

**TENTH ANNUAL
SOUTHERN SURETY & FIDELITY CLAIMS
CONFERENCE
April 15 - 16, 1999**

**MAXIMIZING BOND PROTECTION AGAINST
MECHANICS' LIENS**

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MAXIMIZING BOND PROTECTION AGAINST MECHANICS' LIENS

In the summer of 1998, the Ohio General Assembly significantly amended the mechanics' lien law passing a bill entitled **the Fairness in Construction Contracting Act**. The Act applies to all projects to be performed in Ohio in which the construction contracts were signed after September 30th 1998 (the effective date of the new law). The Act changes the method required to assert a claim against a surety bond on public projects. For the first time (at least in Ohio law), a claimant, under certain circumstances, is required to serve a Notice of Furnishing on the principal contractor in order to protect its right to make a claim against the surety bond.

Section 153.56 of the Ohio Revised Code now requires the service of a Notice of Furnishing upon the principal contractor within 21 days of beginning on the project by all subcontractors or material suppliers whose contract: (1) is for more than \$30,000.00 worth of labor or material; and (2) is not in direct privity with the principal Contractor. This amendment adds a new defense for the surety to a claim made against a public project in Ohio. While the statute's application is obviously limited to Ohio projects, it is a good example of the expanding connection between surety bonds and the mechanics' lien statutes established by the state law.

From time to time, the surety professional is required to respond to mechanics' liens filed on private bonded projects, as well as liens erroneously filed against public projects.

Understanding the key concepts of local state mechanics' lien law allows us to more aggressively respond to these claims. This paper is intended as a working outline to highlight some of the issues a surety professional can raise in dealing with the various mechanics' lien statutes to maximize protection of the bond.

Obviously, the structure and requirements for each state's mechanics' lien statute is different and must be individually studied. This paper and the working outline of mechanics' lien issues presented does not purport to collect all states law , or all lien requirements imposed by states of surety professionals attending the Southern Surety and Fidelity Claims Conference. However, some nearly universal points can be identified, providing a basic checklist of issues for review in many mechanics' lien situations. Although the terms used in many of the state lien statutes are similar, the reader should beware that the requirements are rarely parallel from state to state.

Mechanics' liens are statutorily created by each state. Because mechanics' lien rights are created by statute, in derogation of the common law, the statutory requirements are strictly enforced, particularly the procedural and notice requirements. Harford Accident & Indem. Co. v. American Country Clubs, Inc., 353 So. 2nd 1147 (Ala. 1977). The mechanic lien law and all its technical requirements regarding form and timing of notice are to be strictly construed against the party asserting the lien. LNW Supply Corp. v. Whaley Constr. Co., 399 SE.2nd 272 (Ga. 1990)

I. Defensive response to mechanics' liens filed on projects.

A. Investigate what type of claim was brought

1. What kind of mechanics' lien is available under applicable state law?
2. Full price v. unpaid balance liens
 - a. Alabama distinguishes between full price liens (available to original contractor and material supply providing "notice" prior to delivery [under §35-11-210] and all other claimants can only attach to the unpaid balance owed the original contractor).
3. In some states, the value of the lien claim is limited to the amount remaining to be paid by the owner on the contract price – S.C. Code Ann. § 29-5-40
4. Identify type of claim available under state statute and enforce appropriate requirements.

B. Can a mechanics' lien attach to this "Property"?

1. **Fee Simple** -- A mechanics' lien can attach to any **privately held real property** when the party contracting for construction holds the property in fee simple.
2. **Leasehold Interest** – A mechanics' lien normally extends solely to the right, title and interest of the party who contracts for the improvement. Therefore, if the contract is with a Lessee of property, the lien will attach to a leasehold interest, but not to the underlying fee simple interest of a lessor. Without **authorization** from owner, lien attaches **only** to leasehold interest **not** the owner's fee simple interest. Therefore, a lien against a leasehold interest provides very limited security – Alabama--§35-11-212; Florida--Fla. Stat. ch. 713.10; Georgia--see D&N Electric, Inc. v. Underground Festival, Inc., 414 S.E. 2d 891 (Ga. 1991); Mississippi--Miss. Code Ann. § 85-7-137 (requires written authorization).
3. **Government Property** -- Mechanics' liens do not attach to the land owned by state, county, or local political subdivisions. Alabama-- Rayborn v. Housing Auth., 164 So.2nd 494 (Ala. 1964); Georgia--B&B Elec. Supply Co. v. H.J. Russell Constr. Co., 304 S.E.2d 544 (Ga. 1983); Mississippi--Mississippi Fire Ins. Co., v. Evans, 120 So. 738, 744 (Miss. 1929). However, under Alabama law projects performed by industrial development boards are not protected and a lien will attach. See Abell-Howe Co. v. Industrial Dev. Bd., 392 So.2nd 221 (Ala Civ. App. 1980).

- C. Who is entitled to file a mechanics' lien?** Original contractors, subcontractors, material providers, and laborers are all entitled to prepare and file mechanics' liens in nearly all states. Most mechanics' lien statutes establish **different requirements for each of these different types of claimants**. It is critical to determine the status of the lien claimant in order to properly analyze the method used to perfect an individual lien. Ultimately, the rules and method required to perfect an individual lien **depends** upon the status of the claimant.
1. Contractors, which have a direct contract with the owner, whether they are called prime, direct or original contractors, generally have the right to file mechanics' liens.
 2. Subcontractors generally have the right to file mechanics' liens.
 - a. Under the Mississippi statute, subcontractors, laborers, material providers, and others who have no contractual relationship with the owner have no lien rights.
 - b. Some states require subcontractors and sub-subcontractors to provide notice to the owner of their participation in the project to protect their potential right to file mechanics liens. See infra. at section I,D.
 - c. The North Carolina lien statute provides subcontractors without a direct contract with the owner only a "lien against funds" and a subrogated lien against the owner's real property. N.C. Gen. Stat. §44A-18 (1-4); 44A-23. Such subcontractors have a direct lien against the property if the owner fails to retain funds sufficient to satisfy a perfected lien on funds.
 3. Materialman and suppliers normally have the right to file mechanics' liens.
 - a. Under Alabama law, **suppliers to other material providers**, however, have no right to a lien. Pinecrest Apart., Ltd. v. R.P. McDavid Co., 535 So. 2nd 126 (Ala. 1988). Similarly, under Georgia law, a supplier to a supplier **may not** have the right to a mechanics lien. Ga. Code Ann. § 44-14-361(a).
 - b. Again, some state lien statutes require the materialman and suppliers to subcontractors to provide notice to the owner of their participation in the project to protect their potential right to file mechanic liens. See infra. at section I,D.
 - c. In order to obtain a lien, materials must be incorporated into the liened project.
 - (1) Delivery of materials to the site is prima facie evidence of the incorporation of such materials into the project.
 - (2) In Florida, the burden of proof is placed on material provider to establish actual delivery to the project. Tuttle/White Constructors, Inc. v. Hughes Supply, Inc., 371 So.2nd 559, 564-65 (Fla. Dist. Ct. App. 1979). Materials picked up by contractor and not delivered directly to site do not provide basis for lien.

Florida E. Coast Properties, Inc. v. Coastal Constr. Prod., Inc., 553 So.2nd 705, 706 (Fla. Dist. Ct. App. 1989).

(3) In Georgia and Mississippi, evidence of delivery to the site creates a rebuttable presumption that materials were received and used on the project. The burden of proof is on the owner to prove the materials were not incorporated into the improvement.

See Maloy v. Planters Warehouse & Lumber Co., 234 S.E. 2d 807 (Georgia 1977); Miss. Code Ann. § 85-7-131.

(4) Investigate evidence of incorporation of materials into project through delivery tickets, project logs and invoices.

d. A wide variety of construction materials give rise to a mechanics' lien under most state statutes.

(1) All state lien laws provide that standard construction materials such as wood, steel, concrete, brick, windows, electrical components, HVAC equipment provide the basis for the right to file a lien. In the last 20 years, the definition of "construction materials" has been statutorily extended to include nearly every material, supply, tool, equipment, or fuel found on a construction site.

(2) Rented tools, machinery, and equipment also provides the basis for a claim of lien.

(a) Florida law allows a lien for the "reasonable rental value for period of actual use" for tools, machinery and equipment under Fla. Stat. ch. 713.01(11).

(b) Georgia law expands its definition of "materials" to include the "reasonable value or rental price" of tools, machinery and equipment. Ga. Code Ann. §44-14-360(3)

(3) Items used up in the process of construction including, gas, electricity, and explosives, will provide the basis for a lien.

(4) Unique, prefabricated items can be the subject of a lien whether or not specifically incorporated into the site. In Florida, "specially fabricated materials are defined as "a material not generally suited or readily adaptable in a similar improvement." Fla. Stat. ch. 713.01(11).

4. Laborers and union employee benefit funds have the right to file mechanics' liens.

a. Most lien statutes protect the laborer class of claimants by exempting them from any kind of pre-lien notice requirements. Fla. Stat. ch. 713.05 and 713.06(2)(a).

b. Some states, however, impose a shorter time period for filing lien by laborers. The Alabama statute allows only 30 days from last date of work on the project. Ala. §35-11-215 (1975).

c. Some state lien statutes specifically provide that liens by laborers may be filed "collectively" by an association (union) or employee benefit fund.

d. Most federal courts have found that state mechanics' lien statutes

are preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001. et. seq. Plumbing Indus. Bd. v. E.W. Howell Co., Inc., 126 F.3d 61, 69 (2d Cir. 1997); McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 20 n.3 (1st Cir. 1991); Bricklayers Local 33 Benefit Funds v. Americas Marble Source Inc., 950 F.2d 114 (3d Cir. 1991); Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir. 1990); Sturgis v. Herman Miller, Inc., 943 F.2d 1127 (9th Cir. 1991); Edwards v. Bethlehem Steel Corp., 554 N.E.2d 883, (Ind. App. 1990); Pestridge v. Shinault, 552 So. 2d 643 (La. App. 1989), cert. denied, 559 So. 2d 131 (La. 1990); Carpenters S. Cal. Admin. Corp. v. El Capitan Dev. Co., 811 P.2d 296, (Cal. 1991) (en banc), cert. denied, 502 U.S. 963 (1991). Therefore, liens filed by such funds can be attacked. A few courts have, however, found no ERISA preemption precluding the filing of mechanics' liens by employee benefit funds. Plumbers Local 458 Holiday Vacation Fund v. Howard Immel, Inc., 445 N.W.2d 43, (Wis. 1989) (state construction lien law available to collect judgment for unpaid contributions).

5. Construction "Professionals" generally have the right to file mechanics' liens in most states. Under the Florida statute, these professionals include "architects, landscape architects, interior designers, engineers, surveyors, and mappers". Fla. Stat. Ch. 713.03. Such construction professionals have a right lien a project in most states including Alabama—Hughes v. Torgerson, 11 So. 209 (Ala. 1892); Florida--Fla. Stat. Ch. 713.03; Louisiana--La. Rev. Stat. Ann. § 9:4802; Mississippi--Miss. Code Ann. § 85-7-131. North Carolina – N.C. Gen. Stat. §44A-8. The Ohio lien statute has not yet been expanded to include these professionals. See O.R.C. §1311.01. Some others states have found certain professionals such as surveyors who stake subdivision and draw maps do not provide the necessary "improvement" to the land to allow for a lien. See e.g., Alabama – surveyors do not perform work for "building and improvement" nor do they add substantial value to the property. Wade v. Glencoe Lumber, 103 So. 2nd 730 (Ala. 1958).
6. Other specialized contractors have had difficulty in establishing a basis to file a mechanic's lien.
 - a. Courts in some states have concluded that demolition contractors don't "improve" land needed to provide the basis for a lien.
 - b. In South Carolina, contractors who cleaned and graded land for development have been found to be sufficiently **unconnected** with erection, alteration or repair of a building to support a lien. Clo-Car Trucking Co. v. Cliffure Estates of S.C., Inc., 320 S.E.2d 51 (Ct. App. 1984). . A subsequent case, A.V.A. Const. Corp, 400 S.E.2d 498, 500, clarifies that the grading contractor's lien in Clo-Car failed because the contractor did not allege a connection

between the grading work and the erection, alteration or repair of a building. In A.V.A. Const. Corp., the grading contractor that built the subdivision roads was found entitled to a lien on the entire subdivision.

D. Has the claimant followed all pre-lien Notice Requirements?

1. Notice requirements are **strictly** enforced under mechanic lien statutes. See e.g., Fla. Stat. ch. 713.06(2)(f).
2. Contractors and suppliers with direct contracts with owner are exempt from initial notice requirements in many states. See Fla. Stat. ch. 713.05; Ga. Code Ann. §44-14-361.5
3. “Notice to Owner”, “Notice to Contractor”, or “Notice of Furnishing” must be served within specific time period to protect potential lien rights.
4. Specific notice and method of perfection depends upon the specific type of claimants by group.
 - a. Florida law requires subcontractors and material providers to serve owner with Notice to Owner. Fla. Stat. ch. 713.01(11). A sub-subcontractor and material provider to a subcontractor must sever owner **and prime contractor** with Notice to Owner within 45 days of first work on site. Fla. Stat. ch. 713.06(2)(a).
 - b. The Georgia statute requires subcontractors and material providers not in privity with the prime contractor to serve a Notice to Contractor on the owner (or owner’s agent) and the contractor within 30 days of first work. Ga. Code Ann. § 44-14-361.5.
 - c. Louisiana requires the lessors of rental equipment and machinery to provide the owner with a copy of the lease not more than 10 days after delivery of rented equipment to the site to protect lien rights. La. Rev. Stat. Ann. § 9:4802(G).
 - d. Alabama law provides that “full price liens” are only available to material suppliers (without direct contract with owner) when a “notice” is served on the owner prior to delivery goods. Ala. Code §35-11-210.
 - e. Alabama lien law also requires that all parties who do not have direct contracts with the owner (subcontractors and material suppliers) provide **notices of intent to file lien** under §35-11-218 which establishes the amount of the unpaid balance in the hands of the owner to which the claimants’ lien will ultimately attach. The law requires service of this notice on the owner and the construction lender (if its identify can be reasonably determined). Ala. Code §35-11-218.
 - f. North Carolina law limits the lien rights of all lower-tier subcontractors and suppliers (parties that do not have direct contracts with the general contractor) to a lien on the funds owed

to the party with whom the subcontractor or supplier contracted if the general contractor has timely filed and posted a Notice of Contract. When a lower-tier subcontractor or supplier has served the general contractor with a Notice of Subcontract, the general contractor must also give timely notification to the lower-tier subcontractor or supplier of payments to its subcontractor above that lower-tier subcontractor or supplier. N.C. Gen. Stat. §44A-23.

E. Did claimant follow all Lien Recording and Perfection Requirements?

1. As a creature of statute, the applicable recording and notice requirements must be strictly followed.
2. Applicable time for recording mechanics liens.
 - a. What period applies?
 - b. How is it calculated? Days or months
 - c. When does period start?
 - (1) **Normally, the period begins on last day of work/delivery on the project site.**
 - (2) Warranty work-does not extend period. Time for filing lien cannot be extended by incidental, remedial, or warranty work performed after the project is completed. Georgia—see *Womack Indus., Inc. v. B&A Equip. Co.*, 405 S.E.2d 880 (Ga. 1991).
 - (3) Extra work contracted later– outside original contract should not extend period for filing lien on amounts owed under original contract.
 - (4) Investigate project logs (daily) to confirm the actual last date of work of particular claimants on site.
 - d. Different time periods may apply to different classes of claimants.
 - (1) Alabama law requires liens recorded based upon claimant status:
 - (a) original contractor have 6 months;
 - (b) subcontractors and material providers have 4 months; and
 - (c) Laborers 30 days. Ala. Code § 35-11-215
 - (2) Florida within 90 days of 1st work or delivery for all claimants
 - (3) Georgia requires recording with 3 months **not 90 days.** Ga. Code Ann. §44-14-361.1.
 - (4) Louisiana provides that the subcontractors, material providers and laborers have 30 days after the owner and prime sign and file a notice of acceptance or termination of work. The prime contractors, surveyors, engineers and architects have 60 days to file a claim. La. Rev. Stat. Ann. § 9:4822.
 - (5) Mississippi provides no time period for filing and recording of a notation of the lien in the Notice of Construction Liens book, but such notations will only be good against subsequent purchasers or encumbrances. Miss. Code Ann. § 85-7-133; and 85-7-131.

(6) In North Carolina, a lien against funds is perfected by service of a Notice of Claim of Lien. No filing of this type of lien is required. N.C. Gen. Stat. §44A-18(6). A lien by a contractor with a direct contract with the owner must be filed within 120 days after last date of work or delivery by the claimant at the site. There is no requirement that the claim of lien be served on anyone. N.C. Gen. Stat. § 44A-12(b).

(7) South Carolina establishes a 90-day period within which to record a certificate of lien. S.C. Code Ann. § 29-5-120.

3. Forms of Lien/Claim
 - a. Review substantive information contained in claim.
 - b. Certain states require attachment of pre-lien notices and proof of service. See e.g., N.C. Gen. Stat. §44A-20(d). (Requires subcontractors to attach a copy of their Notice of Claim of Lien and affidavit demonstrating service to claim of lien.)
 - c. Legal Description in claim must be proper description of improved property. Claimants may rely upon information in notices recorded by owner even if the information is incorrect.
4. Filing Requirements for Liens—Nearly all states, except North Carolina, require recording of the lien and “service” of the lien perfected thereafter. Reversing the procedure can void the lien.
5. Service Requirements for Notices and Liens.
 - a. Who must be served with these notices and liens?
 - (1) Owner/Designee from Notice of Commencement
 - (2) Prime/direct Contractors
 - (3) Any additional party identified in the owner’s Notice
 - b. How is “service” perfected?
 - (1) Certified mail – return receipt;
 - (2) Actual delivery—Personally; or
 - (3) Posted at construction site if neither method can be accomplished.
 - c. When must service be completed?
 - (1) Florida requires service **before** recording or within 15 days. Fla. Stat. ch. 713.08(4)(c).
 - (2) Georgia requires service to be completed within Mechanicseven days of filing.

F. Enforcement Requirements for Liens vary and should be reviewed in detail.

1. Action to enforce lien must generally be commenced within a particular trigger date.
 - a. In Alabama, within six months after maturity of the entire indebtedness the enforcement proceeding must be filed. Ordinarily

this means last date of work or delivery to site, but the claimants' own billing practice may change and extend this date. Ala. Code § 35-11-221.

- b. In North Carolina, the claimant must bring an enforcement suit with 180 days from the last date of work or delivery to the site. N.C. Gen. Stat. §44A-13A.
 - c. In South Carolina, a suit to enforce a lien must be brought the earliest of 6 months from the last date of work or delivery **or** from the date the lien was filed. S.C. Code Ann. § 29-5-120; Ciambro Corp. v. Jeffcoat & Martin, 804 F. Supp. 784 (D.S.C. 1992).
 - d. **Within one year of Last work/ delivery on project** or one of the following:
 - e. Mississippi law requires the commencement of a suit to enforce the lien within 12 months of the date the “debt became due and payable” to the claimant. Miss. Code Ann. § 85-7-141.
 - f. Expiration of the time allowed for the filing of the claim of lien. La. Rev. Stat. Ann. § 9:4823(A)(2).
 - g. Date lien was recorded. Fla. Stat. ch. 713.22(1).
 - h. The Georgia law requires the commencement of a suit **on the underlying debt** with 12 months of the date the debt became due. Ga. Code Ann. §44-14-361.1(a).
2. The enforcement period can be shortened in some states by the recording of a Notice of Institution of the Foreclosure Action. Failure to file the notice in a timely fashion (14 days) renders the lien unenforceable. See e.g., Ga. Code Ann. §44-14-361.1(a)(3).

II. Offensive Use of Mechanic's Lien Statutes

A. Notice of Contract, Notice of Commencement—Owner's Notice

1. Follow Publication Requirements of lien statute which include:
 - a. Recording – Confirm recording in county of project.
 - b. Posting – Proof of posting at site must be available for protection.
 - c. Demands – Respond to requests made by subs and suppliers as required by the local statute. Typically, principal contractors are required to provide a copy of owner's notice within 10 days of any party requesting the document in writing.

B. Why follow Owner's Notice provisions?

1. Many state laws require the filing of the preliminary notice by the owner (notice of contract or commencement) in order to obtain the additional protections provided when parties lacking privity are required to serve notice of their participation in the project. Georgia-- Ga. Code Ann. §44-14-361.5

C. Obtain List of All Subcontractors and Material Providers that "Served" Notice on Principal contractor

1. Use list of Notice subcontractors and providers to follow payment progress on projects.
2. Obtain releases/waivers of lien from these subcontractors and material providers

D. Use Contesting Lien Provisions to shorten time for filing enforcement Actions

1. Some lien statutes allow for service or recording of a notice to commence enforcement action or notice contesting lien. These procedures can reduce the period of enforcement from 1 year to 60 days after service of the notice. Fla. Stat. ch. 713.22(2).

**TOP TEN WAYS TO
MAXIMIZE PROTECTION UNDER MECHANICS' LIEN LAWS**

10. Make Certain Owner has recorded and Posted Notice of Contract or Notice of Commencement before construction begins or as soon as possible.
9. Obtain copies of any Pre-lien Notices served on Principal and any proof of "Service".
8. Determine What State Law Applies to Project.
7. Determine type of project (funding authority and source) and appropriate lien perfection method.
6. Investigate what type of Property Interest Contracting Party holds.
5. Apply correct notice and time requirements to claim based upon claimants' status.
4. Investigate actual Last Date of Work on any liens recorded!
3. Investigate "service" of notices and liens on project.
2. Should claimant have served a Pre-lien Notice upon the owner and prime contractor?
1. Understand and investigate entire lien perfection process for any potential defenses.

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