

CONSTRUCTION LAW *Alert*

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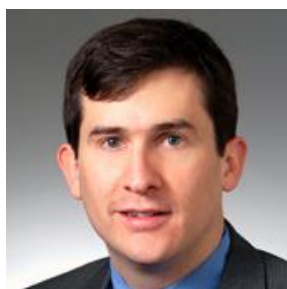
A Guide To North Carolina's 2012 Mechanic's Lien And Bond Law Changes

By Greg Higgins and Eric Biesecker¹

The General Assembly's 2012 "short session" resulted in many controversial changes to North Carolina's mechanic's lien and bond laws. The changes were included in two bills, [House Bill 1052](#) and [Senate Bill 42](#). Governor Perdue signed both bills into law on July 12. SB 42 was crafted by the title insurance industry and introduces an entirely new concept to North Carolina – the Lien Agent. HB 1052 was crafted by construction industry stakeholders and contains less controversial modifications to the current lien and bond law scheme. Some of the changes in these new laws take effect immediately, some take effect on January 1, 2013, and some take effect April 1, 2013.

Designation of Lien Agent – Effective April 1, 2013, North Carolina's mechanic's lien law will require potential lien claimants to provide written notice to a "Lien Agent" in order to preserve all the lien rights that they now possess. If the potential lien claimant does not follow the new requirements associated with the Lien Agent, its lien rights could be terminated or subordinated to others' interests.

New N.C. Gen. Stat. § 44A-11.1 et seq. will require the designation of a Lien Agent for all private projects where the total cost of the improvements is \$30,000.00 or more, except existing single family residences. The owner will choose the Lien Agent from a list of Lien Agents maintained by the Department of Insurance. All Lien Agents will be title insurance companies or agents. The Lien Agent may collect from the owner a fee of \$50.00 or less.



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Identification of Lien Agent – If the project is one that requires a building permit, then the permit is supposed to identify the Lien Agent, and the permit is supposed to be conspicuously and continuously posted on site. If the building permit does not identify the Lien Agent, or if the permit is not posted on site, then a potential lien claimant can submit a written request to the owner, who is then supposed to identify the Lien Agent within seven days.

A contractor or subcontractor must, within three business days of contracting with a material supplier, provide the supplier with a written notice identifying the Lien Agent. This notice can be given by (1) certified mail, return receipt requested; (2) signature confirmation as provided by the USPS; (3) physical delivery and obtaining a delivery receipt from the Lien Agent; (4) facsimile with a facsimile confirmation; (5) depositing with (a) DHL Express;² (b) Federal Express;³ or (c) UPS;⁴ (6) electronic mail with delivery receipt; (7) including the Lien Agent contact information in a written subcontract; or (8) including the Lien Agent contact information in a written purchase order. Any contractor or subcontractor who has received notice of the Lien Agent contact information, whether from the building permit, the inspections office, a notice from the owner, contractor, or subcontractor, or by any other means, and who fails to provide the Lien Agent contact information to the lower-tier subcontractor in the time required under this subsection, will be liable to the lower-tier subcontractor for any actual damages incurred by the lower-tier subcontractor as a result of the failure to give notice.

Notice to Lien Agents – Potential lien claimants who want to preserve their full lien rights must serve a Notice to Lien Agent. The Notice to Lien Agent must include (1) the potential lien claimant's name, mailing address, telephone number, fax number (if available), and electronic mailing address (if available); (2) the name of the party with whom the potential lien claimant contracted; (3) a description of the real property sufficient to identify it; and (4) a notice of the potential lien claimant's right later to pursue a claim of lien for improvements described in the Notice. The Notice to Lien Agent can be served by (1) certified mail, return receipt requested; (2) signature confirmation as provided by the U.S. Postal Service; (3) physical delivery and obtaining a delivery receipt from the Lien

² DHL Same Day Service, DHL Next Day 10:30 am, DHL Next Day 12:00 pm, DHL Next Day 3:00 pm, or DHL 2nd Day Service.

³ FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2 Day, FedEx International Priority, or FedEx International First.

⁴ UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, UPS 2nd Day Air A.M., UPS Worldwide Express Plus, or UPS Worldwide Express.

Agent; (4) facsimile with a facsimile confirmation; (5) depositing with via (a) DHL Express; (b) Federal Express; or (c) United Parcel Service; or (6) electronic mail, with delivery receipt.

Serving a Notice to Lien Agent does not satisfy the requirements for serving a Notice of Claim of Lien Upon Funds. The notices are different. Potential lien claimants that have served a Notice to Lien Agent still must serve, and if appropriate file, a Claim of Lien on Real Property and a Notice of Claim of Lien Upon Funds to perfect their lien rights.

To preserve its full lien rights, a potential lien claimant should (1) serve the Notice to Lien Agent within 15 days after first furnishing labor or materials; (2) serve the Notice to Lien Agent before the owner conveys an interest in the real property (e.g., before the property is sold or a new Deed of Trust is recorded); or (3) file a Claim of Lien on Real Property before the owner conveys an interest in the real property. If the Notice to Lien Agent is not received by the Lien Agent within 15 days after first furnishing labor or materials, or prior to a conveyance of an interest in the real property, then a potential lien claimant's lien rights are (1) terminated if the property is sold or (2) subordinated to the new lender if a new Deed of Trust or mortgage is recorded. Accordingly, the easiest and most cost-effective way for a potential lien claimant to preserve its full lien rights will be to serve a Notice to Lien Agent on every project within 15 days after first furnishing labor or materials.

Curtailment of Double Payment on North Carolina's Public Projects – Effective January 1, 2013, a new scheme is being introduced for North Carolina's public projects that will provide contractors with some protection against double payment. The new scheme requires contractors to furnish any claimant with a copy of the payment bond within seven days of the claimant's written request. It requires contractors to provide all of their subcontractors and suppliers with a "Project Statement." It requires subcontractors to provide all of their subcontractors and suppliers with the contractor's Project Statement, too. A contractor or subcontractor that fails or refuses to provide a Project Statement cannot enforce its contract against the lower tier party until the Project Statement has been provided to the lower tier party.

The Project Statement must contain: (1) the name of the project; (2) the physical address of the project; (3) the name of the contracting body; (4) the name of the contractor; (5) the name, phone number, and mailing address of an agent authorized by the

contractor to accept service of requests for the payment bond, the notice of public subcontract, and the notice of claim on payment bond; and (6) the name and address of the principal place of business of the payment bond surety.

Upon receipt of a Project Statement, subcontractors and suppliers should serve "Notice of Public Subcontract" upon the contractor. If Notice of Public Subcontract is sent within 75 days of the subcontractor's or supplier's first date of furnishing labor or materials, then the subcontractor or supplier can pursue its full claim. Otherwise, the subcontractor's or supplier's claim will be limited to the greater of (1) the value of the labor or materials provided within 75 days of claim or (2) \$20,000.00, unless the contractor has failed to timely furnish a copy of the payment bond to the claimant.

A Contractor's Lien Waiver May Not Prejudice a Subcontractor's Lien Rights – Under current law, a lien waiver signed by the contractor before a subcontractor files a lawsuit to enforce its Claim of Lien On Real Property waives the subcontractor's right to enforce the contractor's lien on real property (e.g., a contractor's lien waiver waives a subcontractor's subrogated lien rights). Effective April 1, 2013, N.C. Gen. Stat. § 44A-23 will provide that a contractor's lien waiver will not prejudice the rights of the subcontractor if (1) the subcontractor has given notice to the Lien Agent; (2) the subcontractor has served a notice of claim of lien upon funds on the owner; and (3) the subcontractor has delivered a copy of the notice of claim of lien upon funds served upon the owner to the Lien Agent.

Claims of Lien on Real Property Must Be Served – North Carolina's current laws require filing, but not serving, Claims of Lien on Real Property. Effective January 1, 2013, Claims of Lien on Real Property must be served upon the owner, and if the Claim of Lien on Real Property is being asserted by a subcontractor or supplier (e.g. by subrogation pursuant to N.C. Gen. Stat. § 44A-23), then it must also be served upon the contractor. The Claim of Lien on Real Property will not be perfected until it is both served and filed. Therefore, service and filing of the Claim of Lien on Real Property should occur before 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

Service is deemed complete when the Claim of Lien on Real Property is: (1) personally delivered; (2) deposited for delivery via the USPS; or (3) deposited for delivery via (a) DHL Express; (b)

Federal Express; or (c) UPS. Parties can be served at (1) the address the party listed on the permit relating the project, (2) the address for the party listed on the tax rolls for any county in North Carolina, or (3) the address for the registered agent of the party listed with the Secretary of State.

The Form of the Claim of Lien On Real Property is Changing – North Carolina law currently does not require a Claim of Lien on Real Property to contain a certification that it was served or require a subrogated lien to name the contractor through which subrogation is asserted. Effective January 1, 2013, each Claim of Lien on Real Property must include a certification of proper service. If the Claim of Lien on Real Property is being asserted by a subcontractor or supplier (e.g., by subrogation pursuant to N.C. Gen. Stat. § 44A-23), then it must also name the contractor through which subrogation is asserted. Chapter 44A also now expressly allows subcontractors and suppliers to use either (a) their own dates of first or last furnishing of labor or materials, or (b) the contractor's dates of first or last furnishing of labor or materials.

Notice of Contract Changes – The current version of N.C. Gen. Stat. § 44A-23 contemplates only the contractor posting and filing the Notice of Contract. Effective January 1, 2013, the statute will allow the owner to post and file the Notice of Contract. Additionally, the deadlines associated with the Notice of Contract will be relaxed. The owner or contractor will be able to comply with the Notice of Contract requirements by posting and filing the Notice of Contract within the latter of (1) 30 days following the date the permit is issued for the improvement of the real property or (2) 30 days following the date the contractor is awarded the contract for the improvement of the real property involved. The statute does not define “permit.”

Bankruptcy “Fix” – Recent bankruptcy cases generated confusion regarding the date that a lien upon funds arises or attaches, and therefore whether a Notice of Claim of Lien Upon Funds could be served after a party in the contractual chain files bankruptcy. Effective January 1, 2013, section § 44A-18 will make clear that a lien upon funds arises, attaches, and is effective immediately upon the first furnishing of labor, materials, or rental equipment at the site of the improvement. This clarification is intended to permit subcontractors and suppliers to serve Notices of Claim of Lien Upon Funds (and related subrogated Claims of Lien on Real Property) after another party in the contractual chain files bankruptcy. The revisions also make clear that until a lien claimant serves a Notice of Claim of Lien Upon Funds, any owner,

contractor, or subcontractor against whose interest the lien upon funds is claimed may make, receive, use, or collect payments thereon and may use such proceeds in the ordinary course of its business.

Sanctions for False Statements Expanded and Increased

– North Carolina’s current law states that a contractor or other person receiving payment for improvements to real property who knowingly furnishes a false statement of the sums due or claimed to be due (e.g., a fraudulent lien waiver) is guilty of a Class 1 misdemeanor. Effective January 1, 2013, the sanctions for such false statements will increase. In addition to the criminal sanctions, fraudulent lien waivers will constitute deceit and misconduct subject to disciplinary action under Chapter 87 of the General Statutes. As a result, a person that knowingly furnishes such a false statement may have its license revoked, suspended, or otherwise restricted. Moreover, an individual involved may also lose his or her ability to act as a qualifying party for a license.

Necessary and Proper Parties to Lien Enforcement

Lawsuit - Effective immediately, not all owners, lenders or title insurance companies are necessary or proper parties to lien enforcement actions. N.C. Gen. Stat. § 44A-13 now states that a former owner is not a necessary party in a lien enforcement lawsuit if the former owner holds no ownership interest in the property at the time the lawsuit is commenced and if the plaintiff seeks no relief from the former owner. Subsequent purchasers and lenders also are not necessary or proper parties to lien enforcement lawsuits if the lien has been discharged via cash deposit or via a lien discharge bond. Nothing in the revised statute prevents a lien claimant from asserting any claims that are separate and distinct from enforcement of the lien.