

EXPANSION OF MISSISSIPPI'S CONSTRUCTION LIEN LAWS TO INCLUDE MISSISSIPPI SUBCONTRACTORS, MATERIALMEN, CONSULTING ENGINEERS, AND SURVEYORS

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"I am the LORD.

You shall not defraud your neighbor;

You shall not steal; and

You shall not keep for yourself the wages of a laborer until morning."

Leviticus 19:12-13

I. THE LONG PUSH TO EXPAND MISSISSIPPI'S CONSTRUCTION LIEN LAWS¹

The Mississippi Legislature enacted a new construction lien law that became effective April 11, 2014.² The new law extends lien rights for the first time in Mississippi's history to subcontractors and materialmen.³ The new lien law matches in scope the payment protections for subcontractors and materialmen that have long existed in Mississippi on public jobs by providing payment protections down to the second tier on private jobs.⁴ The new law also extends lien rights to consulting engineers and land surveyors who had never had any statutory means of securing payment for their services in Mississippi.⁵ It is the intention of the proponents of the new law that it will act, like the injunction cited above from Leviticus to "not keep for yourself the wages of a laborer until morning," to ensure that Mississippi subcontractors, materialmen, and design consultants receive payment in full for enhancing owners' properties.⁶

Enactment of the 2014 construction lien law to protect Mississippi subcontractors and materialmen on private jobs was the culmination of a twenty-year effort. Year after year, since at

¹ The authors dedicate this Article to the loving memory of Sherwood Willing Wise, Esquire (1910-2002), grandfather of Mr. Copeland and father of Mr. Wise, and for each of us an inspiration in the practice of law and our fellow Mink (1928 B.A., 1932 J.D., and 1997 Honorary Doctor of Laws, Washington & Lee University). Further, the authors thank real estate attorney W. Rodney Clement, Jr. of the Jackson law firm of Bradley Arant Boult Cummings, LLP (also our fellow Mink, J.D. 1983, Washington & Lee University), for preparing the draft of the priorities section, MISS. CODE ANN. § 85-7-405(2); email: rclement@bab.com; phone: 601-592-9944.

² Enacted by S.B. 2622, 2014 Leg., Reg. Sess. (Miss. 2014) as MISS. CODE ANN. §§ 85-7-401 to -433 (Supp. 2014).

³ The authors wish to thank Lt. Governor Tate Reeves whose strong support for lien law reform made passage of S.B. 2622 possible. The authors also wish to thank the Chairmen of the Judiciary A Committees in the Mississippi Legislature, Senator Briggs Hopson and Representative Mark Baker, for their unflagging support for the bill, and for their asking the authors to prepare the initial draft of the legislation. We also thank Suzanne Sharpe for her expert guidance in the legislative process.

⁴ The Mississippi Little Miller Act provides payment bond protections on State public works down to second tier subcontractors and materialmen. MISS. CODE ANN. §§ 31-5-51 to -57 (Supp. 2014).

⁵ Previously, engineers and surveyors in Mississippi only had a lien right under MISS. CODE ANN. § 85-7-181 if they had a direct contract with the owner instead of working as a consultant to the architect.

⁶ See *infra* note 17.

least the 1993 Mississippi legislative session forward, proponents of broader lien rights introduced bills in the Mississippi Legislature to reform Mississippi's narrow lien law. Every year before the 2014 session the lien reform bills went down to defeat.⁷

Until 2014 the only construction parties with a lien right on the owner's property in Mississippi, for unpaid work, were the general contractor and designers and surveyors with a direct contract with the owner.⁸ The lien statute had remained virtually unchanged⁹ since its adoption over a hundred years earlier in 1906.¹⁰ Subcontractors of the general contractor had only a stop notice right¹¹ in funds in the hands of the owner under a stop notice statute dating back to 1857 in antebellum times.¹² Second tier subcontractors (a sub to a sub) and second tier materialmen (a materialman to a sub) were mere general creditors with no security in either the project funds or properties they improved for the benefit of owners by their labor and materials.¹³

Although Mississippi adopted construction payment bond statutes in 1980 to protect subs and materialmen on public jobs

⁷ Jackson construction law attorney David Mockbee, now of Mockbee Hall & Drake P.A., representing the Mississippi branch of the American Subcontractors Association (ASA), wrote the Senate Judiciary Chairman, Sen. Hainon Miller, on February 17, 1992, proposing a bill to expand the Mississippi lien law to include subcontractors and suppliers of the general contractor, with exclusions from the law for claims less than \$25,000 and one- to four-family dwellings. Senator Bean introduced the bill, S.B. 2533, at the 1993 legislative session, but even that modest proposal to extend liens to first tier subcontractors and materialmen died in the Senate Judiciary Committee in the face of established opposition.

⁸ See MISS. CODE ANN. § 85-7-131, before its amendment in 2014.

⁹ In 2010 the Mississippi Legislature made an incremental change to the lien, stop notice, and private bond statutes to include renters and lessors of equipment at the urging of H&E Equipment Services, Inc. See generally Robert P. Wise, *Mississippi Construction Payment Claims: Mississippi Lien, Stop Notice, Payment Bond, Prompt Payment, and Open Account Laws*, 29 MISS. C. L. REV. 539, 544 (2010).

¹⁰ See *McKenzie v. Fellows*, 52 So. 628, 628 (Miss. 1910).

¹¹ This rule was formerly codified at MISS. CODE ANN. § 85-7-181 until repealed by S.B. 2622.

¹² See generally William L. Smith & Boswell Stevens Hazard, Comment, *Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals*, 47 MISS. L.J. 437, 452 (1976).

¹³ *Associated Dealers Supply, Inc. v. Miss. Roofing Supply, Inc.*, 589 So. 2d 1245, 1247 (Miss. 1991) ("Subcontractors or materialmen to another subcontractor are not entitled to recovery under this statutory provision.").

down to the second tier level (the Mississippi Little Miller Act),¹⁴ the Mississippi lien law for ensuring payment of work on private projects remained the most narrow lien law in the United States.¹⁵ Proponents of broader lien rights argued that without expansion of lien rights, chronic underbidding had become a problem in Mississippi, with the deficit in project proceeds taken out downstream from unprotected lower tier subcontractors and suppliers.¹⁶ Reformers pushed every year to include liens for subs and materialmen, but the lien law reform bills all died in the Mississippi Legislature through 2013.

II. THE *NOATEX* DECISION CLEARS THE DECKS FOR REFORM OF THE MISSISSIPPI CONSTRUCTION LIEN LAW

The federal courts cleared the decks for Mississippi lien law reform by holding unconstitutional Mississippi's old stop notice statute.¹⁷ The United States Fifth Circuit Court of Appeals on October 10, 2013, affirming an opinion of the United States District Court for the Northern District of Mississippi, held the Mississippi stop notice statute unconstitutional in *Noatex Corp. v. King Construction of Houston, L.L.C.*¹⁸ The Fifth Circuit also implied anyone trying to fix the old stop notice statute would have

¹⁴ See generally Ron A. Yarbrough, *Rights and Remedies Under Mississippi's New Public Construction Bond Statute*, 51 MISS. L.J. 351 (1981).

¹⁵ See generally 1 ROBERT F. CUSHMAN & STEPHEN D. BUTLER, *FIFTY STATE CONSTRUCTION LIEN AND BOND LAW* (2d ed. 2000).

¹⁶ Steve Browning, lobbyist for the Construction Suppliers Association (CSA, formerly the Mid-South Building Material Dealers Association), convened a meeting of trade groups at the Mississippi Capitol during the 2008 session to consider a broad lien bill, H.B. 715, introduced by Representative Noel Akins of Oxford, a long time proponent of expanding lien rights. Present were representatives of the Construction Suppliers, H&E Equipment, the Mississippi American Subcontractors Association, the bankers, general contractors, subcontractors, and the Mississippi homebuilders. Attorney David Mockbee, for the ASA, explained that the stop notice statute had long failed to prevent chronic underbidding of jobs in Mississippi, leaving many lower tier subs and suppliers unpaid. The meeting though ended in frustration for all the reform proponents present when it became apparent there was determined opposition to expansion of lien rights. H.B. 715 died in the House Judiciary Committee. Thereafter, from the 2009 session through the 2013 session, the CSA kept the cause of lien law reform effort alive by finding legislators willing to introduce reform bills in the face of determined opposition; none of the bills survived beyond introduction.

¹⁷ MISS. CODE ANN. § 85-7-181 (1972).

¹⁸ *Noatex Corp. v. King Constr. of Houston, L.L.C.*, 732 F.3d 479, 485 (5th Cir. 2013).

little to work with, finding the stop notice statute an attachment provision, “profound in its lack of procedural safeguards.”¹⁹ The Fifth Circuit stated, “The Stop Notice statute deprives the contractor of a significant property interest, the right to receive payment and to be free from any interference with that right.”²⁰ Further:

It provides for no pre-deprivation notice or hearing of any kind. It requires no posting of a bond on the part of the subcontractor prior to attachment. The statute does not require a showing of exigent circumstances for attachment nor is it narrowly drawn to those circumstances. The statute even fails to require any affidavit or attestation setting out the facts of the dispute and the legal rationale for the attachment.

In light of these procedural deficiencies, the safeguards that the State identifies cannot rescue the facial constitutionality of the Stop Notice statute.

. . .

The Stop Notice statute allows attachment, and therefore deprivation, by mere notice from a subcontractor without any intervention by a government official.²¹

Even before the Fifth Circuit’s October 2013 decision, the Mississippi Supreme Court in August 2013 had taken note of the District Court decision in *Noatex* that the stop notice statute was “facially unconstitutional,” casting doubt on the statute’s continued use statewide.²² Suddenly Mississippi subcontractors and materialmen found they had no statutory payment remedies at all; a void in the law had opened for subs and suppliers.

Not long after the Fifth Circuit’s decision in *Noatex*, the authors of this article received the request to write the initial draft of a lien law reform bill for introduction at the start of the 2014 legislative session. The bill became S.B. 2622. The Chairman of the Senate Judiciary A Committee, Senator Brigg Hopson, and

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 485-87 (citations omitted).

²² *Falkner v. Stubbs*, 121 So. 3d 899, 904 n.1 (Miss. 2013).

the Chairman of House Judiciary A, Rep. Mark Baker, convened a public joint meeting of the Senate and House Judiciary A Committees at the Capitol. The Chairmen invited representatives of all the interested industry associations to attend and present their views. The joint meeting took place on January 16, 2014, in the Old Supreme Court Chamber. Chairmen Hopson and Baker presided. The Lieutenant Governor, Tate Reeves, and the Speaker of the House, Rep. Phillip Gunn, were both present which was unusual even for a joint committee meeting. Outside the chamber's rails, the chairs filled with representatives of the Mississippi construction and banking industries.

We presented to the Joint Committee the initial draft of S.B. 2622 to expand lien rights. An immediate question the Committee members asked, though, was whether the old stop notice statute could just be fixed. We argued, given the strength of the Fifth Circuit's rejection of the stop notice statute as an unlawful attachment, that even if procedural safeguards could be built into the old statute, any attempt to resurrect the statute would only lead to more court challenges.²³ More than that, we saw the final demise of the old statute (never in our view an adequate remedy for subs and materialmen) as the long sought for opportunity to press for expansion of lien rights in Mississippi on private jobs. We argued that the new bill needed to provide lien rights down to at least the first and second tier subcontractors and materialmen to match the coverage those tiers had already had for over thirty years on public jobs under the Mississippi Little Miller Act. The needs of Mississippi design professionals also needed to be addressed. Both Chairmen Hopson and Baker urged all the industry parties to work together toward a single draft. Further, the Chairmen set a tone of urgency by announcing that the Mississippi Legislature would not leave subcontractors and materialmen hanging without a remedy after *Noatex*, but would enact a new lien law in the 2014 session.

²³ A counter-proposal surfaced at the meeting to fix the stop notice statute by requiring notice and an injunction hearing to enforce it. Our response was that requiring an injunction suit and court hearing for every stop notice was a lawyer's dream but a client's nightmare. By contrast, any layman can file a construction lien.

A lot of face-to-face negotiation and the input into the draft of S.B. 2622 by nine diverse interest groups followed.²⁴ With the strong message of Lt. Governor Reeves and of Chairmen Hopson and Baker that there would be a lien bill in 2014, the construction industry and banking representatives ultimately settled on an agreed version of S.B. 2622. Both houses of the Mississippi Legislature then accepted and passed the agreed draft as a Conference Report on March 21, 2014. The new lien law went into effect under Mississippi Governor Phil Bryant's signature on April 11, 2014.²⁵

III. THE 2014 REVISED MISSISSIPPI CONSTRUCTION LIEN LAW

A. Who Has Lien Rights?

The new construction lien law (the Act), appears in the Mississippi Code as MISS. CODE ANN. §§ 85-7-401 to -433. The Act confers lien rights to prime contractors, first tier subcontractors, and materialmen, and second tier subcontractors and materialmen. In addition, design consultants (registered architects, professional engineers and professional land

²⁴ We thank Sam Kelley, Esq. of Brunini, Grantham, Grower & Hewes, PLLC (skelly@brunini.com), representing the general contractors, MSABC Contractors, and Cliff Harrison, Esq. of Butler Snow (cliff.harrison@butlersnow.com), representing the Mississippi Bankers Association, whose contributions to the language of S.B. 2622 through negotiations made passage of the bill possible. S.B. 2622 as adopted received the input and support for final passage from the following nine Mississippi construction related trade groups:

1. Mississippi Associated Builders & Contractors, Inc. (MSABC)
2. American Subcontractors Association of Mississippi
3. American Rental Association
4. Home Builders Association of Mississippi
5. Mid-South Building Material Dealers Association (MBMDA)
6. Mississippi Road Builders Association
7. Mississippi Bankers Association (MBA)
8. Mississippi Concrete Industries Association
9. American Council of Engineering Companies of Mississippi

²⁵ The primary sources for S.B. 2622 are portions of the lien laws of Georgia, Alabama, and the prior Mississippi lien statutes.

surveyors), have lien rights under the Act regardless of their tier.²⁶ Table 1 below is a summary of lien coverage under the Act:

1. Table of Parties with Lien Rights (MISS. CODE ANN. §§ 85-7-401 to -403)

Tier	Trade Name
Prime Contractors	General Contractor (GC)
First Tier Subcontractors	Subs
Second Tier Subcontractors	Sub-Subs
First Tier Materialmen	Materialmen to the GC
Second Tier Materialmen	Materialmen to a Sub
***"Materials" include "materials, tools, appliances, machinery, or equipment," as defined at § 85-7-401(f).	
Design Professionals of Any Tier, Including:	
Registered Architects	As defined at § 73-1-3
Professional Engineers	As defined at § 73-13-3
Professional Surveyors	As defined at § 73-13-71
Parties Without Lien Rights:	
Third Tier or below subcontractors	Sub-sub-subs
Third Tier or below materialmen	Materialmen to a sub-sub

Thus, the prime contractor (or general contractor or GC) or a homebuilder (prime contractor for a residence) with a direct contract with the owner has a lien right under the new Act the same as under the lien law before 2014.²⁷ Under the new Act, though, privity of contract is no longer a requirement for a lien.

²⁶ See the definitions and coverage provisions at MISS. CODE ANN. §§ 85-7-401, 85-7-403 (Supp. 2014).

²⁷ Compare MISS. CODE ANN. §§ 85-7-401(b), 85-7-403(1)(a) (Supp. 2014), with MISS. CODE ANN. § 85-7-131 (1972).

First tier subcontractors and materialmen also have lien rights as do their second tier subcontractors and materialmen (sub-subcontractors and materialmen to subcontractors). Subcontractors and materialmen in the third tier and below, though, have no lien rights.²⁸ However, design professionals of any tier have lien rights.

Let's look at some examples:

Example 1 – Homebuilder: Jim and Jane Doe enter a contract with Smith Homebuilders to build a house. Smith contracts with Messy Painter to do the interior paint. Messy Painter, on his line of credit, uses Sherwin Williams to supply his paint, brushes, and supplies. Messy Painter also subcontracts part of his work to Goodly Painter, who in turn has a line of credit with Home Depot, where he gets all of his supplies. In this example, under the Act, Smith Homebuilders has lien rights, as it is a prime to the owner. Messy Painter is in the first tier, and also has lien rights. As does Sherwin Williams and Goodly Painter, who are in the second tier. However, Home Depot, a supplier to a second tier subcontractor (making Home Depot third tier), would have no lien rights under the Act.

Example 2 – Spec Home: The example is a bit different if Smith Homebuilders is building a “spec” house, and not a custom house. If the house is a “spec” house, which Smith Homebuilders owns and is building to sell to the general public, then Smith Homebuilders is not the prime contractor, it is the owner. Messy Painter is a prime contractor because it has a direct contract with Smith Homebuilders, the owner, and thus would have lien rights. Sherwin Williams and Goodly Painter are in the first tier, because they contract with Messy Painter, who is a prime, and would still have lien rights. Home Depot, then, would be in the second tier, and in this example, *would* have lien rights.

Example 3 – Design Professionals: On the design side, it is a little different. Here, lien rights do not relate to “tier” or the relationship between the design professional²⁹ and the owner. Instead, lien rights are conferred to “[a]ll registered architects or professional engineers” or to “[a]ll registered land surveyors” as

²⁸ MISS. CODE ANN. §§ 85-7-401(g), (k), 85-7-403(1)(a) (Supp. 2014).

²⁹ The Act defines the term “design professional” to include “professional surveyors, professional engineers and registered architects.” *Id.* § 85-7-401(m).

long as their services are performed “on or with respect to any real estate.”³⁰ In most cases the prime designer is an architect, but not always. A design professional of record can be a professional engineer, as well, just depending on the nature of the project. A good example is land development. In the case of land development, the design professional of record is typically a civil engineer, not an architect. The Act recognizes this, distinguishing between a design professional in privity with the owner (the design professional of record) and a “design professional[] . . . not in privity of contract with the owner” (or a design consultant).³¹

Acme Industries hires Artsy Architect to coordinate and prepare contract drawings for the construction of a new plant. Artsy Architect consults with Strong Man Structural Engineer, who in turn consults with Muddy Dirt Geotechnical Engineer. Muddy Dirt Geotechnical Engineer in turn hires Straight Line Surveyor. Under this example, Artsy Architect would be the “Design Professional in privity with the owner” (or prime to the owner), and would have lien rights. Strong Man Structural Engineer would be a “Design Professional not in privity with the owner” (or within the first tier), and also would have lien rights. Muddy Dirt Geotechnical Engineer would be a “Design Professional not in privity with the owner” (or within the second tier), and also would have lien rights. In addition, Straight Line Surveyor, also a “Design Professional not in privity with the owner” (or within the third tier), would also have lien rights under the Act.

Because it is rare to have design professionals below the first tier, limiting lien rights to the first or second tier on the design side had little advocacy, one way or another. Further, design professionals are under contracts separate from the builders. The Act creates broader lien rights to design professionals not in privity with the owner, on the design side, than it does to subcontractors or materialmen on the construction side.

³⁰ *Id.* §§ 85-7-401(e), (h), (l), 85-7-403(1)(b), (c).

³¹ *See, e.g., id.* §§ 85-7-403(2), 85-7-405(5)(b).

B. Seven Procedural Prerequisites for Filing a Construction Lien in Mississippi

The Act provides a lien claimant meet seven (7) very strict procedural prerequisites to enjoy the benefit of lien rights. The failure of the lien claimant to strictly follow the enumerated requirements set forth in MISS. CODE ANN. § 85-7-405(1) renders the lien claimed to “not be effective or enforceable.”³² Courts strictly construe the requirements because lien statutes are in derogation of the common law.³³ The procedural requirements apply regardless whether the job is commercial or residential. The seven prerequisites are that the claimant:

1. Be in substantial compliance with the contract or purchase order;³⁴
2. File claim of lien within ninety days of claimant’s last addition to the job;³⁵
3. Notice the filing of claim of lien within two days to contractor and owner;³⁶
4. File a payment action within 180 days,³⁷ or ninety days if owner files a contest of lien;³⁸
5. File a lis pendens with commencement of the payment action;³⁹
6. Include in the lien a statement of amount due and due date of the claim;⁴⁰ and

³² *Id.* § 85-7-405(1).

³³ As Justice Jimmy Robertson has written, “[t]here is no natural law of materialman’s liens” since claimants have lien rights “only to the extent that they have brought themselves within the terms of the statute.” *Riley Bldg. Supplies, Inc. v. First Citizens Nat’l Bank*, 510 So. 2d 506, 508 (Miss. 1987).

³⁴ MISS. CODE ANN. § 85-7-405(1)(a) (Supp. 2014).

³⁵ *Id.* § 85-7-405(1)(b).

³⁶ *Id.*

³⁷ *Id.* § 85-7-405(1)(c)(i).

³⁸ *Id.* § 85-7-423(3).

³⁹ *Id.* § 85-7-405(1)(c)(i).

⁴⁰ *Id.* § 85-7-415(3).

7. Be licensed if required with Board of Contractors or other licensing board.⁴¹

1. Substantial Compliance

First, the lien claimant must be in “substantial compliance” with the provisions of his contract, subcontract or purchase order in the provision of work, services or materials.⁴² The requirement applies to contractors, subcontractors, materialmen and design professionals.⁴³ Substantial compliance required for the filing of a lien should not be confused with “substantial completion” of one’s scope of work. Substantial compliance is intended to mean that the work of the claimant has been performed in a workmanlike manner and is not defective.⁴⁴ By contrast, “substantial completion” refers to the point where a project as a whole can be used by the owner for its intended purpose, subject only to completion of a normal punch list.⁴⁵

2. Filing Claim of Lien Within Ninety Days

The lien claimant must file his claim of lien with the chancery clerk within ninety days of his provision of last labor, material or services.⁴⁶ Unlike prior practice, which related the

⁴¹ *Id.* § 85-7-403(5).

⁴² *See id.* § 85-7-405(1)(a).

⁴³ *Id.*

⁴⁴ *Troup Enters. v. Mitchell, Carrington & Rayfield, Inc.*, 404 S.E.2d 337, 339 (Ga. Ct. App. 1991) (interpreting the GA. CODE ANN. § 44-14-361.1(a)(1) requirement of substantial compliance).

⁴⁵ *Bevis Constr. Co. v. Kittrell*, 139 So. 2d 375, 378-79 (Miss. 1962) (“[S]ubstantial performance exists where the building or structure as a whole is not impaired, where it can be used for its intended purpose after erection, where the defects can be remedied without any great expenditure and without material damage to other parts of the structure and may without injustice be compensated for by deductions from the contract price.” (quoting *Jackson v. Caffey*, 78 So. 2d 361, 362 (Miss. 1955))).

⁴⁶ Note that filing a lien is not inconsistent with the intent to arbitrate. *See* MISS. CODE ANN. § 85-7-405(1)(c)(iii) (Supp. 2014); *Brendsel v. Winchester Constr. Co.*, 875 A.2d 789, 804 (Md. Ct. Spec. App. 2005) (“[T]he Mechanic’s Lien Law and the cases interpreting it . . . do not support a conclusion that merely filing a mechanic’s lien petition is conduct inconsistent with an intent to arbitrate the underlying contractual dispute and hence constitutes a refusal to arbitrate.”). Further, there is an exception to the automatic stay of bankruptcy allowing a creditor to file a lien to perfect a pre-petition interest in property. *See* 11 U.S.C. § 362(b)(3) (2012); *In re Constr. Supervision Servs., Inc.*, 753 F.3d 124, 127-28 (4th Cir. 2014).

time to file a lien on the date of the last invoice for last labor, material or service (and required suit within one year), the intent of the Act was to mirror the Little Miller Act's provision of protection down to the second tier and its requirement that applicable time periods be measured from last labor or materials provided.⁴⁷ Hence, the ninety days for filing a claim of lien, and the emphasis on "last work performed, labor, services or materials provided," as opposed to "last invoice" for services.⁴⁸

3. Giving Notice Within Two Days of Filing Claim of Lien

In no later than two days after the filing of the lien, the lien claimant must provide the owner with a copy of the lien by "registered or certified mail or statutory overnight delivery."⁴⁹ If the lien claimant is a subcontractor or materialman, then he must send a copy of the lien to the owner and the contractor. If the subcontractor or materialman cannot find the owner, then the lien claimant must send notice to the contractor. If the lien claimant is a design professional, and there is a contractor employed, then the design professional must send a copy of the lien to the owner and the contractor. If there is no contractor employed, then a design professional making a claim of lien must provide notice to the owner.⁵⁰ This is a departure from prior Mississippi construction lien practice. Under the prior Mississippi Lien Statute, no direct notice to the owner was required explicitly.⁵¹

⁴⁷ The Little Miller Act requires that suit be commenced within a year "after the day on which the last of the labor was performed or material was supplied" by claimant. MISS. CODE ANN. § 31-5-53(b) (Supp. 2014).

⁴⁸ *Id.* § 85-7-405(1)(b).

⁴⁹ *Id.* The Act defines "statutory overnight delivery" as delivery through the U.S. Post or "through a commercial firm that is regularly engaged in the business of document delivery . . . in which the sender: (i) [h]as directed that delivery be not later than the next business day . . . ; and (ii) [r]eceive[s] a receipt acknowledging receipt of the document signed by addressee or an agent of the addressee." *Id.* § 85-7-401(j).

⁵⁰ *Id.* § 85-7-405(1)(b). This does appear to be a drafting error in the Act. The requirement of the design professional to notify the contractor is nonsensical since design professionals are under separate contracts.

⁵¹ MISS. CODE ANN. § 85-7-131 (1972). However, the requirement of notice to the owner in the old *lis pendens* statute (MISS. CODE ANN. § 85-7-197 (1972), now repealed by the new lien law) was applied by implication to construction liens in *Hicks v. Greenville Lumber Co.*, 387 So. 2d 94 (Miss. 1980).

4. Payment Action Within 180 Days or Ninety Days if Owner Contests

The lien claimant must file a payment action either in civil court or in arbitration within 180 days of the filing of the lien.⁵² The payment action can be filed in circuit, county, or chancery court, or where provided by contract, in an arbitration tribunal.⁵³ In addition to the time deadlines within which a claimant has to file a lien, a lien claimant must also provide notice on the face of the lien: (1) that the lien automatically expires within 180 days of its filing if no payment action is filed pursuant to MISS. CODE ANN. § 85-7-405(1)(c)(i); and (2) that the owner has the right to contest the lien and shorten the time to file the payment action to ninety days pursuant to MISS. CODE ANN. § 85-7-423. The absence of both of these statements on the face of the lien renders the lien automatically invalid.⁵⁴

Notice that the two important dates for timeliness in the enforcement of the lien are the filing of the claim of lien within the ninety-day period and the filing of a payment action within 180 days from the filing for record of the claim of lien (unless shortened to ninety days by the owner's filing of a contest of lien).⁵⁵ The statute does not prescribe a time for obtaining a judgment, or require that a judgment be obtained before the filing of an action to enforce a lien.⁵⁶ Rather, the demand for a judgment and of enforcement of a lien can be filed in the same complaint.

The short deadlines for suit in the Act may present a problem for subcontractors. Some subcontractors may finish their work fully at an early stage of the project, but be required to wait longer than ninety days to obtain their share of the retainage, available

⁵² MISS. CODE ANN. § 85-7-405(1)(c)(i) (Supp. 2014).

⁵³ *Id.*

⁵⁴ *Id.* § 85-7-405(1)(b).

⁵⁵ The 180-day limitation is set out at MISS. CODE ANN. § 85-7-405(1)(c)(i) and § 85-7-421(1), and the contest of lien filing to shorten the limitation to ninety days is at MISS. CODE ANN. § 85-7-423.

⁵⁶ See *L&W Supply Corp. v. Whaley Constr. Co.*, 399 S.E.2d 272, 273 (Ga. Ct. App. 1990) (“There are two critical dates for the enforcement of mechanics’ liens. One is that the claim of lien must be filed within three months The other is that an action for recovery of the amount of the claim must be commenced within 12 months”) (interpreting GA. CODE ANN. § 44-14-361.1, which is the general source of MISS. CODE ANN. § 85-7-405 (Supp. 2014)). In the Mississippi statute these periods have become ninety days and 180 days respectively.

under the subcontract only when the owner's entire project is complete.⁵⁷ Can the subcontractor waiting on retainage go beyond the ninety days from last labor to file its claim of lien, or even 180 days from the filing of its claim of lien to file a payment action? The short answer is "no." Even if the project is ongoing, if the subcontractor has reached completion of its scope of work, and thus, "last work," prior to the completion of the project as a whole, the time deadlines set forth in the Act for the filing of the claim of lien and the subsequent filing of the payment action must be met, or the putative lien claimant will lose his lien rights.⁵⁸

5. Filing Lis Pendens with Commencement of Payment Action

The Act requires that a lis pendens notice be filed "with the commencement of the [payment] action with a copy to the owner and contractor."⁵⁹ If the lien claimant is the contractor, then, obviously, it is nonsensical for the contractor to copy himself on the notice. Also, if the lien claimant is a design professional, and if there is no contractor, then such notice would only have to be provided to the owner. Note, that there is no standard of delivery of the lis pendens notice, although certified mail with return receipt or statutory overnight delivery with some confirmation of

⁵⁷ As punch list work is not considered "labor" under the Act for determining "last labor" for the starting of the ninety-day period to file a claim of lien, after the subcontractor provides last labor, it must file a claim of lien within the prescribed ninety-day period or lose its lien rights on the project forever, even if the project has itself not reached completion.

⁵⁸ MISS. CODE ANN. § 85-7-405(1)(a), (c)(i) (Supp. 2014); *see also* Riley Bldg. Supplies, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 508 (Miss. 1987). Legislation to avoid the necessity of subcontractors having to file "retainage liens" was introduced by Senator Will Longwitz during the 2015 Regular Legislative Session as S.B. 2424, but was never called out of committee. The authors support such legislation as providing both a practical and effective means to both avoiding the necessity of "retainage liens" and for further protecting the rights of not only subcontractors but also prime contractors in their earned retainage from less than scrupulous owners.

See also MISS. CODE ANN. § 85-7-423(3) (Supp. 2014). To avoid these limitations problems, the Georgia statute upon which much of the Mississippi lien procedure is based allows up to 365 days from the filing of a claim of lien to bring suit against the subcontractor's debtor (called a lien action in Georgia instead of a payment action). GA. CODE ANN. § 44-14-361.1(a)(3) (Supp. 2010). However, Mississippi legislators expressed a preference for earlier deadlines for a payment action. Experience with the 2014 Act and time will tell whether Mississippi's shortened deadlines should be revisited.

⁵⁹ MISS. CODE ANN. § 85-7-405(1)(c)(i) (Supp. 2014).

receipt would be prudent, since the filing of the *lis pendens* and the notice to the owner would be one of the prerequisites to the validity of the lien under the Act. Also, it should be noted that there is no time deadline for filing of the *lis pendens* notice, other than that it should be filed “with the commencement of the [payment] action.”⁶⁰ Note that the lien claimant must first file a payment action against the one who owes the debt to the lien claimant, except for certain specific circumstances,⁶¹ before he can actually seek perfection of his lien and foreclosure against the property. The payment action is intended (1) to make sure that the debt is valid and could result in a judgment, and (2) to encourage resolution of claims prior to the permanent attachment to and foreclosure of an owner’s property.

6. Statement of Amount and Due Date of Claim

The Act specifically states that the failure of a lien claimant to state in the claim of lien the amount of his lien and the date that it became due will invalidate the lien.⁶²

7. Licensing if Required with Board of Contractors

Finally, in order to file a claim of lien, the lien claimant must hold a valid license with the Mississippi Board of Contractors, if one is required of him by law.⁶³ This applies to both residential and commercial construction.⁶⁴ In fact the Act goes one step further: not only does the contractor or subcontractor who is supposed to be licensed, but who is not, lose lien rights, but so does any contractor or subcontractor who enters into a contract or agreement with the unlicensed contractor or subcontractor.⁶⁵ This

⁶⁰ *Id.*

⁶¹ *See id.* § 85-7-405(1)(d)(i).

⁶² *See id.* § 85-7-415(3) (“The failure to specify both the amount claimed due under the lien and the date the claim was due shall result in the lien not constituting notice for any purposes.”). The Claim of Lien form in the Appendix (Form A), *infra*, satisfies the requirement. As noted, GA. CODE ANN. § 44-14-361.1 is the general source of MISS. CODE ANN. § 85-7-405.

⁶³ *Id.* § 85-7-403(5).

⁶⁴ *Id.*

⁶⁵ *Id.*

limitation, however, does not apply to materialmen or design professionals.⁶⁶

C. Thirteen Notice and Time Deadlines

The Act contains thirteen discrete notice and time requirements noted in the chart below that can apply, depending on the circumstances. The first two requirements, if they apply, are especially important to keep in mind because they are starting gate requirements, the failure to observe which can prevent a claimant from even being able to file a claim of lien:

1. Notice of Commencement

The requirement of second tier subcontractors or materialmen, or design professionals not in privity with the owner, on a commercial or multi-family job to send out a notice to the contractor of the commencement of work or supply of materials within thirty days of the first work or supply of materials;⁶⁷ and

2. Pre-Lien Notice

The requirement for any claimant on a single-family residential project to send out a pre-lien notice of the claim at least ten days before filing a claim of lien on a single-family residence.⁶⁸

⁶⁶ *Id.*

⁶⁷ *Id.* § 85-7-407(2). But note a notice of commencement is not required on a single-family project. *Id.* § 85-7-407(4).

⁶⁸ *Id.* § 85-7-409(2).

3. Table of Thirteen Notices and Deadlines

Event	Time	Applicability
<p>1. Notice to Contractor of Commencement of Work or Supply (Commercial and multi-family, but not single-family residential jobs), § 85-7-407(2), (4)</p>	<p>No more than thirty days after first supply of labor, services or materials. Notice is to the GC, or if there is no GC, then to the Owner. Can be sent by email with a read receipt.</p>	<p>The Notice of Commencement applies to all Second Tier Subcontractors and Materialmen <i>and</i> all Design Professionals not in privity of contract with the owner. It does not apply to single-family residential construction, but does apply to commercial and multi-family residential construction.</p>
<p>2. Pre-Lien Notice (Single-family residential only), § 85-7-409(2)</p>	<p>No fewer than ten days prior to the filing of claim of lien. Can use any reliable means of delivery as shown by receipt or affidavit.</p>	<p>The Pre-Lien Notice applies to all Second Tier Subcontractors and Materialmen <i>and</i> all Design Professionals not in privity of contract with the owner. The Pre-Lien Notice applies only to single-family residential construction.</p>

<p>3. Filing Claim of Lien, § 85-7-405(1)(b)</p>	<p>No later than ninety days after the lien claimant's last work performed, labor, services or material supplied or the furnishing of design services.</p>	<p>Applies to all Lien Claimants on all types of projects.</p>
<p>4. Notice of Filing of Claim of Lien, § 85-7-405(1)(b)</p>	<p>No later than two business days after the filing of the claim of lien, the lien claimant must provide notice to the owner, and if applicable to the contractor, by registered or certified mail, return receipt requested, or "statutory overnight delivery."</p>	<p>Applies to all Lien Claimants on all types of projects.</p>
<p>5. Filing of Payment Action; Lis Pendens Notice, §§ 85-7-405(1)(c)(i), 85-7-421(1)</p>	<p>No later than 180 days from the date of filing for record of the claim of lien. A lis pendens notice shall be filed with the commencement of the action with a copy to the owner and contractor.</p>	<p>Applies to all Lien Claimants on all types of projects.</p>

<p>6. Filing Lien Action on the Owner as Allowed by Exception Contained in Section 85-7-405(1)(d), § 85-7-405(1)(d)(ii)</p>	<p>No later than 180 days from the date of filing for record of the claim of lien. A lis pendens notice shall be filed with the commencement of the action with a copy to the owner and contractor.</p>	<p>Applies to all Lien Claimants on all types of projects.</p>
<p>7. Lien Claimant's Right to Remove Detachable Leasehold Property Subject to a Perfected Claim of Lien, § 85-7-411(1)(b)(ii)</p>	<p>Within sixty days after foreclosure and sale by the lien claimant of the lien over the leasehold estate.</p>	<p>Applies to all Lien Claimants on all types of leasehold property.</p>
<p>8. Notice of Filing Bond to Bond out Lien, § 85-7-415(2)</p>	<p>Within seven days of the filing of the bond and any attachments to said bond, the party filing the bond shall send notice of the filing of the bond and a copy of the bond to the lien claimant by registered or certified mail or statutory overnight delivery.</p>	<p>Applies to all Lien Claimants on all types of projects. The failure to send the notice of filing of the bond and a copy of the bond does not invalidate the discharge of the lien from the property.</p>
<p>9. Irrebuttable Presumption of Satisfaction of Interim and Final Provisional Lien Waiver and Release, § 85-7-419(5)(b)(iii)</p>	<p>Sixty days after the date of the execution of the waiver and release, unless, before the expiration of the sixty-day period, an affidavit of nonpayment is filed.</p>	<p>On all projects where a claimant is requested, as part of a payment procedure, to provide a written waiver and release prior to payment.</p>

<p>10. Filing Affidavit of Nonpayment Pursuant to Waiver or Release, § 85-7-419(5)(b)(iii)</p>	<p>No later than two business days after the filing of the affidavit of nonpayment, the lien claimant must provide notice to the owner, and if applicable to the contractor by registered or certified mail, return receipt requested, or “statutory overnight delivery”</p>	<p>On all projects where a claimant is requested, as part of a payment procedure, to provide a written waiver and release prior to payment.</p>
<p>11. Filing of Cancellation of Claim of Lien Following Payment in Full, § 85-7-421(3)</p>	<p>No more than fifteen days after receipt of written request after payment of lien amount.</p>	<p>Applies to all Lien Claimants on all types of projects. The penalty for not removing satisfied liens is \$500 per day after fifteen days plus reasonable attorney’s fees and costs.</p>

<p>12. Owner's or GC's Notice of Contest of Lien to Shorten Lien Claimant's Time to File a Payment Action, § 85-7-423(2), (3)</p>	<p>The lien shall be extinguished upon the <i>earlier</i> of ninety days after the filing of the notice of contest of lien or 180 days of the date of the filing of the claim of lien. The Notice of Contest of Lien must be filed of record and a copy of which must be sent to the Lien Claimant within seven days of the filing of the notice by registered or certified mail or statutory overnight delivery.</p>	<p>Applies to all Lien Claimants on all types of projects.</p>
<p>13. Expungement Action for Penalty for False Claim of Lien Without Just Cause, § 85-7-429(1), (2)</p>	<p>Penalty action must be filed within 180 days from the filing of the claim of lien.</p>	<p>However, more generally, "[a]ny person whose rights may be adversely affected by wrongful filing of a claim of lien" not seeking a penalty may apply to expunge or vacate the lien at any time in the Circuit, County or Chancery Court as a MISS. R. CIV. P. 81(d)(2) matter on seven day's notice.</p>

D. Procedural Steps

As demonstrated above, knowing the procedures for providing notice, where required, filing a lien and then timely filing a payment action under the Act is critical in both perfecting and preserving lien rights under the Act. Any failure to strictly follow the Act's defined procedures will result in the lien being rendered void (not merely voidable) and automatically unenforceable.

Knowing the procedural differences between commercial projects and those projects involving multi-family residential construction (two or more family units) and single-family residential projects is important. Equally important is an understanding of the procedural differences between prime and first tier lien claimants and second tier lien claimants, as well as the difference between design professional lien claimants in privity with the owner and those not in privity with the owner.

1. Commercial and Multi-Family Residential Projects

Under the Act, for commercial projects and those projects involving multi-family residential construction (two or more family units), lien claimants, no matter the tier, must follow a set procedure in filing and perfecting a lien. First, the lien claimant must timely file a claim of lien within ninety days of the provision of last labor, materials or services. The filing is with the chancery court clerk of the county in which the property to be liened is located. The filing requirement applies to all tiers, prime to second tier.⁶⁹ The lien claimant must use substantially the same form as set forth in the statute with the required notice language set forth in the lien law.⁷⁰ The failure to provide at least substantively the specific language of notice required by the statute is fatal to the lien and will result in its automatic invalidity.⁷¹ The practitioner and lien claimant are best advised to utilize the statutory

⁶⁹ *Id.* § 85-7-405(1)(b).

⁷⁰ *Id.* §§ 85-7-405(1)(b), 85-7-421(1).

⁷¹ *See infra* note 72.

language for the claim of lien specifically set forth in Section 85-7-405(1)(b).⁷²

After the lien claimant has timely filed a lien, using the proper form, the lien claimant must then, within two business days of filing the lien, provide the owner a copy of the lien by registered or certified mail or statutory overnight delivery.⁷³ If the owner is unknown, or un-locatable, the prime contractor is an appropriate substitute for notice.⁷⁴ Further, a first or second tier lien claimant must also provide a copy of the claim of lien to the prime contractor in addition to the owner (where he is known or ascertainable).⁷⁵

The statute specifies the means of mailing or delivery; it does not require proof of receipt. Receipt is presumed if the claimant uses the specified means of mailing or delivery.⁷⁶ Further, while the statute is specific about the means of providing notice, we anticipate that if a lien claimant provided notice using a different form of delivery, as long as the notice was actually delivered and received (and the receipt is not contested), the long utilized rule of “substantial compliance” would preserve the validity of the claim of lien.⁷⁷ Lien claimants and practitioners are advised not to “be the first” to test this. Instead, strict compliance with notices, times and methods of delivery is prudent.⁷⁸

After the claim of lien has been filed and the owner noticed, the lien claimant must, within 180 days of the date he has filed

⁷² See also the forms attached to this article as well as those provided at the end of the new lien law at MISS. CODE ANN. § 85-7-433 (Supp. 2014).

⁷³ *Id.* § 85-7-405(1)(b).

⁷⁴ *Id.*

⁷⁵ *Id.* Also service on the owner’s registered agent for service of process is permissible, if the owner is an entity and not an individual person. *Id.*

⁷⁶ *Id.*

⁷⁷ See, e.g., *Bros. in Christ, Inc. v. Am. Fid. Fire Ins. Co.*, 692 F. Supp. 701, 703, 704 n.1 (S.D. Miss. 1988) (demonstrating that a certified mail/return receipt requirement was overlooked “where the only failure to comply with the statute was the failure to send notice by certified mail, and where there is no dispute but that actual notice was received by the proper party”).

⁷⁸ The lien law is in derogation of common law and therefore requires strict compliance. *Riley Bldg. Supplies, Inc. v. First Citizens Nat’l Bank*, 510 So. 2d 506, 508 (Miss. 1987); see also *L&W Supply Corp. v. Whaley Constr. Co.*, 399 S.E.2d 272, 272-73 (Ga. Ct. App. 1990) (“Mechanics’ and materialmen’s liens under OCGA § 44-14-361 are in derogation of common law and thus are to be strictly construed against the mechanic and materialman.”).

his lien, file suit against the person or entity with whom he has contracted, and from whom the debt is owed.⁷⁹ Under the Act, the suit is termed the “payment action” and can take the form of a civil suit, demand in arbitration or a proof of claim in bankruptcy.⁸⁰

Upon the “commencement” of the payment action, the lien claimant must also file a *lis pendens* notice in the chancery clerk’s office of the county in which the property upon which the lien was filed is found. The claimant must also send a copy of the *lis pendens* notice to the owner and, in the case of a first or second tier subcontractor or design professional, also to the general contractor.⁸¹ The reason for the *lis pendens* filing is to allow title searchers an easy way to determine if the lien claimant has satisfied the requirement of initiating a payment action to determine the validity of the lien. Having one place to maintain these records is ideal and makes title work much easier from the title insurer’s standpoint. The payment action is commenced like any other civil action or matter in arbitration. If the defendant to a payment action cannot be found in the state or is not a resident of Mississippi, the defendant may be summoned by publication as in similar cases in chancery.⁸² The payment action can be filed in any court in the county in which the property that is the subject of the lien is situated.⁸³

A claimant must bring a payment action as a prerequisite to perfecting the claim of lien by a foreclosure action against the owner’s land.⁸⁴ The foreclosure action is called a “lien action” in the Act.⁸⁵ However, the practitioner may join both the payment action and the lien action in the same pleading, for the sake of judicial economy. In addition, interested parties, the contractor, subcontractor, or design professional, may intervene in the lien action, although they are not required to, to either refute the lien claimant’s right to lien or a defense to the lien claimant’s right

⁷⁹ MISS. CODE ANN. § 85-7-405(1)(c)(i) (Supp. 2014).

⁸⁰ *Id.* § 85-7-401(d).

⁸¹ *Id.* § 85-7-405(1)(c)(i).

⁸² *Id.* § 85-7-405(1)(c)(ii).

⁸³ *Id.* § 85-7-405(1)(c)(i).

⁸⁴ *See generally id.* § 85-7-405(3).

⁸⁵ *Id.* § 85-7-401(c).

under an applicable contract or agreement.⁸⁶ This is a departure from former practice in Mississippi, where all interested persons were required to be named as parties to an action to enforce or perfect a construction lien.⁸⁷

As discussed in more detail below, in the event that the owner has not paid the prime contractor under a pay-when-paid clause, rendering the obtaining of a final judgment in a payment action against the contracted party impossible, the Act does allow the claimant to skip the payment action and file a direct lien action against the owner's property instead.⁸⁸ In such a case, the lien action must be filed within the same time that a payment action must be filed, 180 days from the filing of the claim of lien, and a *lis pendens* notice must be filed, in the same time and manner as is required in conjunction with a payment action, as discussed above.⁸⁹ In such a case, any judgment rendered is rendered against the property only and not against the owner of the property.⁹⁰

Once a judgment has been rendered, the claim of lien shall be perfected and made permanent to the property, in the amount of the lien, plus interests, costs and attorney's fees.⁹¹

Once a lien has been perfected and made permanent, the lien claimant may seek a judgment of foreclosure establishing the lien and ordering the property be sold in satisfaction, enforced by a writ of execution in accordance with existing law as set forth in MISS. CODE ANN. § 85-7-153.⁹²

2. Single-Family Residential Projects

The procedure for placing a lien on single-family residential real property is identical to other properties, except that prior to filing the claim of lien, the lien claimant must provide the owner a ten-day "pre-lien written notice."⁹³ The form and contents of the

⁸⁶ *Id.* § 85-7-405(3)(a)-(b).

⁸⁷ Required by former MISS. CODE ANN. § 85-7-133 and § 85-7-143, which the 2014 Act amended to apply only to oil, gas, and water wells.

⁸⁸ MISS. CODE ANN. § 85-7-405(1)(d)(i) (Supp. 2014).

⁸⁹ *Id.* § 85-7-405(1)(d)(ii).

⁹⁰ *Id.*

⁹¹ *Id.* § 85-7-405(3)(b)-(c).

⁹² *Id.* § 85-7-427(1).

⁹³ *Id.* § 85-7-409(2).

ten-day pre-lien notice must substantially follow the form at MISS. CODE ANN. § 85-7-433(5). The pre-lien notice must identify the property upon which the lien is to be filed, the amount currently due to the lien claimant, and a statement that the claimant intends to file a lien no sooner than ten days from the date of the notice.⁹⁴ Although the mode of delivery is not specified, the claimant must deliver the pre-lien notice to the owner at least ten days before a claim of lien is actually filed. Further, the claimant must choose a method of delivery that can be confirmed by a reliable means, such as an affidavit of service or a receipt.⁹⁵ The pre-lien notice requirement is applicable to a subcontractor or materialman in the first or second tier, or a design professional not in privity of contract with the owner.⁹⁶

3. Second Tier Lien Claimant's Notice of Commencement on Commercial and Multi-Family Projects

A second tier lien claimant (a sub-subcontractor or a material supplier to a subcontractor) on a commercial project or on a multi-family residential construction project (two or more family units), must identify itself and its contract to the general contractor by a notice of commencement. Similarly, a design professional not in privity with the owner must send out a notice of commencement to identify itself to the general contractor. If there is no general contractor, the notice is to be given to the owner.⁹⁷

Specifically, within thirty days of their first delivery of labor, services or materials to the project, second tier lien claimants (and design professionals not in privity with the owner) must provide written notice to the contractor (or if there is no contractor, to the owner) of the following information:

- a. Name, address and telephone number of the second tier lien claimant;
- b. Name and address of the person with whom the second tier lien claimant has contracted;

⁹⁴ *Id.* § 85-7-433(5).

⁹⁵ *Id.* § 85-7-409(2).

⁹⁶ *Id.*

⁹⁷ *Id.* § 85-7-407(2).

- c. The name and location of the project; and
- d. “A description of the labor, services or materials being provided and, if known, the contract price or anticipated value of the labor, services or materials to be provided.”⁹⁸

If this information is not provided to the contractor by the second tier lien claimant within the thirty days required under the Act, the second tier lien claimant will forfeit its lien rights.⁹⁹ The notice of commencement shall be provided to the contractor, or if no contractor, the owner, by email with a confirmed receipt, or by registered or certified mail or statutory overnight delivery.¹⁰⁰ This is one of the few places in the Act that email is specifically mentioned as an allowable means of delivery.

The purpose of the notice of commencement is to let general contractors know of remote subs, materialmen and design consultants who may have lien coverage under the Act. Knowing all the potential lien claimants is important to the contractor because the Act also provides that the owner may make a written request of the contractor to furnish the owner a complete list of all subcontractors and materialmen (both first and second tier) on the job.¹⁰¹ The willful failure of the contractor to provide the list “within a reasonable time . . . shall” result in the contractor’s forfeiture of his lien rights under the Act.¹⁰² In turn the general contractor can require its subcontractors to provide the same information.¹⁰³ Thus, MISS. CODE ANN. § 85-7-407(2) was added during the drafting stages of the Act to assist the contractor in being able to provide complete information to the owner. It is also important for the contractor, and inevitably the owner, to know who is on the project so the contractor will have a practical way to know from whom to seek provisional lien waivers so the owner can secure the defense of payment, provided under MISS. CODE ANN. § 85-7-413(1)(a).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 85-7-407(1).

¹⁰² *Id.*

¹⁰³ *Id.*

It is important to note that the requirements for the notice of commencement and the provision of a list of subcontractors and materialmen “do not apply to single-family residential construction.”¹⁰⁴

4. Design Professionals

The Act differentiates between design professionals in privity with the owner and design professionals not in privity with the owner. This distinction is very important. Design professionals not in privity with the owner have a few extra duties as follows to preserve their liens. For single-family residential projects, the design professional not in privity with the owner must provide the ten-day pre-lien notice to the homeowner just as first and second tier subcontractors and suppliers are required to.

Likewise, for commercial projects and those projects involving multi-family residential construction (two or more family units), the design professional not in privity with the owner must also follow the notice of commencement requirements.¹⁰⁵ Because the Act does not limit lien rights to design professionals of any specific tier, the requirement of the notice of commencement is especially important. Note, though, that the design professional not in privity with the owner must provide its notice of commencement to the owner, unless there is a contractor involved in the project; if a contractor is involved, then the design professional is required to provide his notice of commencement to the contractor.¹⁰⁶

E. Owner's Defenses

The Act balances the grant of lien rights to the lien claimants as discussed above with the provision of defenses to “innocent” landowners who have paid their general contractor for the labor, materials and services provided them. The Act provides for specific defenses relating to the owner's payment. The owner defenses differ for commercial and multi-family residential projects from single-family residential projects.

¹⁰⁴ *Id.* § 85-7-407(4).

¹⁰⁵ *Id.* § 85-7-407(2).

¹⁰⁶ *Id.*

There are three primary defenses available to the owner: (1) payment in reliance on the presentment of a valid provisional lien waiver, (2) payment in reliance on a “sworn written statement” of the contractor as to payment of subcontractors and materialmen, (3) the limitation of “total fund in hand” and (4) the limitation of the total contract sum. We explore each of these defenses below.

1. Commercial and Multi-Family Residential

a. Payment in Reliance on the Presentment of a Valid Provisional Lien Waiver or a “Sworn Written Statement” of the Contractor

The Act provides that an innocent owner (or its lender) who makes payments to a contractor, or to a design professional in privity with the owner, in good faith reliance on an interim or final provisional lien waiver executed by a contractor, subcontractor, materialman or design professional, and before receipt of a filed claim of lien or of an affidavit of nonpayment, has a complete defense to a lien action. Indeed, it is not only a defense to a lien action, but also to the lien itself.¹⁰⁷ The defense of payment also applies to an owner’s payment made in good faith reliance upon a sworn written statement (commonly called an “owner’s and contractor’s affidavit”) made by the contractor that he has paid for all services, labor, and materials billed to date, or that a lien claimant has waived his right to payment for such services, labor, and materials in writing.¹⁰⁸ In fact, the Act states that where the owner’s defense of payment applies, the lien claimant’s claim of lien is “dissolved and unenforceable.”¹⁰⁹ Therefore, an owner who is presented with either lien waivers by a contractor, signed by a potential lien claimant (subcontractor or materialman), or a sworn affidavit of payment by the contractor, and makes payment in good faith reliance upon the validity of such lien waivers or sworn written statements, and has no actual knowledge of the filing of a lien or an affidavit of nonpayment by a

¹⁰⁷ *Id.* §§ 85-7-413(1)(a), 85-7-413(2).

¹⁰⁸ *Id.* §§ 85-7-413(1)(b), 85-7-413(2).

¹⁰⁹ *Id.* § 85-7-413(1).

potential lien claimant, has an absolute defense to the lien and a lien action.

However, if the owner makes payment, after the provision of notice (which can be constructive as well as actual notice) by the lien claimant of the filing of a claim of lien or the filing of an affidavit of nonpayment, then the owner's payment defense is dissolved, and his property is subject to the lien and a lien action.¹¹⁰ Further, an owner who is not an innocent owner, but knows that the contractor is not spending his or his lender's check as represented in a lien waiver or contractor affidavit to pay subcontractors and materialmen, has no defense of payment.¹¹¹ To assert the defense of payment, the owner must have paid "in good-faith reliance upon receipt of a lien waiver . . . or upon receipt of a sworn written statement,"¹¹² a situation that does not exist if the owner knows that the contractor is not using the check to pay outstanding bills of subcontractors and suppliers as represented. Let's look at some examples:

Example 1 – Owner pays on a lien waiver and release:

Owner receives an application for payment from contractor which includes lien releases from the site work subcontractor, the concrete supplier and the concrete finish subcontractor, but not from the plumbing subcontractor. Owner pays the application for payment, in full. Contractor pays all of the subcontractors except the concrete supplier and the plumbing subcontractor. The plumbing subcontractor has a valid claim of lien against the owner's property and may file a payment action against the contractor towards the perfection of his lien. However, the concrete supplier does not have a valid claim of lien.¹¹³

Example 2 – Owner pays on a lien waiver and release but received a notice of nonpayment: Owner receives an application for payment from contractor which includes lien

¹¹⁰ *Id.* § 85-7-413.

¹¹¹ *Id.* § 85-7-413(2).

¹¹² *Id.*

¹¹³ As we will see below, the supplier, while left without a lien by the innocent owner's payment pursuant to the waiver and release, is not left without a remedy under the law. See Part III.F below and MISS. CODE ANN. § 85-7-407(3) (Supp. 2014), for an action for triple damages against a dishonest contractor, subcontractor or designer who obtains payment based on collected lien waivers and releases, but fails to pass amounts owed down the line.

releases from the site work subcontractor, the concrete supplier and the concrete finish subcontractor, but not from the plumbing subcontractor. Owner pays the application for payment, in full, but three days before he does, the concrete supplier files a Notice of Nonpayment, and serves notice of same on the owner per the Act. Contractor pays all of the subcontractors except the concrete supplier and the plumbing subcontractor. Under this example, both the concrete supplier and the plumbing subcontractor have a valid claim of lien against the owner's property and may file a payment action against the contractor towards the perfection of his lien. Note actual receipt of the Affidavit of Nonpayment is not required, mere "receipt of notice" by the owner. Therefore, the Act does not limit this notice to actual notice, but it can include constructive notice, as well. This very point was debated, not only by the drafters of the Act, but the House specifically rejected a proposed amendment during debate that would have excluded constructive notice.

Example 3 – Owner pays on a sworn written statement:

Owner receives a sworn written statement from contractor in conjunction with an application for payment. The sworn written statement states the contractor has paid for all labor and materials up to the date of the application. Owner pays the application for payment. Contractor pays all of the subcontractors except the concrete supplier and the plumbing subcontractor, and no claim of lien has been filed. Under this example, neither the concrete supplier nor the plumbing subcontractor has a right to make a claim of lien for amounts owed up to the date of the contractor's sworn statement.¹¹⁴

Example 4 – Owner pays on a sworn written statement but not in good faith reliance upon it: Owner, the Church of the Happy Giver, and his lender receive a sworn written statement from contractor that he has paid all subcontractors and materialmen as of the date of the application for payment. However, the contractor uses half the check to pay off a loan to the

¹¹⁴ While the owner's payment pursuant to the sworn statement leaves the subcontractor without a lien, the subcontractor is not left without a remedy by the law. See Part III.F below and MISS. CODE ANN. § 85-7-413(1)(b) (Supp. 2014), for an action for triple damages against a contractor for a false written statement that it has paid subs and materialmen.

Church's representative, Deacon Snopes, and none of the funds to pay off an outstanding debt to a concrete supplier. The Church can not claim the defense of payment to the extent of the money paid to its representative, the Deacon Snopes, since it knows or should know that the contractor's affidavit of payment to all subs and materialmen is false to the extent the money was used to pay the Deacon, its agent, instead of the outstanding bills of the concrete supplier. The Church to the extent of payment to its agent, the Deacon who received half the check, has not made the payment "in good-faith reliance" upon the sworn written statement. The concrete supplier will have a claim of lien at least to the extent of payment to the Deacon Snopes instead of payment of the outstanding bills of the supplier.

b. The Limitation of "Unpaid Balance of the Contract Price"

In addition to the defense of payment, the Act also provides an additional defense to the owner, limiting all first and second tier subcontractor's and materialmen's liens, and all liens of design professionals not in privity with the owner, to the "unpaid balance" of the contract price between the owner and contractor, or owner and design professional in privity with the owner, as the case may be, at the time of the filing of the first claim of lien.¹¹⁵ However this defense is not universal. It is limited only to owners who are either conditioning payment upon the provision of lien waivers or sworn written statements during the entirety of the project.¹¹⁶ The failure of the owner to collect either lien releases or affidavits of payment of subs and materialmen negates his right to rely upon this limitation.¹¹⁷

Example 1 – Lien waivers: Owner has not been demanding lien waivers from all contractors, subcontractors and materialmen for all applications for payment. At some point in the project, the site work subcontractor, the concrete supplier, the concrete finish subcontractor, and the plumbing subcontractor all file claims of lien on the owner's property. The total of the claims of lien exceed

¹¹⁵ MISS. CODE ANN. § 85-7-405(5) (Supp. 2014).

¹¹⁶ *Id.*

¹¹⁷ The language of the statute is conditional: "[i]f payments have been made in reliance upon either lien waivers issued by lien claimants . . . or sworn written statements of the contractor" then the limitations apply. *Id.*

the contract funds in hand held by the owner. Because the owner has not been requiring lien waivers from all contractors, subcontractors and materialmen for all applications for payment, he cannot rely upon the limitation provided by MISS. CODE ANN. § 85-7-405(5)(a).

Example 2 – Sworn written statements: The result is different if the owner, at draws or at closing, receives from the contractor and relies in good faith on a sworn written statement of payment to all subs and suppliers. If that happens, then all rights of all potential lien claimants are dissolved as to the affected draw or final payment, as applicable, and the owner has a defense to any subsequently filed lien and lien action.¹¹⁸

Section 85-7-405(5) was intended to complement the defenses provided by Section 85-7-413 and really does nothing to add to that defense, or limit the rights of first or second tier, or design professional, lien claimants, beyond what is already provided by Section 85-7-413.

c. The Limitation of the “Aggregate of Liens”

As we have seen, Section 85-7-405(5) limits lien relief for subs and suppliers not in privity with the owner to “the unpaid balance of the contract price,” but the limitation is dependent upon the owner’s prudently collecting and reasonably relying upon lien waivers or sworn written statements as a condition of the owner’s payments made during the course of the project. Section 85-7-405(4) provides more generally that, “[i]n no event shall the aggregate amount of liens created by Section 85-7-403 exceed the contract price as determined by the terms of the contract or other agreement between the owner and contractor for the improvements made or services performed.”¹¹⁹

Section 85-7-405(4) derives from, and closely follows, a Georgia statute, GA. CODE ANN. § 44-14-361.1(e), which similarly states: “In no event shall the aggregate amount of liens set up by Code Section 44-14-361 exceed the contract price of the improvements made or services performed.”¹²⁰ Georgia case law

¹¹⁸ *Id.* §§ 85-7-413(1)(b), 85-7-413(2).

¹¹⁹ *Id.* § 85-7-405(4).

¹²⁰ GA. CODE ANN. § 44-14-361.1(4)(e) (Supp. 2010).

and the commentary of Georgia law, though, note there are limits to the reach of the statute. The same limitations should also guide interpretation of MISS. CODE ANN. § 85-7-405(4).¹²¹ The *Fifty State* commentary on the Georgia law, for example, cautions that the statute only takes into account the aggregate of liens actually filed: “Carefully read, however, this provision only protects owners when the ‘aggregate amount of liens’—meaning the total amount of all liens filed on the property, exceeds the contract price.”¹²²

Moreover, applying the principles of case law applicable to Georgia’s similar, general “aggregate of liens” defense, a Mississippi owner cannot assert the defense to excuse its ignoring and paying over earlier filed liens of subcontractors, materialmen or design professionals. Nor may an owner excuse its failing to see that its payments to the general contractor were properly applied for payment of subcontractors, materialmen or design professionals, at least on commercial projects, by collecting lien waivers or sworn written statements under the more specific requirements of the subsections that follow, MISS. CODE ANN. § 85-7-405(5)(a), (b).¹²³ The two sections, MISS. CODE ANN. § 85-7-405(4) and § 85-7-405(5), should be read together as part of the same act in *pari materia*.¹²⁴

For example, in *Mayer Electric Supply Co. v. Federal Insurance Co.*,¹²⁵ the Georgia Court of Appeals stated:

The “contract price of the improvements made or services performed” establishes the maximum extent to which an owner’s property may be subject to materialmen’s liens. OCGA § 44-14-361.1(e). However, an owner’s mere payment of the full contract price to the contractor, standing alone, is not and has never been a complete defense to foreclosure of a materialman’s lien. “The obvious purpose of the statute is to

¹²¹ See generally CUSHMAN & BUTLER, *supra* note 15, at 250-52.

¹²² *Id.* at 250.

¹²³ MISS. CODE ANN. § 85-7-405(5), like GA. CODE ANN. § 44-14-361.1(a)(4), specifically makes the use of lien waivers and releases or contractor affidavits a prerequisite to the owner’s defenses to the claims of claimants not in privity with the owner.

¹²⁴ *Kellum v. Johnson*, 115 So. 2d 147, 150 (Miss. 1959) (“[S]tatutory provisions are regarded as in *pari materia* where they are parts of the same act.” (quoting 50 AM. JUR. *Statutes* § 352)).

¹²⁵ 393 S.E.2d 270 (Ga. Ct. App. 1990).

protect materialmen who comply with its terms. If it is held that mere payments to the contractor in discharge of the contract price would defeat the lien of materialmen, the whole statute which undertakes to authorize liens for materialmen would be avoided.”

...

[A]n owner must not only show that full payment was actually made to the contractor, he is also “required to show that the sums paid to the contractor were properly appropriated to materialmen and laborers or that the contractor’s statutory affidavit concerning such indebtedness had been obtained.” Therefore, it is entirely possible that an owner who has paid the full contract price to the contractor may nevertheless still have his property subjected to enforceable materialmen’s liens to the maximum extent of the full contract price. “[A]lthough the owner had paid the contractor the entire contract price, this would provide no defense to the action unless the owner further showed that the affidavit of the contractor had been obtained, or that the money had in fact been used for payment of labor and materials.”¹²⁶

The very next subsection of the Mississippi Act following Section 85-7-405(4), Subsection 405(5), states specifically as to subcontractors, materialmen and design professionals not in privity with the owner, that the owner, at least on commercial or multi-family jobs,¹²⁷ is to make payments “in reliance upon either lien waivers issued by lien claimants . . . or sworn written statements of the contractor.”¹²⁸ Therefore, Mississippi, like Georgia, retains the requirement that the owner take care, at least on commercial and multi-family jobs, to see that his payments are properly applied for the benefit of those not in privity with the owner as a prerequisite to asserting defenses based on the “aggregate amount of liens.”

¹²⁶ *Id.* at 272 (citations omitted).

¹²⁷ Defenses of owners of single-family residences are treated separately under MISS. CODE ANN. § 85-7-409 (Supp. 2014).

¹²⁸ *Id.* § 85-7-405(5).

The *Mayer Electric* case involved the construction of an office building in the Atlanta area. The electrical supplier to one of the contractor's subcontractors (i.e., a second tier materialman), Mayer Electric, filed a claim of lien for unpaid materials before completion of the building. A payment bond was secured to cover and discharge Mayer Electric's claim. The subcontractor had dealt with declared bankruptcy and abandoned the job. The general contractor remained on the job, completed the work, and received the contract price in full from the owner. When Mayer Electric sued the bond surety for payment, the surety moved for summary judgment, asserting the owner's payment to the general contractor of the contract price was a complete defense. The Georgia Court of Appeals held that since the claimant had filed a lien before the owner's payment to the general contractor of the full contract price, the owner's payments were not "properly appropriated" and could not bar the claim of Mayer Electric:

If, however, materialmen's liens have previously been filed, payment that is thereafter made to any other materialman as a potential lien claimant is not payment which is "properly appropriated" and may not be set up by the owner in defense of the subsequent foreclosure of those previously filed liens. "If a claim of lien has been filed and recorded, then the owner must see that such materialman or laborer is satisfied out of the money paid by him to the contractor, or he will be held liable for the amount in the event, upon suit brought, it should be determined that the claim was valid."¹²⁹

Sections 85-7-405(4) and 85-7-405(5) must be read in *pari materia* so that the rights of subcontractors, materialmen and design professionals to have the owner's payments properly applied and appropriated in payment for their contributions to the project are preserved, and their claims of lien duly filed are respected.

¹²⁹ *Mayer Elec.*, 393 S.E.2d at 273 (citation omitted).

2. Owner Defenses on Single-Family Residential Projects

All of the defenses and limitations noted above are available to owners of single-family residential construction. However, in addition, owners of single-family residential properties also enjoy an additional defense not available to owners of commercial and multi-family residential construction. Owners of single-family residential construction enjoy the defense of payment.

Payment made by or on behalf of the home owner, for the work of a subcontractor, materialman, or design professional not in privity with the owner, creates an absolute defense to the owner from any liens filed by claimants not in privity with the owner, to the extent of the owner's actual payment for their labor, materials or services.¹³⁰ However, the homeowner's payment defense is not without limit. The defense does not exist if the owner makes payment after receipt of a ten-day pre-lien notice from a claimant owed money by the owner's contractor or design professional.¹³¹

Once the owner receives the ten-day pre-lien notice, he is at risk, and should take reasonable steps to head off the filing of any claim of lien by communicating with his contractor or design professional and with the lien claimant in an effort to determine the reason for the issuance of the ten-day pre-lien notice. Owners are well advised that if they cannot resolve any dispute through communication, then they should protect themselves by either paying the lien claimant directly for amounts claimed (which are verified as due), or through the issuance of a joint check to both their contractor or design professional and the lien claimant. If the owner merely makes payment to its contractor or design professional over the pre lien notice without consideration for the lien claimant, he does so at his own risk, and may subject his property to a filing of a claim of lien and potential lien action.

F. Lien Claimant's Remedies for Nonpayment

One of the hallmarks of the Act is its balance: balance between owners, contractors, subcontractors, suppliers and design professionals. Each party has rights and responsibilities. Responsible owners who require lien waivers or sworn written

¹³⁰ MISS. CODE ANN. § 85-7-409(1) (Supp. 2014).

¹³¹ *Id.*

statements will have the benefit of their payment as a defense to a claim for lien.¹³² What happens, though, if the contractor or design professional in privity with the owner takes the owner's money and doesn't pay its subcontractors, suppliers or consultants? Are unpaid subcontractors, suppliers or consultants just left "without" a remedy? The answer is "no." The balance struck by the Act is that it does create a defense to the responsible owner, while providing for a penalty to the contractor or design professional in privity with the owner who fails to pay downstream claimants in the amount of three times the amounts left unpaid (treble damages).¹³³ The provision is meant to be penal to the contractor or design professional in privity with the owner who induces payment from the owner, and then takes the proceeds and uses them for something other than paying his subcontractors, materialmen or consultants.

The penalty works in two ways:

1. Failure to Pass on Payments Received for Lien Waivers:
Triple Damages

On a commercial or multi-family construction project, if the owner pays its contractor or design professional in reliance on waivers and releases collected from potential lien claimants, but the owner's contractor or design professional willfully fails or refuses to pass on to the potential lien claimants their share of the payment, then owner's contractor or design professional "shall be liable to the claimant in the amount of three (3) times the amount claimed on the face of the waiver and release."¹³⁴ Further, if a subcontractor willfully fails or refuses to pass on payment owed a sub-subcontractor or to a materialman, the same penalty can apply.¹³⁵

Example 1 – Subcontractor lien waiver presented: So, for example, Flat Head Roof subcontractor submits an application for payment, interim or final, in the amount of \$25,000, and with that application for payment executes a provisional lien waiver, in the form set forth in Section 85-7-433(1) or (2) in the same

¹³² *Id.* § 85-7-413.

¹³³ *Id.* § 85-7-407(3).

¹³⁴ *Id.* For guidance on how triple damages are calculated, see *infra* Part III.F.2.

¹³⁵ MISS. CODE ANN. § 85-7-407(3) (Supp. 2014).

amount. Contractor takes the lien waiver and transmits it with his own application for payment to the owner, who pays contractor. Contractor takes the amounts paid and goes to Tahiti. Flat Head Roof subcontractor, then, would have no lien rights against owner, but would have a claim against contractor for \$75,000.

Example 2 – Subcontractor and second tier supplier present lien waivers to Contractor who fails to pay: The same applies to second tier subcontractors or suppliers as to their first tiers. Same example, Flat Head Roof subcontractor contracts with Randy Roofing Supply for his supplies. Randy Roofing Supply submits an application for payment, interim or final, in the amount of \$10,000, and with that application for payment executes a provisional lien waiver, in the form set forth in Section 85-7-433(1) or (2) in the same amount to Flat Head Roof subcontractor. Flat Head Roof subcontractor then submits an application for payment, interim or final, in the amount of \$15,000, and with that application for payment executes a provisional lien waiver, in the form set forth in Section 85-7-433(1) or (2) in the same amount to contractor. Contractor takes the lien waivers and transmits them with his own application for payment to the owner, who pays contractor. Contractor takes the amounts paid and goes to Tahiti. Neither Flat Head Roof subcontractor nor Randy Roofing would have lien rights against owner, but would have claims against contractor for \$45,000 and \$30,000, respectively.

Example 3 – Subcontractor and second tier supplier lien waivers presented but Subcontractor fails to pay: Change it up a bit. Flat Head Roof subcontractor contracts with Randy Roofing Supply for his supplies. Randy Roofing submits an application for payment, interim or final, in the amount of \$10,000, and with that application for payment executes a provisional lien waiver, in the form set forth in Section 85-7-433(1) or (2) in the same amount to Flat Head Roof subcontractor. Flat Head Roof subcontractor then submits an application for payment, interim or final, in the amount of \$15,000, and with that application for payment executes a provisional lien waiver, in the form set forth in Section 85-7-433(1) or (2) in the same amount to contractor. Contractor takes the lien waivers and transmits them

with his own application for payment to the owner, who pays contractor. Contractor takes the amounts paid and pays Flat Head Roof subcontractor, with whom he has a contract. Flat Head Roof subcontractor takes the money and pays off a gambling debt and does not pay Randy Roofing Supply. Randy Roofing Supply would not have lien rights against owner, and also would not have a claim against contractor, but would have a claim against Flat Head Roof subcontractor for \$30,000.

What happens if there is a dispute between contractor and Flat Head Roof subcontractor over Flat Head Roof subcontractor's workmanship or his scope of work? Can contractor issue a charge back against Flat Head Roof subcontractor, without suffering a penalty? The answer is "yes." Section 85-7-407(3) provides that a payment withheld with "good cause" is not subject to the penalty. Section 85-7-407(3) defines "good cause" as including "any defense available pursuant to the terms of the applicable contract, subcontract or purchase order."¹³⁶

Example 4 – Subcontractor and second tier supplier lien waivers presented but materials are defective: Applying this to our example, then, Flat Head Roof subcontractor contracts with Randy Roofing Supply for his supplies. Randy Roofing submits an application for payment, interim or final, in the amount of \$10,000, and with that application for payment executes a provisional lien waiver, in the form set forth in Section 85-7-433(1) or (2) in the same amount to Flat Head Roof subcontractor. Flat Head Roof subcontractor then submits an application for payment, interim or final, in the amount of \$15,000, and with that application for payment executes a provisional lien waiver, in the form set forth in Section 85-7-433(1) or (2) in the same amount to contractor. Because the materials supplied by Randy Roofing Supply do not conform to the material specified in the contract documents, contractor (or owner) rejects them, as allowed under the contract, and provides appropriate notice of its rejection of the materials. Contractor takes the lien waivers and transmits them with his own application for payment to the owner, who pays contractor for the amounts approved, but

¹³⁶ *Id.*

holds back amounts for the rejected supplies. Contractor takes the amounts paid and pays Flat Head Roof subcontractor, with whom he has a contract. Flat Head Roof subcontractor takes his money, but because of the rejected materials, does not pay Randy Roofing Supply. Randy Roofing Supply would not have lien rights against owner (because he failed to substantially comply with his contractual obligations, see Section 85-7-405(1)(a)), and also would not have a claim against contractor or against Flat Head Roof subcontractor as they had a defense under the contract documents.

The same penalty, and examples, applies also to design professionals and their consultants.

2. Failure to Pass on Payments Received on Sworn Statements: Triple Damages and How They Are Calculated

The second penalty for nonpayment is for a contractor's sworn written statement of payment that owners rely upon in issuing or causing to be issued payment under Section 85-7-413(1)(b). If a "sworn written statement . . . is falsely and knowingly made, then all parties injured thereby" have a claim in an action against the contractor "for damages in the amount of three (3) times their actual damages" caused as a result of the false statement.¹³⁷ The damages may be claimed by downstream subcontractors or materialmen. The phrase "falsely and knowingly" derives from prior Mississippi lien law as it related to the penalty for a "false lien."

The difference between the triple damages for a contractor's false sworn written statement (Section 85-7-413(1)(b)) and the penalty for failure to pass on payments to claimants covered by lien waivers and releases (Section 85-7-407(3)) is that the damages for a contractor's false sworn written statement are not limited to a liquid amount (i.e., the amount stated on a provisional lien waiver), but are for all "actual damages" caused by the false statement; also the claimants are not limited to lien claimants against non-payers, but reaches "all parties injured thereby."¹³⁸ In addition, as stated above, the penalty for a false written statement

¹³⁷ *Id.* § 85-7-413(1)(b).

¹³⁸ *Id.*

applies to all projects, commercial and residential, whereas the penalty for failing to pay claimants pursuant to lien waivers covering their work does not apply to single-family residential.¹³⁹ Further, the penalty for a contractor's false sworn statement does not apply to design professionals, unless the design professional is either in privity of contract with the contractor or one of his subcontractors or suppliers (in such case the design professional would be included in the broad category of "all parties injured thereby").¹⁴⁰ Lastly, the penalty for a false sworn statement is not limited to a specific tier, but can reach third or fourth tiers (or as many as are on the project) as long as those claimants of the penalty can show injury or damage caused by the contractor's falsely and knowingly made sworn written statement.¹⁴¹

For guidance on how triple damages work in practice, one may look to the triple damages provision of the anti-trust law, the Clayton Act.¹⁴² Courts have interpreted the Clayton Act to hold that a jury's "function is to compute the amount of *damages*," but that the statutory authority "to triple the award of damages is a matter of law to be applied by the district court without interference from the jury."¹⁴³ Indeed, the "court can sufficiently instruct the jury to determine only *actual* damages" without informing the jury of the mandatory tripling provision since it is up to the court to triple the damages.¹⁴⁴ Since the actual damages are tripled, the triple damages are not a penalty in addition to actual damages, but overlap and are a tripling of the amount of the actual damages.¹⁴⁵

Example – Sworn Written Statement: For example, Andy Appliance Dealer orders \$25,000 of appliances at the request of Shady Homebuilder for installation in owner's home. Shady Homebuilder requests a draw from owner's bank to cover the appliance purchase. To get that draw, owner's bank requires Shady Homebuilder to sign an affidavit that states that Shady

¹³⁹ Compare *id.* § 85-7-407(4), with *id.* § 85-7-413(1)(b).

¹⁴⁰ *Id.* § 85-7-413(1)(b).

¹⁴¹ *Id.*

¹⁴² 15 U.S.C. § 15(a) (2012) ("[A]ny person who shall be injured . . . shall recover threefold the damages by him sustained . . .").

¹⁴³ *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1243 (5th Cir. 1974).

¹⁴⁴ *Id.* at 1242-43.

¹⁴⁵ *Id.*

Homebuilder has paid for the appliances, and that there are no debts currently owed on the project. Shady Homebuilder then takes the draw of \$25,000 and pays off debts incurred on another project. Owner later fires Shady Homebuilder, and in the process of trying to complete his home, is informed by Andy Appliance Dealer that there remains a balance due of \$25,000, and that if owner wants his appliances, he has to pay the balance due. If owner pays the balance due to Andy Appliance Dealer, then he has a right of action against Shady Homebuilder in the amount of \$75,000.¹⁴⁶

However, because Shady Homebuilder signed the affidavit to the bank to induce the draw payment, could the owner argue he had an “absolute defense” to any lien of Andy Appliance Dealer, or that its lien has become “dissolved and unenforceable”? Section 85-7-409(1) provides the homeowner “an absolute defense to any claim of lien,” but “only to the extent the owner has not received a pre-lien notice.” So if Andy Appliance Dealer provided a pre-lien notice in writing at least ten days before filing a claim of lien, his lien should be preserved against the owner’s defense of payment. Further, although Section 85-7-413(1) provides that a lien “shall be dissolved and unenforceable” where the owner has made payment “in reliance upon a sworn written statement” that subs and materialmen have been paid, the owner’s defense of payment is available only if the owner can show “good-faith reliance upon receipt” of a lien waiver or sworn written statement. Reading Sections 85-7-409 and 85-7-413 together in *pari materia*, as part of the same Act, and giving effect to all parts, then a homeowner who has received a pre-lien notice of an unpaid claim would not be able to claim “good-faith reliance” upon a sworn written statement without at least inquiring whether the amount of the pre-lien notice had been satisfied upon his receipt of the statement. In that case Andy Appliance Dealer would retain the lien for the unpaid claim against the owner.

¹⁴⁶ MISS. CODE ANN. § 85-7-413(1) (Supp. 2014).

G. Liens on Leasehold Property

As with the prior lien law, the Act provides lien claimants a right to place a lien on leased property as well as a right to foreclose on that property if the lien claimant desires.

Section 85-7-411(1)(a) provides that a lien claimant may file a claim of lien for labor, materials or services in the design and construction of buildings or improvements to leasehold property, but only if the improvements were not built in violation of the tenant's lease with the owner. The lien only extends, though, to the actual improvement and only to the extent of the lessee's interest in the improvement (the lease term).¹⁴⁷ The lien claimant has the right to "step into the shoes" of the tenant, and assume the tenant's lease obligations, in turn for retaining the benefit of the lease.¹⁴⁸ If the lien claimant forecloses on the improvements, his foreclosure rights are limited to the leasehold estate.¹⁴⁹ If a sale happens, the purchaser has the right to take possession of the improvements and the leasehold, and remain there for the unexpired term of the lease. Of course, the purchaser also buys the duty to continue paying rent to the landlord under the lease.¹⁵⁰ The purchaser may also, within sixty days of the sale, remove any detachable improvements made subject to the lien claimant's lien, but only to the extent that the improvements can be removed from the property without injury to the property.¹⁵¹ Even if the purchaser elects to take possession and remain on the property until the term of the lease runs, he still has the right, under the Act, to remove any improvement, as long as the improvement is detachable without injury to the property. This, of course, assumes that the detachable improvement was the subject of the lien claimant's lien.¹⁵²

If the lien claimant, prior to the sale, has made lease payments or made other payments that were the obligation of the tenant, then the lien claimant is entitled to reimbursement for

¹⁴⁷ *Id.* §§ 85-7-411(1)(a), 85-7-411(3).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* § 85-7-411(1)(b)(i).

¹⁵¹ *Id.* § 85-7-411(1)(b)(ii).

¹⁵² *Id.*

those payments as part of the sale.¹⁵³ Upon the perfection of the lien, but prior to a foreclosure of the leasehold estate, the owner/lessor has the right to discharge the lien by paying the lien claimant the lien amount, including all rents or other monies paid by the lien claimant to preserve the leasehold estate. The owner/lessor also may, after the foreclosure sale, pay the purchaser of the leasehold the value of any detachable improvements, retaining any detachable improvements as property of the owner/lessor.¹⁵⁴

H. Priorities

One of the goals of the Act is to codify the rules of priority, not only between construction liens and other land encumbrances, but also between competing construction liens. Another goal is to replace the “reasonable diligence” requirements of the common law that placed construction lenders’ priority at risk with every extension of a construction loan in favor of the clear priority rules of the Act.¹⁵⁵

1. Other Non-Construction Liens/Deeds of Trust¹⁵⁶

Construction liens are inferior to tax liens and all deeds of trust, mortgages, and other encumbrances filed prior to the filing of the construction lien.¹⁵⁷ Construction liens have priority, however, to all non-tax liens filed after the date that the construction lien is filed.¹⁵⁸ In other words, other than tax liens, priority between construction liens and competing deeds of trusts, mortgages, and other encumbrances are determined in a strict “first to file” basis.¹⁵⁹ This is so, regardless as to when the lien claimant performed the labor, materials or services that form the

¹⁵³ *Id.* § 85-7-411(1)(c).

¹⁵⁴ *Id.* § 85-7-411(2).

¹⁵⁵ *See, e.g.*, *Wortman & Mann, Inc. v. Frierson Bldg. Supply Co.*, 184 So. 2d 857, 860 (Miss. 1966).

¹⁵⁶ Again, we thank real estate attorney W. Rodney Clement, Jr. of Bradley Arant Boult Cummings LLP for preparing the draft of the priorities section, MISS. CODE ANN. § 85-7-405(2) (Supp. 2014).

¹⁵⁷ *Id.* § 85-7-405(2)(a)-(b).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

basis of the construction lien.¹⁶⁰ Priority is based purely on the order of filing. Actual knowledge of unrecorded liens does not affect the priority of instruments recorded subsequent to the actual notice of the existence of an unrecorded lien. What “counts” is the date and time that the lien itself is filed in relation to the date and time that all competing deeds of trust, mortgages, and encumbrances are filed.¹⁶¹

Original priority is not affected by the amendment, restatement, or assignment of the construction lien, deed of trust, mortgage, or other encumbrance. Such acts simply relate back to the date of original filing for the purposes of priority.

The foreclosure of a construction lien does not affect deeds of trust, mortgages and encumbrances filed prior to the filing of the construction lien. The foreclosure of a prior filed construction lien, deed of trust, mortgage and encumbrance does wipe out (the Act uses the terms “terminate and extinguish”) all subordinate deeds of trust, mortgages and encumbrances filed; subordinate lien holders shall have the right to excess proceeds received by the foreclosing party, as otherwise provided by law.¹⁶² The Act also specifically deals with purchase money mortgages and deeds of trust used to either purchase, construct or improve real property. The Act defines a “construction mortgage” as:

A deed of trust, mortgage, assignment of leases and rents, fixture filing or other security agreement affecting real property . . . to the extent it secures a loan or loans for the purpose of financing the repair or construction of an improvement on the real property, which may include the acquisition cost of the real property.¹⁶³

Construction liens are inferior to construction mortgages, including all advances made on a construction line of credit, if: (1) the construction mortgage is filed prior to the construction lien, and (2) the lender either (a) obtained an affidavit from the owner that no work had been performed or no materials had been delivered (not necessarily purchased) to the property, before the

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* § 85-7-405(2)(c).

construction mortgage was filed, or (b) obtained an affidavit or sworn statement from the contractor (or if no contractor, the owner), that all labor, materials or services had been paid for or the claims waived before the construction mortgage was filed.¹⁶⁴ The construction lender's priority extends to all advances made through the construction mortgage, regardless as to when the advances were made, and regardless if they were made after the filing of a subsequently filed construction lien.¹⁶⁵ Like other deeds of trust, mortgages, and encumbrances, a construction mortgage's priority extends to all "amendments, restatements and refinancings of the construction mortgage."¹⁶⁶

2. Other Construction Liens

Separately from deeds of trust, mortgages, construction mortgages and other encumbrances, the Act also separately addresses priority issues between competing construction liens. Specifically, the Act provides that construction liens have equal priority, no matter when filed, and are to be paid out either from the proceeds of any foreclosure sale of the property or from monies paid by the owner. In the instance where there are insufficient funds to satisfy all of the existing liens, lien claimants are to be paid either on a pro-rata basis or in any manner ordered by a court of competent jurisdiction.¹⁶⁷ This is a departure from past Mississippi lien law, which provided that priority among liens was based upon the rule of "first to file."¹⁶⁸

I. Special Provisions

In addition to the general grant of lien, its timelines, notice requirements and priorities, the Act also contains several "special provisions" taken from various states' lien laws that the drafters

¹⁶⁴ *Id.* A contractor's sworn statement is provided for by MISS. CODE ANN. § 85-7-413(1)(b). Of course, any subcontractor, materialman or design professional injured by the owner or contractor's sworn written statement, falsely made in this instance, would be subject to the triple damages claim provided for under Section 85-7-413(1)(b), as well.

¹⁶⁵ *Id.* § 85-7-405(2)(c).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* § 85-7-405(3)(d).

¹⁶⁸ Formerly codified as MISS. CODE ANN. § 85-7-133 (1972).

felt merited inclusion into Mississippi's revised lien law, as they promoted efficiency, practicality and codified a reward for "good behavior" in the construction industry.

1. Amendment of Liens

One of the unique features of the Act is that it allows lien claimants to amend their claims of lien, at any time, to either increase or decrease the amount claimed. While the right to amend claims of lien is not new, and the provision creating the framework for amending a claim of lien was adopted from the Georgia lien statute, the right to *increase* the amount of a lien is unique to the Act. The amendment allowed for under this section relates back to the filing of the original claim of lien, and does not affect the lien's priority in relationship to subsequently filed deeds of trust, mortgages, construction mortgages, and other encumbrances.¹⁶⁹

A lien claimant who amends his claim of lien must file his amendment using the form language contained in the Act, must file it of record with the chancery clerk's office of the county in which the property is found, and must provide the owner and the contractor actual notice of the amendment within two business days of its filing.¹⁷⁰

2. Contractor's Subcontractor Lists

As discussed above, upon the written request of the owner, the contractor must provide to the owner a list of all subcontractors and materialmen, within the first tier, that are on the project. Further, upon written request from the contractor to the first tier subcontractors (not materialmen), the subcontractors must also provide a list of all second tier subcontractors and materialmen working on or supplying materials to the project for them. Note that the request from the owner to the contractor is required to be in writing and delivered by certified or registered mail or statutory overnight delivery. The request from the contractor to the subcontractor need only be in writing; the mode of delivery is not specified. Also, as pointed out above, the

¹⁶⁹ MISS. CODE ANN. § 85-7-405(1)(e) (Supp. 2014).

¹⁷⁰ *Id.*

requirement that the first tier supply information on their second tier only applies to subcontractors and not materialmen.¹⁷¹ This requirement also only applies to commercial and multi-family projects, not to single-family residential projects.¹⁷² The penalty for a contractor or subcontractor who “willfully fails or refuses” to provide this information, “within a reasonable time,” which is not defined within the Act, is the loss of lien rights.¹⁷³

For example, if owner properly sends a written request to contractor to provide owner a list of all of the contractor’s subcontractors and materialmen, and contractor intentionally leaves off his infamous site work subcontractor Shady Siteworks from the list, then contractor would lose his rights to make a claim of lien against the owner. However, it should be noted, that the site work subcontractor, as long as he is in the first tier, would retain his lien rights, even though the contractor does not.

However, if the omission of Shady Siteworks was a mere oversight, not intentional, then the contractor would retain lien rights. However, the contractor, in this case, would be well advised to notify owner of the oversight and provide Shady Siteworks’ information to the owner as soon as is practical, to avoid losing lien rights in not notifying the owner of Shady Siteworks’ involvement “within a reasonable time.”

The reason behind the provision is to allow the owner the right to know who is on his project, so that he knows who to expect lien releases from in order to diligently preserve his defense on payment with regard to the first and second tier.¹⁷⁴

3. Provisions Ensuring Payment for “Benefit of Subcontractors or Materialmen”

In the event that the contractor or subcontractor, on a commercial or multi-family residential project, in its contract agrees to utilize payments made by the owner to pay first tier subcontractors or materialmen, and fails to do so (intentionally or

¹⁷¹ *Id.* § 85-7-407(1).

¹⁷² *Id.* § 85-7-407(4).

¹⁷³ *Id.* § 85-7-407(1).

¹⁷⁴ *Id.* § 85-7-413(1).

not), then that contractor forfeits his lien rights under the Act for that project.¹⁷⁵

The AIA General Conditions of Construction, for example, require contractors to pay their subs and suppliers from funds received from the owner.¹⁷⁶ The purpose of the AIA provision is to encourage “good behavior” (contractors paying their subcontractors and suppliers), while discouraging bad behavior (the opposite). Obviously, however, if the contractor has a good faith basis for not paying its subcontractors or suppliers, such as non-conforming work or materials, or subcontractor caused delays, then the payment defenses would also be a defense to the penalty.¹⁷⁷

4. Bonding off Liens from an Owner’s Property

A unique feature that the Act provides for is the right of the owner, contractor or subcontractor, to “bond off” a lien from the property, to allow the property to go through a loan closing or be transferred unencumbered, while preserving the lien claimant’s rights. Specifically, the Act provides that the owner of property (or if contractually bound to clear liens, the contractor or a subcontractor) may “discharge the lien” upon the payment of either a cash bond or the provision of a surety bond. The bond must be conditioned to pay the lien claimant the sum found to be due and payable upon a judgment entered in a payment action.¹⁷⁸ The bond (whether cash or through a surety) must be in the amount of 110% of the amount claimed under the lien, and must be “approved” by the chancery clerk of the county in which the lien was filed. Upon such approval, “the real estate shall be discharged from the lien.”¹⁷⁹

¹⁷⁵ *Id.* § 85-7-407(1).

¹⁷⁶ *See* AM. INST. OF ARCHITECTS, A201—2007 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION §§ 9.6.2, 9.6.7, at 35 (2007), available at <http://www.aia.org/groups/aia/documents/pdf/aia076835.pdf> (“[P]ayments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner.”).

¹⁷⁷ *See, e.g.*, MISS. CODE ANN. § 85-7-407(3) (Supp. 2014).

¹⁷⁸ *Id.* § 85-7-415(1).

¹⁷⁹ *Id.*

“Within seven (7) days of filing the bond” with the chancery clerk, the party filing the bond (the owner, etc.) “shall send a notice of filing the bond and a copy of the bond by registered or certified mail or statutory overnight delivery to the lien claimant.”¹⁸⁰ The failure to meet the time deadline will not invalidate the bond for the purpose of discharging the lien from the property.¹⁸¹ The chancery clerk will have the right to rely upon the lien and the amount stated on the lien to determine the bond amount.¹⁸² Further, the Act specifically states that the failure of a lien claimant to state the amount of his lien and the date that it became due will invalidate the lien.¹⁸³ Finally, and importantly to clerks, there is a stated immunity for a clerk who, in good faith, approves a bond for the purpose of “bonding off” a lien.¹⁸⁴ Note, the Act specifically states that the clerk’s act of approving a bond is a discretionary function of their office, and the act of approving a bond for this purpose is not mandatory.¹⁸⁵

5. Provisional Lien Waivers

The Act uses the provisional lien waiver as a mechanism to both provide to the owner a payment defense while creating for the contractor or subcontractor a penalty for failing to pass on payments due to the tier below them.¹⁸⁶ The Act also creates a triple damages remedy at law for nonpayment in favor of the first or second tier subcontractor or materialman, or design professional not in privity with the owner, in exchange for releasing their lien rights.¹⁸⁷

The Act specifically provides that the lien rights or the right to make a claim upon a surety bond “may not be waived in advance of furnishing of labor, services or materials.”¹⁸⁸ Any provision for a waiver or release of lien rights contained in a contract or other document executed before provision of labor,

¹⁸⁰ *Id.* § 85-7-415(2).

¹⁸¹ *Id.*

¹⁸² *Id.* § 85-7-415(3).

¹⁸³ *Id.*

¹⁸⁴ *Id.* § 85-7-415(4).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* § 85-7-413(1).

¹⁸⁷ *Id.* § 85-7-407(3).

¹⁸⁸ *Id.* § 85-7-419(1).

materials or services, is “null, void and unenforceable” under the explicit terms of the Act.¹⁸⁹ The exclusion of pre-work waivers or releases is important because preemptive exclusion of lien and bond waivers is not universal in the industry, and is a departure from prior Mississippi practice. However the inclusion of this provision in the Act was intended to stop “heavy handedness” in contracting that had been prevalent in some quarters in the Mississippi construction industry. In fact, the Act was drafted as a response to the need to create more equality and fairness in contracting in Mississippi.

The prohibition against pre-provision waivers and releases, however, does not prevent a lien claimant from entering into a subordination agreement in the advance of the provision of labor, materials or services, even though the lien claimant has not been paid for his labor, materials or services.¹⁹⁰ The Act also does not prohibit the waiver and release of lien rights as part of a settlement of a bona fide dispute as to amounts to be paid to a lien claimant for labor, materials or services already performed.¹⁹¹ And the Act does not prohibit or affect the validity of a recorded cancellation or release of a claim of lien.¹⁹²

The Act provides for two separate post-provision lien waiver and release forms: Interim and Final.¹⁹³ The language of the lien waiver forms is specifically provided for in the Act.¹⁹⁴ The forms are specific in stating the lien waivers are provisional. The furnishing of a form without the statutory language, including the provisional language, renders the waiver void under the Act.¹⁹⁵ An executed lien waiver is prima facie evidence of payment, which becomes an irrebutable presumption of payment to the maker at the earlier date of actual payment, the execution by the maker of a separated written acknowledgment of payment, or sixty days after its execution. Once the irrebutable presumption of payment exists, it exists whether or not the claimant in fact has been paid if the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* § 85-7-419(4)(a).

¹⁹¹ *Id.* § 85-7-419(4)(b).

¹⁹² *Id.* § 85-7-419(4)(c).

¹⁹³ *Id.* § 85-7-419(2)-(3).

¹⁹⁴ *Id.* § 85-7-433(1)-(2).

¹⁹⁵ *Id.*

claimant has not filed an affidavit of nonpayment as provided for in the Act.¹⁹⁶

The filing of an affidavit of nonpayment “suspends” the lien waiver, and its effect, including creation of a defense to the owner of payment, unless, of course, at the time of the filing of the affidavit of nonpayment, the owner had already paid in good faith reliance on the lien waiver previously executed by the claimant.¹⁹⁷ The form of the affidavit of nonpayment is statutorily prescribed.¹⁹⁸ After the filing of the affidavit of nonpayment, the owner is on notice of a pending issue regarding payment, if payment has not already been made. If payment has been made by the owner to the contractor, or design professional in privity with the owner, then the filing of the affidavit of nonpayment should be a warning to them that the claimant may begin the pursuit of the penalty, set forth in Section 85-7-407(3). If, after a claimant files an affidavit of nonpayment, but before the claimant files a lien, the claimant is paid, the Act provides that the claimant shall file of record, “upon request” an affidavit swearing that the payment in full had been received.¹⁹⁹ The statute provides no form for this document, as it should be as simple as it sounds.

6. Satisfaction of Lien

A lien claimant whose filed claim of lien has been paid or compromised is well advised to quickly remove the lien. The Act provides that a lien claimant who fails to cancel a lien for fifteen days after receiving a written demand to do so faces a very stiff penalty of no less than \$500 *per day* payable to the injured party plus the attorney’s fees and costs required for the owner to remove the lien in an expungement or related action.²⁰⁰

¹⁹⁶ *Id.* § 85-7-419(5)(b).

¹⁹⁷ *Id.* §§ 85-7-419(5)(c), (e), 85-7-413(1)(a).

¹⁹⁸ *Id.* § 85-7-433(3).

¹⁹⁹ *Id.* § 85-7-419(5)(c).

²⁰⁰ *Id.* § 85-7-421(3).

7. Notice of Contest of Lien

As indicated above, one of the hallmarks of the Act is its balance. Owners have rights, responsibilities and protections, as do contractors, design professionals, subcontractors and materialmen. In fact, more than one time during the legislative debate over the Act, one or more of the drafters remarked that the Act contained more protections for owners than it did subcontractors and materialmen, for whom the Act was originally drafted. The Notice of Contest is one of the provisions that greatly benefit the owner. The notice of contest requires that lien claimants “fish or cut bait,” providing a means of timing out and invalidating smaller claims of lien that a lien claimant has no desire to actually pursue with a suit, but just filed “to prove a point.”

The Owner, his agent or his attorney, or the contractor, his agent or attorney, may shorten the time required of a lien claimant to institute a payment action by filing with the chancery clerk’s office a Notice of Contest of Lien.²⁰¹ The contest of lien should substantially follow the statutory form.²⁰² The filer of the Notice of Contest of Lien must, within seven days of filing, send a copy of the Notice of Contest to the lien claimant by registered or certified mail or statutory overnight delivery. Service of the notice is deemed complete upon mailing.²⁰³ The effect of the filing of a Notice of Contest of Lien is to shorten the time within which a lien claimant can file a payment action from 180 days from the filing of the claim of lien to ninety days after the filing of the Notice of Contest of Lien. After the filing of a Notice of Contest of Lien, and running of the ninety-day period without a filing of a payment action per Section 85-7-405(1)(c), the claimant’s claim of lien is deemed extinguished automatically. No further action is needed by the owner or contractor (in the case of a first tier lien claimant) to void the lien.²⁰⁴

²⁰¹ *Id.* § 85-7-423(1).

²⁰² *Id.* § 85-7-433(4).

²⁰³ *Id.* § 85-7-423(2).

²⁰⁴ *Id.* § 85-7-423(3).

8. Exception to Prerequisite of Filing Payment Action

As indicated above, the Act provides that before a lien claimant may perfect his lien in a lien action and then seek foreclosure of that lien in a sale of the property, the lien claimant must first reduce his claim to a judgment against the one who owed the claimant the money.²⁰⁵ However, what does one do if a payment action is a legal impossibility, e.g., that the one owing the money has received a discharge in bankruptcy, is dead (assuming the debtor is a person), or there exists a “pay when paid” provision between the debtor and the lien claimant that the lien claimant is not entitled to funds from the debtor until the debtor has, himself, first been paid by the owner (or by the tier above him)? It would seem that in such a case, because obtaining a judgment is a prerequisite to perfecting and then foreclosing on a claim of lien, that a lien claimant would be left completely frustrated, and the owner (who has not paid) unjustly enriched.

In order to preserve the balance that the Act strives to preserve, the Act’s drafters adopted an exception to the requirement of a payment action from the Georgia lien statute.²⁰⁶ Where the owner has not paid, and where the lien claimant is unable to secure a final judgment because of the contractor’s or first tier’s bankruptcy, death (in the case of a sole proprietorship or an individual d/b/a), or defense to payment under a “pay when paid or if paid” provision, then the Act allows the lien claimant to skip the requirement of filing a payment action.²⁰⁷ Instead the claimant can go straight on to the filing of a lien action to seek foreclosure of the lien against the owner’s property.²⁰⁸ If the exception applies, the lien action must be filed within 180 days of the filing of the claim of lien, just as with the filing of a payment action. Also, the lien claimant must file with the chancery clerk a *lis pendens* notice of the filing of the lien action, copying the owner

²⁰⁵ *Id.* § 85-7-405(1)(c).

²⁰⁶ GA. CODE ANN. § 44-14-361.1(a)(4) (Supp. 2010). As stated previously, the Georgia procedural statute for filing and perfecting liens, GA. CODE ANN. § 44-14-361.1, is the source of MISS. CODE ANN. § 85-7-405 (Supp. 2014).

²⁰⁷ MISS. CODE ANN. § 85-7-405(1)(d) (Supp. 2014).

²⁰⁸ *Id.* In many cases, also, a claimant will combine payment and lien actions in one suit in any case.

and the contractor.²⁰⁹ The exception provisions of Section 85-7-405(1)(d) apply only to first and second tier subcontractors and materialmen and all design professionals not in privity with the owner. They do not apply to contractors or design professionals in privity with the owner.

Note that any judgment rendered in favor of a lien claimant under this exception shall be to the property only (in rem), and does not impose personal liability on the owner.²¹⁰

9. Action for Penalty for Knowingly False Liens; Action for Expungement and Vacating of Wrongful Liens

As with prior Mississippi practice, the Act provides for a vehicle to expunge or vacate wrongfully filed liens, and a penalty for the filing of knowingly false liens. The difference between the Act and prior Mississippi law is that (1) a lis pendens filing is not required to trigger the expungement right under the Act; (2) the expungement action under the Act is an expedited action, filed as an action governed by Rule 81(d)(2) of the Mississippi Rules of Civil Procedure (allowing for the filing of a complaint and summons summoning the defendant to court on a date certain no fewer than seven days from the date of service, with no requirement of an answer or discovery); and (3) the expungement action can be filed by anyone “adversely affected” by the wrongful filing of a claim of lien, not just the owner.²¹¹ The expungement action can be filed in any court in the county in which the lien was filed.²¹²

In addition to the filing of an expungement action, *every* party injured by the “falsely and knowingly” filing of a claim of lien may seek damages from the lien claimant in the amount of three times the amount claimed on the lien.²¹³ The penalty is indeed penal in nature, and may be claimed by multiple claimants jointly injured by the “falsely and knowingly” filing of the wrongful lien.²¹⁴ However, in order to take advantage of the stiff

²⁰⁹ *Id.*

²¹⁰ *Id.* § 85-7-405(1)(d)(ii).

²¹¹ *Id.* § 85-7-429(2).

²¹² *Id.*

²¹³ *Id.* § 85-7-429(1).

²¹⁴ *Id.*

penalty (which under prior Mississippi law was limited to the amount of the lien), those aggrieved must file their action to recover within 180 days of the filing of the claim of lien.²¹⁵

A second part of the expungement statute allows one to file an expungement action regardless of whether the lien was filed “falsely and knowingly” or not; a merely mistaken lien can be expunged.²¹⁶ Nothing in the Act requires that the general application to expunge or vacate a lien under Subsection (2) of Section 85-7-429 be filed at any specific time, as opposed to the limitation on the action to impose the penalty for a knowingly false lien of 180 days under Subsection (1). However, prudence and practicality would dictate that it be filed as soon as possible to take advantage of its expedited format of Rule 81(d)(2). Also, nothing in the Act requires combining the general action to expunge or vacate a lien (Subsection (2)) and the action to recover a penalty for a “falsely and knowingly” filed lien (Subsection (1)), but again, prudence and judicial economy would dictate otherwise. In fact, because such an action would be a logical counter-claim to a payment or lien action, the action to recover for a “falsely and knowingly” filed lien can be filed ancillary to one of several actions authorized by the Act.²¹⁷ Lastly, the Act does not specify into which court the action to recover for a “falsely and knowingly” filed lien is to be filed, although, reason dictates that it can be filed in any court in the county in which the lien was filed, as with all other actions provided for in the Act.

10. Surety Payment Bonds on Private Jobs

The Act provides that where a contractor provides a payment bond with the same level of payment protection as afforded under the Mississippi Little Miller Act,²¹⁸ extending payment rights to first and second tier subcontractors and materialmen, the payment bond rights substitute for the lien rights provided under the Act to first and second tier subcontractors and materialmen.²¹⁹ Of course, the general contractor’s provision of a payment bond

²¹⁵ *Id.*

²¹⁶ *Id.* § 85-7-429(2).

²¹⁷ *Id.* § 85-7-405(3)(a)-(b).

²¹⁸ *Id.* § 31-5-51.

²¹⁹ *Id.* § 85-7-431.

does not abrogate his own right to file a claim of lien under the Act if the owner fails to pay the contractor.²²⁰

Mississippi law does not require contractors on private projects to furnish performance or payment bonds. However, the first inquiry a claimant should make on a private job is whether the general contractor has provided a payment bond protecting subcontractors and materialmen down to the second tier since the bond rights are in lieu of statutory lien rights.²²¹

Further, an owner, general contractor or subcontractor on a private job, faced with a sub's or materialman's filing a claim of lien that could delay the owner's draw or closing with its lender (also holding up payments down the line), can "bond around the lien" by filing with the chancery clerk a payment bond that is 110% of the amount claimed under the lien.²²²

Section 85-7-431 of the new 2014 lien Act now substitutes for the old Mississippi private bond statute, Section 85-7-185, which the 2014 lien Act repealed.²²³ Therefore, if a surety company provides a payment bond on a Mississippi private job under current law for the purpose of substituting bond for lien rights, it will have to provide payment bond protections down to second tier subcontractors and materialmen just like the Mississippi's Little Miller Act to fully substitute bond for lien rights.²²⁴

This is a real change from former practice in Mississippi under the now repealed private bond statute, MISS. CODE ANN. § 85-7-185. The Mississippi Supreme Court had held under the old private bond law that on a private job remote subcontractors and materialmen were not ordinarily protected by the bond unless the bond explicitly provided otherwise; only the sub of the contractor issuing the private payment bond had bond rights unless the terms of the bond were broader.²²⁵ Surety bond companies that

²²⁰ *Id.*

²²¹ *Id.* "Where a contractor gives a payment bond providing payment protection to subcontractors and material suppliers to the full extent provided by the Mississippi Little Miller Act found at Section 31-5-51, the payment bond shall be in substitution for the liens provided for a subcontractor or materialman in this article." *Id.*

²²² *Id.* § 85-7-415(1).

²²³ Section 24 of S.B. 2622 repealed the former MISS. CODE ANN. § 85-7-185 (1972).

²²⁴ The Mississippi Little Miller Act appears at MISS. CODE ANN. § 31-5-51 to § 31-5-57.

²²⁵ *U.S. Fid. & Guar. Co. v. Md. Cas. Co.*, 199 So. 278, 282 (Miss. 1940); *Ala. Marble Co. v. U.S. Fid. & Guar. Co.*, 111 So. 573, 574 (Miss. 1927).

fail to recognize the impact of the new 2014 lien law covering private jobs will find that if they provide bond rights on a private job only to the extent of the first tier, they will not have substituted lien rights of the second tier under the new, 2014 lien law as provided for at MISS. CODE ANN. § 85-7-431. The second tier claimants in that instance can file claims of lien.

CONCLUSION

The broadening of Mississippi's lien law in 2014 to include subcontractors, materialmen, and consulting design professionals was a long time in coming. It took the U.S. Fifth Circuit Court of Appeals to clear the way for broader lien rights in 2013 by killing off the old, inadequate stop notice statute once and for all. It also took firm leadership by the Mississippi Legislature in 2014 to bring all parties to the table by making it clear to potential opponents of broad lien rights that a lien bill would be passed during the session.

Now that the new law is in place, proponents of lien rights will have to monitor it closely to ensure that the new law achieves its purpose of creating a fairer, broader system of payments in the Mississippi construction industry that ensures payment for improvements benefiting owners' properties. Proponents of lien rights will also need to monitor the new lien law to ensure that it is working to encourage the growth of credit for construction, equipment, and materials while discouraging the underbidding of jobs that can have very adverse ripple effects for subcontractors, materialmen, and design consultants. The authors have every confidence Mississippi has made an important start in the right direction, and have every hope that the new law will succeed in promoting the growth of the entire Mississippi construction industry.

APPENDIX

A. Claim of Lien

(3" SPACE ABOVE THIS LINE RESERVED FOR RECORDING USE ONLY)

Lienor: [Name/address] General Contractor: [Name/address]

Owner: [Name/address]

Prepared by:

[Attorney name and contact information]

Indexing Instructions:

To the Chancery Clerk of _____, Mississippi:

The real property described herein is situated at

[Description]

_____ County, Mississippi.

This instrument is to be filed in the Construction Lien Book.

NOTICE OF CLAIM OF SPECIAL LIEN

STATE OF MISSISSIPPI

COUNTY OF _____

_____, a mechanic, contractor, subcontractor, materialman, machinist, manufacturer, registered architect, registered forester, registered land surveyor, registered professional engineer, or other person (as the case may be) claims a lien in the amount of _____ (\$_____) on the building, structure, house, factory, mill, machinery, or railroad (as the case may be) and the premises or real estate on which it is erected or built, hereinafter described as _____, for satisfaction of a claim which became due on _____, 20__, for work performed or labor, materials, services provided (or whatever the claim may be).

The undersigned lien claimant has or shall, within two (2) days of the date hereof, provide a copy of the instant Special Lien by registered or certified mail or statutory overnight delivery to the owner of the subject property or, if the owner's address cannot be found, to the contractor, as the agent of the owner; if the property owner is an entity on file with the Secretary of State's office, sending a copy of the Special Lien to the entity's address or the registered agent's address shall satisfy this requirement. If the lien claimant is not the contractor, he has or shall also send a copy of the claim of lien within two (2) business days by registered or certified mail or statutory overnight delivery to the contractor or to the contractor's registered agent.

THIS CLAIM OF LIEN EXPIRES AND IS VOID ONE HUNDRED EIGHTY (180) DAYS FROM THE DATE OF FILING OF THE CLAIM OF LIEN IF A PAYMENT ACTION IS NOT FILED BY THE CLAIMANT WITHIN THAT TIME PERIOD.

NOTICE TO OWNER OF PROPERTY: YOU HAVE THE RIGHT TO CONTEST THIS CLAIM OF LIEN PURSUANT TO MISSISSIPPI LAW.

SO SWORN, this the _____ day of _____, 20__.

LIEN CLAIMANT,

By:

Its:

STATE OF MISSISSIPPI
COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this the ____ day of _____, 20__, within my jurisdiction, the within named _____, who acknowledged that he is _____ of _____ corporation, and that for and on behalf of the said corporation, and as its act and

deed he executed the above and foregoing instrument, after first having been duly authorized by said corporation so to do.²²⁶

NOTARY PUBLIC
My Commission Expires:

²²⁶ For various forms of acknowledgement see MISS. CODE ANN. § 89-3-7 (Supp. 2014).

B. Amendment of Lien

Prepared by:

[Attorney name and contact information]

Indexing Instructions:

To the Chancery Clerk of _____, Mississippi:

The real property described herein is situated at

[Description]

_____ *County, Mississippi.*

This instrument is to be filed in the Construction Lien Book.

AMENDMENT TO SPECIAL LIEN
STATE OF MISSISSIPPI
COUNTY OF _____

THAT CERTAIN claim of lien filed by _____
against property of _____ on _____, 20____
and recorded at Book____, Page____ in the lien index of
_____ County is hereby amended by increasing/reducing
(cross out one) the amount of the claim of lien to
\$_____. The remaining terms of the original claim
of lien are hereby incorporated by reference into this amended
claim of lien. This amended claim of lien relates back to the date
that the original claim of lien was filed for record.

SO SWORN, this the _____ day of _____, 20____.

LIEN CLAIMANT,

By:

Its:

STATE OF MISSISSIPPI
COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this the ____ day of _____, 20__, within my jurisdiction, the within named _____, who acknowledged that he is _____ of _____ corporation, and that for and on behalf of the said corporation, and as its act and deed he executed the above and foregoing instrument, after first having been duly authorized by said corporation so to do.²²⁷

NOTARY PUBLIC
My Commission Expires

²²⁷ For various forms of acknowledgement see MISS. CODE ANN. § 89-3-7 (Supp. 2014).

C. Lis Pendens Notice of Payment Action

Prepared by:

[Attorney name and contact information]

Indexing Instructions:

To the Chancery Clerk of _____, Mississippi:

The real property described herein is situated at

[Description]

_____ County, Mississippi.

This instrument is to be filed in the *Lis Pendens* Record.

NOTICE OF PAYMENT ACTION

FILED PURSUANT TO MISS. CODE ANN. § 85-7-405(1)(C)

TAKE NOTICE, that, pursuant to Miss. Code Ann. § 85-7-405(1)(c), the undersigned lien claimant has commenced a payment action for the recovery of the amount of the lien claimant's claim against the party he contracted with in _____ court (or arbitration tribunal), a copy of said complaint (or demand in arbitration) being attached hereto, which has been filed within one hundred eighty (180) days from the date of filing for record of the lien claimant's claim of lien, which was filed at Book _____, Page _____ in the Construction Lien Book found in the Land Records Office of the _____ County Chancery Clerk.

THIS NOTICE shall be filed by the Clerk of this Court in the *lis pendens* record located in the _____ County Chancery Clerk's Office. A copy of this notice has been or contemporarily herewith will be provided to the owner and contractor by or on behalf of the undersigned.

SO SWORN, this the _____ day of _____, 20__.

LIEN CLAIMANT,

By:

Its:

STATE OF MISSISSIPPI
COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this the ____ day of _____, 20__, within my jurisdiction, the within named _____, who acknowledged that he is _____ of _____ corporation, and that for and on behalf of the said corporation, and as its act and deed he executed the above and foregoing instrument, after first having been duly authorized by said corporation so to do.²²⁸

NOTARY PUBLIC
My Commission Expires

²²⁸ For various forms of acknowledgement see MISS. CODE ANN. § 89-3-7 (Supp. 2014).

D. Lis Pendens Notice of Lien Action

Prepared by:

[Attorney name and contact information]

Indexing Instructions:

To the Chancery Clerk of _____ County, Mississippi:

The real property described herein is situated at

[Description]

_____ County, Mississippi.

This instrument is to be filed in the *Lis Pendens* Record.

NOTICE OF LIEN ACTION

FILED PURSUANT TO MISS. CODE ANN. § 85-7-405(1)(D)

TAKE NOTICE, that, pursuant to Miss. Code Ann. § 85-7-405(1)(d), the undersigned lien claimant has commenced a lien action against the property described herein as:

YOU ARE HEREBY NOTIFIED THAT the commencement of a payment action under Miss. Code Ann. § 85-7-405(1)(c) is not required by the undersigned, in so far as the owner has not made payment to the contractor and the undersigned lien claimant cannot secure a final judgment against the party with whom the undersigned lien claimant contracted because:

1. The party has been adjudicated a bankrupt;
2. If an individual, the party is deceased; or
3. Payment is not due to the lien claimant under an applicable contractual agreement until after payment is received by the party with whom the lien claimant contracted.

YOU ARE ALSO HEREBY PLACED ON NOTICE that the undersigned lien claimant has commenced a lien action for the enforcement and perfection of the Claim of Special Lien directly against the property against the owner; however, any judgment rendered in the proceeding shall be limited to a judgment *in rem* against the property improved and to impose no personal liability upon the owner of the property. Said lien action has been filed in

_____ court of _____ County, a copy of said complaint being attached hereto, which has been filed within one hundred eighty (180) days from the date of filing for record of the lien claimant's claim of lien, which was filed at Book _____, Page _____ in the Construction Lien Book found in the Land Records Office of the _____ County Chancery Clerk.

THIS NOTICE shall be filed by the Clerk of this Court in the *lis pendens* record located in the _____ County Chancery Clerk's Office. A copy of this notice has been or contemporarily herewith will be provided to the owner and contractor by or on behalf of the undersigned.

SO SWORN, this the _____ day of _____, 20__.

LIEN CLAIMANT,

By:
Its:

STATE OF MISSISSIPPI
COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this the ____ day of _____, 20__, within my jurisdiction, the within named _____, who acknowledged that he is _____ of _____ corporation, and that for and on behalf of the said corporation, and as its act and deed he executed the above and foregoing instrument, after first having been duly authorized by said corporation so to do.²²⁹

NOTARY PUBLIC
My Commission Expires:

²²⁹ For various forms of acknowledgement see MISS. CODE ANN. § 89-3-7 (Supp. 2014).

*E. Notice to Contractor of Commencement of Work or Supply*NOTICE TO CONTRACTOR, OR IF NO CONTRACTOR,
OWNER

[Commercial and Multi-Family Residential Only]
 (Pursuant to Miss. Code Ann. § 85-7-407(2))

TAKE NOTICE that the undersigned is a person having a right to a lien pursuant to Section 85-7-403, who does not have privity of contract with the Prime or General Contractor, or, if there is no Prime or General Contractor, to the Owner, and is providing labor, services or materials for the improvement of property commonly known as _____ (“the Property”).

THIS NOTICE, which is being provided within thirty (30) days following the first delivery of labor, services or materials to the property, is intended to provide written notice to the Prime or General Contractor, or, if there is no Prime or General Contractor, to the Owner, either by e-mail with a confirmed receipt, registered or certified mail, or statutory overnight delivery setting forth the following:

(a) _____;
 [The name, address, and telephone number of the person providing labor, services or materials]

(b) _____;
 [The name and address of each person at whose instance the labor, services or materials are being furnished]

(c) _____;
 [The name of the project and location of the project to which labor, services or materials are provided]

(d) _____;
 [A description of the labor, services or materials being provided and, if known, the contract price or anticipated value of the labor, services or materials to be provided]

LIEN CLAIMANT,

By:

Its:

F. Pre-Lien Notice to Owner of Single-Family Residence

PRE-LIEN NOTICE TO OWNER

[Single-Family Residential Only]

(Pursuant to Miss. Code Ann. § 85-7-409(2))

To:

TAKE NOTICE that the undersigned is a person having a right to a lien pursuant to Miss. Code Ann. § 85-7-403, who does not have privity of contract with the Owner, and has provided labor, services or materials for the improvement of property commonly known as _____ (“the Property”), for the sum of \$_____ for which the undersigned has not been paid, and intends to file a Claim of Special Lien on the subject property in ten (10) or more days from the date hereof.

SO NOTIFIED, this the ____ day of _____, 20____.

LIEN CLAIMANT,

By:

Its:

G. Interim Waiver and Release

INTERIM WAIVER AND RELEASE UPON PAYMENT
STATE OF MISSISSIPPI
COUNTY OF _____

THE UNDERSIGNED mechanic and/or materialman has been employed by _____ (name of contractor) to furnish _____ (describe materials and/or labor) for the construction of improvements known as _____ (title of the project or building) which is located in the City of _____, County of _____, and is owned by _____ (name of owner) and more particularly described as follows:

(describe the property upon which the improvements were made by using either a metes and bounds description, the land lot district, block and lot number, or street address of the project.)

Upon the receipt of the sum of \$_____, the undersigned mechanic and/or materialman waives and releases any and all liens or claims of liens it has upon the foregoing described property or any rights against any labor and/or material bond through the date of _____ (date) and excepting those rights and liens that the mechanic and/or materialman might have in any retained amounts, on account of labor or materials, or both, furnished by the undersigned to or on account of said contractor for said building or premises.

SO SWORN, this the _____ day of _____, 20__.

LIEN CLAIMANT,

By:

Its:

SWORN TO AND SUBSCRIBED BEFORE ME, this the ____ day of _____, 20__.²³⁰

²³⁰ The simple form of acknowledgement is included in the forms attached to the new lien law at MISS. CODE ANN. § 85-7-433.

NOTARY PUBLIC

My Commission Expires:

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT STATED ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED THE PAYMENT, SIXTY (60) DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE EITHER AN AFFIDAVIT OF NONPAYMENT OR A CLAIM OF LIEN BEFORE THE EXPIRATION OF THE SIXTY-DAY PERIOD. THE FAILURE TO INCLUDE THIS NOTICE LANGUAGE ON THE FACE OF THE FORM SHALL RENDER THE FORM UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER SECTION 85-7-419, MISSISSIPPI CODE OF 1972.

H. Final Waiver and Release

WAIVER AND RELEASE UPON FINAL PAYMENT
STATE OF MISSISSIPPI
COUNTY OF _____

THE UNDERSIGNED mechanic and/or materialman has been employed by _____ (name of contractor) to furnish _____ (describe materials and/or labor) for the construction of improvements known as _____ (title of the project or building) which is located in the city of _____, county of _____, and is owned by _____ (name of owner) and more particularly described as follows:

(describe the property upon which the improvements were made by using either a metes and bounds description, the land lot district, block and lot number, or street address of the project.)

Upon the receipt of the sum of \$_____, the mechanic and/or materialman waives and releases any and all liens or claims of liens it has upon the foregoing described property or any rights against any labor and/or material bond on account of labor or materials, or both, furnished by the undersigned to or on account of said contractor for said property.

SO SWORN, this the _____ day of _____, 20__.

LIEN CLAIMANT,

By:
Its:

SWORN TO AND SUBSCRIBED BEFORE ME, this the ___ day of _____, 20__.²³¹

NOTARY PUBLIC

²³¹ The simple form of acknowledgement is included in the forms attached to the new lien law at MISS. CODE ANN. § 85-7-433.

My Commission Expires

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT STATED ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED THE PAYMENT, SIXTY (60) DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE EITHER AN AFFIDAVIT OF NONPAYMENT OR A CLAIM OF LIEN BEFORE THE EXPIRATION OF THE SIXTY-DAY PERIOD. THE FAILURE TO INCLUDE THIS NOTICE LANGUAGE ON THE FACE OF THE FORM SHALL RENDER THE FORM UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER SECTION 85-7-419, MISSISSIPPI CODE OF 1972.

I. Affidavit of Nonpayment

AFFIDAVIT OF NONPAYMENT

Prepared by:

[Attorney name and contact information]

Indexing Instructions:

To the Chancery Clerk of _____ County, Mississippi:

The real property described herein is situated at

[Description]

_____ *County, Mississippi.*

This instrument is to be filed in the Construction Lien Book.

STATE OF MISSISSIPPI

COUNTY OF _____

THE UNDERSIGNED mechanic and/or materialman has been employed by _____ (name of contractor) to furnish _____ (describe materials and/or labor) for the construction of improvements known as _____ (title of the project or building) which is located in the city of _____, county of _____, and is owned by _____ (name of owner) and more particularly described as follows:

(Describe the property upon which the improvements were made by using either a metes and bounds description, the land lot district, block and lot number, or street address of the project.)

Pursuant to section 85-7-419 the undersigned executed a lien waiver and release with respect to this property dated _____, _____. The amount set forth in the waiver and release (\$ _____) has not been paid, and the undersigned hereby gives notice of the nonpayment pursuant to Miss. Code Ann. § 85-7-419(5)(b)(iii).

The above facts are sworn true and correct by the undersigned, this _____ day of _____, ____.

LIEN CLAIMANT,

By:

Its:

SWORN TO AND SUBSCRIBED BEFORE ME, this the ___ day
of _____, 20__.²³²

NOTARY PUBLIC

My Commission Expires

WITHIN TWO (2) DAYS OF FILING THIS AFFIDAVIT OF NONPAYMENT, THE FILING PARTY SHALL SEND A COPY OF THE AFFIDAVIT BY REGISTERED OR CERTIFIED MAIL OR STATUTORY OVERNIGHT DELIVERY TO THE OWNER OF THE PROPERTY. WHENEVER THE OWNER OF THE PROPERTY IS AN ENTITY ON FILE WITH THE SECRETARY OF STATE'S OFFICE, SENDING A COPY OF THE AFFIDAVIT TO THE COMPANY'S ADDRESS OR THE REGISTERED AGENT'S ADDRESS ON FILE WITH THE SECRETARY OF STATE SHALL BE DEEMED SUFFICIENT.

²³² The simple form of acknowledgement is included in the forms attached to the new lien law at MISS. CODE ANN. § 85-7-433.

*J. Notice of Contest of Lien*²³³

Prepared by:

[Attorney name and contact information]

Indexing Instructions:

To the Chancery Clerk of _____ County, Mississippi:

The real property described herein is situated at

[Description]

_____ County, Mississippi.

This instrument is to be filed in the Construction Lien Book.

NOTICE OF CONTEST OF LIEN

STATE OF MISSISSIPPI

COUNTY OF _____

To: [name and address of lien claimant]

YOU ARE NOTIFIED that the undersigned contests the claim of lien filed by you on _____ 20__, and recorded in _____ book _____, page _____ of the public records of _____ County, Mississippi, against property owned by _____, and that the time within which you may commence a payment action to enforce your lien is limited to ninety (90) days from receipt of this notice. This ___ day of _____, 20__.

THIS ABOVE-REFERENCED LIEN WILL EXPIRE AND BE VOID IF YOU DO NOT: (1) COMMENCE A PAYMENT ACTION FOR RECOVERY OF THE AMOUNT OF THE LIEN CLAIM

²³³ This version of the Notice of Contest of Lien Form reflects corrections to the original form in the 2014 lien law in S.B. 2364, passed by the 2015 Regular Session of the Mississippi Legislature. We proposed that the 2014 version of the form be amended to strike the references to sixty (60) days, and substitute in their place ninety (90) days from receipt of the notice to commence a payment action. The substantive notice of contest of lien statute at MISS. CODE ANN. § 85-7-423 only mentions a ninety (90) day period to commence the payment action where a contest is filed, so the 2015 amendment conforms the form to the substantive statute.

PURSUANT TO SECTION 85-7-405, MISSISSIPPI CODE OF 1972, WITHIN NINETY (90) DAYS FROM RECEIPT OF THIS NOTICE; AND (2) FILE A LIS PENDENS NOTICE OF THE PAYMENT ACTION WITH THE CHANCERY CLERK UPON COMMENCEMENT OF THE PAYMENT ACTION WITH A COPY TO THE LIEN CLAIMANT, OWNER AND CONTRACTOR.

SIGNATURE

By:_____ (Print Name)

Its:_____ (Print Title)

SWORN TO AND SUBSCRIBED BEFORE ME, this the ___ day of _____, 20__.²³⁴

NOTARY PUBLIC

My Commission Expires:

²³⁴ The simple form of acknowledgement is included in the forms attached to the new lien law at MISS. CODE ANN. § 85-7-433.