



UNDER CONSTRUCTION

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The Annual Round With Utah's Mechanics' Lien Laws

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Death and taxes aren't the only sure things in this life. Another event you can take to the bank is the annual tweaking and twisting of Utah's mechanics' lien laws in the legislature. It is always a dynamic process to watch, and with banks and title companies getting a lot of attention this year, the 2011 Utah State Legislative Session was active. There were countless hours spent debating pros and cons of the changes suggested by all sides of the construction industry.

At the end of the day, the Utah legislature made some very significant changes to the Utah Mechanic's Lien laws in 2011. Two bills enacted the changes: HB 260 "Mechanic's Lien Revisions" and HB 115 "Mechanics' Liens Amendments." Following is a brief summary of the changes. As with any changes, there will be a period of adjustment to work out the details in interpretation and enforcement. How Utah's appellate courts will ultimately interpret these changes, too, is always an uncertain dynamic.

HB 260 – Mechanic's Lien Revisions

- As it relates to notice requirements for bond claims, government projects will continue consistent with current law. Filing by owner or general contractor of the Notice of Commencement for the project is unchanged. Thereafter subcontractors and suppliers are required to file Preliminary Notices in order to preserve bond claim rights.

- Changes to the mechanic's lien law from this bill have applied to all **private** projects as of August 1, 2011.
- All filings with the State Construction Registry (SCR) are required to contain tax identification number(s) for the property.
- Now, standardized building permits must include the tax identification number for each parcel of property for the project as well as the county within which the project is located.
- Local government entities issuing building permits must now transmit the building permit information to the SCR for filing, but for informational purposes only.
- The requirement for the filing of a Notice of Commencement with the SCR on private projects was eliminated.
- The new law requires all persons or entities (including general contractors) to file a Preliminary Notice in order to preserve lien rights on private projects. Preliminary Notices are still required to be filed within 20 days of commencement of the claimant's work.
- Construction lenders are now required to file with the SCR a Notice of Construction Loan "promptly" after and "in conjunction with" the recording of the trust deed with the loan closing. They are also required to file with the SCR a Notice of Construction Loan Default within five days of the recording of a notice of default with the county recorder.
- Additional information is required to be included in the Preliminary Notice (tax identification number(s) for each parcel where work is to be performed and the name of the county where the property is located).
- The First Preliminary Notice filed with the SCR is deemed to be the first work for priority purposes and the relation back doctrine. "First work" will no longer be determined by actual work done on the property.
- Now, if a construction lender wants to ensure first priority, the new law allows for the persons or entities who have filed a Preliminary Notice with the SCR prior to the recording of the trust deed to withdraw their respective Preliminary Notices at the request of the construction lender. This will make for some interesting pre-loan negotiations.
- Contractors must be wary, because if a party has withdrawn its Preliminary Notice at the request of the construction lender, that party must re-file its Preliminary Notice within 20 days of the lender's recordation of the trust deed to preserve its lien rights.

HB 115 – Mechanics' Lien Amendments / Preconstruction Services

- The Legislature created a new animal called "preconstruction services." Preconstruction services include "plan or design" services provided before construction of the improvement commences. Compensation for this must be separate and apart from construction services compensation.
- Persons or entities are required to file a Notice of Retention (an unfortunate choice of words for a construction statute, as in this case "retention" refers to one being retained to perform work; not to be confused with contractual monetary retainage) in order to

preserve preconstruction lien rights.

- A Notice of Retention is required to be filed within 20 days of commencement of the claimant's work.
- Notices of Retention are required to contain: contact information of service provider, description of services to be performed, identifying information of person/entity who hired service provider, identifying information of property owner including county and tax identification number.
- There are provisions to challenge the validity of a Notice of Retention.
- Preconstruction services are deemed completed when the physical, on-the-ground construction commences. This may be messy, as it appears preliminary notices of actual construction may be filed prior to work on the ground.
- Priority for all preconstruction service liens relate back in time to the filing of the Notice of Retention. There is an exception, however, as a preconstruction services lien is subordinate to a loan to the extent preconstruction services are provided **after** the recording of the loan.
- Providers are required to file preconstruction liens within 90 days after completing the services.
- Perfecting a preconstruction lien must take place to foreclose the preconstruction lien within 180 days of recordation of the preconstruction lien.
- Unfortunately, these new iterations are going to provide many and likely expensive opportunities for owners, lenders, title insurers, architects, materialmen, engineers, contractors and subcontractors to explore the legislative intent behind these changes in the coming months and years. And of course, I must conclude with the obligatory caveat that my observations herein are my own and should not be construed as legal advice. Because these laws and changes to them are always a moving target, consulting with a knowledgeable attorney for application of these changes to a specific situation or interpretation will remain a very good idea.

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