

New Lien Law

By now, many of you know that a new lien law will go into effect on April 1, 2013. We in the title insurance industry believe that the provisions of the law will go a long way to preventing the imposition of “hidden liens” and offer protection to your clients from the same. The purpose of this article is to inform you of the changes that will result from the implementation of the new law. First, be aware that the provisions of the new law only impacts **new construction in excess of \$30,000**. In all other instances the provisions of the law will not change. The law applies to both commercial and residential transactions.

The current provisions of Chapter 44A will remain. Claims of liens on real property and claims of liens on funds will continue to be part of our vocabulary. The big change is that, in order for a contractor or a sub-contractor to have mechanic’s lien rights which can take priority over a deed to a third party purchaser for value, or a new deed of trust, the GC or subcontractor will have to serve a notice with a private lien agent, stating that the potential lien claimant is on the job. When it comes time to close the transaction, the closing attorney will get a list of all of the workmen and materialmen who have given notice to the lien agent. The companies and workers on that list will be the only ones from whom a lien waiver will be required.

You will no longer have to rely on self-serving affidavits from the owner and general contractor, who may fail to disclose an unhappy subcontractor who is disputing payment and who can later file suit, much to the chagrin of your client, the new owner.

The new law requires the Owner to designate a Lien Agent to perform certain duties for any transaction that involves new construction that exceeds \$30,000.00. This appointment must be made in order to get a building permit. NOTE: This requirement does not apply to improvements to an existing single-family residence dwelling that is used by the Owner as a residence. This means that the provisions of the law do not apply to renovations made to an owner’s current place of residence.

In order to have a valid lien on the real property, a potential lien claimant must first do any one of the following things:

1. File a notice with the Lien Agent within 15 days of the first furnishing of labor or materials.
2. File a notice with the Lien Agent prior to the date of recordation of a conveyance of the property interest in the real property to a bona fide purchaser for value.
3. File a notice with the Lien Agent prior to the date of recordation of the mortgage or deed of trust.

4. File a Claim of Lien prior to the date of recordation of a conveyance of the property interest in the real property to a bona fide purchaser for value or the mortgage or deed of trust.

Special Note: The potential lien claimant can file as soon as they begin work on the project, but all they file is a notice that they are on the job. They don't have to say how much money will be involved. The potential lien claimant may also choose to wait to file any notice, but if they wait until after a deed or deed of trust is recorded, they lose any priority over the newly filed instrument.

Special Note: When a Lien Agent is identified in the contract for improvements between an Owner and a contractor, the contractor will be deemed to have met the notice requirement on the date of the Lien Agent's receipt of the Owner's Notice of Designation. We anticipate that standard AIA and other construction contracts will begin requiring the designation of a Lien Agent at the time of the contract.

Special Note: Note the distinction between #4 above from #2 and #3. . #4 relates to a **Claim of Lien**, while #2 and #3 reference the Notice that is a creation of the statute and is further described below.

The requirements of the notice as to form are very basic and laid out in the statute. Essentially the notice will (i) provide contact information for the potential lien claimant; (ii) name the party with whom the potential lien claimant contracted with; (iii) provide a description of the property; and (iv) and state the following, "I give notice of my right subsequently to pursue a claim of lien for improvements to the real property described in this notice." According to the terms of the law, claims for lack of payment will be "subordinate" to a Deed or Deed of Trust unless one of the four methods above have been employed by a contractor prior to the date of the recordation of said Deed or Deed of Trust.

All of the title insurance companies doing business in North Carolina have joined together and are using a web-based solution to take care of the collection and reporting functions of the Lien Agent. All you have to do is log on to www.NCLiens.com and the website will do all of the statutorily required steps to appoint a Lien Agent, file a Notice to Lien Agent and generate a report for the closing attorney to use in checking off potential lien claimants who have to waive their lien rights at closing.

The law requires the closing attorney to contact the Lien Agent and request copies of any notices received by the Lien Agent. If the Attorney does so not more than 5 days prior to the recordation of the Deed, the attorney shall be deemed to have fulfilled his or her obligations under the statute and shall have no further duty to ask for additional information from the Lien Agent.

Realistically, because checking with the on-line service will be so easy, most underwriters will be asking the closing attorney to check on-line within a day of closing, to be sure no potential lien claimants have filed since the initial search.

. This web-based system is a fully automated system that may be accessed on-line or on your smart phone. There will be no charge to attorneys to use the system if they are doing so for the

sole purpose of checking for notices. (That web address again is www.NCLiens.com.) This system will enable you to check – for each and every construction project that meets the statutory requirements – as to what notices have been filed. There will be multiple ways to search on the site to find a particular construction project, but the simplest way will be to use the unique identifier number the system gives to each job registered with the system or to use the QR code that is generated and which will be posted on the job site with each building permit. The QR code will lead you to the unique site for that particular construction project.

In this manner, a closing attorney will be able to identify some critical information, namely which contractors have filed the notices identified in #1, 2 and 3 above. This will enable the attorney to identify all the parties that will need to execute a Lien Waiver and/or those that will need to be paid from the closing proceeds. Once the Deed of Deed of Trust goes on record, any liens filed will be subordinate to the rights of the owner and/or beneficiary under the Deed of Trust. A subcontractor may still have a dispute with the contractor on a job, but they will have to look to regular contract law and a claim of lien on funds for relief. They will no longer have a “hidden lien” which can be asserted 120 days after the last furnishing, and which can surprise unwary purchasers for value, by upsetting the priority of the deed or deed of trust on the newly completed project.

Claims of Liens will continue to be filed with the Clerk, so you will have to continue checking the Clerk’s office prior to closing to be sure no Claim of Lien on Real Property has been filed on the project.

The North Carolina Land Title Association (NCLTA) will promulgate new lien waiver forms to deal with the changes in the law. We will let you know, as soon as they are finally adopted., and will begin sending them out as soon as we can.

Note: This article does not go into any details concerning Claims for Liens on funds. Contact me to discuss further.

sb