

By-Lined Article

Lien-ing Towards Payment

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With a growing number of projects facing financial difficulty, the importance of maintaining leverage for securing payment is greater than ever. The project itself remains a prime security target for any contractor, subcontractor or supplier for assuring appropriate attention is given to their claims and that payment will be forthcoming in a timely and unencumbered manner. Some very recent developments in the lien realm emphasize the ongoing attention that is being given to lien statutes and the opportunity they provide for maximizing those considerations of security and leverage.

Utah

First, in Utah, the state's lien law was amended to accommodate the prospect of bankruptcy. There is an increasing intersection between bankruptcy laws and lien laws insofar as they both address situations of financial distress. In fact, it is not at all unusual to have to be mindful of the bankruptcy implications of a lien filing as well as a given lien law's potential impact on how a claim will be pursued in the bankruptcy realm. Utah appears to have recognized the potential for conflict when the owner and developer files for bankruptcy, and a contractor or subcontractor seeks to pursue their respective lien rights to secure payment.

Most often, the filing of a bankruptcy petition initiates the automatic-stay provisions of the U.S. Bankruptcy Code. The potential lien claimant is then placed in a situation where, in order to advance its lien, it has to be cautious that such action is not viewed as violating those automatic-stay constraints. While navigation of the automatic-stay provisions is dependent in part upon the individual states' lien laws viewed in conjunction with the Bankruptcy Code, Utah appears to have felt that an overarching protection of the contractor or subcontractor is preferred. Under the newly enacted amendment to the Utah lien law, the time for presentment of the lien enforcement action has been specifically modified to account for a bankruptcy filing. If the owner of the subject property becomes the subject of a bankruptcy proceeding before the expiration of the 180-day period to initiate an action in enforcement of the lien, the statutory amendment operates to extend that filing deadline. Under the amendment, the action may now be filed within 90 days after the automatic stay imposed by the applicable bankruptcy law ends by expiration or is otherwise lifted in the bankruptcy proceedings.

North Carolina

Second, in North Carolina, another lien development occurred—in this instance, in the courts rather than the legislature. In a very recent decision—*Wachovia Bank v. Superior Construction Corporation*¹, —the court aptly concluded that a waiver submitted in connection with a progress payment waived rights to make lien claims for the dollar amounts involved. However, what was unique about the decision is the court also held that the waiver impacted the "date of first furnishing of labor and/or materials," which is significant under North Carolina's lien statute to establish lien priority. On that score, the court concluded that with the language of the partial lien waiver included with the payment application, the "date of first furnishing" was reset to the effective date of the partial waiver.

The potential impact of this decision should not be underestimated. Contractors and subcontractors have somewhat routinely provided partial waivers of lien on projects because the waiver was being provided specifically to secure payment. While there are some rather unfortunate decisions suggesting that a contractor or subcontractor providing such a waiver without actually obtaining payment might be operating at its own risk, those cases tend to remain in the minority. Here, however, the effectiveness of the waiver is not only for payments received, but also potentially for *future* payments—since if the lien loses its priority as a security interest, its ability to gain the appropriate attention on the project will be significantly impaired. Even though this case may be the subject of further appellate review, the decision is certainly an important one for any party evaluating the potential impact of partial waivers of lien. As such, keeping an eye on this case as it continues to unfold would be prudent.

Oregon

Venturing westward, Oregon recently passed amendments to its construction lien law of a dual nature: one from the perspective of the property owner and the other from the perspective of the potential subcontractor claimant. In the first instance, the Oregon amendments prohibit a purchaser of residential property from waiving its protection from potential claims of lien. In a similar vein, Oregon also now prohibits an unlicensed subcontractor or those supplying materials, equipment or labor to an unlicensed contractor from pursuing a lien against an "owner-occupied residence" property.

Pennsylvania

Keep in mind that Pennsylvania recently took a much different step—but seemingly in the same direction—in October of 2009, expanding the potential for upfront waivers of lien on residential building projects. Pennsylvania now permits again under its lien law (much as it did upon its original passage in 1963) broad, upfront waivers of lien against residences and residential development projects as long as the property in question is a "residential building not more than three stories in height, not including any basement level, regardless of whether any portion of that basement is a grade level" This amendment certainly places a number of contractors and subcontractors in a much less advantageous position for securing payment on projects, provided they are of a residential nature as defined under Pennsylvania law.

Conclusion

Despite the variations of these amendments and determinations, it is clear that lien laws are going to gain more attention as potential vehicles for securing payment, particularly while the current economic forecast remains as uncertain and troubling as it has been to date. Oftentimes, taking action relative to liens becomes more routine and based upon past experience. With changes to these lien laws occurring at a much higher rate, proceeding in such a "traditional" fashion may very well lead a claimant outside of the applicable lien law and, consequently, beyond its protection.

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Note

1. *Wachovia Bank Nat'l Ass'n v. Superior Constr. Corp.*, 2010 NCBC 9 (N.C. Super. Ct. 2010).