presumably valid, and care should be taken to avoid waiver of lien rights for unpaid retainage, unbilled changes or work not yet performed. Waivers of liens and bonds are presumed valid, must follow statutory formatting, but if such waiver is not substantially similar to those set forth in the statutory code.

Public Work

Rights Available: Suit against a political subdivision (as broadly defined in the statute) that fails to obtain payment bond.

Who May Claim: All persons supplying labor or materials to the contractor or its subcontractors for the construction of, alteration of or addition to any public building, work or improvement.

Required Notice and Timing: For failure to require bond, the claimant must serve the political subdivision with written notice within 90 days of last labor or materials. The person shall state in the notice a designation of the construction project and its location, the amount claimed, and the name of the party for whom the labor was supplied. The notice shall be served by registered or certified mail, postage prepaid, on the state agency or political subdivision that is a party to the contract. For such claims, preliminary notice (the type required for mechanics liens) must be given to the “designated agent” as that term is defined by contract and statute.

Suit Filing: Suit must be commenced after 90 days but within one year after last materials or labor was furnished.

Contractual Waivers: Waiver of bond rights in a contract prior to commencement of work is presumably valid in the absence of case law. Implied waivers by subcontractors based on pay-if-paid terms are also presumably valid for lack of clear and unequivocal waiver. Waivers of liens and bonds are presumed valid, but must follow statutory formatting.

Waivers After Commencement of Work: Waivers signed after commencement of work are presumably valid in the absence of case law, so care should be taken to avoid waiver of bond rights for unpaid retainage, unbilled changes or work not yet performed.

Vermont

By Donald W. Gregory, Esq.
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Private Work

Rights Available: Contractor's lien.

Who May Claim: The contractor, subcontractor and materialman.

Required Notice and Timing: A notice of intent to claim a lien must be given in writing to the owner. The notice shall include the date that payment is due, if known. If done, it prevents the owner from conveying the land before payment without disclosure to the purchaser. Vt. Stat. Ann. tit. 9, § 1921. A person claiming a lien shall file a written memorandum for record in the clerk's office of the town where such real estate is located. The written memorandum must be signed by him/her and must assert his/her claim, which shall charge such real estate with such lien as of the visible commencement of work or delivery of material. Vt. Stat. Ann. tit. 9, § 1923.

Lien Filing: A lien must be filed within 180 days of the date that payment is due for materials or services. Vt. Stat. Ann. tit. 9, § 1921.

Suit Filing: Suit must be filed, and property actually must be attached, within the later of 180 days of the lien filing or the date payment was due. Judgment is to be filed with a brief statement of the contract after obtaining the claim. Vt. Stat. Ann. tit. 9, § 1924.

Contractual Waivers: Lien rights cannot be waived before labor is performed or materials are supplied. Any contract provision requiring such is void. (Non-waiver provisions apply to prime contractors, as well as subcontractors.) Vt. Stat. Ann. tit. 9, § 1921.

Waivers After Commencement of Work: Lien waivers entered after the commencement of work are valid only to the extent of the labor and materials already provided.

Public Work

Rights Available: Suit on a payment bond for highway contracts. Can be waived on contracts for less than \$100,000.

Who May Claim: All creditors.

Type/Amount of Bond: A sworn statement of claim must be given to the secretary of the agency of transportation within 90 days of final acceptance of project or within 90 days of the date taxes are due to the commissioner of employment and training. Vt. Stat. Ann. tit. 19, § 10.

Suit Filing: Suit must be filed within one year of the filing of claims.

Waivers: The secretary may accept other good and sufficient surety in lieu of a bond and, in cases involving contracts for \$100,000.00 or less, may waive the requirement of a performance bond. Vt. Stat. Ann. tit. 19, § 10.

Private Work

Rights Available: Mechanics lien; personal liability notice to owner.

Who May Claim:

1. All persons furnishing labor/materials of \$150 or more (including rental or use value of equipment) regardless of tier, provided that on residential projects, a pre-filing notice is given to the mechanics lien agent at the start of work. Va. Code Ann. § 43-3.

2. Where repairs or improvements are made only to a structure, no lien attaches to the property improved or repaired unless such repair or improvement was ordered or authorized by the owner or its agent. Other limitations exist where work is performed on a single unit. Va. Code Ann. § 43-3.

3. The statute expressly precludes a contractor that performed work without a valid contractor's license to lien property. The mechanics lien form must include the lien claimant's license or certificate number and date of issuance and expiration date. Va. Code Ann. § 43-3.

Required Notice and Timing:

1. After the perfection of a lien with the court, subcontractors must send notice to the owner(s) of record. Suppliers/sub-subcontractors must send notice to the owner(s) and prime contractor. Notice must inform them of the amount and character of the claim. A prime contractor is required to also file a certificate of mailing. Va. Code Ann. § 43-7.

2. On residential work (one- or two-family dwellings), if a mechanics lien agent is designated in writing by the owner, any party entitled to a lien must notify any mechanics lien agent identified on the building permit by registered or certified mail or physical delivery of the amount due, the name, address, telephone number of the person sending the notice, building permit number, property description as shown on that permit, and a statement that the party is seeking payment for labor performed or material furnished. Such notice, however, must inform the agent within 30 days of the first date the claimant performs labor or furnishes material to the building, or 30 days from the date a permit is issued if such labor or materials were provided prior to permit issue. If the permit is not

posted, a person performing labor or providing material shall determine from the appropriate authority whether such a permit has been issued. Va. Code Ann. § 43-4.01.

Lien Filing: A lien must be perfected by filing a memorandum of mechanic's lien with clerk of the Circuit Court where work was performed. The lien must be filed within 90 days of the last day of the month in which the claimant last performed work or furnished materials, but not later than 90 days from the date the building is completed or work terminated. Va. Code Ann. § 43-4.

Suit Filing: Suit must be filed within six months of the time of filing the memorandum of lien or within 60 days after the project is completed, whichever is later, in the Circuit Court for the county in which the land is located. The prime contractor, trustees, beneficiaries of deeds of trust existing at the time of the suit and others with an interest in the property are necessary parties. Other mechanics lienors should be made parties. Otherwise, a foreclosure sale after the suit would not affect their interests. Va. Code Ann. §§ 43-17, 43-22.

Milestone Alert: Suit must be filed within six months of the date of filing the memorandum of lien or within 60 days after project is completed, whichever is later, in the Circuit Court for county in which the land is located. Va. Code Ann. § 43-17.

Contractual Waivers: A subcontractor, lower tier subcontractor or supplier may not waive or diminish its lien rights in a contract in advance of furnishing any labor, services or materials. However, lien rights can be waived during the remainder of the project through the date the waiver is signed and to liens securing retention, extra work or unresolved claims. This last statement arises from the fact that it appears that Virginia's courts give this provision an absolute and strict interpretation. As a result, the best practice is to assume any waiver is strictly interpreted and fully enforceable. Va. Code Ann. § 43-3.

Waivers After Commencement of Work: See previous section. Simply stated, a subcontractor's right to lien may be waived at any time in whole or in part.

Special Warnings:

1. There is a 150-day “reach-back” provision (i.e., you cannot include sums due for labor or materials furnished more than 150 days prior to the last day that labor or materials were furnished) for each memorandum, except for retainage not exceeding 10 percent of the total contract price.

2. The amount of the lien is limited to the amount owed to the party with whom the claimant has direct contract. Claimants are required to notify the mechanics lien agent (named in the permit, whose name should be available from the permit-issuing authority) for work on one- and two-unit residences. Failure to give notice prior to performing work can result in a loss of lien rights for work performed prior to written notice to mechanics lien agent.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: First-tier subcontractors and suppliers protected by payment bond furnished by the prime contractor. Second-tier subcontractors and suppliers are protected by a payment bond furnished by the first-tier subcontractor. If no bond is obtained by the prime contractor from the subcontractor, then second-tier subcontractors and suppliers may seek recovery against the prime contractor’s bond. Va. Code Ann. § 2.2-4341.

Type/Amount of Bond: Upon award of any contract exceeding \$500,000 (or \$350,000 in the case of transportation-related projects partially or wholly funded by the Commonwealth), the contract must obtain and furnish a performance bond and payment bond in the amount of the contract sum. Va. Code Ann. § 2.2-4337.

If there contract value is between \$100,000 and \$500,000 and payment and performance bond requirements are waived, the prospective contractors must be prequalified for each project. Likewise, if the contract value exceeds \$100,000 but is less than \$300,000 and the contractor holds a Virginia Class A Contractor’s License, a locality may waive the prequalification requirement.

Required Notice and Timing: Any claimant with a direct contract with the contractor or subcontractor who has performed work must bring an action within one year after the date on which the claimant last performed labor or supplied materials. Va. Code Ann. § 2.2-4341.

Persons having a contract with the subcontractor, but claiming against the prime contractor, must give written notice to the prime contractor within 180 days from when such person last did work or furnished materials, sent by registered or certified mail, postage prepaid, in an envelope addressed to any place where the prime contractor regularly maintains an office for transacting business. However, claims for retainage are not subject to the 180-day notice requirement. The notice must state the amount being claimed with substantial accuracy, the name of the party to whom materials were furnished or for whom labor was performed, and must be sent by registered or certified mail, postage prepaid.

Suit Filing: Suit must be filed within one year after the claimant last performed work or furnished material.

Contractual Waivers: A subcontractor, sub-subcontractor or material supplier may not waive or diminish its rights to assert payment bond claims in a contract in advance of furnishing any labor, services or materials. Virginia statute states that on public contracts “no damage for delay” clauses are unenforceable as against public policy. Va. Code Ann. § 2.2-4335(A).

Waivers After Commencement of Work: After entering into a contract, a party may waive its bond rights. However, unless the following conditions are met, any waiver of a right to sue on a bond is void — the waiver is:

- In writing.
- Signed by the party waiving its rights.
- Executed *after* the party has performed its labor or furnished its materials in accordance with the contract.

It is not clear if this last requirement is for the furnishing or all, or only some/any, of the labor or material.

Lien Available: No.

Washington

By James T. Yand, Esq.
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Private Work

Rights Available: Mechanics' lien; stop notice to lender.

Who May Claim:

1. Mechanics' Lien: contractor, subcontractor, materialman, and a person furnishing labor, professional services or equipment. Wash. Rev. Code § 60.04.021.

2. Stop Notice to Lender: any potential lien claimant who has not received payment within 5 days after the date required by contract. Wash. Rev. Code § 60.04.221(1).

Required Notice and Timing:

1. Mechanics' Lien: To claim a mechanics' lien for professional services, materials, supplies, or equipment, written notice of a right to claim a lien should be given to the owner by personal delivery or registered/certified mail:

- Within 60 days of first delivery, unless it is a single-family residence; or
- Within 10 days of first delivery for a single-family residence. Wash. Rev. Code § 60.04.031(1).

Notice is not required of persons contracting directly with the owner (of an existing residence), a laborer whose claim is based solely on performing labor, or subcontractors who contract directly with the prime contractor. Wash. Rev. Code § 60.04.031(2).

If statutory notice is not given to the appropriate parties following the appropriate procedures, the claimant waives its right to assert the lien; however, late notice excludes a claim only for those materials delivered prior to 60/10 days before the notice was given. Wash. Rev. Code 60.04.031.

2. Stop Notice to Lender: If the lien claimant has not received payment within 5 days after the date required by contract, written notice must be given to the lender by registered/certified mail within 35 days after the payment is due. A copy must also be provided to the owner and prime contractor. Notice may be used only if there is not a payment bond of at least 50 percent

of the construction amount. Wash. Rev. Code § 60.04.221.

A Notice to Customer form must be provided by the contractor for the following project types:

- Residential projects involving four or fewer residential units if the contractor bid or contract price is greater than \$1,000.
- Commercial projects on which the contractor bid or contract price is greater than \$1,000, but less than \$60,000. Wash. Rev. Code § 18.27.114(1).

The Notice to Customer Form must be signed by the customer and kept by the contractor for a minimum of 3 years. Wash. Rev. Code § 18.27.114(1)(2). The contractor is not required to provide a Notice to Customer form when contracting with another contractor, unless the contractor is acting as an owner. Wash. Rev. Code 18.27.114(5); *A.W.R. Const., Inc. v. Wash. State Dept. of Labor & Indus.*, 152 Wn. App. 479, 489, 217 P.3d 349 (Div. 3 2009).

Lien Filing: Notice of claim of lien must be filed within 90 days after last performance or delivery by claimant. Wash. Rev. Code § 60.04.091. The lien's attestation clause must be signed by the claimant or the claimant's authorized agent. Wash. Rev. Code § 60.04.091(2). If the notice of claim of lien is signed by an authorized agent, it must be notarized and must satisfy all elements of formal corporate acknowledgment. Wash. Rev. Code § 60.04.091(2). A sample form for individuals specified by statute is insufficient for authorized agents.

The lien claimant must mail or personally serve a copy of the claim of lien to the owner within 14 days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181. Wash. Rev. Code § 60.04.091.

Comment on Lien Filing with Defects: In 2011, the Washington Supreme Court issued a ruling in *Williams v. Athletic Field, Inc.* validating claims of lien that utilized the sample form set forth in RCW § 60.04.091, but did not comply with certain requirements of the statute. Consequently, if a lien is alleged to be defective, the court will broadly construe the statute to

enforce the lien. *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 698, 261 P.3d 109 (2011).

Suit Filing: Suit must commence within 8 months after the lien is recorded. Wash. Rev. Code § 60.04.141. All necessary parties must be named as defendants and served within 90 days after filing the summons and complaint to affect their interest. Wash. Rev. Code § 60.04.141.

Lien Bonds: Owner can record a release bond before or after the commencement of a foreclosure suit. If the lien is \$10,000 or less, the bond must be greater than \$5,000 or twice the amount of the lien. If the lien is over \$10,000, the bond must be at least 1.5 times the amount of the lien. Wash. Rev. Code § 60.04.161. The bond will serve to guarantee payment of any judgment on the lien to recover the amount claimed in the lien in favor of the lien claimant. Wash. Rev. Code § 60.04.161. Where a lien release bond is obtained by a general contractor, a lien claimant is not required to name the general contractor as a party to a lien foreclosure suit. *Inland Empire Dry Wall Supply Co. v. Western Surety Co.*, 189 Wn.2d 840 408 P.3d 691 (2018).

Contractual Waivers: Lien rights may be waived by contract prior to performing any work. However, any acts of coercion—including threats to withhold future contracts in order to avoid giving an owner a notice of the right to claim a lien—are against public policy and will constitute unfair or deceptive acts for the purpose of applying the Consumer Protection Act. Wash. Rev. Code § 60.04.035. Further, such acts may also serve to invalidate lien waivers and pay-if-paid clauses, which will generally be strictly construed. *See Amelco Elec. v. Donald M. Drake Co.*, 20 Wn. App. 899, 903, 583 P.2d 658 (Div. 1 1978) (holding that a contract specifying that the subcontractor would receive payment only "to the extent that the Contractor has received payment" did not create a condition precedent to the subcontractor's payment, but instead merely postponed payment for a reasonable period of time). The language of a pay-if-paid clause must be sufficiently clear in order to be enforced as a condition precedent that creates a forfeiture of right to payment. *See Amelco Elec. v. Donald M. Drake Co.*, 20 Wn. App. 899, 903, 583 P.2d 658 (Div. 1 1978).

Waivers after Commencement of Work: Lien rights may be released or waived after commencing work; however, in order to be enforceable, the lien claimant must be paid for the portion of work for which release is given. Wash. Rev. Code § 60.04.071. A lien release does not preclude later filing of a second lien for work not fully paid in the original lien. *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 878, 901, 351 P.3d 895 (Div. 2 2015). A lien release may be required as a condition on payment. A voluntary and consensual

waiver of lien rights is enforceable. *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 878, 901, 351 P.3d 895 (Div. 2 2015) (implying that a voluntary lien release is permissible under a liberal construction of RCW § 60.04.071); *DKS Constr. Mgmt., Inc. v. Real Estate Improvement Co., LLC*, 124 Wn. App. 532, 537, 102 P.3d 170 (Div. 3 2004).

Special Warning: Late notice by the subcontractor/materialman on a commercial project excludes the claim only for those materials delivered prior to 60 days before the notice was given. Wash. Rev. Code § 60.04.031(1). Late notice on a residential project excludes the claim only for those materials delivered prior to 10 days before the notice was given. Wash. Rev. Code § 60.04.031(1).

Public Work

Rights Available: Suit on payment bond and lien on retained funds. *See* Wash. Rev. Code § 60.28.011.

Who May Claim: Subcontractor, sub-subcontractor, materialman, and employee trust funds. Wash. Rev. Code § 39.08.010(1)(a). Any person performing services or furnishing material to any subcontractor has a claim against the bond. Wash. Rev. Code § 39.08.010(1)(b). However, a supplier to a materialman has no claim against the bond. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 726, 741 P.2d 58 (Div. 1 1987).

Type/Amount of Bond: Generally, payment bond is 100 percent of the prime contract price. Wash. Rev. Code § 39.08.030(1). For certain entities entitled by RCW § 39.10.420 to use the job order contracting procedure, however, the bond will be in an amount no less than the dollar value of all open work orders. Wash. Rev. Code § 39.08.030(2).

Type/Amount of Retainage: In lieu of a bond on contracts of \$35,000 or less, the contractor may agree to have the public entity retain 50 percent of the contract amount for 30 days after date of final acceptance, or until receipt of all necessary releases from the department of revenue, the employment security department, and the department of labor and industries, and settlement of any liens filed under chapter 60.28 RCW, whichever is later. Wash. Rev. Code § 39.08.010(3).

Required Notice and Timing:

Suit on Payment Bond:

1. All claimants must give written notice of a claim to the public body no later than 30 days after completion of the contract and formal acceptance of the completed work by the

public body. Wash. Rev. Code § 39.08.030(1).

2. Materialmen who supply materials to a subcontractor must give pre-claim written notice to the prime contractor within 10 days of the first delivery, and should include reference to any retainage lien in this notice. Wash. Rev. Code § 39.08.065.

Lien on Retained Funds:

1. All claimants must give written notice of a claim of lien on retained funds to the public body no later than 45 days after completion of the contract work. Wash. Rev. Code § 60.28.011(2). Notice is to be given in accordance with RCW § 39.08.030. Wash. Rev. Code § 60.28.011(2).
2. Materialmen must give written notice by registered/certified mail or personal service to the prime contractor within 60 days of first delivery. Wash. Rev. Code 60.28.015. Such notice covers materials supplied both before and after notice is given. Wash. Rev. Code 60.28.015. Statutory pre-claim notice for private projects substantially complies with the requirements of RCW 60.28.015. *Keller Supply Co., Inc. v. Lydig Constr. Co., Inc.*, 57 Wn. App. 594, 600, 789 P.2d 788 (Div. 1 1990).

No suit or action may be maintained without giving proper notice.

Suit Filing:

1. Payment Bond: Claimants must comply with the time limit period set forth in the bond. The bond claim must be commenced no later than 6 years after the notice of claim. *Indus. Coatings Co. v. Fid. & Deposit Co. of Md.*, 117 Wn.2d 511, 519, 817 P.2d 393 (1991). The retainage lien suit should also include a claim against the bond. Attorneys' fees are not allowed in any suit brought prior to 30 days after the date of filing of notice. Wash. Rev. Code. § 39.08.030.

2. Retained Funds: Suit on lien on retained funds must be commenced within 4 months of filing the notice of claim. Wash. Rev. Code § 60.28.030.

Contractual Waivers: Bond and retainage lien rights may be waived in a contract prior to performing any work. In the absence of statutes or case law to the contrary, these waivers may be enforceable.

Waivers after Commencement of Work:

1. Lien and bond rights may be released or waived; however, in order to be enforceable, the claimant must be paid for the portion of work for which release is given. Wash. Rev. Code § 60.04.071. A release may be required as a condition on payment. A voluntary and consensual waiver of lien and bond rights is likely enforceable. It is unclear whether bond rights may be waived in a contract prior to performing any work; best practice is to assume that they can be. Washington's prompt pay law will not specifically bar a pay-if-paid clause when the clause is clearly drafted to establish a relationship between the subcontractor and the owner. *Amelco Elec. v. Donald M. Drake Co.*, 20 Wn. App. 899, 903, 583 P.2d 658 (Div. 1 1978).

2. Bond and retainage rights may be released or waived; however, in order to be enforceable, the claimant must be paid for the portion of work for which release is given. Wash. Rev. Code § 60.04.035. A release may be required as a condition on payment. A voluntary and consensual waiver of rights is enforceable. *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 878, 901, 351 P.3d 895 (Div. 2 2015) (implying that a voluntary lien release is permissible under a liberal construction of RCW § 60.04.071).

Special Warning: The 10-day materialman notice does not relate back. If this notice is late, the claimant loses its bond claim. See Wash. Rev. Code § 39.08.065. This limitation, however, does not apply to claims against retainage.

Lien Available: Yes. Lien on retained funds.

West Virginia

By J. Ben Shapiro, Jr., Esq.

Private Work

Rights Available: Suit on a mechanics lien.

Who May Claim:

1. Contractors, mechanics and materialmen who have direct contract with the owner have a lien on the building and on the owner's interest in the land.
2. Subcontractors, workmen, laborers or other persons under contract with the prime contractor, contractor or subcontractor have a lien on the building and on the owner's interest in the land.
3. Architects, surveyors, engineers or landscape architects under contract with the owner, prime contractor, contractor or subcontractor have a lien on the building and on the owner's interest in the land.

Required Notice and Timing:

1. The owner may require, by written notice, filing of an itemized statement of work done and materials furnished. Failure to so notify the owner within 10 days after receipt of the notice releases the owner from the lien.
2. If the claimant has no direct contract with owner, then:
 - a. Lien must be filed within 100 days from completion of contract.
 - b. It must serve notice of a lien on the owner within 100 days from the completion of its contract.
 - c. It must file notice of a lien within 100 days from the completion of its contract.
 - d. A subcontractor must serve notice of a lien on the owner within 100 days from the completion of its subcontract.
 - e. A subcontractor must file its notice of lien within 100 days from the completion of its subcontract.
3. If the claimant has a direct contract with the owner, it must file a notice of lien within 100 days after the completion of work, but no direct notice to the owner is required.

The claimant may give the owner preliminary notice of its lien rights prior to beginning work. After giving preliminary notice, the claimant does not have to file accounting and 100 days' notice unless the owner, in writing, requires it to do so.

Lien Filing: Each claimant must file a notice of lien in the office of the clerk of the county in which the property is located within 100 days from completion of the claimant's contract or the last date that materials or supplies were furnished. An individual working for a corporation must file a notice of lien within 90 days from the time work or labor for the corporation closed.

Suit Filing: Suit must be filed within six months after filing the notice of lien. All persons having a lien on the same property may intervene in a suit by any lien claimant. All sureties upon a lien bond must be joined in a suit to enforce the lien. *Lien claimants also may sue on a payment bond.*

Lien Bonds: The owner may limit the total amount of liens to the contract price if it records the contract and files a payment bond equal to the contract price.

Lien Waivers: No specific statutory provision allows the parties to execute a lien waiver in the contract, but there are no cases in which the courts have refused to enforce such waivers. In fact, there is case law commenting that West Virginia statutes lack anti-waiver language and opining that a release "may well be a waiver."

Special Warning: If the owner, by written notice, requests an itemized account of the work done and materials furnished, the claimant must notify the owner within 10 days after receipt of the notice or lien is forfeited.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: All subcontractors, materialmen, suppliers, mechanics and all other persons furnishing labor or materials pursuant to the contract or subcontract on a public project.

Type/Amount of Bond: A payment bond equal to the reasonable costs of materials, machinery, equipment and labor is required for the completion of the contract, or the contractor may deposit a sum in cash, or U.S. or West Virginia bonds and securities.

Waivers: No specific statutory provision allows the parties to execute a waiver of bond rights, but there are

no cases in which the courts have refused to enforce such waivers. Accordingly, the best practice is to assume bond rights may be waived. A pay-if-paid provision in a contract may be enforced by a surety.

Lawsuit Filing: Lawsuit must be filed in Court of Chancery.

Lien Available: No.

Wisconsin

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Construction lien (or suit on bond in lieu of lien); lien on unpaid funds; suit to recover trust funds.

Who May Claim:

1. *Construction liens:* Prime contractors, subcontractors and suppliers of any tier, but only for work that meets the statutory definition of improvement of land. Wis. Stat. § 779.01(3).

2. *Bond in lieu of lien:* Subcontractors and suppliers whose rights have been eliminated by a payment bond furnished by prime contractor in lieu of liens and with consent of the owner. Wis. Stat. § 779.03(2).

3. *Lien on unpaid funds:* Subcontractors and material suppliers of any tier, where bond in lieu of lien has been furnished. Wis. Stat. § 779.03(2).

Required Notice and Timing:

1. *Construction liens:* Preliminary (identification) notice by the prime contractor: Statutory notice advising owner of possibility of lien claimants must be included in prime contract. Where there is no written consent, prime contractor must serve separate written statutory notice on owner personally or by registered mail within 10 days after first furnishing labor or materials. If prime contractor fails to give notice, prime contractor has no lien except as provided by statutory savings clause. Wis. Stat. § 779.02.

2. *Subcontractors/suppliers:* Unless excluded by statute, a subcontractor/supplier must give owner written notice, substantially in the form prescribed by statute, two copies of which must be served on owner personally or by registered mail (with return receipt requested) advising the owner that the subcontractor/supplier is included in the job. Notice, as prescribed by statute, must be given within 60 days after first furnishing of labor or materials by subcontractor/supplier. Owner must furnish a copy of the notice to the mortgage lender within 10 days after receipt or lose lien rights except as provided by statutory saving clause. Wis. Stat. § 779.02.

3. *Notice of intent to claim lien:* All claimants, without exception and regardless whether preliminary notice is required, must notify the owner in writing, substantially in the form described by statute, by personal service or registered mail (return receipt requested), of claimant's intent to file a lien claim. The notice of intent must be served on the owner at least 30 days prior to filing a lien claim. In practice, the notice of intent must be served less than five months from the date of last labor or materials to allow for the filing of a lien claim within the statutory limitations period (six months after last labor or materials). Wis. Stat. § 779.06.

4. *Bond in lieu of lien:* Subcontractor/suppliers may sue on the bond only if they have given written notice to the prime contractor that they are providing labor or materials for the improvement. Such notice must be given within 60 days after they first provided labor or materials for the improvement. Exceptions: Notice is not required if claimant's contract does not exceed \$5,000 or if claimant is listed in a written contract or in a document appended to a written contract between a subcontractor/supplier and the prime contractor. Wis. Stat. § 779.035.

5. *Lien on unpaid funds:* Where bond in lieu of lien has been furnished, subcontractor/supplier may also have a lien on unpaid funds if it gives written notice of a claim (by registered mail, return receipt requested) both:

- a. To the owner and construction lender before payment is made to the prime contractor or subcontractor.
- b. To the prime contractor or subcontractor within seven days after service of notice on the owner and lender.

If the prime contractor or subcontractor does not dispute the lien claim within 30 days after service of written notice to the owner and lender by registered mail (return receipt requested), owner shall pay the amount claimed to the claimant on demand and charge it to the prime contractor or subcontractor. Wis. Stat. § 779.036.

Lien Filing: Lien claims, substantially in the form prescribed by statute, must be filed with the clerk of Circuit Court in the county in which the lands are situated within six months after the claimant *last* furnished the labor and materials. Wis. Stat. § 779.06(1).

Suit Filing:

1. *Construction liens*: Suit must be filed within two years after the lien claim is filed. Wis. Stat. § 779.06(1).

2. *Suit on payment bond in lieu of lien*: Suit must be filed within one year after completion of the prime contract. Wis. Stat. § 779.035(2)(a).

3. *Lien on unpaid funds*: If the prime contractor or subcontractor disputes the claim within 30 days after service of notice of claim, the suit must be filed within three months after the notice of claim is served on the owner and lender. If total claims exceed the unpaid balance, and if prime contractor or subcontractor did not dispute them, the owner determines entitlement. A claimant, the prime contractor or subcontractor, must file suit within 20 days after the owner mails the notice of entitlement (or within six months after completion of work, whichever is earlier) or the determination will be final and payment made accordingly. Wis. Stat. § 779.036.

4. Contract provisions making the contract subject to the laws of another state or requiring litigation, arbitration or other dispute resolution process on the contract in another state are void.

Waivers: Contract provisions requiring waivers prior to payment are void. Lien waivers are valid with or without consideration, before or after performance of work. A waiver is all-inclusive unless it is expressly limited to a particular portion of work. Wis. Stat. § 779.05.

Subcontractors/suppliers may refuse to give a waiver unless paid in full for the work in question. A waiver does not affect the contract rights of a claimant. Pay-if-paid clauses are void.

Trust Funds: A prime contractor or subcontractor (including, if a corporation, officers, directors and agents of the corporation) that misappropriates trust funds (funds received from lender or owner for the improvement) is guilty of theft by contractor and subject to civil and criminal sanctions. Shareholders who are not responsible for the misappropriation but who have received misappropriated funds as salary, dividends, etc., are subject to a civil action to recover and restore such trust funds. Wis. Stat. § 779.02(5).

Contract Payment Provisions: Contract payment provisions making payment to a prime contractor a condition precedent to the prime contractor's obligation to pay a subcontractor/supplier are void. Payment provisions

that delay payments to a subcontractor/supplier until the prime contractor receives payment are not prohibited.

Special Warning: To ensure the validity of construction lien notices, verify ownership of the property by securing a title report.

Public Work

Rights Available: Suit on payment bond or other assurance (if and as required by statute); lien on unpaid funds (Milwaukee, whose public work is exempt from the state public lien statute, provides for a lien on unpaid funds by city ordinance).

Who May Claim:

1. *Suit on payment bonds*: First-tier and second-tier subcontractors/suppliers, except in the case of highway improvement contracts, on which only first-tier subcontractors/suppliers can file suit. Broader coverage may be available if the bond exceeds the statutory minimum coverage.

2. *Lien on unpaid funds*: First-tier subcontractors/suppliers have lien on unpaid funds under state statute and, in the city of Milwaukee, under city ordinance.

Type/Amount of Bond and Assurances:

1. *State contracts (subject to statutory indexing provisions based on changes in construction costs)*:

a. Contracts in excess of \$16,000 but not exceeding \$148,000:

i. Contract must contain a provision allowing state to make direct payments to subcontractors or to pay prime contractor and subcontractor by joint check. (Note statutory exceptions.)

ii. Contract must comply with written standards established by Dept. of Admin. (DOA).

b. Contracts in excess of \$148,000 but not exceeding \$369,000:

i. Contract must contain a provision allowing state to make direct payments to subcontractors or to pay prime contractor and subcontractor by joint check. (Note statutory exceptions.)

ii. Contract must require prime contractor to provide a payment and performance bond meeting statutory requirements unless DOA allows substitution of a different payment and performance assurance, but only after award of the contract and only if such assurance is for an amount at least equal to the contract price and is in the form of a bond, irrevocable

letter of credit or an escrow account acceptable to the DOA. The DOA shall establish written standards governing when such assurances may be substituted for a statutory bond.

- c. Contracts exceeding \$250,000: Contract must require prime contractor to obtain a statutory bond with a penalty of not less than the contract price. Wis. Stat. § 779.14(1m)(c).

2. *Local government contracts (subject to statutory indexing provisions based on changes in construction costs):*

- a. Contracts in excess of \$16,000 but not exceeding \$74,000:
 - i. Contract must contain provision allowing public body to make direct payments to subcontractors or to pay prime contractor and subcontractor by joint check. (Note statutory exceptions.)
 - ii. Contract must comply with written standards established by public body.
- b. Contracts in excess of \$74,000 but not exceeding \$148,000:
 - i. Contract must contain provision allowing public body to make direct payments to subs or to pay prime contractor and subcontractor by joint check. (Note statutory exceptions.)
 - ii. Contract must require prime contractor to provide a payment and performance bond meeting statutory requirements unless the public body allows substitution of a different payment and performance assurance, but only if such assurance is for an amount at least equal to the contract price and is in the form of a bond, irrevocable letter of credit or an escrow account acceptable to the public body. The public body shall establish written standards governing when such assurances may be substituted for a statutory bond. Wis. Stat. § 779.14(1m)(d).

- 3. *Contracts exceeding \$369,000:* Contract must require prime contractor to obtain a statutory bond with

a penalty of not less than the contract price. Wis. Stat. § 779.14(1m)(3).

Required Notice and Timing:

1. *Suit on a payment bond:* Subcontractor/supplier must notify prime contractor in writing no later than 60 days after it first provided labor or materials that it is or will be on the job. *Exceptions:* Notice is not required where subcontractor/supplier contract amount does not exceed \$5,000; or subcontractor/supplier is listed in a written contract, or document appended to a written contract, between the subcontractor/supplier and the prime contractor; or where subcontractor/supplier is included in list required by statute to be kept by the prime contractor on contracts over \$30,000. Wis. Stat. § 779.14(2)(am).

2. *Lien on unpaid funds:* Claimant must give a written notice of claim (by registered mail) to the proper public authority and to prime contractor prior to the payment of funds to the prime contractor.

3. *City of Milwaukee projects:* The claimant must give written notice of claim by registered mail to the city clerk and commissioner of public works within 20 days after the mailing of the notice. Wis. Stat. § 779.15(4).

4. If the prime contractor does not dispute the lien claim within 30 days of notice of claim by written notice to the debtor public entity, the claimed amount shall be paid to the claimant on demand and charged to the prime contractor. Wis. Stat. § 779.15(3).

Suit Filing: Suit must be filed within one year after completion of the prime contract Wis. Stat. § 779.14(2).

Special Warning: Monies paid to a prime contractor or subcontractor for public improvement are trust funds, and use for any purpose other than the improvement constitutes theft and is punishable criminally and civilly.

Wyoming

By Donald W. Gregory, Esq.
and Eric B. Travers, Esq.

Private Work

Rights Available: Mechanics lien; suit on a lien bond.

Who May Claim: Every person performing work on or furnishing material or plans for any building or any improvement upon land. A cooperative utility lien shall attach to the location where the materials or services were provided, if the amount due is greater than \$5,000 and has been unpaid for more than 90 days. Wyo. Stat. Ann. § 29-2-101.

Required Notices and Timing:

1. Preliminary Notices:

All contractors, subcontractors and materialmen must send written notice to the record owner or his agent of (1) the right to claim a lien for unpaid services or materials and (2) the owner's right to a lien waiver in exchange for payment. The contractor must send this notice prior to receiving any payments (including advances) from the owner. Subcontractors and materialmen must send the notice within 30 days after providing materials or services to the project. Each subcontractor and materialmen must also send a copy of the notice to the contractor, regardless of the type of project. Wyo. Stat. Ann. § 29-2-112.

2. *Notice of Intention to File a Lien.* A claimant must send written notice of intent to file a lien to the owner or its agent at least 20 days before filing a lien and must be in substantially the same form, and contain the same information, as a notice form specified in Wyo. Stat. Ann. § 29-2-107.

Lien Filing: Liens must be recorded within 150 days (for contractors) or 120 days (for subcontractors and materialmen) after last work was performed or materials furnished, or from the date of substantial completion of the project on which work was performed or materials were furnished, whichever is earlier. Wyo. Stat. Ann. § 29-2-106(a).

The record owner can record a notice of substantial completion of the project in the records of the county clerk in the county where the project is located. Wyo. Stat. Ann. § 29-2-106(c). If this is done, the date on which the notice is recorded will be presumed to be the substantial completion date of the project. *Id.* After

recording the notice, the record owner must send a copy of the notice within five days to all contractors, subcontractors and materialmen who provided the record owner with a preliminary notice. *Id.* The record owner's notice of substantial completion does not extend the date by which a lien statement must be filed. *Id.* The record owner must send the notice as prescribed, or the filing of a notice will not at all affect the time to file a lien. The notice of substantial completion must include the wording in Wyo. Stat. Ann. § 29-2-106(d).

The time to file a lien may be extended by written, recorded agreement.

Suit Filing: Filing to foreclose lien or sue on the lien bond required within 180 days after filing the lien statement. An extension may be filed pursuant to state law, but may not exceed 360 days. Wyo. Stat. Ann. § 29-2-106(f).

Lien Bonds: Owner, contractor or subcontractor may file a bond for 1.5 times the lien before judgment is entered.

Contractual Waivers: The best practice is to assume lien rights can be waived in a contract before performing any work and that a pay-if-paid clause can prospectively waive lien rights.

Waivers After Commencement of Work: The best practice is to assume lien rights may be waived after starting work for the remainder of the project and for retainage, unbilled extra work and unresolved claims. It should also be assumed a waiver may apply through the date the waiver is signed, rather than the date of last work, unless the lien waiver specifies otherwise. Another best practice is to assume lien waivers are not required to be conditioned on payment.

Special Warnings: Liens against a lessor's interest are valid only if the lessor agreed to pay for or specifically authorized the improvements being constructed. Liens "extend to the owner's real property and easements to the extent necessary to provide legal access by a roadway for ingress and egress to the building, improvements or real property subject to the lien, not to exceed forty (40) feet in width to the nearest easement, public road or highway." Wyo. Stat. Ann. § 29-2-101(e).

At the time of contracting, contractors must provide the name and address of the record owner and the owner's

agents to any subcontractors or materialmen. If applicable, a legal description of the project must also be provided. Wyo. Stat. Ann. § 29-2-113.

Public Work

Rights Available: Suit on a payment bond.

Who May Claim: Subcontractors, materialmen, laborers.

Type/Amount of Bond: For work under \$7,500, no bond is required. For work with a value between \$7,500 and \$150,000, a minimum 50 percent bond or other form of guarantee is required. For work more than \$150,000, the amount is at the owner's discretion. Wyo. Stat. Ann. § 16-6-112.

Required Notice and Timing: If prime contractor's contract is \$50,000 or more, notice of right to protection under bond must be sent to prime contractor by certified mail or personal delivery no later than 60 days after materials or services are first provided. Notice of claim must be sent to the prime contractor by certified mail or delivered to and received by the

prime contractor or his agent. Wyo. Stat. Ann. § 16-6-121.

Suit Filing: Filing required within one year after the date of first publication of owner's notice of final payment.

Contractual Waivers: The best practice is to assume bond rights can be waived in a contract before performing any work and that a pay-if-paid clause can prospectively waive bond rights.

Waivers After Commencement of Work: The best practice is to assume bond rights may be waived after starting work for the remainder of the project and for retainage, unbilled extra work and unresolved claims. It should also be assumed a waiver may apply through the date the waiver is signed, rather than the date of last work, unless the bond waiver specifies otherwise. It is also the best practice to assume waivers of bond rights are not required to be conditioned on payment.

Special Warning: If bond/guarantee amount is insufficient for all claims, the bond is distributed *pro rata*.

Lien Available: No.

Appendices

Appendix A

Lien and Bond Statutes in the 50 States and the District of Columbia

Appendix B

Contributors

Appendix A: Lien and Bond Statutes in the 50 States and the District of Columbia

State	Statutory Reference	Attorney Contact(s)
Federal	40 U.S.C. § 3131 <i>et seq.</i> (Miller Act) (formerly codified at 40 U.S.C. § 270a (2000) (revised and recodified by Pub. L. No. 107-217, 116 Stat 1062 (Aug. 21, 2002))).	Lawrence M. Prosen (202) 508-5800 lprosen@kilpatricktownsend.com
Alabama	Ala. Code § 39-1-1 (bonds); § 35-11-210 <i>et seq.</i> (liens). 2014 Note: Bills exist in the AL House that would alter relevant law. <i>See</i> 2014 AL H.B. 451 & 2013 AL H.B. 668.	Edward P. Meyerson Stephen K. Pudner (205) 328-0480 emeyerson@bakerdonelson.com spudner@bakerdonelson.com
Alaska	Alaska Statutes §36.25.010 (bonds) <i>et seq.</i> ; §§ 34.35.005 <i>et seq.</i> , 34.35.050 <i>et seq.</i> (liens).	James T. Yand Jessica Roberts (206) 777-7404 James.Yand@MillerNash.com Jessica.Roberts@MillerNash.com
Arizona	Ariz. Rev. Statutes §§ 34-222, 34-223, 41-2574 (bonds); §§ 33-981, 33-992.01 and .02, 33-993, 33-995, 33-1003, 33-1004, 33-1008 (liens); §§ 33-1051 through 33-1067 (stop notice); § 12-1191.	Jason Ebe (602) 382-6240 jebe@swlaw.com
Arkansas	Ark. Code §§ 18-44-503, 504, 505, §§ 22-9-401, 404 (bonds); §§ 18-44-101, 107, 108, 110, 115, 117, 118, 124 (liens).	Allen C. Dobson (501) 664-9555 adobson@bjd-law.com
California	Calif. Civil Code §§ 3225-3252 (bonds); §§ 3082-3154 (liens).	E. Scott Holbrook, Jr. (626) 858-4207 SHolbrook@builderslaw.com
Colorado	Colo. Rev. Statutes §§ 38-26-105 through 108 (bonds); § 38-22-101 (liens).	Mark Gruskin (303) 298-1122 MGruskin@SennLaw.com
Connecticut	Connecticut Revised Statutes §§ 49-41, 49-41a, 49-41b, 49-42 (bonds); §§ 42-158l, 42-158n, 49-33 <i>et seq.</i> (liens).	Benjamin J. Berger (860) 548-2600 bberger@uks.com
Delaware	29 Del. Code § 6962 (bonds); 25 Del. Code § 2701 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
District of Columbia	D.C. Code §§ 2-375.01 <i>et seq.</i> (bonds); §§ 40-301.01 through 40-307.3 (liens).	Lawrence M. Prosen (202) 508-5800 lprosen@kilpatricktownsend.com
Florida	Florida Statutes § 255.05 (bonds); §§ 713.001-713.37 (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com

State	Statutory Reference	Attorney Contact(s)
Georgia	Ga. Code § 13-10-1 <i>et seq.</i> (bonds); § 44-14-361.1 (liens).	J. Ben Shapiro (678) 406-8709 bshapiro@bakerdonelson.com
Hawaii	Hawaii Revised Statutes § 103D-324, (bonds); § 507-41 <i>et seq.</i> (liens); Hawaii Administrative Rules § 3-122-224 (bonds); § 371.405 (waivers).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Idaho	Idaho General Statutes §§ 54-1923 through 1930 (bonds); §§ 45-501, 45-504 to 525 (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Illinois	Ill. Compiled Statutes, 30 ILCS 550/0.01 <i>et seq.</i> (bonds); 770 ILCS 60/0.01 <i>et seq.</i> (liens).	Michael J. Roth (312) 499-6312 mroth@sheppardmullin.com
Indiana	Indiana Code § 36-1-12-1 <i>et seq.</i> (bonds—local projects); either § 4-13.6-7-1 <i>et seq.</i> or § 5-16-5-1 <i>et seq.</i> (bonds—state projects); § 8-23-9-1 <i>et seq.</i> (bonds—highway projects); §§ 32-28-3-1 through 32-28-3-18 (liens). 2014 Note: A bill exists in the IN Senate that would alter relevant law. <i>See</i> 2013 IN S.B. 436.	Mark A. Voigtmann (317) 237-1265 mark.voigtmann@FaegreBD.com
Iowa	Iowa Code § 573.1 <i>et seq.</i> (bonds); § 572.1 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Kansas	Kansas General Statutes §§ 60-1111, 60-1112 (bonds); § 60-1101 <i>et seq.</i> (liens).	Richard A. Stockenberg Ross Boden (314) 446-4301 rstockenberg@sandbergphoenix.com rboden@sandbergphoenix.com
Kentucky	Ky. Rev. Stat. § 45A.190 (bonds); §§ 376.010 <i>et seq.</i> [private], 376.210 <i>et seq.</i> [public] (liens); § 371.405 (waivers).	John H. Dwyer Jr. Larry Zielke (502) 589-4600 jdwyer@zielkefirm.com lzielke@zielkefirm.com
Louisiana	Louisiana Rev. Stat. § 38:2241 <i>et seq.</i> (bonds); § 9:4801 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Maine	Maine Rev. Stat. Ann, Title 14 § 871 (bonds); Title 10 § 3251 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com

State	Statutory Reference	Attorney Contact(s)
Maryland	Maryland Code, State Finance and Procurement §§ 13-207, 13-216, 17-101-110 (bonds); Real Property § 9-101 <i>et seq.</i> (liens); Real Property § 9-201 <i>et seq.</i> (Constr. Trust).	Lawrence M. Prosen (202) 508-5800 lprosen@kilpatricktownsend.com
Massachusetts	Mass. Gen. Law Ch. 149, § 29 (bonds); Ch. 254 (liens)	James M. Anderson (617) 742-3420 janderson@corwinlaw.com
Michigan	Michigan General Statutes §§ 570.101 - 570.105 (highway bonds); §§ 129.201 - 129.212 (bonds); §§ 570.1101 - 570.1305 (construction liens).	Ken Vance (248) 684-7952 KBVance@comcast.net
Minnesota	Minn. Stat. §§ 574.26 - 574.32 (bonds); § 514.01 (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Mississippi	Miss. Code Ann. § 31-5-51 <i>et seq.</i> (public bonds); § 65-1-85 (bonds on highway projects); § 85-7-185 <i>et seq.</i> (private bonds); § 85-7-401 (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 dgregory@keglerbrown.com etravers@keglerbrown.com
Missouri	Missouri Revised Statutes §§ 107.170, 522.300 (bonds); §§ 429.010 <i>et seq.</i> , 431.183. (liens).	Richard A. Stockenberg Ross Boden (314) 446-4301 rstockenberg@sandbergphoenix.com rboden@sandbergphoenix.com
Montana	Montana Rev. Code § 18-2-201 <i>et seq.</i> (bonds); § 71-3-521 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Nebraska	Nebraska Rev. Stat. § 52-141 <i>et seq.</i> (private bonds); §§ 52-118, 52-118.01, 52-118.02 (public bonds); § 52-125 <i>et seq.</i> (liens); §§ 52-116, 52-117 (railway liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Nevada	Nevada Rev. Stat. § 339.025 <i>et seq.</i> (bonds); § 108.221 <i>et seq.</i> (liens); § 108.2413 <i>et seq.</i> (lien bonds).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
New Hampshire	New Hampshire Revised Statutes §§ 447:2 - 447:14 (liens); §§ 447:15 - 447:18 (bonds).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
New Jersey	N.J. Annotated Statutes § 2A:44A-1 <i>et seq.</i> (Construction Lien Law); § 2A:44-125 <i>et seq.</i> (Municipal Mechanics' Lien Law); § 2A:44-143 <i>et seq.</i> (Bond Act); § 2A:15-6 (<i>lis pendens</i>).	Greg K. Vitali (908) 233-6800 gvitali@lindabury.com

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New York	New York Consolidated Laws: General Obligations Law § 5-322.3 (availability of private bonds); State Finance Law § 137 (requirement for public bonds); General Obligations Law § 322.1(2) (voids exhaustion of legal remedy as defense to payment bond claim); Lien Law § 40 <i>et seq.</i> (enforcement of liens); Lien Law § 4 (bond required for private construction on public land); Lien Law § 2 <i>et seq.</i> (filing lien); Lien Law § 21 (amount withheld)	Jordan R. Pavlus (315) 474-6448 jpavlus@bcplegal.com
North Carolina	North Carolina General Statutes §§ 44A-7 through 44A-24 (liens); §§ 44A-25 through 44A-35 (bonds); chapter 22B, chapter 22C (subcontracts).	James P. Laurie III (919) 256-4455 jameslaurie@laurielaw.com
North Dakota	North Dakota Century Code § 35-27-01 <i>et seq.</i> (liens); § 48-01.2-01 <i>et seq.</i> (bonds).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
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Oklahoma	Oklahoma Statutes Annotated Tit. 61 § 1-2 (bonds); Tit. 42 §§ 141-154, 171-180 (liens). 2014 Note: Bills exist in the OK House that would alter relevant law. <i>See</i> 2013 OK H.B. 2237 & 2013 OK H.B. 3362.	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Oregon	Oregon Revised Statutes §§ 279C.600 - 279C.610, 2796.836 (bonds); §§ 87.001 - 87.060, 87.075 - 87.093 (liens); § 701.630 (waivers); §§ 180.750 – 180.785 (False Claims).	James T. Yand Jessica Roberts (206) 777-7404 James.Yand@MillerNash.com Jessica.Roberts@MillerNash.com
Pennsylvania	Pennsylvania Statutes Title 49 (liens); Title 8, § 191 <i>et seq.</i> , Title 16, § 2318 <i>et seq.</i> , Title 53, § 1291 <i>et seq.</i> (bonds).	Andrew B. Cohn (610) 941-2549 acohn@kaplaw.com
Rhode Island	Rhode Island General Statutes § 37-12-1 (bonds); § 34-28-1 <i>et seq.</i> (liens).	Girard R. Visconti (401) 272-1400 gvisconti@shslawfirm.com
South Carolina	South Carolina Code §§ 11-1-120, 11-35-3030, 29-5-440, 29-6-250, 57-5-1660, 57-17-660 (bonds); § 29-5-10 <i>et seq.</i> (liens).	Daniel T. Brailsford (803) 238-1543 = cell danieltblailsford@gmail.com

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South Dakota	South Dakota Codified Laws § 5-21-1 <i>et seq.</i> (bonds) § 5-22-1 <i>et seq.</i> (public improvement liens); § 31-23-1 <i>et seq.</i> (highway); § 44-9-1 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Tennessee	Tennessee Code §§ 12-4-201 <i>et seq.</i> (public project bonds); § 66-11-101 <i>et seq.</i> (private project liens).	Elizabeth B. Stengel (901) 474-6138 bstengel@evanspetree.com
Texas	Texas Government Code Chapter 2253 (public project bonds); Property Code Chapter 53 (private project liens and bonds); Art. 16, § 37, Tx. Const.	Fred D. Wilshusen Regan Gayle O’Steen (214) 369-3008 fwilshusen@tfandw.com rosteen@tfandw.com
Utah	Utah Code §§ 14-1-18 <i>et seq.</i> , 14-2-1 <i>et seq.</i> (bonds); § 38-1-1 <i>et seq.</i> (liens); § 38-11-101 <i>et seq.</i> (owner residences).	Rick Ensor (385) 695-6450 rfensor@michaelbest.com
Vermont	Vt. Stat. Ann. tit. 19, § 10 (highway bonds); Vt. Stat. Ann. tit. 9, § 1921 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Virginia	Virginia Code §§ 2.2-4337 through 2.2-4341 (bonds); § 43-11 (personal liability notice to owner); §§ 43-1 through 43-23.2, 43-64 through 43-71 (liens).	Lawrence M. Prosen (202) 508-5800 lprosen@kilpatricktownsend.com
Washington	Washington Revised Code § 39.08.030 (bonds); § 64.04.011 <i>et seq.</i> (liens); § 60.28.011 (lien against the prime contractor’s retainage on public works projects).	James T. Yand Jessica Roberts (206) 777-7404 James.Yand@MillerNash.com Jessica.Roberts@MillerNash.com
West Virginia	W. Va. Code §§ 38-2-39, 18-5-12, 17-4-20 (bonds); § 38-2-1 <i>et seq.</i> (liens).	J. Ben Shapiro (678) 406-8709 bshapiro@bakerdonelson.com
Wisconsin	Wisconsin Statutes §§ 779.14 - 779.15 (bonds); §§ 779.01 - 779.13 (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com
Wyoming	Wyoming Statutes §§ 16-6-112 through 117, 16-6-121 (bonds); §§ 29-1-201 <i>et seq.</i> , 29-1-101 <i>et seq.</i> , 29-1-301 <i>et seq.</i> , 29-2-101 <i>et seq.</i> (liens).	Donald W. Gregory Eric B. Travers (614) 462-5400 DGregory@keglerbrown.com ETravers@keglerbrown.com

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