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February 10, 2009

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LIEN LAW CHANGES AS OF JANUARY 1, 2008

ALABAMA

According to recent Alabama cases, attorney's fees and interest MAY be allowed where the parties' credit agreement allows them to be recovered. [O'Grady v. Bird, 411 So. 2d 97 (Ala.1981); Reese & Howell, Inc. v. United States, No. 2:06-cv-999-WKW, 2008 WL 584988 (M.D. Ala. 2008)]

There has been a lot of discussion in recent years as to the relative priority of liens and mortgages. According to the relevant statutes, the lien claim takes priority over a subsequent mortgage, and over a prior one to the extent of the improvement alone. Case law has interpreted this law to mean that where a subsequent mortgage pays off a prior mortgage, and where the lien is not filed until after the second mortgage has been given, the lenders of the second mortgage will NOT be subrogated to the rights of the first mortgage, and will NOT take priority over the lienor. [In re Lawson, --- So.2d ----, 2006 WL 2780780 (Ala. 2008)]

ARIZONA

Attorney's fees on a private works project are allowed for appeals, as well as at the trial level. [North Star Pipelines, Inc. v. Elna Rae Development LLC, Not Reported in P.3d, 2008 WL 4787627 (Ariz.App. Div. 1, 2008)]

ARKANSAS

According to a recent case, where a lis pendens is filed to foreclose on a mortgage, and it is filed after lien claimant's work is performed but before claimant files its lien, and the mortgage is foreclosed without ever including the lien claimant, the lien claimant's lien will be barred. [National Home Centers, Inc. v. Coleman, --- S.W.3d ---, 2008 WL 1747108 (Ark.2008)]

CALIFORNIA

For public works projects, from now until January 1, 2014, retainage is not to be withheld on a Department of Transportation project. [7202]

COLORADO

On a residential project, a homeowner may be able to bring a claim against the trust fund, however funds recovered by the owner will be held in trust for the unpaid subs and suppliers. [Syfrett v. Pullen, --- P.3d ----, 2008 WL 5352682 (Colo.App.2008)]

On public works project, according to a recent case where the claimant is not timely paid according to the prompt payment rules, penalty interest at the rate of 15% will accrue, but will not be compounded annually. New Design Constr. Co., Inc. v. Hamon Contractors, Inc., --- P.3d ----, 2008 WL 2522306 (Colo.App. 2008).

CONNECTICUT

A recent case has reaffirmed the principle that if the general contractor defaults, then the total of all lien claims is limited to the amount of the general contract after deducting the cost of completing the contract, all payments made, *and* any damages resulting from the general contractor's default. Raymond's Bldg. Supply, LLC v. Prentice, Not Reported in A.2d, 2008 WL 441897 (Conn.Super.,2008).

There is some dispute as to whether attorney's fees will be allowed where a bond is substituted for the real property on a mechanic's lien claim. At least two courts held that attorney's fees will *not* be allowed where a bond is substituted for a mechanic's lien, a more recent case *has* allowed the award of fees in that situation. Abele Tractors & Equipment Co., Inc. v. Norwalk Excavating Co., Inc., Not Reported in A.2d, 2008 WL 2068199 (Conn.Super.).

Where there is a defect in the lien (such as an error in the description) and the defect is minor and an honest mistake, (not major and an intentional mistake or fraud,) a court recently ruled that the lien may be upheld. Mark Ouellette Drywall, LLC v. DeRosa, Not Reported in A.2d, 2008 WL 2553053 (Conn.Super. 2008).

On a private works project, if the owner or contractor resides in town where work performed, the notarized copy must be SERVED on each, or left at their residence by a neutral person or state marshal. Certified mail is NOT acceptable. [Attam v. Salmeron, Not Reported in A.2d, 2008 WL 4926336 (Conn.Super. 2008)]

DELAWARE

A court recently clearly established that, on private works projects, claimants providing laborers (for example, manpower agencies) do have lien rights, regardless of whether the labor is manual or supervisory. Construction Resource Management v. Littleton, Not Reported in A.2d, 2008 WL 4117186 (Del.Super.,2008).

On a private works project, the final notice must be given *after completion or acceptance of the structure*, but within 180 days after its completion or acceptance. [King Const., Inc. v. Plaza Four Realty, LLC, Not Reported in A.2d, 2008 WL 4382798 (Del.Super.)]

FLORIDA

Discussing condominium projects, a court recently held that where the claimant contracts with the homeowner association on a condominium project for work solely on common areas (such as the roof), it may be acceptable to bring the foreclosure action only against the condominium association, though it would be safest to name and serve the individual unit owners as well. Trintec Const., Inc. v. Countryside Village Condominium Association, Inc., --- So.2d ---, 2008 WL 4058013 (Fla.App. 3 Dist. 2008).

On a private works project, where a claimant files a lien and the owner or general contractor files suit to seek to have a claimant's lien discharged, the claimant must, within 20 days thereafter, either file its foreclosure action or show good cause why enforcement should not be commenced. According to a recent case, filing a motion to compel arbitration, even if consistent with the contract requirements, will not satisfy the requirement of filing a foreclosure action or showing good cause why enforcement should not be commenced. [713.21; Brookshire v. GP Const. of Palm Beach, Inc., 993 So.2d 179, 46 Fla. L. Weekly D2593 (Fla.App. 4 Dist.,2008)]

On a lien, profit and overhead are not to be included in the lien amount. [Politano v. GPA Const. Group, --- So.2d ----, 2008 WL 5156611, 33 Fla. L. Weekly D2802 (Fla.App. 3 Dist. 2008)]

Note that a court may decide that there is no prevailing party, and not award attorney's fees to anyone. Prior to this, the rule had been that an award of fees was mandatory. [Trytek v. Gale Industries, Inc., -- So.2d ----, 2008 WL 5170586 (Fla.2008), 33 Fla. L. Weekly

GEORGIA

As of July 1, 2008, contractors and subcontractors must be licensed, and if they are unlicensed they will not have lien rights. Note that a contractor's or sub's failure to be licensed does not prevent his or her subs or suppliers from having lien rights.

According to a recent case, listing only the street address rather than the legal description on a Notice of Commencement will not suffice, and listing an a/k/a name of the owner, rather than the true name, will not suffice. And, if the listings on the NOC do not suffice, then the preliminary notice is not required. General Elec. Co. v. North Point Ministries, Inc. --- S.E.2d ----, 2008 WL 223714 (Ga.App. 2008).

A recent case clarified the rule the suit against the claimant's customer must begin within 12 months after the debt becomes due, and that the debt becomes due on the last day materials or equipment are furnished, not the date due stated on the claimant's invoice. The case also held that equipment suppliers are to be treated the same as materials suppliers. Central Atlanta Tractor Sales, Inc. v. Athena Development LLC, --- S.E.2d ----, 2008 WL 223264 (Ga.App. 2008)

The lien statutes were recently changed to allow an owner or contractor to bond around a lien and release it. (2008)

The statutes were recently revised to specify how Notice to Contractor is to be given: by certified or registered mail or by statutory overnight delivery to the addresses set out in the Notice of Commencement. (2008)

Recent changes to the statute require that a lien must be filed within 90 days after claimant's last delivery, rather than 3 months after that date. In addition, a true and accurate copy of the lien must be sent to the owner **not later than two business days after the lien is filed**. Previously it was to be sent at the same time as filing. Where a notice of commencement is filed, a copy must also be sent to the contractor at the address shown on the NOC, again, **not later than two business days after the lien is filed**. Failure to give a copy to the owner or contractor is a fatal defect. If the owner's address cannot be found, then give notice to the contractor, as the agent of the owner. If, however, the property owner is an entity on file with the Secretary of State's Corporations Division, sending a copy of the claim of lien to the entity's address or the registered agent's address will satisfy the notice requirement. (2008)

A big change has occurred in the lien statutes, effective **March 31, 2009**. **As of that date, , the requirement of first suing one's customer has apparently been abolished, and a deadline for bringing a lien action has been established**. The new deadline for filing suit is within 365 days from the date of filing the lien claim. After 3/31/09, if, during the time period for finding the lien, the general, sub, or any other party to the lien action has absconded, died, left the state, or been declared bankrupt, preventing the claimant from obtaining jurisdiction against the customer to sue them, or if there is an explicit pay-when-paid clause in the claimant's contract, meaning that claimant's customer is not required to pay the claimant until the customer has been paid, then the claimant is not required to bring an action or obtain a judgment against that party. After May 31, 2009, the requirement of filing a notice of commencement of the breach of contract action has been replaced with the requirement of filing a Notice of Commencement of Lien Action. Failure to timely file suit or to timely file the Notice of Commencement of Lien Action is fatal to the claim. Another new aspect of the statute is that where a Notice of Contest of Lien is given, the claimant must file a Notice of Commencement of Lien Action within 90 days after the Notice of Contest of Lien was filed. The Notice of Contest of Lien is to be recorded by the owner or contractor, or the agent or attorney of either of them, with the superior court clerk, and a copy sent to the claimant by certified or registered mail or overnight delivery within 7 days of filing. (2008)

Where lien rights have been waived in exchange for a promised payment, but the payment is not made, the deadline for filing a lien or Affidavit of Nonpayment was changed from a 30-day time limit to a 60-day time limit. (2008)

The form to be used when filing a lien has been changed effective March 31, 2009. (2008)

The Waivers and Release forms and the Affidavits of Nonpayment forms, have also been altered as a result of revisions to the statutes. (2008)

A court recently determined that, where a Notice of Commencement fails to correctly identify the true owner of the property or fails to include a legal description of that property, the Notice of Commencement is fatally deficient. Harris Ventures, Inc. v. Mallory and Evans, Inc., --- S.E.2d ----, 2008 WL 2279755 (Ga.App. 2008.)

In addition, if the Notice of Commencement is given late, but prior to the sub or supplier performing its work or delivering the materials, then the NOC is valid and the Notice to Contractor is required. Beacon Medical Products, LLC v. Travelers Cas. and Sur. Co. of America, --- S.E.2d ----, 2008 WL 2670184 (Ga.App.,2008).

Note that the lien filing fee must be paid within 14 days of recording the suit, or the lien will be unenforceable.

Until March 31, 2009, all notices where the deadline falls on a holiday or weekend, the notice must be given *before* the holiday or weekend. After March 31, 2009, the notice may be given on the first business day following the weekend or legal holiday. [Cent. Atlanta Tractor Sales, Inc. v. Athena Dev., LLC, 2657 S.E.2d 290 (2008); 44-14-369]

A recent case has held that that only including a street address instead of a legal description, or incorrectly listing the project owner's name, is considered a fatal defect. [Gen. Elec. Co. v. N. Point Ministries, Inc., 657 S.E.2d 297 (2008)]

As of March 31, 2009, preliminary notice may be given to the Secretary of State, where appropriate.

Also, until March 31, 2009, the copy to the owner is to be sent at the same time the lien is filed, while after that date the notice is to be sent not later than two business days after the lien is filed. Note that punch list work might be included in determining the last date work or materials were provided. . [D.C. Ecker Const., Inc. v. Ponce Inv., LLC, - - S.E.2d ----, 2008 WL 4981088 (Ga.App.2008)]

For public works projects, as with private projects, where lien rights have been waived in exchange for a promised payment, but the payment is not made, the deadline for filing a lien or Affidavit of Nonpayment was changed from a 30-day time limit to a 60-day time limit. (2008)

ILLINOIS

Providers of construction management services have lien rights. Cordeck Sales, Inc. v. Construction Systems, Inc., --- N.E.2d ---, 2008 WL 919684 (Ill.App. 1 Dist.,2008)]

Liens are effective as of the date of the claimant's contract, and a mortgage is effective as of the date of recording, and priority between the two is established according to those dates. As against mortgagees, a claimant cannot amend its lien and have the amended lien take priority over the mortgage, even if the amendment is still within 4 months after claimant's last work on the project. The claimant's claim as against the mortgagee will be limited to the initial amount recorded, though the claim against the owner will not be so limited. Cordeck Sales, Inc. v. Construction Systems, Inc., --- N.E.2d ---, 2008 WL 919684 (Ill.App. 1 Dist.,2008)]

An appellate court recently held that a sub who does not give notice prior to final payment will have lien rights up to the amount listed on the contractor's sworn statement. [Weather-Tite, Inc. v. University of St. Francis, --- N.E.2d ---, 2008 WL 2444688 (Ill.App. 3 Dist. 2008)]

A recent case has confirmed that only general contractors have to give the notice to the homeowner on residential repair or remodel projects costing more than \$1,000. [MD Elec. Contractors, Inc. v. Abrams, 888 N.E.2d 54, 228 Ill.2d 281 (Ill.,2008)]

An appellate court recently ruled that the activity of removing and disposing of drums containing hazardous waste, in and of itself, is not considered an improvement to real property, and therefore is not lienable. This is especially true where the removal work is part of an overall plan to improve the property. [Inter-Rail Systems, Inc. v. Ravi Corp. --- N.E.2d ---, 2008 WL 5382045 (Ill.App. 1 Dist.2008)]

The public works statutes have changed, so that now, public contracts costing over \$50,000 when done for the state, or \$5,000 when performed for a political subdivision, are covered. [2008]

INDIANA

On private residential and public utility projects, an owner and a general contractor can include a no-lien provision in the contract. It will apply to all subs, suppliers, laborers, etc, but only if the required steps are taken. If the contract is not timely filed, the no-lien provision will be effective as between the owner and general contractor, but will not bar liens by the subs, suppliers, etc. Mayberry Cafe, Inc. v. Glenmark Const. Co., Inc., --- N.E.2d ---, 2008 WL 251800 (Ind.App.2008).

A claim MAY be limited to the amount held by the owner and owed to the general contractor, or the claimant's "employer" at the time the notice is given. [Walsh & Kelly, Inc. v. Intern. Contractors, Inc., Slip Copy, 2008 WL 2930226 (Ind.App.2008) Unpublished Disposition]

Addressing the relative priority of mortgages as compared to mechanic's liens, a court recently ruled that where the funds from a loan secured by a mortgage are for the specific project that gave rise to the mechanic's lien, the mortgage lien has priority over the mechanic's lien recorded after the mortgage. (In other words, an earlier-recorded mortgage for a construction loan will take priority over mechanic's liens created as a result of the construction.) Harold McComb & Son, Inc. v. JPMorgan Chase Bank, NA, --- N.E.2d ---, 2008 WL 4058866 (Ind.App.2008).

A recent case has determined that decontamination and hazardous waste removal and disposal are covered. [Midwest Biohazard Services, LLC v. Rodgers, --- N.E.2d ---, 2008 WL 4291173 (Ind. App.,2008)].

A [supplier to a sub-subcontractor is too remote to have a claim](#). Alberici Constructors, Inc. v. Ohio Farmers Ins. Co., 866 N.E.2d 740 (Ind. 2007)]

On private works projects, attorney's fees are allowed on private works projects, as is prejudgment interest. [Hayes v. Chapman, 894 N.E.2d 1047, (Ind.App.,2008)]

The minimum amount for a public works project to require a bond has been increased to \$200,000.

KANSAS

A new case has ruled that the lien claim form itself must include all of the required information. It is not sufficient if attachments to the lien include some of the required information – all required information must be included in the verified lien itself. Buchanan v. Overley, --- P.3d ---, 2008 WL 612255 (Kan.App.2008).

KENTUCKY

On private works projects, maintenance, mowing, trimming and street cleaning are not covered. Steeplechase Subdivision Homeowners Ass'n, Inc. v. Thomas, --- S.W.3d ----, 2008 WL 351451 (Ky.App. 2008).

A recent case has determined that where a sub's supplier on a commercial property brings a claim, and the general contractor posts a lien release bond, the bond will likely be required to cover interest and attorney's fees, if awarded. [Crace Const. Co. v. Anthony Crane Rental, LP, Not Reported in S.W.3d, 2008 WL 4181978 (Ky.App.2008)]

LOUISIANA

On a private works project, note that the Notice of Nonpayment must be given before the lien is filed. [Teche Elec. Supply, L.L.C. v. M.D. Descant, Inc., -- So.2d ----, 2008 WL 5177841 (La.App. 3 Cir.), 2008-171 (La.App. 3 Cir. 2008)]

MAINE

On public works projects, the statute was recently changed to require all projects in excess \$125,000 to have payment and performance bonds. The statutes also now allow a contractor to post an irrevocable letter of credit instead of a payment bond.

MARYLAND

According to recently passed statutes, there is now a Home Builder Guaranty fund, which allows homeowners to collect for deficiencies in the construction of a house. (2008)

MASSACHUSETTS

A subcontract to crush rock, especially where it is not connected to any kind of a construction project, is not an improvement to the property and therefore such a subcontractor has no lien rights. Boston Power Crushing Corp. v. Mantenuto, Slip Copy, 2008 WL 3244910 (Table) (Mass.App.Ct.,2008)

Note that where a claim goes to binding arbitration, the only attorney's fees recoverable are those incurred prior to the matter being submitted to arbitration. [149 §29; Sun Fire Protection & Engineering, Inc. v. D.F. Pray, Inc., --- N.E.2d - ---, 73 Mass.App.Ct. 906, 2009 WL 57821 (Mass.App.Ct.)]

MICHIGAN

Michigan statutes were recently changed to provide that only licensed contractors and subs can file liens OR bring an action to collect on an unpaid contract. Previously the statute only mentioned the liens. Other statutory changes established that where a contractor's or sub's license lapses or is suspended or revoked, the contractor or sub is considered unlicensed or unregistered. (2008)

According to a recent case, if the sworn statement conforms with the statutory requirements, except that it is not notarized, it MAY be honored, but this is STRONGLY discouraged. Big L Corp. v. Courtland Const. Co., --- N.W.2d ----, 2008 WL 867304 (Mich.App. 2008).

On a private works project, where a lien is filed but is discharged by a bond, and the suit is filed against the bond (rather than to foreclose the lien), attorney's fees are not allowed. [Landmark Const. Co., Inc. v. R. Lockwood Const., Inc., Not Reported in N.W.2d, 2008 WL 4606300 (Mich.App.,2008)]

MINNESOTA

On private works projects, note that where the improvement is made for a tenant and the leased space is less than 5000 square feet, even if the entire property owned by the landlord exceeds 5000 square feet, the preliminary notice exception does NOT apply, and preliminary notices MUST be given. [Wallboard, Inc. v. St. Cloud Mall, LLC, 58 N.W.2d 356 (Minn.App.,2008)]

In addition, the prelien exception for projects consisting of more than 4 family units includes developments of more than 4 single-family lots, so no prelien is needed for developments of 5+ single family homes. [S.M. Hentges & Sons, Inc. v. Mensing, --- N.W.2d ----, 2009 WL 67106 (Minn.App.2009)]

A recent case has held that on a public works project, if the contract exceeds \$75,000 and the public body fails to require a payment bond, then the public body is liable to claimants. The claimant, however, must show that the contractor was insolvent when it defaulted on its obligation to the claimant. Collins Elec. Systems, Inc. v. Redflex Traffic Systems, Inc., Not Reported in N.W.2d, 2008 WL 933488 (Minn.App. 2008)

MISSOURI

On a private works project, that the party with whom the claimant contracts is a necessary party in a lien foreclosure action. Lee Deering Elec. Co. v. Pernikoff Const. Co., --- S.W.3d ----, 2008 WL 222315 (Mo.App.E.D.2008).

On a private works project, where claimant prevails on his or her lien claim but is not awarded any damages under his or her breach of contract claim, the court may hold that he or she is not the prevailing party on the breach of contract claim and therefore is not entitled to attorney's fees or the contract rate of interest. [Hadley v. Burton, 265 S.W.3d 361, (Mo.App. S.D.,2008)]

In addition, if the debt amount is liquidated, an award of prejudgment interest on a mechanic's lien claim is mandatory once the trial court assesses the principal amount due on such a claim. Missouri Land Development Specialties, LLC v. Concord, --- S.W.3d ----, 2008 WL 4476734 (Mo.App. E.D.,2008)

A recent case has determined that added that "quasi-public regulated utilities", such as a privately owned but highly regulated electric utility are required to obtain payment and performance bonds, just as a public body would. [Collins & Hermann, Inc. v. TM2 Const. Co., --- S.W.3d ----, 2008 WL 4291781 (Mo.App. E.D.2008)]

NEBRASKA

According to a recent case, where an owner records Notice of Commencement and deed of trust simultaneously, the holder of the deed of trust will have priority over lienholders. [Borrenpohl v. DaBeers Properties, LLC, --- N.W.2d --, 276 Neb. 426 (Neb. 2008)]

NEVADA

On the issue of lien waivers and pay-if-paid clauses, the court recently ruled that pay-if-paid clauses are not allowed because they are contrary to public policy, and that a lien waiver clause in a contract that fails to secure payment for the contractor or subcontractor is against public policy and will not be enforced. [Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 185 P.3d 1055, 2008 WL 2374249 (Nev.,2008)]

A Nevada court recently ruled that postjudgment fees are also allowed where they were incurred in enforcing the lien through foreclosure. [Barney v. Mt. Rose Heating & Air Conditioning, -- P.3d ----, 2008 WL 4266189 (Nev.,2008)]

NEW YORK

A recent case serves as a good reminder that the terms of the payment bond itself may also be relevant to a determination as to when to bring suit against the bond. J & A Concrete Corp. v. St. Paul Mercury Ins. Co.; --- N.Y.S.2d ----, 2008 WL 495898, 2008 N.Y. Slip Op. 01621 (N.Y.A.D. 2008).

A court recently decided that where a claimant performs landscaping work at a newly constructed home, this work is not considered new construction, and the claimant will be required (if local statutes require it) to have a home improvement contractor's license; if the claimant is unlicensed, he or she cannot sue for breach of contract and cannot foreclose a lien. [Hakimi v. Cantwell Landscaping & Design, Inc., --- N.Y.S.2d ----, 2008 WL 1748315 (N.Y.A.D. 2 Dept.,2008)]

Recently, the court ruled that where a project is done for a tenant, to make the owner liable the claimant must show some affirmative act or course of conduct establishing consent by the owner, not mere acquiescence and benefit. [Modern Era Const., Inc. v. Shore Plaza, LLC, 51 A.D.3d 990, 858 N.Y.S.2d 783 (N.Y.A.D. 2 Dept.,2008)]

In addition, a court held that on a road project, where there is no bond and the general contract states that the retainage is to be paid to the general contractor, a subcontractor cannot recover against the retainage. [IMS Engineers-Architects, P.C. v. State, 51 A.D.3d 1355, 858 N.Y.S.2d 486, 2008 N.Y. Slip Op. 04813 (N.Y.A.D. 3 Dept.,2008)]

On a private works project, a professional employer organization (PEO) that merely enables its clients to outsource its payroll and human resources responsibilities will not have lien rights unless it is established that the PEO is actually a provider of labor. This is so even if the PEO covers the payroll for its client for a time. [Cooper Square Hotel, LLC. v. Assured Source National, LLC, 864 N.Y.S.2d 301 (2008)]

The public works statutes were recently revised to clarify that where the project is a medical facility contracted with one of the county Health Care Corporations, the bond requirement begins when the project is greater than \$500,000 or \$1.5 million. Note that where project owner is a county "Health Care Corporation", the project may be a public one. (2008)

OHIO

Recent changes to the statutes provide that where the claimant timely submits its invoices to the claimant's customer and properly performs his or her contract, the claimant will be able to sue his or her customer and recover interest at the rate of

18% per year, plus costs and attorney's fees. (2008)

According to a recent case, a lien claimant is not entitled to prejudgment interest. Prejudgment interest may be allowed for a breach of contract claim, but not for a lien claim. [Guernsey Bank v. Milano Sports Ents. L.L.C., Slip Copy, 2008 WL 2122348 (Ohio App. 10 Dist.,2008)]

Per recent changes in the statute, the date for determining priority of claims was changed from 3 months to 90 days. (2008)

PENNSYLVANIA

Note that a sewage pump station has been held to be a public use, and thus exempt from the lien laws, even when on private property, as has the humane society and a hospital. [Cornerstone Land Development Co. of Pittsburgh LLC v. Wadwell Group, 959 A.2d 1264 (Pa.Super.,2008)]

Note also that an unpaid general contractor is not covered by the payment bond. [Cornerstone Land Development Co. of Pittsburgh LLC v. Wadwell Group, 959 A.2d 1264 (Pa.Super.,2008)]

RHODE ISLAND

Note that it is now clear that a lien claim will cover any retainage earned but not paid. (2008)

The statutes were recently revised to clarify that the preliminary notice relates back 200 days from the date of *filing* the notice, but because the language in the prelien form was not changed in the statute, it is recommended that the notice be both mailed *and* filed within 200 days of providing the relevant work or materials.

SOUTH CAROLINA

On public projects, a recent case held that where the public body fails to require that the general contractor provide or maintain a payment bond, the unpaid subcontractor or supplier may bring a breach of contract or negligence action against the public body for this failure. [Sloan Const. Co., Inc. v. Southco Grassing, Inc., --- S.E.2d ---, 2007 WL 5022447 (S.C., 2008).

On a private works project, fees cannot exceed the *principal* amount of lien. [Mozingo & Wallace Architects, L.L.P. v. Grand, 379 S.C. 478, 666 S.E.2d 267 (S.C.App.,2008)]

TENNESSEE

The Tennessee statutes have been changed to clarify that if the project Owner files a notice of completion but does not give a copy to the prime contractor, the prime contractor's lien rights are not affected by the recording of the notice. In addition, a claimant who has filed a notice of nonpayment before a notice of completion is filed, must file his or her lien within 30 days *after recording of the notice of completion*. If the claimant is not served with a copy of the notice of completion, then the 30-day deadline does not apply. (2008)

A lien attaches from the time of the visible commencement of operations on the property, but demolition, surveying, excavating, clearing, filling or grading, placement of sewer or drainage lines or other underground utility lines or work preparatory therefor, erection of temporary security fencing and the delivery of materials therefor are NOT considered 'visible commencement of operations.' (2008)

On projects other than oil, gas and mineral leases' subsection, per statutory changes, if more than one agent is listed on the building permit, service on a listed agent shall be deemed to be service on all of the agent's principals, including those who have not separately listed an agent. If more than one owner is listed on the building permit, service on the listed owner or owners is deemed to be service on all owners, including those not listed. (2008)

Per recent statutory changes, if the claimant willfully or grossly exaggerates the amount of the lien, the claimant may lose the lien and be liable for damages and attorneys fees incurred as a result of the exaggerated lien. (2008)

Note that according to a recent case, where the project involves 2 or more lots, parcels, etc. improved under one contract and the improvements are not to be operated as a single improvement, the claimant must apportion the contract price between the various lots and improvements, and serve a separate notice of lien for the amount claimed against each lot, parcel, etc. Where more than one building or improvement is made to a single lot or contiguous lots (such as townhomes), claimant must apportion the contract price between the separate buildings, units or improvements, and it is best to file a separate lien for each UNIT, if appropriate. [Williamson County Ready Mix, Inc. v. Pulte Homes Tennessee Ltd. Partnership, Slip Copy, 2008 WL 5234730 (Tenn.Ct.App.)]

TEXAS

Note that on a private works project, attorney's fees are allowed but are not required. Horizontal Holes, Inc. v. River Valley Enterprises, Inc., 197 S.W. 3d 834 (App. 5 Dist. 2006); C. Green Scaping, L.P. v. Westfield, Ins. Co., --- S.W.3d ----, 2008 WL 467334 (Tex.App.-Fort Worth 2008).

A recent case has held that, to receive an award of attorney's fees, the claimant must have actually recovered damages; relief from liability without an award of damages is insufficient. Vaughan v. Phillips, Not Reported in S.W.3d, 2008 WL 1903340 (Tex.App.-Amarillo,2008)

A recent case determined that attorney's fees are allowed in an action to declare a lien invalid or unenforceable. [53.156; R.M. Dudley Const. Co., Inc. v. Dawson, --- S.W.3d ---, 2008 WL 2209919 (Tex.App.-Waco 2008)]

UNITED STATES

On projects covered by the Miller Act, interest is allowed where it is allowed by the state in which the project took place. In addition, a pay-when-paid clause will not be enforced as against a Miller Act bond claim. U.S. ex rel. McKenney's, Inc. v. Government Technical Services, LLC, --- F.Supp.2d ----, 2008 WL 240450 (N.D.Ga.2008)

A recent case held that there is no cause of action for a breach of the federal Prompt Payment Act. U.S. ex rel. King Mountain Gravel, LLC v. RB Constructors, LLC, Slip Copy, 2008 WL 205295 (D.Colo.2008).

The Federal Claims Court recently ruled that where a surety gives the public body written notice of a potential default, the public body may be required to withhold funds from the contractor. [Insurance Co. of West v. U.S., --- Fed.Cl. ----, 2008 WL 4266242 (Fed.Cl.2008).

Note that a recent case determined that prejudgment interest may be awarded. [Eastern Seaboard Const. Co., Inc. v. Gray Const., Inc., --- F.3d ----, 2008 WL 5428159 (C.A.1 (Me.) 2008)]

UTAH

Note that on a private works project, where an owner prevails in establishing that the claimant's lien was untimely filed, and therefore is invalid, the owner is entitled to attorney's fees. Uhrhahn Const. & Design, Inc. v. Hopkins, --- P.3d ----, 2008 WL 466569, 2008 UT App 41 (Utah App. 2008).

A recent case addressed the issue of prejudgment interest and ruled that it may be allowed, even where the claim includes quantum meruit and unjust enrichment claims. Iron Head Const., Inc. v. Gurney, 176 P.3d 453, 594 Utah Adv. Rep. 14, 2008 UT App 1 (Utah App., 2008).

In another recent case, the court ruled that where payments are made to a subcontractor and supplier by joint check, if there is no agreement with the owner or general as to allocation, then the supplier endorsing the check will be deemed to have received the funds due. If a lien is subsequently filed, the general contractor will not be responsible for amounts paid jointly to the sub and supplier. The court also ruled that a fee award may be reduced in proportion to the amount recovered, thus where a claimant recovers 75% of the amount sought, the fee award may be reduced by 25%. SFR, Inc. v. Control, Inc., 77 P.3d 629 (Utah App. 2008)

According to recent case law, where a claimant timely files its notice, but does not timely foreclose, the claimant cannot file another notice for the same work, even if the original contract has not been completed. The claimant thus loses his or her lien rights. Foothill Park, LC v. Judston, Inc., --- P.3d ----, 2008 WL 879382 (Utah App.,2008)

A court recently determined that employee benefit funds have standing to bring a lien or bond claim; ERISA does not preempt the lien or bond law. [Forsberg v. Bovis Lend Lease, Inc., --- P.3d ----, 2008 WL 1820938 (Utah App.,2008)]

The statutory waiver forms have been revised slightly, by changing the number of the statute to which it refers.

Another recent case has determined that amending a lien or filing a subsequent lien for the same labor or materials will not extend the deadline for filing suit, even if the project has not been completed at the time the amended or second lien is filed. Foreclosure must begin within 180 days of the first time the lien is filed. [Foothill Park, LC v. Judston, Inc., 182 P.3d 924 (Utah App.,2008)]

On a private works project, a court has ruled that engineering work such as surveying, wetlands delineations, groundwater monitoring, geotechnical testing, and irrigation work, involving staking but nothing more visible, is not sufficiently visible to establish priority over a mortgage recorded after that work was done. [EDSA/Cloward, L.L.C. v. Klibanoff, 192 P.3d 296, 609 Utah Adv. Rep. 9 (Utah App. 2008)]

VERMONT

Note that on private works claims, attorney's fees are to be awarded to the prevailing party in a claim for violation of the Prompt Payment Act, in addition to a breach of contract action. (2008)

On private works projects, funds paid by the owner to the contractor, or by the contractor to the owner, are now held in trust for the intended payee. They do not need to be held in a separate account, however. The trust has priority over any

unsecured interest of a party seeking payment from the contractor or sub for claims other than those due and owing and connected with the specific project for which the trust was created. [9 §4005a; 2008]

VIRGINIA

New statutes provide that any public construction contract with a public institution of higher education that purports to waive, etc. a contractor's or sub's rights to recover costs or damages for unreasonable delay where the delay is caused by acts or omissions of the Institution or its agents or employees and due to causes within their control, is void and unenforceable. Furthermore, on such a project, if the claimant claims delay, the claimant may be responsible for the costs of investigating the claim.

WASHINGTON

A recent case held that moving to join a foreclosure suit does not constitute commencing suit to foreclose; a claimant must meet the deadlines for actually filing one's complaint, answer, etc. In addition, a claimant joining another foreclosure suit, rather than starting its own, must still file its complaint within 8 months of filing its lien (this time may be extended somewhat while its application to join the existing lawsuit is pending). Van Wolvelaere v. Weathervane Window Co., --- P.3d ----, 2008 WL 483711 (Wash.App. 2008). The Washington lien statutes were recently revised to clarify that a lien claim is notice to the *spouse or domestic partner* of the person who appears of record to be the property owner, and that the lien subjects all the community interest of both *spouses or both domestic partners* to the lien. Previously the statute listed husband or wife. (2008)

According to a recent case, where a lien is rejected because the claimant has not registered under the contractor's registration statutes, the owner is entitled to recover attorney's fees. Lopez v. Courville, Not Reported in P.3d, 2008 WL 2460280 (Wash.App. Div. 3, 2008)

Per recent statutory changes, it is now a gross misdemeanor for a contractor to subcontract to or use an unregistered subcontractor.

In a case addressing liens challenged as frivolous or excessive, the Court of Appeals recently ruled that "clearly excessive" liens may be challenged, with the loser paying the other sides costs and attorney's fees, and that a lien will be declared invalid as excessive only if there is bad faith or an intent to defraud, and the party resisting the lien has the burden of establishing bad faith or an intent to defraud. [Steadfast Const., Inc. v. Apter, Not Reported in P.3d, 2008 WL 4053443 (Wash.App. Div.1, 2008), also citing Structurals Northwest, Ltd. v. Fifth & Park Place, Inc., 33 Wn.App. 710, 715, 658 P.2d 679 (1983)]

The public works statutes were recently revised to provide that that contracts for less than \$200,000 may be exempted from the bonding and retainage requirements. (2008)

A recent case has held that where a sub or sub-sub supplies heavy equipment with operators, they MAY be deemed to only be laborers, and no preliminary notice would be required. Nonetheless, we feel that it is safest to send the notice anyway. [Campbell Crane & Rigging Services, Inc. v. Dynamic Intern. AK, Inc., --- P.3d ----, 2008 WL 2655088 (Wash.App. Div. 2, 2008)]

The information contained in this document is a summary of the private and public works construction lien statutes and new regulations impacting construction in various states and is subject to change without notice. This document is provided as a courtesy and, as such, Levy · von Beck & Associates, P.S. accepts no liability in connection with reliance thereon or any loss sustained by anyone using or relying on the information contained herein. The intended use of this document is to provide a framework for understanding and dealing with the construction lien statutes. Please note that Levy · von Beck & Associates, P.S. is only licensed to practice law in the States of Washington and Oregon.