

Mississippi Lien Law Client Alert



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Mississippi Legislature Passes Sweeping New Lien Law

Both houses of the Mississippi legislature have now passed an act completely revising statutory lien rights on construction projects in Mississippi. This bill, which will take effect as soon as Governor Bryant signs it into law, strikes the prior lien laws in whole and creates a new statutory scheme.

Who is covered under the new law?

The Act grants lien rights not only to contractors, but also to all subcontractors, sub-subcontractors, and materialmen providing work to any improvement of real estate, as well as architects, engineers, and surveyors. This is a dramatic departure from the prior lien law, which only allowed claims by a general contractor in privity with the owner.

There are multiple statutory hurdles to asserting a lien, and there are several affirmative defenses available to owners as well.

Statutory General Prerequisites

- To enforce a lien, a lien claimant must not only be licensed, but also have contracted with other licensed parties, presumably meaning that if a general contractor hires unlicensed subcontractors, an owner could use this fact as a defense to the general contractor's lien.
- The lien claimant must also have substantially complied with its contract.
- The following prerequisites do not apply to single-family residential construction, but do apply to all other types of construction:
 - If asked, a general contractor asserting a lien must have furnished to the owner a complete list of subcontractors within a reasonable time; otherwise, lien rights are forfeited.
 - Likewise, a subcontractor, if requested by the general contractor, must furnish a complete list of its sub-subcontractors and/or material suppliers to recover.
 - A sub-subcontractor and materialmen of subcontractors have more onerous duties: they *must* give notice, whether asked to or not, to the general contractor (or owner, if there is no general) of the labor or materials it is providing to the project. The notice must be given within 30 days of *first* providing labor or materials to the job.
- For single-family construction, the lien claimant must give 10 days' notice of the intent to file a lien before filing the lien.
- For subcontractors or material suppliers, the project must not be bonded under the Little Miller Act.
- The filed lien must contain a statement giving notice to the owner of its rights. The statement is specified by statute.

Timing Provisions

- The lien must be filed within 90 days of the last work or materials furnished.
- Notice must be mailed by certain methods to the owner within 2 days of the lien's filing.
- The lien claimant must bring *both* a breach of contract action and a lien enforcement action within 180 days of filing the lien.
 - The requirement to bring a breach of contract action is waived if (1) if the owner has not paid the contractor; and (2) the lien claimant cannot obtain a judgment because the defendant is bankrupt, deceased, or a pay-when-paid clause precludes payment to the lien claimant.
 - The breach of contract action can be a demand for arbitration or a claim in bankruptcy.
- If, after filing the lien, the owner or general contractor files a notice of contest, then the lien claimant must bring its suit within 90 days of filing the claim.
- The lien can be amended at any time, and amendment will relate back to the original filing.

Affirmative Defenses and Rights of Owners

- If the owner has no notice of the lien claim, then the owner can assert the following complete defenses to a lien action:
 - Payment to the general contractor in reliance on a lien waiver.
 - Payment to the general contractor in reliance on sworn statement by contractor that the lien claimant has been paid.
- The owner or contractor can discharge the lien upon filing a bond with the chancery clerk. The bond must be for 110% of the lien claim and must promise to pay the lien, if due, upon judgment that such payment is due.
- If the owner has obtained lien waivers or sworn contractor's statements that the lien claimant has been paid, then the total amount of liens in favor of anyone who does not have a direct contract with the owner cannot exceed the unpaid contract balance on the owner's contract with the general contractor.

Release and Waivers

- Lien rights cannot be waived but may be subordinated in advance of providing labor, services, or materials.
- Any interim lien releases must follow the form set forth in Miss. Code 85-7-433.
- A lien release is effective at the earliest of (1) the lien claimant's actual receipt of funds, (2) the lien claimant's actual acknowledgment of payment in full, or (3) 60 days after the date of the waiver and release if, during that time, the claimant does not file an affidavit of nonpayment.

Amount of Recovery and Statutory Penalties

- The lien is limited to the amount owing under the terms of an express or oral contract, subcontract, or purchase order, plus interest (either the statutory rate of interest, if none is specified in the contract, or the contractual rate of interest).
- Attorney's fees can be awarded to the prevailing party in the lien enforcement action.
- Treble damages are available:
 - For requiring a lien release as a precondition of payment and then willfully failing to pay the amount covered by the release.
 - For willfully making a false sworn statement to the owner that lien claim has been paid.
 - For falsely and knowingly filing a lien claim.
- Failure to cancel a lien within 15 days of being fully paid subjects the lien claimant to an action for damages at a rate of \$500 per day.

Priority of Liens

- Construction liens will be inferior to taxes but will be superior in priority to all other liens filed after the date of the lien, with the exception of construction mortgages.
- A construction mortgage is a security interest that secures the loans used to finance the repair, construction, improvement, or acquisition of real property.

- Construction mortgages filed before construction liens have priority over construction liens; this includes priority for all loan advances pursuant to a construction mortgage, even if the advances are made after the construction lien is filed.
- For a construction mortgage to have priority, the lender must have obtained either an affidavit saying no work has yet begun, or a sworn statement by the contractor that lien claimant has been paid.
- All construction liens are of equal priority and shall be paid out of the proceeds of the sale; if the proceeds are insufficient, they are distributed pro rata.

— [Mark D. Herbert](#), [Adam Stone](#), [Bradford C. Ray](#), [Kaytie M. Pickett](#), and [Sabrina B. Ruffin](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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