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LEGAL BRIEFING GEORGIA LIEN LAW REVISIONS

FORGET WHAT YOU KNEW ABOUT THE GEORGIA LIEN LAW: CHANGES FOR MARCH 2009

While most people were finally getting comfortable with the ins and outs of the puzzle known as the Georgia Mechanic's and Materialmen's lien law, the Georgia Senate recently created and charged a Lien Law Study Committee to review the lien statute and determine whether there were any areas which should be revised. The Committee, comprising five Senators and chaired by Senator Seabaugh, was advised by an Advisory Committee drawn from a broad spectrum of interested associations, groups and persons. The goal of the Committee was to review the lien statute and determine whether there were aspects of the current lien law that needed to be "fixed" or that should be modified to make the lien process more clear and consistent, more functional, or more closely reflective of the construction process, both residential or commercial, as it is carried out today. In fulfillment of this charge, a Senate Bill 374 was introduced in the Senate, and worked its way through the General Assembly in substantially the recommended form. The bill "as passed" was recently signed into law by the Governor.

Many changes, some fairly significant, were adopted, including a number of "traps for the unwary." However, these revisions will not go into effect until March 31, 2009. Nevertheless, because there are significant and substantive changes, everyone in the construction industry, from owners and contractors to subcontractors and vendors, will need to understand these new requirements in order to effectively protect their property from liens or enforce their lien rights going forward. All affected parties must keep in mind in their contracting and contract administration activities that until March 31, 2009, all must abide by the old (i.e. current) procedures and use the old forms, and then upon the stroke of midnight on March 30, 2009, all must transition overnight fully to the significantly new and different forms and procedures. Failure to use the new forms and formats and abide by the new procedures will be fatal to enforcement and protection of lien and bond rights and remedies.

The following are a few of the more substantive revisions to the Georgia Lien Law*:

- **Time for Filing a Lien:** A lien now must be filed within 90 days - not "three months" as currently provided - after the completion of the work or services performed on, or the labor or material was furnished to, a project. Many people believed this to be the current rule while it was not, but this should make it easier to remember when a lien needs to be filed.
- **New Lien Language:** The statutory lien form has been modified, and claims of lien filed after March 30, 2009, will now include the phrase "which is the same as the last date the labor, services, or materials were supplied to the premises", referring to and further explaining the phrase "claim became due." Additionally, any such lien shall include on the face of the lien the following statement in at least 12 point bold font:

"This claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action is filed in that time period." And, the lien needs to include on its face a specific notice to the owner that the owner has the right to contest the lien. Failure to include either the language or the notice shall invalidate the lien and prevent it from being filed!

- **Lien Filing Procedure Changes**: The lien claimant, after March 30, 2009, must "no later than two business days after the date the claim of lien is filed" (in contrast to the current more ambiguous "at the time" of filing) send by registered or certified mail or statutory overnight delivery (e.g. "Federal Express") a copy of the lien to, depending upon the circumstances, the owner and/or the contractor.
- **Time for Filing Suit (or "lien action") on the Lien**: A lien claimant must file a "lien action" against the entity with whom it contracted for the recovery of the amount due within 365 days from the date the party filed its claim of lien. The term "lien action" is a newly defined term, and includes commencement of a lawsuit (currently the only option), arbitration, or filing of a proof of claim in a bankruptcy. This change actually modified two existing rules. First, switching the timeframe from months to days makes the method for counting the time - days instead of months - in which a lien action must be filed consistent with the method for counting the time for filing a new lien. Second, and perhaps more importantly, the changes provide a lien claimant as much as an extra three months in which to file its suit to perfect its lien rights, as the timing for the suit now runs from the date of the filing of the lien, and **not** from the last date work was performed or materials supplied on the project (date the "claim became due").
- **Notice to Contractor Procedure Changed**: For the lower tier contractors and suppliers required to send a "notice to contractor" to the contractor filing the "notice of commencement" in order to preserve their lien rights, it is now specifically directed that the notice not merely be "given", but that it "shall be sent by registered or certified mail or statutory overnight delivery" to the owner and the contractor.
- **New Language for the Interim Waiver and Release Upon Payment and the Waiver and Release Upon Final Payment**: Both of the statutorily prescribed "waiver" of lien and bond rights forms (the "Interim" and "Final" forms) and procedures were changed in several significant ways:
 - The forms are now required to be in substantially the statutory form in ALL CAPS, bold, 12 point font.
 - The forms now expressly include a release of all rights against any "labor and/or material bond," together with "lien" rights, through the date of the waiver.
 - Regarding the interim lien waiver form, the 'conclusive' presumption of payment (satisfying the "condition" to give effect to the waiver) will not occur until 60 days after the waiver form is executed and submitted - rather than the 30 days currently specified.
 - Regarding the form of waiver upon final payment, the form has been changed to clearly make it "conditional" in the same manner as the interim waiver form

- rather than the "unconditional" language in the current form giving effect to the waiver immediately upon execution and irrespective of the actual receipt of payment. Again, the presumption of payment occurs only after the expiration of 60 days, as with the interim waiver form.
- There is new mandatory statutory "Notice" language required at the bottom of the statutory waiver forms.
- **Affidavits of Non-Payment:** While not utilized as often as it should be, the rules relative to the Affidavit of Non-Payment have been changed in four significant ways after March 30, 2009, as well.
 - First, the Affidavit form must be in ALL CAPS, bold, 12 point font.
 - Second, the Affidavit must be filed if a contractor is not paid within 60 days of the date that the waiver form is executed. The 60 days (as opposed to the prior version of 30 days) should make it possible for more payments to be received, and fewer affidavits to be filed. Note, however, that the rule remains that if the claimant does not file an Affidavit of Non-Payment prior to the expiration of 60 days, then the claimant shall be deemed to have been paid and its lien rights will be jeopardized.
 - Third, there is new statutory language required at the bottom of the statutory Affidavit of Non-Payment forms (although there is no provision that failure to include such language shall invalidate the Affidavit).
 - Fourth, copies of the Affidavit must be sent by registered or certified mail or statutory overnight delivery to the owner (and contractor where a notice of commencement has been filed) within seven days of filing of the Affidavit.
- **Notice of Contest of Lien:** In response to a need to more fully protect residential property owners, the legislature specifically sought a manner in which to address and remove clearly invalid liens for both residential and commercial properties. To accomplish this the amended statute entirely rewrites the current method specified for removing invalid liens from the property, and replaces it with an entirely new process to accelerate a challenge to the validity of a lien claim. Essentially, in a process modeled after a similar procedure employed in Florida, an owner, or contractor for a project, may shorten the time for enforcing a lien that has been filed by filing a Notice of Contest of Lien in the superior court in the same manner as a claimant would file a lien. The Notice of Contest of Lien allows an owner or contractor to contest a clearly invalid lien (for example, the lien claimant liened the wrong property or no work was actually performed by the lien claimant) by forcing the lienor to file suit in a shortened period of time. This rule gives the owner (or contractor) the ability to quickly address unenforceable liens rather than waiting more than a year to invalidate such a lien.
- **Lien Discharge Bonds:** The requirements for the filing and recording of "lien discharge" bonds, which if properly done transfer a specific lien claim from the improved real property to the bond, have been changed to require that a notice be given by the party filing the bond together with a copy of the bond to either the lien claimant or the property owner.

Because the law has been changed so significantly*, it is important that each of the changes, including those above, be discussed with your attorney so that your business is prepared to incorporate these changes into its daily practice, including the proper revised forms for lien claims, waivers forms and affidavits.

*This article is only intended to highlight some of the more important changes which will most likely impact a lien claimant's business. For a full copy of the full copy of the adopted statutory changes, go to http://www.legis.ga.gov/legis/2007_08/versions/sb374_AP_11.htm, or contact us and we will be happy to provide you with a full copy of the new lien law.

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