

## **North Carolina Changes Mechanic Lien Laws (Part 1)**

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On July 18, 2005, the North Carolina General Assembly passed Senate Bill 887, making significant changes to North Carolina's mechanic's lien laws (G.S. §44A-7 through §44A-23) as they have stood for almost 40 years. The revised law took effect on as of October 1, 2005. While supporters of the new law claim that the changes simply "clarify" the old law lien law and codify existing case law, the new law includes several changes that all subcontractors working in North Carolina need to know. The changes can be divided into three main categories: 1.) definitional; 2.) procedural, and 3.) substantive. The time limits for filing a claim of lien on real property (120 days) and the lawsuit to enforce the claim of lien (180 days) did not change. Part One of this two part article focuses on the first two categories.

The most obvious change was definitional, the renaming throughout the chapter of the two primary types of liens available to subcontractors. The subrogated "Claim of Lien" (the subcontractor's right to assert the GC's lien on the property) is now a subrogated "Claim of Lien on Real Property", and the "Notice of Claim of Lien" is now a "Notice of Claim of Lien upon Funds." This change does not affect the operation of the liens themselves, but clears up any confusion – usually on the part of owners and banks – as to whether or not the lien attached to or threatened the real property. The impact of this change, if any, remains to be seen. At a minimum, however, every subcontractor needs to revise the current lien claim and sub-tier lien release forms her or she uses.

The second category of changes is procedural. The new law allows the lien enforcement lawsuit to be filed in any county where venue is proper.<sup>1</sup> Under the old law, you had to file the lawsuit in the same county in which the project was located. Under the new law, you can now file your lien enforcement lawsuit in the county where your office, or that any of the defendants is located as well. For example, if the project is in Cabarrus Co., your office is in Charlotte, the GC is from Raleigh, and the Owner is from Wilmington, you could now file your lawsuit in Cabarrus, Mecklenburg, Wake or New Hanover County. There is a catch, however: if you file your lawsuit in a county other than the one in which the project is located, you must also file a *Lis Pendens* in the project county within the 180 day time limit.<sup>2</sup>

The second procedural change in the new law is a confirmation that filing a proof of claim with the Federal bankruptcy court within 180 days satisfies the State law enforcement lawsuit requirement, but only if a *Lis Pendens* is timely filed in the county where the project is located.<sup>3</sup>

The third procedural change requires that all subrogated Claims of Lien on Real Property must have a Notice of Claim of Lien upon Funds included with it as an attachment.<sup>4</sup> This addition mandates a standard practice statewide. Given that liens are strictly construed by the NC courts, however, it is now possible that if you forget to attach a copy of your notice of claim of lien upon funds, your claim of lien against the property will be discharged for failure to satisfy the statute requirements.

The two substantive changes are: 1.) allowing liens upon funds to be bonded off in the same manner as claims of liens on real property, and allowing the bond to cut off any liens

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<sup>1</sup> N.C.G.S. §44A-13(a). It is possible that this change is meaningless if proper venue is dictated by §1-76, which still requires actions against an interest in real property to be tried in the county in which the property is located.

<sup>2</sup> N.C.G.S. §44A-13(c).

<sup>3</sup> N.C.G.S. §44A-13(a).

<sup>4</sup> N.C.G.S. §44A-23(a).

served or filed by lower-tier subcontractors in the ‘chain’ of the lien that is bonded off,<sup>5</sup> and 2.) a formalizing the pro rata treatment of claims of liens on funds.<sup>6</sup> These exact impact of these substantive changes will need to be decided by the courts, and they will be discussed in Part Two of this article in the next edition.

In the mean time, there are three things every subcontractor must do immediately in order to preserve his or her lien rights: 1) revise your lien forms to incorporate the new definitions and terminology; 2) make sure that if you do file any subrogated claims of lien on real property that you attach the corresponding notices of claim of liens upon funds to it; and 3) that if you file a lawsuit to enforce a claim of lien on real property in any county other than where the project is located, you file a notice of *Lis Pendens* in that project county at the same time.

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<sup>5</sup> N.C.G.S. §aaA-20(e), (f),

<sup>6</sup> N.C.G.S. §44A-21.