

PUBLICATION

Summary of Senate Bill 2622 - Mississippi's Construction Lien Law

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NOTE: THE STATUTE PROVIDES EIGHT PROVISIONS OF MANDATORY LANGUAGE OR FORM OF NOTICE

This is the first in a series of alerts exploring how this new law will affect your business. Look for more information regarding this law in the coming weeks. The bill has passed out of conference but it must be enrolled and signed by the governor before becoming law.

I. IMPORTANT DEFINITIONS

- "Materialmen" or "materialman" means all persons furnishing the materials, tools, appliances, machinery, or, equipment included in the definition of materials to a contractor or to a subcontractor in privity with the contractor.
- "Subcontractor" means subcontractors having privity of contract with the contractor; "subcontractor" also means subcontractors having privity of contract with a subcontractor having privity of contract with the contractor.

II. COVERAGE

- All contractors, all subcontractors (including subsubcontractors) and all materialmen furnishing materials for the improvement of real estate shall each have a special lien on the real estate or other property for which they furnish labor, services or materials if they are furnished at the instance of the owner, design professional or contractor or a subcontractor having direct privity of contract with a contractor, and shall include the value of the work done and labor, services or materials furnished.
- Each lien shall include interest on the principal amount due in accordance with Sections 75-17-1, 75-17-7 or 75-17-19¹ of the Mississippi Code, as applicable.
- No lien shall exist in favor of any contractor or subcontractor who is not properly licensed to work in Mississippi with a Certificate of Responsibility.

KEY TAKEAWAY: No lien is available to any claimant who fails to possess a Certificate of Responsibility issued by the Mississippi State Board of Contractors as required by law.

- Upon request, any contractor or subcontractor is required to provide any owner, contractor, subcontractor or materialman with a copy of that person's current Mississippi license.
- To be able to file a lien, there must be substantial compliance by the party claiming the lien with the party's contract.

III. TIMING

- The filing for record of the claim of lien in the office of the clerk of the chancery court of the county where the property is located within 90 days after the claimant's last work performed, labor, services or materials provided, the furnishing of architectural services, or the furnishing or performing of surveying or engineering services, or within 90 days after material is furnished.

KEY TAKEAWAY: A claimant **MUST** file his claim of lien within 90 days after the claimant's last work performed or material is furnished.

- The lien shall include mandatory language regarding when the lien expires (*i.e.* 180 days) pursuant to Section 85-7-421(1) and a notice to the owner of the property on which a claim of lien is filed that the owner has the right to contest the lien. The following language must be used verbatim in the notice:

"A.B., a mechanic, contractor, subcontractor, materialman, machinist, manufacturer, registered architect, registered forester, registered land surveyor, registered professional engineer, or other person (as the case may be) claims a lien in the amount of (specify the amount claimed) on the building, structure, house, factory, mill, machinery, or railroad (as the case may be) and the premises or real estate on which it is erected or built, of C.D. (describing the houses, premises, real estate, or railroad), for satisfaction of a claim which became due on (specify the date the claim was due, which is the same as the last date the labor, services or materials were supplied to the premises) for work performed or labor, services provided (or whatever the claim may be).

THIS CLAIM OF LIEN EXPIRES AND IS VOID ONE HUNDRED EIGHTY (180) DAYS FROM THE DATE OF FILING OF THE CLAIM OF LIEN IF A PAYMENT ACTION IS NOT FILED BY THE CLAIMANT WITHIN THAT TIME PERIOD.

NOTICE TO OWNER OF PROPERTY: You have the right to contest this claim of lien pursuant to Mississippi law."

IV. MAILING OF LIEN

- Within two business days of filing the notice of lien, the claimant must mail the notice to the owner of the property and to the contractor.

V. TIME TO FILE SUIT

- Lawsuits shall be commenced in county, circuit or chancery court within 180 days of the lien file date. The Claimant must also file a lis pendens with the commencement of the action.

KEY TAKEAWAY: Chancery courts are "courts of equity." Claims are tried in chancery court without a jury. Cases are tried in county courts before a six-person jury; cases are tried in circuit court before a 12 person jury.

- In the event of bankruptcy, death or a "paid when paid clause," claimant may enforce the lien directly against the property in a lien action against the owner if it is filed within the required time for filing a

payment action, with the judgment rendered in the proceeding to be limited to a judgment *in rem* against the property improved and to impose no personal liability upon the owner of the property and a lis pendens notice shall be filed with the commencement of this lien action with a copy to the owner and the contractor.

VI. AMENDMENT

- A claim of lien may be amended at any time;
- An amended claim shall relate back to the date the original claim was filed;
- An amended claim shall be sent to the owner of the property and contractor, with the following mandatory language:
"That certain claim of lien filed by A.B. against property of C.D. on (date) and recorded at book (book#), page (page#) in the lien index of (name of county) County is hereby amended by increasing/reducing (cross out one) the amount of the claim of lien to (specify reduced amount claimed). The remaining terms of the original claim of lien are hereby incorporated by reference into this amended claim of lien. This amended claim of lien relates back to the date that the original claim of lien was filed for record."

VII. RANKING

- The lien priorities are determined by the date and time of filing and without regard to the actual knowledge of the parties of unrecorded liens.
- Foreclosure of any prior deeds of trust or other liens shall terminate and extinguish the subordinate construction lien or other interest as to the land and the buildings and improvements thereon, whether or not at the time of the foreclosure the construction lien or interest has been perfected.
- A construction lien is subordinate to a construction mortgage, if the construction mortgage is recorded in the land records before a notice of a claim of lien is filed, and the holder of the construction mortgage obtains either a sworn statement from (1) the owner that no work or improvements have commenced for the property or (2) from the contractor swearing that he has been paid.

VIII. TRIAL

- Construction lien actions to enforce a lien against the property can be tried by jury, if filed in the proper court.
- The prevailing claimant may receive an award equal to the amount of the claim plus interest and costs.
- The court, in its discretion, may award reasonable costs, interest and attorney's fees to the prevailing party in an action against the owner to enforce a lien against the property.

IX. LIEN VS. LIEN

- All liens arising under Section 85-7-403 shall have an equal priority.
- Proceeds and moneys collected from the owner shall be distributed pro rata among the claimants.
- As between the owner and the contractor, the amount of the lien cannot exceed the amount agreed upon for the contractor's work
- If the owner makes interim payments in reliance upon either signed lien waivers or the contractor's sworn written statement, then, the aggregate amount of liens created by Section 85-7-403 for parties not in privity with the owner shall not exceed the outstanding balance owed by the owner to the contractor at the time that the first notice of lien was filed.

X. DISCLOSURE OF INFORMATION REGARDING WHO IS ON A JOB

- Upon the owner's written request, the contractor must provide the owner with a complete list of all subcontractors and materialmen working on the project and, upon written request from the contractor, all subcontractors shall provide the same information.
- If the contractor or subcontractor fails to pay any materialman or subcontractor in direct privity with him in accordance with any contract, subcontract or purchase order specifically requiring him to do so, the contractor or subcontractor shall thereby forfeit his right to a construction lien.

XI. PRE-LIEN NOTICE

- Any person who has a right to a construction lien but who does not have a privity of contract with the contractor or with the owner, if there is no contractor, must give a written notice to the contractor or to the owner, if there is no contractor, **within 30 days** following the first delivery of labor, services or materials to the property. The person performing such labor or service shall deliver his notice either by e-mail with a confirmed receipt, by registered or certified mail, or by statutory overnight delivery.

KEY TAKEAWAY: A sub-subcontractor or materialman must, within 30 days of starting work, put the contractor and/or the owner on notice that he or she is providing work or materials for the construction project.

- The notice to the contractor required by this section shall not apply to residential construction.
- If payment is made pursuant to the waiver and release and the design professional, contractor or subcontractor, without good cause, in turn willfully fails or refuses to pay the claimant the amount claimed as set forth in the waiver and release, then the design professional, contractor or subcontractor, as the case may be, shall be liable to the claimant in the amount of three times the amount claimed on the face of the waiver and release.

XII. RESIDENTIAL LIENS

- The provisions of the above section do not apply to single-family residential construction.
- Payment shall be an absolute defense to any claim of lien made by the subcontractor, materialman, professional engineer or professional surveyor, (a) but only to the extent of the payment actually made by or on behalf of the owner to the contractor or design professional in privity with the owner, and (b) only to the extent the owner has not received a pre-lien notice before the payment.
- As to single-family residential construction only, as a condition precedent of any right to a special lien under Section 85-7-403 in favor of a subcontractor, materialman or design professional not in privity with the owner, the claimant must provide the owner a pre-lien written notice at least 10 days before filing a claim of lien under Section 85-7-405, using the mandatory language provided by the statute.

XIII. LEASED PROPERTY

- The lien shall attach to the building or improvement, and to the unexpired term of the lease, and the holder of the lien shall have the right to avoid a forfeiture of the lease by paying rent to the lessor, as it becomes due and payable, or by the performance of any other act or duty to which the lessee is bound.

- If the lien can be enforced by a sale of the building or improvement, the purchaser may, at his election, become entitled to the possession of the demised premises, and to remain therein for the unexpired term, by paying rent to the lessor, or performing any other act or duty to which the lessee was bound.
- Only the building or improvements erected shall be subject to the lien unless done by the written consent of the owner.

XIV. BONDING OUT

- The owner of the real estate or the contractor or subcontractor employed to improve the property may, before or after foreclosure proceedings are instituted, discharge the lien upon the approval of a bond by the clerk of the chancery court.
- The bond shall be conditioned to pay to the holder of the lien the sum that may be found to be due the holder upon the trial of any payment action that may be filed by the lienholder to recover the amount of the claim within 180 days.
- The bond shall be 110% of the amount claimed under that lien.

XV. RELEASES AND WAIVERS

- A right to claim a lien or to claim upon a bond may not be waived in advance of the work provided.
- Releases and waivers required before the issuance of an Interim or Final Payment must follow the mandatory language included in the statutory Interim Waiver and Release Upon Payment Form, or the Waiver and Release Upon Final Payment Form, as applicable.
- Subordination of lien rights by agreement remains enforceable.

KEY TAKEAWAY: A party's pre-performance agreement to subordinate his lien rights remains enforceable.

- Waiver of lien rights through settlement of a bona fide dispute remains enforceable.
- Claimants may cancel and release a recorded lien.
- A claimant has 60 days after signing an acknowledgement of payment to file an affidavit of nonpayment with the applicable court; otherwise the claimant will lose the ability to assert a lien claim.

XVI. NOTICE OF CONTEST

- Failure of a lien claimant to commence a payment action to collect the amount of his or her claim within 180 days from the date of filing the lien renders the claim of lien unenforceable.
- Failure to include the required language shall invalidate the lien and prevent it from being filed. No release or voiding of the liens shall be required.
- An owner or an owner's agent or attorney, or the contractor or contractor's agent or attorney may elect to shorten the time prescribed in which to commence a payment action to enforce any claim of lien by recording in the chancery clerk's office a Notice of Contest in substantially the form set forth in Section 85-7-433(4), along with proof of delivery to the lien claimant.
- Within seven days of the filing of a lien, the owner or the owner's agent, or the contractor or the contractor's agent, must send a copy of the Notice of Contest of lien by registered or certified mail or statutory overnight delivery to the lien claimant at the address noted on the face of the lien.

KEY TAKEAWAY: The property owner or contractor must file a Notice of Contest of lien within seven days of the claimant's filing of the lien.

- The lien shall be extinguished by law upon the earlier of 90 days after the filing of the Notice of Contest of lien, or 180 days from the date of lien filing if no payment action is filed in that time period.
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¹ Section 75-17-1 defines legal rates of interest and finance charges; Section 75-17-7 sets forth the available interest on judgment and decrees; and Section 75-17-19 sets forth available finance charges for credit extended pursuant to revolving charge agreement, annual fees for membership in credit card plans, late payment charges, billing and collection of finance charges, and finance charges for closed end credit sales.