

CONSTRUCTION LIENS

APPLICABLE LAW

- Prior Law: Miss. Code Ann. § 85-7-131 and § 85-7-181
- Current Law: Miss. Code Ann. § 85-7-401 et seq. (the “Construction Lien Act”)
 - Enacted April 11, 2014

SUMMARY OF THE CONSTRUCTION LIEN ACT

- **Parties entitled to a Construction Lien**
 - The following persons each have a special lien on the real estate for which they have furnished labor, services, or materials (a “Construction Lien”):
 - Contractors having privity of contract with the owner or lessee.¹
 - Subcontractors having privity of contract with the contractor.²
 - Subcontractors having privity of contract with a subcontractor having privity of contract with the contractor.³
 - Materialmen who furnish materials to a contractor or to a subcontractor in privity with the contractor.⁴
 - Registered architects.⁵
 - Professional engineers.⁶
 - Registered land surveyors.⁷

¹ § 85-7-403(1)(a) and § 85-7-401(b)

² § 85-7-403(1)(a) and § 85-7-401(k)

³ § 85-7-403(1)(a) and § 85-7-401(k)

⁴ § 85-7-403(1)(a) and § 85-7-401(g)

⁵ § 85-7-403(1)(b) and § 85-7-401(l)

⁶ § 85-7-403(1)(b) and § 85-7-401(h)

⁷ § 85-7-403(1)(c). “Registered land surveyors” is not defined; however, “professional surveyor” is defined in § 85-7-401(e)

- Subcontractors' and Materialmen's right to a Construction Lien is lost if the contractor provides a satisfactory Payment Bond.⁸
 - The Payment Bond is in substitution for the Construction Lien.⁹
 - The Contractor posting the Payment Bond retains his right to a Construction Lien.¹⁰

- **Perfecting the Construction Lien**
 - File a Claim of Lien
 - A party with a right to a Construction Lien must file a Claim of Lien;
 - The Claim of Lien must be filed in the county where the property is located; and
 - The Claim of Lien must be filed **within 90 days** of the claimant's last work performed, labor, services, or materials provided.¹¹

 - Commence a Payment Action
 - The Lien Claimant must then commence a Payment Action (or, in certain circumstances where a Payment Action is not required, a Lien Action) in County, Circuit, or Chancery Court; and
 - Unless a Notice of Contest of Lien is filed, the Payment Action must be commenced **within 180 days** from the date of filing for record the Claim of Lien.¹²
 - * The failure of the Lien Claimant to commence the Payment Action within 180 days from the date of filing the lien renders the Claim of Lien unenforceable.¹³
 - * Notice of Contest of Lien
 - The time to commence a Payment Action may be shortened by filing a Notice of Contest of Lien.¹⁴

⁸ § 85-7-431

⁹ § 85-7-431

¹⁰ § 85-7-431

¹¹ § 85-7-405(1)(b)

¹² § 85-7-405(c) and (d)

¹³ § 85-7-421(1)

¹⁴ § 85-7-423(1)

- If a Notice of Contest of Lien is properly filed, the Construction Lien shall be extinguished if no Payment Action is instituted within the earlier of:
 - 90 days after filing of the Notice of Contest of Lien; OR
 - 180 days from the date of the filing of the Claim of Lien.¹⁵

- **Property Subject to the Construction Lien**

- Owner

- The Construction Lien attaches the real estate of the **owner** for which the labor, services or materials are furnished, if furnished at the request of:
 - * The owner;
 - * A professional surveyor, professional engineer, or registered architect;
 - * A contractor; or
 - * A subcontractor having privity of contract with a contractor.¹⁶
- A Construction Lien resulting from work at the request of the Lessee will not attach to the interest of the owner "...unless done by the written consent of the owner..."¹⁷

- Lessee

- If labor, services, or materials are furnished under or by virtue of a contract with a **lessee in possession** and the work does not violate the terms of the lease, then the Construction Lien attaches to:
 - * the building or improvements (but only to the extent that they are detachable from the real property without injury to the real property); and
 - * the unexpired term of the lease.¹⁸

¹⁵ § 85-7-423(3)

¹⁶ § 85-7-403(2)

¹⁷ § 85-7-411(3)

¹⁸ § 85-7-411(1) and (3)

- **Amount of the Construction Lien**

- The Construction Lien includes:
 - The value of the work done and labor, services or materials furnished;¹⁹ and
 - Interest on the principal amount due.²⁰
- The amount of the claim is stated in the Claim of Lien.²¹
 - The Claim of Lien may be amended at any time to increase or reduce the amount claimed and the amended Claim of Lien relates back to the date of filing for record of the original Claim of Lien.²²
- Limits on the amount of the Construction Lien:
 - Each Construction Lien is limited to the amount due and owing the Lien Claimant under the terms of its express or oral contract, subcontract, or purchase order.²³
 - The aggregate amount of Construction Liens shall not exceed the contract price as determined by the terms of the contract or other agreement between the Owner and the Contractor.²⁴
 - The aggregate amount of Constructions Liens in favor of subcontractors and materialmen and in favor of design professionals not in privity with the owner are further limited if payments have been made in reliance upon either Lien Waivers or a Sworn Written Statement.²⁵ See “Defenses Based On Lien Waivers and Sworn Written Statements” below.

- **Priority of Construction Liens**

- Construction Liens are subordinate to tax liens, but have priority over all other liens except as specified below.²⁶

¹⁹ § 85-7-403(2)

²⁰ § 85-7-403(4)

²¹ § 85-7-405(1)(b)

²² § 85-7-405(1)(e)

²³ § 85-7-403(3)

²⁴ § 85-7-405(4)

²⁵ § 85-7-405(5)(a) and (b)

²⁶ § 85-7-405(2)(a)

- Construction Liens vs. Construction Mortgage
 - Construction Mortgage: A deed of trust, mortgage, assignment of leases and rents, fixture filing or other security agreement is a Construction Mortgage to the extent it secures a loan for the purpose of financing the repair or construction of an improvement on the real property, which may include the acquisition costs.²⁷
 - A Construction Mortgage has priority over a Construction Lien if:
 - * The Construction Mortgage is filed in the land records before a Claim of Lien is filed; and
 - * The lender, secured party, mortgagee, beneficiary or holder of the construction mortgage obtained either:
 - An affidavit or sworn statement from the owner that no work has been performed on, or materials delivered to, the real property; OR
 - An affidavit or sworn statement from the contractor, or owner if there is no contractor, that the agreed price or reasonable value of the labor, services or materials has been paid or waived in writing by the Lien Claimant.²⁸
 - The priority of the Construction Mortgage extends to:
 - * Loan advances, regardless of whether the advances are made before or after the filing of a Claim of Lien.²⁹
 - * Amendments, restatements, and refinances of the Construction Mortgage.³⁰

²⁷ § 85-7-405(2)(c)

²⁸ § 85-7-405(2)(c)

²⁹ § 85-7-405(2)(c)

³⁰ § 85-7-405(2)(c)

- Construction Liens vs. All Other Liens
 - Except for Construction Mortgages discussed above, all Deeds of Trust, Mortgage, Liens, and other encumbrances that are filed before the Claim of Lien is filed will have priority over a Construction Lien.³¹
 - * Priority is established by the date and time of filing and without regard to actual notice.³²
 - The priority extends to amendments, restatements, and assignments.³³
- Construction Liens vs. Other Construction Liens
 - All Construction Liens have equal priority.³⁴
- Construction Liens vs. Bona Fide Purchaser
 - The Construction Lien Act does not state whether a Bona Fide Purchaser takes free of unperfected Construction Liens, or subject to them.
 - * The Act does provide that Construction Liens shall be dissolved and unenforceable against a purchaser or a lender providing purchase money in certain situations.³⁵ See “Defenses Based On Lien Waivers and Sworn Written Statements” below.

- **Waiver and Release of Construction Liens**

- The right to claim a lien may not be waived in advance of furnishing labor, services or materials.³⁶
 - Any purported waiver or release in advance of furnishing labor, services or materials is null, void and unenforceable.³⁷
 - Notwithstanding the restriction on waiver and release, lien rights may be subordinated in advance and even though the claimant has not been paid.³⁸

³¹ § 85-7-405(2)(b)

³² § 85-7-405(2)(b)

³³ § 85-7-405(2)(b)

³⁴ § 85-7-405(3)(d)

³⁵ § 85-7-413(1)

³⁶ § 85-7-419(1)

³⁷ § 85-7-419(1)

³⁸ § 85-7-419(4)(a)

- Form of Waiver and Release by a Lien Claimant
 - Interim Payments: When a claimant is requested to execute a waiver and release in exchange for a payment other than a final payment, the waiver and release shall substantially follow the Interim Waiver and Release upon Payment form set forth in Section 85-7-433(1).³⁹
 - Final Payment: When a claimant is requested to execute a waiver and release in exchange for a final payment, the waiver and release shall substantially follow the Waiver and Release upon Final Payment form set forth in Section 85-7-433(2).⁴⁰

- Effect of the Waiver and Release
 - The Waiver and Release is binding against the Lien Claimant for all purposes, subject only to payment of the amounts set forth in the Waiver and Release.⁴¹
 - * In other words, the Waiver and Release is not final, but is conditioned upon receipt of payment.
 - Amounts are conclusively deemed paid in full upon the earlier to occur of:
 - * Actual receipt of funds;⁴²
 - * Execution by the Lien Claimant of a separate written acknowledgment of payment in full;⁴³ or
 - * Sixty days after the execution of the Waiver and Release, UNLESS the Lien Claimant files an Affidavit of Nonpayment before the expiration of the 60 days.⁴⁴

³⁹ § 85-7-419(2)

⁴⁰ § 85-7-419(3)

⁴¹ § 85-7-419(5)(a)

⁴² § 85-7-419(5)(b)(i)

⁴³ § 85-7-419(5)(b)(ii)

⁴⁴ § 85-7-419(5)(b)(iii)

- **Defenses Based On Lien Waivers and Sworn Written Statements**

- Dissolving the Construction Lien
 - The Construction Lien shall be dissolved and unenforceable if (1) the owner, (2) the purchaser from the owner; or (3) a lender, shows that payment or release of funds was made in reliance upon:
 - * a Lien Waiver issued by the Lien Claimant;⁴⁵ OR
 - * a Sworn Written Statement of the Contractor that the agreed price or reasonable value of the labor, services, or material has been paid or waived in writing by the lien claimant.⁴⁶
 - NOTE: Affidavits of Nonpayment shall not affect dissolution of the claimant's lien.⁴⁷
- In a Lien Action, the Owner shall have a defense to the extent of payment for the work, materials or services that are the subject of the lien made to a contractor, to a design professional in privity with the owner, or to a subcontractor:
 - Made in good faith reliance upon either receipt of a Lien Waiver, or receipt of a Sworn Written Statement; and
 - Made before receipt of notice of the filing of a Claim of Lien or an Affidavit of Nonpayment.⁴⁸
- The aggregate amount of Construction Liens in favor of subcontractors and materialmen is limited to the unpaid balance of the contract price between the owner and contractor at the time the first Claim of Lien is filed, if payments have been made in reliance upon either:
 - Lien Waivers by Lien Claimants; or
 - a Sworn Written Statement of the Contractor.⁴⁹
- The aggregate amount of Construction Liens in favor of design professionals who are not in privity of contract with the owner is limited to the unpaid balance of the contract price between the owner and design professional who is in privity of contract with the owner at the time the first Claim of Lien is filed, if payments have been made in reliance upon either:
 - Lien Waivers by Lien Claimants; or
 - a Sworn Written Statement of the Contractor.⁵⁰

⁴⁵ § 85-7-413(1)(a)

⁴⁶ § 85-7-413(1)(b)

⁴⁷ § 85-7-419(5)(e)

⁴⁸ § 85-7-413(2)

⁴⁹ § 85-7-405(5)(a)

⁵⁰ § 85-7-405(5)(b)

- On single family residential construction only, payment made by the Owner to a Contractor or to a Design Professional in Privity with Owner for work of a subcontractor, materialmen, professional engineer, or professional surveyor shall be an absolute defense to any Claim of Lien by them, but
 - only to extent of payment actually made, AND
 - only to the extent the owner has not received a Pre-Lien Notice before payment.⁵¹

Note that payments by the owner on a residential construction project are not required to be based on Lien Waivers or a Contractor's Sworn Written Statement.

- **Discharging a Construction Lien by Filing a Bond**

- A Construction Lien may be discharged upon the approval of a satisfactory Bond by the Clerk of the Chancery Court.⁵²

- **Failure to Cancel a Construction Lien after Payment**

- After the Construction Lien has been paid, a Lien Claimant who does not cancel his Claim of Lien within 15 days after written demand is liable for the amount of the injury (which shall not be less than \$500 per day), plus reasonable attorneys' fees and costs.⁵³

- **False Filing of a Construction Lien**

- Penalty
 - Any person who falsely and knowingly files the Claim of Lien without just cause shall be liable to every party injured for a penalty equal to 3 times the amount for which the claim was filed.⁵⁴

* The action to recover under this section must be brought within 180 days from the filing of the Claim of Lien.⁵⁵

⁵¹ § 85-7-409(1)

⁵² § 85-7-415(1)

⁵³ § 85-7-421(3)

⁵⁴ § 85-7-429(1)

⁵⁵ § 85-7-429(1)

- Procedure to Vacate
 - Any person whose rights may be adversely affected by the wrongful filing of a Claim of Lien may apply, upon 7 days' notice, to the Circuit, County, or Chancery Court, to expunge or vacate the claim of lien in accordance with Rule 81(d)(2).⁵⁶

⁵⁶ § 85-7-429(2)