



*The State Senate
Senate Research Office
204 Paul D. Coverdell Office Building
18 Capitol Square
Atlanta, Georgia 30334
404.656.0015 (office) 404.656.0929 (facsimile)*

**FINAL REPORT
OF THE
SENATE LIEN LAW STUDY COMMITTEE**

Honorable Mitch Seabaugh, Chair
Senator, District 28

Honorable Don Balfour
Senator, District 9

Honorable Tim Golden
Senator, District 8

Honorable Dan Weber
Senator, District 40

Honorable John Wiles,
Senator, District 37

2007

**Prepared by the
Senate Research Office**

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I. INTRODUCTION

The Senate Lien Law Study Committee was created pursuant to Senate Resolution 8 of the 2007 Legislative Session and sponsored by Senator Eric Johnson of the 1st Senate District. The Senate Lien Law Study Committee (LL Study Committee) was authorized to review the current standing of Georgia's lien laws, to examine their effectiveness, to discuss strengths and weaknesses, and to explore potential remedies to any possible deficiencies.

The LL Study Committee was chaired by Senator Mitch Seabaugh of the 28th Senate district. The following members served on the LL Study Committee:

- Senator Don Balfour of Gwinnett County;
- Senator Tim Golden of Lowndes County;
- Senator Dan Weber of DeKalb County; and
- Senator John Wiles of Cobb County.

The LL Study Committee convened on five occasions in Room 450 of the Georgia State Capitol:

- Thursday, August 16, 2007;
- Tuesday, October 2, 2007;
- Thursday, November 8, 2007;
- Tuesday, December 18, 2007; and
- Tuesday, January 8, 2008.

The LL Study Committee did not seek to find a problem; to the contrary, the LL Study Committee convened to study whether problems with Georgia's lien laws exist or whether the current lien filing procedures serve as an effective compromise which generally protects all interested parties. To effectuate this purpose, the members of the LL Study Committee appointed an Advisory Committee which was charged with reviewing Georgia's lien laws and to determine, if any, applicable problems with the liens. The Advisory Committee met under its own accord, set its own schedule, and debated its own agenda. It determined what needed to be reviewed and discussed. The Advisory Committee made reports to the members of the LL Study Committee of its findings and conclusions, recommendations, and suggestions for potential revisions to the law. The members of the LL Study Committee reserved the right to accept or disagree with the Advisory Committee's findings or suggestions.

The Advisory Committee was facilitated by Mr. William Hopson, partner the with law firm Troutman Sanders LLP. The following persons generously served on the Lien Law Advisory Committee:

William Hopson
Suzanne Williams

Troutman Sanders
Home Builders Association of Georgia

Mark Woodall	Georgia Associated General Contractors
Charles Surasky	Georgia Utility Contractors Association
Tom Leslie	Georgia Engineering Alliance
Charolette Gattis	Georgia Manufacturing Housing Association
Tim Kibler	Georgia Association of Realtors
Barbara Lynn Howell	Construction Suppliers Association
Bill Clark	Georgia Trial Lawyers Association
Rick Alembik	Georgia Trial Lawyers Association
Helen L. Sloat	Nelson Mullins Riley and Scarborough
Chris Foster	Atlanta Electrical Contractors Association
Niel H. Dawson	Independent Electrical Contractors
Ronald Fennel	America Subcontractors Association
Gordon Kenna	Georgia Concrete Association
Mo Thrash	Mortgage Bankers Association of Georgia
Steven L. Parks	Georgia Highway Contractors Association
Vernon Thomas	American Subcontractors Association
Brandi Shockley	Walker Construction
John F. Guest	Carson Guest
Christopher C. Mingledorff	Moore Ingram Johnson & Steele
Chad Reed	Lawfirm of Busch and Reed
Dan Hinkel	Lien Expert
Dan Douglass	Stites and Harbison, PLLC
Hal Meeks	
Frank Riggs	Troutman Sanders, LLP
Terry Matthews	Georgia Construction Aggregate Association
Boyd Pettit	Boyd Pettit
Dayna J. Sondervan	Georgia Lien Rights Coalition
Anne Infinger	Governor's Office of Consumer Affairs
David R. Hendrick	ABC of Georgia
Jeff Jernigan	ABC of Georgia
Bill Anderson	ABC of Georgia
Chuck Bankston	Construction Suppliers Association
David C. Moulds	The Moulds Law Firm
Deron Hicks	Home Builders Association
Jim Busch	Lawfirm of Busch and Reed
David Simons	Construction Suppliers Association
Randy L. Foster	Associated General Contractors
Bob Lopater	Overhead Door Company of Atlanta
Haydon Stanley	Fiveash Stanley, Inc.
Kamy Molavi	Nelson Mullins Riley and Scarborough
Michael D. Culbertson	Georgia Credit Union Affiliates
Mike Holiman	Council of Superior Court Clerks
Tonya L. Griesbach	Judicial Counsel of Georgia
Patrise M. Perkins-Hooker	Hollowell, Foster & Gepp, P.C.
Stephanie Carter	Troutman Sanders Public Affairs Group LLC
Steve D. Neff	Surveying and Marble Society of Georgia
Steve Jordan	Georgia Real Estate Investors Association

II. EXECUTIVE SUMMARY

The LL Study Committee was born out of concern for homeowners coupled with respect to private enterprise. Indeed, there are frustrated and worried homeowners who have had liens filed against their real property despite the fact that these homeowners have paid in full for services rendered. Conversely, there exist disappointed, hard-working homebuilders, subcontractors, and suppliers who have provided goods and services yet have received no payment.

One of the goals of the LL Study Committee was to strengthen the understanding of the average Georgia citizen regarding liens rights and procedures and to protect individuals' property rights of their homesteads.¹ Additionally, it was important for homeowners to understand how they can protect themselves from potentially frivolous liens without enduring a cumbersome, lengthy, and expensive process to remove these liens.²

Lien rights are not a product of traditional common law; they are the product of legislative intent and creation.³

One of the primary issues regarding lien rights turns on the contractual principal of privity (or lack thereof) between the homeowner and a distant supplier or subcontractor. Too often, a good faith homeowner has never even met the person or been familiar with the entity which filed a lien against that property. It is nothing short of a hassle when the property owner is a no-fault party to a lien-filing.

The LL Study Committee sought to establish a mechanism to force privity-lacking subcontractors and suppliers to enforce a lien through a judicial rendering; moreover, an expected outcome of this study was to quicken the process to settle payment of a lien. Ultimately, sound policy should improve the overall standing of the homeowner and the preservation of his property rights.

¹ Georgia Mechanic's and Materialman's Lien Law may be found at O.C.G.A. §§ 44-14-361, et seq.

² In Georgia, lien laws were enacted in the early 1800s to provide protection for masons and carpenters. The statute has been modified a number of times since then and now extends to cover a wide variety of persons, including, among others, registered architects and engineers, lawyers, contractors, subcontractors, materialmen, suppliers and others who provide labor, materials or services for the construction or improvement of real property.

³ Lien rights originate from England, and is not a product of American common law. In the United States, lien rights have existed since Thomas Jefferson started construction of Washington, D.C. in 1791. As the country grew and construction became increasingly vital to the growth of the nation, the various states enacted mechanics' lien statutes to encourage construction while preventing owners from "enjoying the labor and materials furnished by others without compensation."

III. PERSPECTIVE AND DISCUSSION

The Advisory Committee met numerous times to discuss potential imperfections in Georgia's lien laws. During the first meeting, it was explained that liens are not a product of English common law, for lien claims are statutory creatures created by each state's legislatures to provide security for laborers and materialmen. Courts have traditionally favored property owners because liens are a contradiction to traditional common law; strict interpretation has generally been applied. Recent judicial decisions have begun to favor commercial interests by applying a broad, remedial interpretation of lien laws. Legislatures have historically drafted unenforceable, vague, or conflicting lien laws which create chaos during the procedural process.

The questions that should be addressed by policymakers include: why are there lien laws? Do some lien rights holders have more standing than others? Are there conflicting procedures for filing liens?

Other comments included the idea that lien laws are difficult to understand by legislators and industry representatives alike, and this is with understanding that Georgia has a rather clean law as it stands in relation to other states.⁴ Any changes to Georgia's lien laws must be concise or the LL Study Committee risks losing support for any substantive changes. Clarification of existing law should be the priority to erase ambiguities or vagueness.

Seventy-four percent of liens claimed in Georgia stem from residential construction while 62 percent of that number are against the commercial homebuilder. It is possible for homeowners to inherit "ghost liens" despite a title report showing clear title; moreover, homeowners rely upon title reports rather than performing their own investigations or relying upon the advice of an attorney. This makes the title reports very important or reinforces the need to ensure that deed records are correct.

The Advisory Committee expressed that there were certain areas of interest to be discussed under the purview of their charge. The first area of interest is residential. Some states have special lien rules for residential liens. For example, Kansas' lien rights state that suppliers must provide warning statements to homeowners that contain a list of duties and remedies for homeowners to follow. Does Georgia adequately define the term "residential" as it applies to lien laws? Is it practical to include property owner rights in loan closing notifications? Should there be a contractor affidavit in closings?⁵ Should title standards be changed? Why does the contractor provide the bond when the developer sometimes does not provide payment?

⁴ It was also mentioned that Georgia's lien laws are generally favorably received by other states and are sometimes used as a model.

⁵ It was noted that many contractors use closing proceeds to pay the subcontractors and suppliers.

Homeowners continue to possess a criminal avenue to pursue if a lien is fraudulently filed. Additionally, it was stated that notice of commencement rules can sometimes be a burden on commercial suppliers. Education of consumers should be of primary concern. There is no focus on education of property owners on rights and obligations under lien laws. Georgia's Right-to-Repair Act might be the best avenue to further protect homeowners.⁶ This law provides a right to repair disclosure obligation which allows a right to repair before litigation is ensued.

The second primary area of interest is statutory time periods. It was noted that Georgia utilizes a calendar model for establishing applicable time periods. Georgia requires a lien claimant to record the claim within 3 months of the last day of services provided; this can be confusing because not all months are of the same length. Additionally, some states allow homeowners to file a response to a claim of lien to demand immediate legal action be initiated by the claimant or the claim of lien is lost. In Georgia, a claim of lien must be acted upon within 12 months from when the amount is due. Further, there is fourteen days' notice of suit requirement when proceeding to perfect the lien; such notice is due to the property owner.

The third primary area of interest involves the preparation of lien claims. What should be included on the claim itself? Claims should include the amount and the due date. The statutory form requires substantial compliance, but it should require absolute compliance.

The fourth area of interest concerns the statutory lien claims form itself. There was discussion that the form is not express enough, and that strict scrutiny should be applied to ensure absolute compliance when filing a claim of lien.

The fifth area of interest turned on improper lien claims; applying strict scrutiny should preclude claims that include the wrong address, were filed too late, or overstate the amount due. In Florida, lien claimants lose all lien rights if the amount due is knowingly overstated. If such a lien is filed, the property owner may file an affidavit in response to the claim of lien with a citation to the incorrect information; the burden then shifts back to the claimant or he loses enforceability.

Stale claims should be defective on their face and judicially unenforceable; should these lien claims have an expiration date requirement. Lien waiver forms provide a presumption of payment that could be interpreted to waive lien rights even though no payment was made. Satisfaction and Release of liens should require the signature of the lien claimant; moreover, there should be a required notice of payment or repayment of funds to join the release of lien. Another area of interest regards the statutory procedure of commencing action; the 12 month delay is too long and burdensome. There should be interim steps that could be taken to expedite lien claim enforcement. The issue of credit score was

⁶ Georgia's Right-to-Repair Act is found at OCGA § 8-2-35, et seq.

discussed; it can be diminished if the lien claim remains on property owners credit; there should be an express prohibition of the credit scoring agencies from decreasing score.

The Advisory Committee facilitator appointed three subcommittees to examine these issues and questions: Residential; Statutory Time Periods; and Satisfaction and Release.

Subsequent Advisory Committee meetings concerned the reports of the subcommittees and how far they had narrowed down the list of areas to review to determine the scope of review. The Satisfaction and Release subcommittee cautioned to take a slow approach to make changes and to avoid unnecessary changes; it further discussed the waiver and release of lien process noting that there are complications and loose ends and very little case law. The existing lien law is archaic yet understood by commercial practitioners. There should be greater clarity whether conditional or unconditional. A suggestion was made to extend the time to make it 60 days instead of 30 days before Affidavit of Nonpayment must be filed in order to accommodate the cycle of payment. All the other states have figured out a way to deal with it without the Affidavit of Nonpayment. Regarding tenant improvements, the question turns on what is lienable. A lease for four years creates a usufruct;⁷ a lease for five or more years creates a leasehold interest which is lienable.⁸ Commonly, both the owner and the tenant are subject to the lien.

The Statutory Time Period subcommittee discussed the issue involving 90 days versus three months to file a claim of lien. Also, there is the issue of 7 days versus “at the time of filing” to send a copy of the lien to the property owner or contractor. It should be considered whether sending to owner or contractor is sufficient since that may leave an owner without proper notice. It was discussed that common law has shown that the date of the claim became due is the last date on the job; if liens were required to state as such, that would help eliminate issue of untimely liens. Notice of commencement of action is allowed 14 days to file, and it was stated that this is difficult especially in Fulton County; it should be 30 days. Stale liens could be eliminated if lien claims have an express statement of when lien expires.

The Residential Subcommittee recommended no changes except perhaps that there should exist a website to educate consumers about liens. This recommendation was made to determine whether lien imperfections would be dealt with by the new General and Residential Contractors Licensing Board’s regulations. It was stated that there is no incentive by consumers to be educated

⁷ A usufruct is defined as a limited duration on the property of another, or right of using an enjoying anything in which there is no property interest.

⁸ There exists a rebuttable presumption based upon the intent of the parties.

about liens. A website could be created containing information about lien rights in conjunction with the Governor's Office of Consumer Affairs.⁹

There was an opinion that the ambiguity as to how one perfects a lien when no *action* has been filed in a court needs to be resolved because it creates unnecessary litigation. A claimant should not have to file a legal action solely to perfect a claim of lien when the claim is subject to a mandatory arbitration clause.

There was much discussion following the suggestions made by the subcommittees. Interior design professionals remained disappointed that they are not afforded the statutory right to lien on delinquent payment for services rendered. It was noted that failure of inclusion of interior designers continues to keep the only remaining class of registered design professionals in Georgia from the lien rights statutes.¹⁰

Additionally, there was discussion relating to Georgia's court clerks and applicable statutory forms, filing fees for liens and related documents. Court clerks request that the their organization will need to amend the Clerks Cooperative Authority Board standards to require court clerks to index the "Property Owner" and the "Lien Claimant" so that these instruments get into the chain of title. This form is intended to be addressed to the lien claimant, but does not expressly inform the clerk, or the public, as to the correct party. Clerks do not need to be attempting to assume the identity of the lien claimant. The form needs to clearly identify the Lien Claimant. Regarding the form, it has a space to be signed by either the owner, the contractor, their agent or attorney. Providing only a signature of the attorney or the owner's contractor will not effectuate the purpose. The form needs to clearly identify the owner such as "Property Owner is: [name of property owner];" adequately listing the property address is beneficial, as well. It was clarified that court clerks are not suggesting that the proposed law define what the court clerk should index; the Clerks Cooperative Authority Board standards will properly address that requirement.¹¹

It was further counter-argued that the notion of referencing an address is not feasible. Many liens do not have an address because they are for new construction and an address has not yet been assigned by the county or city. There are many variables allowed in the liens that would not translate easily into directions for what to put on the proposed Notice of Contest; it would be more efficient to just clearly cross-reference the lien itself. Regarding listing the property owner and then the lien claimant, that might actually be useful to help the owner easily look up any applicable Notice of Contest.

⁹ Representative from the Governor's Office of Consumer Affairs stated that a website for home buyers is being created, and such information about lien rights would be welcomed addition.

¹⁰ Interior designers' request would cover interior designers for only the same services covered for architects and engineers where these services overlap. It was further noted that when President Thomas Jefferson wrote the first lien laws he did it as an incentive for designers and builders of homes in the District of Columbia; apparently he wanted to assure them that they would be paid for their labor on such a risky venture as creating a city in a swamp.

¹¹ The proposed revision does state that the court clerk must cross reference to the lien.

Regarding filing fees for lien-related documents--from the clerks perspective--the recording fee issue may appear clear, but it is not. Attorneys argue that each county assesses varying charges and fees for filing lien-related documents. It was stated that when fees are discussed, clerks that charge \$10 and \$2 respond that the clerks charging \$5 and \$2 are incorrect; the clerks charging \$5 and \$2 state that the clerks charging \$10 and \$2 are incorrect. Attorneys argue that the filing fees must be consistent regardless of what the codified cost may be. The attorneys' argument stems from when an attorney only has 14 days to obtain a case number from the court, prepare a notice of suit, and send the notice of suit to be recorded, the clerk then returns it stating the wrong recording fee was accompanying the filing document. Simply, there is confusion under the current system.

The court clerks affirm that the reason as to the \$4.50 versus \$5.00 charge arises from the fact that court clerks charge \$4.50 to file a lien, but they add \$.50 to that amount for the Clerk's Retirement Fund, as required by O.C.G.A. § 47-14-51 (b); however, that statute only accounts for \$4.50 of the fees. The applicable fees come from two statutes; the second statute is O.C.G.A. §47-14-51, which adds 50 cents. It was mentioned that citizens dealing with court clerks about lien-related document filings should be able to refer to one Code section that is easy to find and easy to present as authority for the fees to charge. The lien statute that is being proposed can be revised to reference the other statutes from where the fees originate.

It was further stated that title examiners in the various county deed rooms are the ones who routinely decide what gets set up on the title report; they should know to ignore most liens after seven years, whether satisfied or not, and federal tax liens after ten years. Since materialman's liens are the only ones that expire in only one year, they sometimes get mistakenly set up as a problem when they have long ago expired. The notice on the face of the lien is to help them along with anyone else looking at the lien.¹²

The issue of defining the term "action" was debated, as well. The idea is to create a clear, express definition that attorneys and the public can rely on so they know exactly when they have to file a Notice of Commencement of Action to preserve lien rights. The members of the Advisory Board had discussed this at length, and determined that the only times such a notice should be required is if there is a lawsuit, proof of claim in bankruptcy, or a binding arbitration. The definition was intended to be narrow rather than broad for clarity. It was further argued that the phrase "any other action" might create litigation over its meaning. Some attorneys will try to argue that a non-binding arbitration or mediation falls into the category of "any other action," for example. Adding this language to the definition simply begs the question of what "any other action" might be, and this

¹² It was suggested to refer to *Title Standard 15.5*, as "No Release of Lien Necessary" or in the alternative it may be called "No Court Proceeding Necessary."

will result in a lack of clarity and potential litigation. It was further stated that the existing code lacks clarity already, and the idea of defining "any other action" with specificity was to add clarity. It was also warned that defining "action" might give rise to malpractice lawsuits; as soon as someone loses their lien rights over this definition, someone will blame their attorney for not foreseeing what "any other action" might entail, and for not filing the required notice of commencement of action.

During the final meeting of the LL Study Committee, it was discussed that the effective date for proposed legislation be delayed to March 31, 2009, to enable members during the 2009 Legislative Session to amend any necessary provisions if they prove to need altering. There was substantial discussion as to defining the term "action" or "any other action." Additionally, there was discussion regarding lien discharge bonds and transferring lien security to another property. Further, there was ample discussion regarding waivers. It was questioned whether the proposed language for O.C.G.A. § 14-44-366 will address the express concerns of the legal community; the questions turns on whether it is an actual waiver for it is inconsistent as to if the waiver applies to lien or bond rights. It was stated that the proposed language should, when in effect, waive both lien and bond rights. It was also recommended that the proposed language should extend the window of time for Affidavit of Nonpayment. There was also discussion as to whether the term "submission" is an inaccurate reflection for the date of execution.

IV. RECOMMENDATION OF PROPOSED LEGISLATION

The LL Study Committee is pleased to submit language for consideration and adoption by the Georgia General Assembly. The language contained therein addresses the concerns and issues which were raised and debated by both the Advisory Committee and the members of the LL Study Committee.¹³

The three final reports of the Advisory Committee subcommittees are available for review in the Georgia Senate Research Office and will be included with the Final Report of the LL Study Committee found online at the Georgia Senate Research Office website.¹⁴

The members of the LL Study Committee desire to express their gratitude for the hard work and many volunteer hours to Facilitator William Hopson, the members of the Advisory Committee, and the Chairs of the Advisory Committee subcommittees: Chad Reed, Jim Busch, and David R. Hendrick.

¹³ LC 38 0518.

¹⁴ Georgia Senate Research Office website:

http://www.legis.state.ga.us/legis/2007_08/senate/aboutsro.htm



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Honorable John Wiles
Senator, District 37

**FINAL REPORT
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ATTACHMENT A

A BILL TO BE ENTITLED
AN ACT

To amend Part 3 of Article 8 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to mechanics and materialmen, so as to provide for definitions; to revise certain time periods for filing materialmen's and mechanics' liens; to provide for certain notices regarding waiver of lien or claim upon bond; to set filing fees for such liens; to define certain terms; to provide that certain notices shall be sent by registered or overnight mail or statutory overnight delivery; to provide that certain liens are unenforceable if an action is not commenced within 12 months; to provide for a notice of contest of lien; to provide for the computation of certain time periods; to provide for related matters; to provide for an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Part 3 of Article 8 of Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to mechanics and materialmen, is amended by adding a new paragraph to Code Section 44-14-360, relating to definitions, to read as follows:

"(2.1) 'Lien action' means a lawsuit, proof of claim in a bankruptcy case or a binding arbitration."

SECTION 2.

Said part is further amended by revising Code Section 44-14-361.1, relating to how liens are declared and created, as follows:

"44-14-361.1.

(a) To make good the liens specified in paragraphs (1) through (8) of subsection (a) of Code Section 44-14-361, they must be created and declared in accordance with the following provisions, and on failure of any of them the lien shall not be effective or enforceable:

(1) A substantial compliance by the party claiming the lien with his or her contract for building, repairing, or improving; for architectural services furnished; for registered forester services furnished or performed; for registered land surveying or registered professional engineering services furnished or performed; or for materials or machinery furnished or set up;

(2) The filing for record of his or her claim of lien within ~~three months~~ 90 days after the completion of the work, the furnishing of the architectural services, or the furnishing or performing of such surveying or engineering services or within ~~three months~~ 90 days after the material or machinery is furnished in the office of the clerk of the superior court of the county where the property is located, ~~which~~. The lien shall include a statement regarding its expiration pursuant to Code Section 44-14-367 and a notice to the owner of the property on which a claim of lien is filed that such owner has the right to contest the lien; the absence of such statement or notice shall not invalidate the lien. The claim shall be in substance as follows:

'A.B., 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 (specify the amount claimed) on the house, factory, mill, machinery, or railroad (as the case may be) and the premises or real estate on which it is erected or built, of C.D. (describing the houses, premises, real estate, or railroad), for satisfaction of a claim which became due on (specify the date the claim was due, which is the same as the last date the labor, services, or materials were supplied to the premises) for building, repairing, improving, or furnishing material (or whatever the claim may be).'

~~At the time~~ Within seven days of filing for record of his or her claim of lien, the lien claimant shall send a copy of the claim of lien by registered or certified mail or statutory overnight delivery to the owner of the property or, if the owner's address cannot be found, the contractor, as the agent of the owner; provided, however, if the property owner is an entity on file with the Secretary of State's Corporations Division, sending a copy of the claim of lien to the entity's address or the registered agent's address shall satisfy this requirement. In all cases in which a notice of commencement is filed with the clerk of the superior court pursuant to subsection (b) of Code Section 44-14-361.5, a lien claimant shall also send a copy of the claim of lien by registered or certified mail or statutory overnight delivery to the contractor at the address shown on the notice of commencement;

(3) The commencement of ~~an~~ a lien action for the recovery of the amount of the party's claim within ~~12 months~~ 365 days from the ~~time the same shall become due~~ date of filing for record of his or her claim of lien. In addition, within ~~14~~ 30 days after filing

1 commencing such lien action, the party claiming the lien shall file a notice with the clerk
 2 of the superior court of the county wherein the subject lien was filed. The notice shall
 3 contain a caption referring to the then owner of the property against which the lien was
 4 filed and referring to a deed or other recorded instrument in the chain of title of the
 5 affected property. The notice shall be executed, under oath, by the party claiming the lien
 6 or by such party's attorney of record, but failure to execute the notice under oath shall be
 7 an amendable defect which may be cured by the party claiming the lien or by such party's
 8 attorney without leave of court at any time before entry of the pretrial order and thereafter
 9 by leave of court. An amendment of notice pursuant to this Code section shall relate back
 10 to the date of filing of the notice. The notice shall identify the court or arbitration venue
 11 wherein the lien action is brought; the style and number, if any, of the lien action,
 12 including the names of all parties thereto; the date of the filing of the lien action; and the
 13 book and page number of the records of the county wherein the subject lien is recorded
 14 in the same manner in which liens specified in Code Section 44-14-361 are filed. The
 15 clerk of the superior court shall enter on the subject lien so referred to the book and page
 16 on which the notice is recorded and shall index such notice in the name of the then
 17 purported owner as shown by the caption contained in such notice. A separate lis pendens
 18 notice need not be filed with the commencement of this action; and

19 (4) In the event any contractor or subcontractor procuring material, architect's services,
 20 registered forester's services, registered land surveyor's services, or registered
 21 professional engineer's services, labor, or supplies for the building, repairing, or
 22 improving of any real estate, building, or other structure shall abscond or die or leave the
 23 state ~~within 12 months from the date such services, labor, supplies, or material are~~
 24 ~~furnished to him or her~~ during the required time period for filing a lien action, so that
 25 personal jurisdiction cannot be obtained on the contractor or subcontractor in ~~an~~ a lien
 26 action for the services, material, labor, or supplies, or if the contractor or subcontractor
 27 shall be adjudicated a bankrupt, or if, after the filing of ~~an~~ a lien action, no final judgment
 28 can be obtained against him or her for the value of such material, services, labor, or
 29 supplies because of his or her death, adjudication in bankruptcy, or the contract between
 30 the party claiming the lien and the contractor or subcontractor includes a provision
 31 preventing payment to the claimant until after the contractor or the subcontractor has
 32 received payment, then and in any of these events, the person or persons furnishing
 33 material, services, labor, and supplies shall be relieved of the necessity of filing ~~an~~ a lien
 34 action or obtaining judgment against the contractor or subcontractor as a prerequisite to
 35 enforcing a lien against the property improved by the contractor or subcontractor. Subject
 36 to Code Section 44-14-361, the person or persons furnishing material, services, labor, and
 37 supplies may enforce the lien directly against the property so improved in ~~an~~ a lien action

1 against the owner thereof, if filed within ~~12 months from the time the lien becomes due~~
 2 the required time period for filing a lien action, with the judgment rendered in any such
 3 proceeding to be limited to a judgment in rem against the property improved and to
 4 impose no personal liability upon the owner of the property; provided, however, that in
 5 such lien action for recovery, the owner of the real estate improved, who has paid the
 6 agreed price or any part of same, may set up the payment in any lien action brought and
 7 prove by competent and relevant evidence that the payments were applied as provided
 8 by law, and no judgment shall be rendered against the property improved. Within ~~14~~ 30
 9 days after filing such lien action, the party claiming the lien shall file a notice with the
 10 clerk of the superior court of the county wherein the subject lien was filed. The notice
 11 shall contain a caption referring to the then owner of the property against which the lien
 12 was filed and referring to a deed or other recorded instrument in the chain of title of the
 13 affected property. The notice shall be executed, under oath, by the party claiming the lien
 14 or by his or her attorney of record. The notice shall identify the court or arbitration venue
 15 wherein the lien action is brought; the style and number of the lien action, if any,
 16 including the names of all parties thereto; the date of the filing of the lien action; and the
 17 book and page number of the records of the county wherein the subject lien is recorded
 18 in the same manner in which liens specified in Code Section 44-14-361 are filed. The
 19 clerk of the superior court shall enter on the subject lien so referred to the book and page
 20 on which the notice is recorded and shall index such notice in the name of the then
 21 purported owner as shown by the caption contained in such notice. A separate lis pendens
 22 notice need not be filed with the commencement of this action.

23 (b) As between themselves, the liens provided for in Code Section 44-14-361 shall rank
 24 according to the date filed; but all of the liens mentioned in this Code section for repairs,
 25 building, or furnishing materials or services, upon the same property, shall, as to each
 26 other, be of the same date when declared and filed for record within ~~three months~~ 90 days
 27 after the work is done or before that time.

28 (c) The liens specified in Code Section 44-14-361 shall be inferior to liens for taxes, to the
 29 general and special liens of laborers, to the general lien of landlords of rent when a distress
 30 warrant is issued out and levied, to claims for purchase money due persons who have only
 31 given bonds for titles, and to other general liens when actual notice of the general lien of
 32 landlords and others has been communicated before the work was done or materials or
 33 services furnished; but the liens provided for in Code Section 44-14-361 shall be superior
 34 to all other liens not excepted by this subsection.

35 (d) In any proceeding brought by any materialman, by any mechanic, by any laborer, by
 36 any subcontractor, or by any mechanic of any sort employed by any subcontractor or by
 37 any materialmen furnishing material to any subcontractor, or by any laborer furnishing

labor to any subcontractor, to enforce such a lien, the contractor having a direct contractual relationship with the subcontractor shall not be a necessary party; but he or she may be made a party. In any proceedings brought by any mechanic employed by any subcontractor, by any materialmen furnishing material to any subcontractor, or by any laborer furnishing labor to any subcontractor, the subcontractor shall not be a necessary party; but he or she may be made a party. The contractor or subcontractor or both may intervene in the proceedings at any time before judgment for the purpose of resisting the establishment of the lien or of asserting against the lienor any claim of the contractor or subcontractor growing out of or related to the transaction upon which the asserted lien is based.

(e) 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.

(f) The filing fees for a claim of materialman's or mechanic's lien and any related document created pursuant to this Code section, including but not limited to a notice of commencement of action, shall be the amount set by Code Section 15-6-77 for liens on real estate and personal property."

SECTION 3.

Said part is further amended by revising subsection (c) of Code Section 44-14-361.5, relating to liens of persons without privity of contract, as follows:

"(c) A ~~Notice to Contractor~~ notice to contractor shall be ~~given~~ sent by registered or certified mail or statutory overnight delivery to the owner or the agent of the owner and to the contractor at the addresses set forth in the ~~Notice of Commencement~~ notice of commencement setting forth:

- (1) The name, address, and telephone number of the person providing labor, services, or materials;
- (2) The name and address of each person at whose instance the labor, services, or materials are being furnished;
- (3) The name of the project and location of the project set forth in the ~~Notice of Commencement~~ notice of commencement; and
- (4) 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 or the amount claimed to be due, if any."

SECTION 4.

Said part is further amended by revising subsection (a) of Code Section 44-14-364, relating to the release of lien on filing of bond, as follows:

33
34
35

- 6 -

"44-14-366.

(a) A right to claim a lien or to claim upon a bond may not be waived in advance of furnishing of labor, services, or materials. Any purported waiver or release of lien or bond claim or of this Code section executed or made in advance of furnishing of labor, services, or materials is null, void, and unenforceable.

(b) No oral or written statement by the claimant purporting to waive, release, impair, or otherwise adversely affect a lien or bond claim is enforceable or creates an estoppel or impairment of claim of lien or claim upon a bond unless:

(1) It is pursuant to a waiver and release form duly executed by claimant prescribed below; and

(2) The claimant has received payment for the claim as set forth in subsection (f) of this Code section.

(c) When a claimant is requested to execute a waiver and release in exchange for or in order to induce payment other than final payment, the waiver and release must follow substantially the following form, and the priority of such claimant's lien rights, except as to retention, shall upon such payment thereafter run from the day after the date specified in such Interim Waiver and Release upon Payment form:

INTERIM WAIVER AND RELEASE
UPON PAYMENT

STATE OF GEORGIA

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.)

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

8 Given under hand and seal this _____ day of _____, _____.

9 _____ (Seal)

10 _____
 11 _____
 12 (Witness)

13 _____
 14 (Address)

15 NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL
 16 BE CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT
 17 STATED ABOVE, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH
 18 PAYMENT, 60 DAYS AFTER THE DATE STATED ABOVE UNLESS YOU FILE
 19 EITHER AN AFFIDAVIT OF NONPAYMENT OR A CLAIM OF LIEN PRIOR TO
 20 THE EXPIRATION OF SUCH 60 DAY PERIOD. THE FAILURE TO INCLUDE THIS
 21 NOTICE LANGUAGE ON THE FACE OF THE FORM SHALL RENDER THE FORM
 22 UNENFORCEABLE AND INVALID AS A WAIVER AND RELEASE UNDER
 23 O.C.G.A. SECTION 44-14-366.'

24 Provided, however, that the failure to correctly complete any of the blank spaces in the
 25 above form shall not invalidate said form so long as the subject matter of said release may
 26 reasonably be determined.

27 (d) When a claimant is requested to execute a waiver and release in exchange for or in
 28 order to induce payment making of final payment, the waiver and release must follow
 29 substantially the following form:

30 ~~UNCONDITIONAL~~ WAIVER AND RELEASE
 31 UPON FINAL PAYMENT

32 STATE OF GEORGIA

33 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 ~~or any right against any labor and/or~~
~~material bond~~ 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.

Given under hand and seal this _____ day of _____, _____.

 _____ (Seal)

 (Witness)

 (Address)

NOTICE: ~~THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND~~
~~STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS~~
~~DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU~~
~~HAVE NOT BEEN PAID. IF YOU HAVE NOT YET BEEN PAID, USE A~~
~~CONDITIONAL RELEASE FORM. 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 SUCH PAYMENT, 60 DAYS AFTER THE DATE STATED
ABOVE UNLESS YOU FILE EITHER AN AFFIDAVIT OF NONPAYMENT OR A
CLAIM OF LIEN PRIOR TO THE EXPIRATION OF SUCH 60 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 O.C.G.A. SECTION 44-14-366.'

Provided, however, that the failure to correctly complete any of the blank spaces in the above form shall not invalidate said form so long as the subject matter of said release may reasonably be determined.

(e) Nothing contained in this Code section shall affect:

(1) The enforceability of any subordination of lien rights by a potential lien claimant to the rights of any other party which may have or acquire an interest in all or any part of the real estate, factories, railroads, or other property for which the potential lien claimant has furnished labor, services, or material, even though such subordination is entered into in advance of furnishing labor, services, or material and even though the claimant has not actually received payment in full for its claim;

(2) The enforceability of any waiver of lien rights given in connection with the settlement of a bona fide dispute concerning the amount due the lien claimant for labor, services, or material which have already been furnished;

(3) The validity of a cancellation or release of a recorded claim of lien or preliminary notice of lien rights; or

(4) The provisions of paragraph (2) of subsection (a) of Code Section 44-14-361.2, paragraphs (3) and (4) of subsection (a) and subsections (b) and (c) of Code Section 44-14-361.4, or Code Section 44-14-364.

(f)(1) When a waiver and release provided for in this Code section is executed by the claimant, it shall be binding against the claimant for all purposes, subject only to payment in full of the amount set forth in the waiver and release.

(2) Such amounts shall conclusively be deemed paid in full upon the earliest to occur of:

(A) Actual receipt of funds;

(B) Execution by the claimant of a separate written acknowledgment of payment in full; or

(C) ~~Thirty~~ Sixty days after the date of the execution of the waiver and release, unless prior to the expiration of said ~~30~~ 60 day period the claimant files a claim of lien or files in the county in which the property is located an Affidavit of Nonpayment, using substantially the following form:

'AFFIDAVIT OF NONPAYMENT UNDER
O.C.G.A. SECTION 44-14-366

STATE OF GEORGIA

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 O.C.G.A. Section 44-14-366 the undersigned executed a lien waiver and
 release with respect to this property dated _____, _____. The amount set
 forth in said waiver and release (\$_____) has not been paid, and the undersigned
 hereby gives notice of such nonpayment.

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

 (SEAL)

Claimant's Signature

Sworn to and executed
 in the presence of:

 Witness

 Notary Public

Within seven 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. If the filing party is not in privity of contract with the property
 owner and a Notice of Commencement is filed for the improvement on the property for
 which the filing party's labor, services, or materials were furnished, a copy of the

17 **SECTION 6.**
18 Said part is further amended by revising Code Section 44-14-367, relating to notice regarding
19 the process to void liens not perfected by statute, in its entirety as follows:

20 "44-14-367.
21 Failure of a lien claimant to commence a lien action to collect the amount of his or her
22 claim within 365 days from the date of filing the lien, or failure of the lien claimant to file
23 the statutory notice of commencement in the county where the property is located, renders
24 the claim of lien unenforceable. A claim of lien may be disregarded if no notice of
25 commencement was filed within 395 days from the date the claim of lien was filed. Any
26 lien filed after March 31, 2009, shall include on the face of the lien the following statement
27 in at least 12 point bold font: 'This claim of lien expires and is void 395 days from the date
28 of filing of the claim of lien if no Notice of Commencement is filed in that time period.'
29 However, failure to include such language shall not invalidate the lien or prevent it from
30 being filed. No release or voiding of such liens shall be required. A lien shall expire
31 sooner and be disregarded once it is determined that no notice of commencement was
32 timely filed in response to a notice of contest pursuant to Code Section 44-14-368."

33 **SECTION 7.**
34 Said part is further amended by inserting new Code sections to read as follows:

"44-14-368.

(a) An owner or an owner's agent or attorney, or the contractor or contractor's agent or attorney, may elect to shorten the time prescribed in which to commence a lien action to enforce any claim of lien by recording in the superior court clerk's office a notice in substantially the following form, with the bold face type in at least 12 point font, along with proof of delivery upon the lien claimant:

'NOTICE OF CONTEST OF LIEN

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, Georgia, against property owned by _____, and that the time within which you may commence a lien action to enforce your lien is limited to 60 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 lien action for recovery of the amount of the lien claim pursuant to O.C.G.A. Section 44-14-361.1 within 60 days from receipt of this notice; and (2) file a Notice of Commencement within 30 days of filing the above-referenced lien action.

Signed: _____

(Owner, Contractor, Agent or Attorney)'

(b) The clerk of the superior court shall cross-reference the notice of contest of lien to the lien. The owner or his or her agent or attorney, or the contractor or his or her agent or attorney, shall send a copy of the notice of contest of lien within seven days of filing by registered or certified mail or statutory overnight delivery to the lien claimant at the address noted on the face of the lien. Service shall be deemed complete upon mailing.

(c) The lien shall be extinguished by law 90 days after the filing of the notice of contest of lien if no notice of commencement is filed in that time period. No release or voiding of such liens shall be required. This subsection shall not be construed to extend the time in which a lien action must begin.

44-14-369.

For the purposes of this part, the computation of time shall be determined pursuant to paragraph (3) of subsection (d) of Code Section 1-3-1."

This Act shall become effective on March 31, 2009.

All laws and parts of laws in conflict with this Act are repealed.

**FINAL REPORT
OF THE
SENATE LIEN LAW STUDY COMMITTEE**

ATTACHMENT B

LIEN MEMORANDUM
Subcommittee on Residential Liens
Lien Law Advisory Board

By: Jim Busch, Chair of Subcommittee

Re: Subcommittee Conclusions for Presentation to
Lien Law Study Committee Nov. 8, 2007

Subcommittee Members:

Deron Hicks	Home Builders Association of Georgia
Ann Infinger	Office of Consumer Affairs
Steve Jordan	Georgia Real Estate Investors Association (GaReia)
Steve Neff	Survey and Mapping Society of Georgia
Brandi Shockley	Walker Concrete
Vernon Thomas	American Subcontractors Association
Tim Kibler	Georgia Association of Realtors
John Guest	Carson Guest (interior designers)
Barbara Lynn Howell	Construction Suppliers Association
Dayna Sondervan	Georgia Lien Rights Coalition
Charlotte Gattis	Georgia Manufactured Housing Association

INTRODUCTION

This subcommittee discussed the following topics related to residential liens: 1) the misallocation of funds by home builders, 2) the education of consumers 3) a notice to owner prior to filing a claim of lien, and 4) the overall purpose and success of Georgia's existing lien laws.

1. MISALLOCATION OF FUNDS BY HOME BUILDERS

Liens on their face are not the problem. Residential Homebuilders who do not pay their debt which in turn results in liens being filed against real property is the problem. How do we encourage the payment of legitimate debts and there by reduce the number of liens is an important question all should consider.

The misallocation of funds by home builders accounts for the vast majority of liens, since nearly three-fourths of all liens are filed against new homes owned by home builders. Two major problems in the home building industry regularly go unaddressed: it is a crime to sign a false affidavit of payment, and a major problem to not pay subcontractors and suppliers from the loan funds provided for that purpose. Evidence of these issues abounds, and can be seen in the high numbers of liens and foreclosures against home builders. Each lien and each foreclosure represents a claim of unpaid debt.

Public records show that home builders that are financially responsible -- such as Centex, Pulte, and John Weiland -- have very few liens filed against their properties, and virtually no foreclosures. On the other hand, home builders that are not financially responsible have lots of liens and foreclosures against them, with 10% of all liens being wiped out by foreclosures of construction loans. Often what happens is these home builders wind up going out of business, then re-opening under another company name.

This subcommittee considered a variety of ways to make home builders be more financially responsible. After much discussion, the subcommittee concluded that there is already a development on the horizon that will address this concern. In 2008 new contractor licensing laws will go into effect, requiring that home builders be licensed in Georgia for the first time ever. To become licensed and stay licensed, they will need to demonstrate financial responsibility. If they fail in this regard after becoming licensed, then they will face consequences, and possibly lose their license and be unable to renew it.

The licensing laws have yet to take effect, but when they do they are likely to weed out the home builders who cause so many liens through misallocation of funds. This subcommittee therefore recommends that we allow new licensing laws to take effect before implementing allows new laws to address this concern.

2. EDUCATION OF CONSUMERS

The second concern discussed by this subcommittee is the rare occasion when a lien gets filed against an existing home and the individual homeowner. Liens against existing homes account for only 4% of all liens in metro Atlanta, and many of these are possibly liens that are filed by the contractor. However, there are also liens that get filed from time to time by a supplier or subcontractor whom the owner did not even know about. This can happen after the owner pays the contractor for services. Once again, the fault here lies with the contractor misallocating funds. The question here is: How can we inform homeowners about lien laws to help them avoid liens, know who is working on the house, and ensure that the contractor properly allocates funds?

This subcommittee has concluded that plenty of remedies already exist in the current laws, if only the homeowner knew about these remedies. Also, the new contractor licensing laws will provide yet another remedy, allowing the owner to complain to the licensing board about a contractor misallocating funds. This subcommittee concluded that using a website was by far the most effective means possible.

The Office of Consumer Affairs is currently in the process of creating a new website for consumers that will cover the topic of liens. What's more, the OCA plans to partner with other associations related to real estate and construction to promote the website and steer consumers to it for information. This subcommittee therefore recommends that we allow the positive effects this website has on consumer education concerning liens, prior to deciding whether to legally mandate anymore educational approaches.

3. IMPROPER LIENS

While not directly under this subcommittee scope of review the topic of improper liens has been repeatedly discussed by this subcommittee. After these numerous discussions this subcommittee is in agreement with Chad Reeds subcommittee the solution to this problem is to follow what the State of Florida has done and afford consumers with the ability to contest a lien in writing and thereby place a burden on the claimant to attempt to perfect their claim of lien within 60 days or have their claim of lien declared invalid.

4. NOTICE OF OWNER

This subcommittee discussed various proposals that would provide some preliminary notice to a property owner prior to the filing of a claim of lien. While this proposal was generally deemed to be good conceptually there quickly appeared numerous problems with actually implementing the concept.

These complications included when should the notice be sent, how was owners address information going to be obtained, the burden sending potentially thousands of notices per month places on suppliers, and did the notice truly improve the property owners position.

This subcommittee determined that while this proposal conceptually had merit implementing the proposal proves to be complicated and burdensome to recommend.

5. PURPOSE AND SUCCESS OF LIEN LAWS

It should be noted that this subcommittee also discussed whether it should be more difficult to file liens, as another approach to reducing the numbers of liens that get filed. It was decided that this would only suffocate the construction industry and the economy in general, and do nothing to solve the problem of unpaid debts. Liens exist for the public good, because they encourage growth and development by offering some protection to those who finance construction through the sale of materials and labor on credit. Considering that growth in metro Atlanta has topped the nation for about 15 years, the lien laws are clearly working effectively to achieve their purpose. If the lien laws were weakened to a point of being ineffective to offer any protection and help in getting paid, then those who supply materials and labor would tighten up their credit requirements, shipping goods on COD and requiring payment up front for labor. Development and growth would be severely slowed, taking away jobs and hurting the industry as a whole and hence the Georgia economy.

The construction industry is a direct contributor to Georgia's economic health. Anything that adversely affects the construction industry will adversely affect the state as a whole, and every person and business in it. This is another reason we feel the public interest in liens outweighs the possible inconvenience to an individual property owner.

Particularly in light of the fact that property owners currently have protections under the law.

This subcommittee believes that the new contractor licensing laws and the new website by the Office of Consumer Affairs as well as the recommendations of the other subcommittee, sufficient address the interest of all parties with respect to claims of lien.

CONCLUSION

The positive impacts of the new contractor licensing laws and the new Office of Consumer Affairs website -- coupled with the improvements to the lien laws recommended by other subcommittees -- should eliminate the need to do anything further to deal with residential liens. It is this sub committee's strong recommendation that the new contractor licensing laws and the new office of Consumer Affairs Website be given an opportunity to impact liens in Georgia before any additional action is taken.

**FINAL REPORT
OF THE
SENATE LIEN LAW STUDY COMMITTEE**

ATTACHMENT C



HENDRICK PHILLIPS
SALZMAN & FLATT^{PC}
ATTORNEYS AT LAW

MEMORANDUM

TO: GEORGIA LIEN LAW REVISION ADVISORY COMMITTEE
FROM: DAVID R. HENDRICK / FRANK RIGGS
DATE: NOVEMBER 30, 2007
SUBJECT: SUBCOMMITTEE REPORT AND RECOMMENDATIONS

I. INTRODUCTION

On behalf of our Subcommittee, we set forth below our recommendations and supporting comments and analyses regarding our assigned aspects of the Georgia Mechanic's and Materialman's Lien Law, O.C.G.A. §§ 44-14-361 through 44-14-367.¹ These recommendations are discussed below in the order of significance and priority, in the judgment of the Subcommittee.

Generally, our approach for recommending any changes or modifications has been cautious – that is: “If it ain’t broke, it don’t need fixing”. The lien law is very complicated and complex and has evolved over many decades of legislative tinkering and judicial interpretation. Even our appellate courts, struggling to interpret and apply the lien law have observed that such an effort was essentially the same as being “cast into the thicket caused by” a round of amendments enacted over 40 years ago.² That being said, and as archaic and complex as it is, the current form of the lien law is mostly functional and understood by practitioners (at least in the commercial setting). After decades of judicial interpretation, we generally know what the law requires of all parties involved. Consequently, without further perceived need or direction, we are reluctant to consider and propose wholesale revisions of entire structure or even tweaking the existing statute just “to make it better”. Proposing extensive, or even minor, alterations of the lien statute is akin to opening up “Pandora’s box”, since every action has a reaction affecting the delicate balance among the stakeholders and interested parties. Thus, we modify the existing

¹ . Particularly, we were tasked with reviewing the following areas: (1) Tenant Improvement Lien Claims; (2) Statutory Lien Waiver Forms; (3) Statutory Presumptions; (4) Statutory Affidavit of Nonpayment; (5) Satisfaction and Release of Lien Claims; (6) Lien Discharge Bonds; (7) Statutory Procedure for Commencing Action to Enforce Lien; and (8) Sworn Statements and Affidavits of Full Payment by Owner's and Contractors and the Resulting Dissolution of Un-filed Lien Claims.

² **Error! Main Document Only.** See, *Adair Mortgage Co. v. Allied Concrete Enterprise*, 144 Ga. App. 354, 355, 241 S.E. 2d 267, 268 (1977). And, that was before two later rounds of further significant amendments, the complicating effects of which we are still struggling with today.

Memorandum to
January 16, 2008

structure at our peril and only to the extent necessary to remedy a specific problem and only as much as necessary.

II. LIEN WAIVER ISSUES.

Because of their interrelationship and the fact that they all derive out of the same Code Section, O.C.G.A. § 44-14-366, this Section will consolidate the recommendations regarding (1) Statutory Lien Waiver Forms, (2) Statutory Presumptions and (3) Statutory Affidavit of Nonpayment issues.

(a) BACKGROUND.

Georgia Code Section 44-14-366 regarding “Waiver and release of lien and bond [i.e. payment bond] rights” was enacted in 1991 as an entirely new and laudable addition to the lien law. There was no analogous provision in the prior versions of the lien statute which, in substance, expressly sought to effect two significant “public policy” derived limitations of “lien waivers”, namely:

- (a) **A preclusion of prospective waiver or release of lien or payment bond rights, i.e. waiver “in advance of furnishing of labor, services, or materials” (§ 44-14-366(a))**
- (b) **A requirement that, in order to be enforceable, any such waiver or release of lien or bond must be in exchange for and conditioned upon receipt of corresponding payment (§ 44-14-366(b)(2)).**

While these objectives, in concept, were clear and understandable, difficulties have been subsequently experienced from the remainder of the language of the Section dealing with prescription and application of mandatory statutory waiver forms and their conditional payment status, theoretically to implement these simple objectives. In this regard, the Section provided that such **waiver and release can only be accomplished by way of use of waiver forms which “follow substantially” the two statutory forms:**

- (a) The **“Interim Waiver and Release Upon Payment”** form generally “in exchange for or in order to induce payment *other than final payment*” (i.e. “progress payments”) (Emphasis added) (§ 44-14-366(c)); and
- (b) The **“Unconditional Waiver and Release Upon Final Payment”** form generally “in exchange for or in order to induce payment of *final payment*” (Emphasis added) (§44-14-366(d)).

There has been little judicial interpretation or application of this Section by Georgia appellate courts.

(b) THE FIRST PROBLEM - THE “PRESUMPTION OF PAYMENT” REGARDING THE INTERIM WAIVER FORM (§ 44-14-366 (c) AND (f))

CONFIDENTIAL/ATTORNEY WORK PRODUCT

PAGE 2 OF 16

(1) Background and Nature of Problem

The clearly expressed purpose of this statute was to assure that waivers of lien or bond rights were to be “conditional” and, thus, effectual only upon actual receipt by the waiving party of actual corresponding payment. The title of the “Interim” form indicates that the waiver and release is expressly “upon payment” and the text of the form reaffirms this conditional nature by stating that the waiver and release is “[u]pon the receipt of the sum of \$ _____” which is the amount for which interim progress payment is requested by the potential lien or bond claimant. See § 44-14-366 (c). This concept of waiver only conditional upon receipt of payment is further emphasized by Subsection (b) stating that “[n]o . . . statement by the claimant purporting to waive, release, impair, or otherwise adversely affect a lien or bond claim is enforceable or creates an estoppel or impairment of claim of lien or claim upon a bond unless: . . . (2) The claimant has received payment for the claim as set forth in subsection (f) of this Code section.” Subsection (f) (1) reaffirms this “conditional” concept, asserting that: “[w]hen a waiver and release provided for in this Code section is executed by the claimant, it shall be binding against the claimant for all purposes, subject only to payment in full of the amount set forth in the waiver and release.”

However, this “conditional” character of the waiver and release is subtly but effectively countermanded by the qualifying language buried deep in the last subpart of this last Subsection, namely § 44-14-366 (f) (2), which states, in pertinent part, that:

(2) Such amounts shall conclusively be deemed paid in full upon the earliest to occur of:

(A) Actual receipt of funds;

(B) Execution by the claimant of a separate written acknowledgment of payment in full; or

(C) Thirty days after the date of the execution of the waiver and release, unless prior to the expiration of said 30 day period the claimant files a claim of lien or files in the county in which the property is located an Affidavit of Nonpayment, using substantially the following form: [AFFIDAVIT FORM OMITTED] (Emphasis added).

This language effects waiver and release of lien and payment bond rights upon expiration of this 30 day period irrespective of actual receipt of payment. To understand the practical problems and risks posed to the participants in the construction industry by this “conclusive” presumption of receipt of payment after this 30 day period, one must understand the typical payment cycle for interim progress payments. Interim progress payments are typically provided by contract to occur on a monthly basis. In order to prepare its monthly progress payment application for submission to the owner, the prime general contractor must receive applications for the corresponding period from its subcontractors, who must similarly receive corresponding applications from the lower tier subcontractors and suppliers.

With each application at each lower tier, the subcontractors and suppliers are also generally required to submit the statutory “Interim Waiver and Release of Lien Upon Payment”

forms relative to such payment period and corresponding in amount to the amounts requested for payment. Among many, if not most participants in the construction industry, execution and submission of such forms as a part of the routine application for payment process is generally not perceived to pose any risk of inadvertent waiver because the forms, on their face, are explicitly “conditional” upon receipt of payment. These subcontractor and supplier “Interim” waiver forms are then assembled and submitted by the prime contractor, together with its own statutory “Interim” waiver form, to the owner at about the end of every month. Then, depending upon contract terms and practical considerations, the Owner generally has 20 to 25 days – or longer³ - after submission of the application to make payment under the prime contract. Again depending upon the payment terms of the successive lower tier subcontracts and agreements, each lower tier will likely then not be entitled to payment until 7 to 15 days after actual receipt of payment by the upper tier contractor of corresponding funds (known as “pay-if-paid” or “pay-when-paid” contract payment terms).

As this plays out, the prime contractor may not even be entitled to expect payment until 20 days or longer after the submission of the progress payment application, and then the best case for the subcontractors at any tier would be that they are not entitled to payment until longer than 30 days after the submission of their application - and lien waiver forms- for the corresponding period. Thus, almost all parties are at risk every time they submit an application for payment, supported by an executed “Interim” waiver form, that the nominally “conditional” waiver forms will have been executed and submitted more than 30 days before actual payment flows to them. Thus, irrespective of whether payment has actually is eventually received, the lien claimant will have been “conclusively . . . deemed paid in full” upon the expiration of the 30 day period. Of course, upon such “deemed” payment, the condition of the waiver has been satisfied and the waiver of lien and bond rights accomplished. If the delayed payment is then never received, the corresponding lien and bond rights will nevertheless have been waived.

The only way to avoid such inadvertent waiver of lien and bond rights upon such “deemed” payment under the current statutory scheme is to have filed of record an “**Affidavit of Nonpayment**” in statutory form within that 30 day period after the giving of the executed waiver form. Such Affidavit filing typically causes considerable confusion and accounting complications, as well as unnecessary dispute and paranoia (unnecessary because all parties may well be acting within their contract payment schedules and terms). Further, upon receipt of payment, the claimant filing such an “Affidavit of Nonpayment” would, upon receipt of a request for filing of an acknowledgement of payment of the corresponding amounts, have to file yet another sworn statement. And all of this would be required for all potential lien claimants (contractors, subcontractors and suppliers) for whom the normal contractual cycle of payment

³ While the Georgia Prompt Payment Act, O.C.G.A. §§ 13-11-1 through 11, provides for payment at the prime contract level within 15 days of application, and then successively each lower tier of subcontractors or suppliers within 10 days of receipt of the upper tier party of corresponding payment, according to the express terms of this statute, any conflicting contractual payment terms setting a longer time for payment will supersede and govern. And, even if the statutory sequence were to be pursued, the second tier subcontractors would not be entitled to receive payment for 35 days (15 + 10 + 10 days) after submission of the prime contract application (including the lien waivers from all tiers).

extends to 30 days or longer. affected parties The only reason this “doomsday” scenario does not occur on virtually every construction project is that most participants are oblivious of this statutory provision deeming them conclusively paid and effectively making their waivers effectual after the passage of the 30 day period, and, as they say, ignorance is bliss.

(2) *The Proposed Solutions*

- (A) Change the period for “conclusively . . . deemed” payment in Subpart 44-14-366 (f) (2) (C) from thirty (30) days to sixty (60) days. This duration would accommodate most of the contractual payment cycles encountered in the construction industry since even lower tier subcontractors awaiting payment under a “pay-if-paid” relationship will usually be entitled to receive and have actually received payment within such time frame. Indeed, if payment has not been received within 60 days then most contractors or subcontractors will already be on heightened alert regarding payment and more likely to be concerned about preserving and protecting their lien rights.

Yet, it will still eventually afford, in 60 days rather than the current 30 days, a conclusive presumption of payment. This will give effect to the waiver and release regarding work performed within the application payment period and waiver amount, unless an Affidavit of Nonpayment is filed and transmitted to the owner and contractor. This seems to suitably protect and serve the interests of all parties involved.

Finally, we recommend an additional minor edit to clarify the point in time from which such period commences to run. The clock should not commence to run until an executed waiver from has actually been submitted to the upstream party from whom payment is requested.

As modified per this recommendation, this provision would read as follows:

(C) Sixty ~~Thirty~~ days after the date of the submission of an executed wavier and release to the party from whom payment is requested, unless prior to the expiration of said 60 ~~30~~ day period the claimant files a claim of lien or files in the county in which the property is located an Affidavit of Nonpayment, using substantially the following form:

- (B) To assure that all parties actually are aware of the conclusive statutory presumption of payment after passage of the sixty days, we recommend requiring a bold face NOTICE (similar in format and nature to the one currently specified for the “Unconditional” waiver form (§ 44-14-366 (d))). A recommended form of such “Notice” is:

NOTICE: WHEN YOU EXECUTE AND SUBMIT THIS DOCUMENT, YOU SHALL BE CONCLUSIVELY DEEMED TO HAVE BEEN PAID IN FULL THE AMOUNT STATED HEREIN, EVEN IF YOU HAVE NOT ACTUALLY RECEIVED SUCH PAYMENT, UPON THE PASSAGE OF SIXTY (60) DAYS AFTER THE SUBMISSION OF THIS DOCUMENT TO THE PARTY FROM WHOM PAYMENT IS

REQUESTED, UNLESS YOU FILE AN AFFIDAVIT OF NONPAYMENT PRIOR TO EXPIRATION OF SUCH 60 DAY PERIOD.

Additionally, in order to emphasize and enforce this "Notice" requirement regarding lien waiver forms, we recommend further modification of the text of that Subsection, immediately following the "Notice" form specification as follows:

Provided, however, that (1) the failure to include the Notice language on the face of the above form shall render the form ineffectual and invalid as a waiver and release under this Section, and (2) the failure to correctly complete any of the blank spaces in the above form shall not invalidate said form so long as the subject matter of said release may reasonably be determined.

- (C) Expressly provide that, in the event of the filing of such an "Affidavit of Nonpayment" pursuant to § 44-14-366 (f) (2) (C), a copy of the affidavit shall be transmitted to the owner and, where appropriate, to the contractor as well. The recommended insertion (drawn substantially from the language currently employed in § 44-14-361.1 (a) (2) regarding the filing of lien claims) at the end of § 44-14-366 (f) (2) (C) is:

Within seven (7) days of filing for record of an Affidavit of Nonpayment, the claimant shall send a copy of the Affidavit by registered or certified mail or statutory overnight delivery to the owner of the property and, where the lien claimant is not in privity of contract with the owner and a Notice of Commencement has been filed relative to the improvement on the property for which the lien claimant's labor, services or materials were furnished, to the contractor."

While this admittedly adds yet another procedural step - and trap for the unwary lien claimant, this device is only to be used in the relatively infrequent situation (assuming the recommended modifications are adopted) in which payment is not received within the 60 day period after application. This in itself should warrant heightened awareness and vigilance, and due diligence, by the claimant in protecting its lien and bond rights. Such notice of Affidavit filing will provide the parties in control of the payment flow important information regarding any significant payment flow problems (i. e., more than 60 days delay) experienced by the lower tier subcontractors and suppliers. This prompt notice of payment delays will permit the upper tier parties an opportunity for exercising contractual and other recourse to effect full and proper payment flow to the lower tiers. The mere act of filing an Affidavit of Nonpayment, without giving actual notice of such filing, does not itself assure that the owner, and the contractor, will become aware of such payment flow problems in time to address them. Requiring that notice of such filing be given to the owner and contractor will inform them of such claims. Any additional burden on the lower tier subcontractors and suppliers is more than offset by the consequential benefits of facilitating remedy of the payment problems without need for formal lien claim filing. An unpaid lower tier subcontractor or supplier will greatly increase the likelihood of payment without need for filing and prosecution of a lien claim

when the both the general contractor and owner are aware of the problems regarding payment flow. The seven day period allowed for transmission of such notice is reasonable (compare, e.g § 44-14-361.3 (b)).

Further, requiring notification of Affidavit filing of both the owner and the contractor the authors submit that: (1) if notice must be sent to one party, adding another adds little burden, (2) the difficulties of identifying the “contractor” is no greater (and we submit is often easier) than with the “owner”, particularly where a Notice of Commencement has been filed, (3) effecting remedy of the payment flow stoppage is more likely if both the contractor and the owner are made aware of it, and (4) there are already at least one provision of the lien law which requires that identification of the “contractor” and that notices be sent “to the contractor” (e.g § 44-14-361.3 (a) and (b), § 44-14-361.5 (a) and (c)). Thus, the prime contractor can assure that it will receive all notice transmissions on a project by properly filing a Notice of Commencement identifying the recipients and their addressees.⁴

- (D) Also, to make the statutory “Interim” waiver form language (§ 44-14-366 (c)) consistent with the existing statutory text clearly indicating that the statutory waivers should encompass both “lien” rights and “bond” rights, as well as to bring it in line with the existing text of the “Unconditional” waiver form (§ 44-14-366 (d)), it is recommended that the language “or any rights against any labor and/or material bond,” be inserted in the “Interim” waiver form after “described property”. As modified, the pertinent portion of the Interim waiver form would read as follows:

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, 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.

- (E) Finally while unrelated specifically to the presumed payment issue, if this provision is going to be amended, it should be considered whether to clarify the intent and affect of the “Interim” waiver form by modifying the language of § 44-14-366 (c) to expressly

⁴ As an aside, we note that the existing requirements for transmission of notice lien filing “to the owner of the property or the contractor, as the agent of the owner” (e.g. § 44-14-361.1 (a) (2)), is predicated upon an incorrect view of the legal and practical relationship of the owner and the contractor. The “contractor” is generally an independent contractor with and not an “agent” of the owner. Indeed, if the concept embodied in the existing text is that the “contractor,” as an “agent” of the owner, will pass along any such notices to the owner, it is a fiction since generally the last thing a contractor wants to tell an owner is that one of its subcontractors or suppliers has filed a lien claim. The person who really needs to know of the filing of such a lien as soon as possible, in order to protect its interests, is the owner. If that is true, then the notice should be required to go to the owner directly and not through the contractor on the basis of a fictional “agency” relationship.

state that the effect on lien priority is not invoked until payment and effectuation of the waiver. This would read as follows:

(c) When a claimant is requested to execute a waiver and release in exchange for or in order to induce payment other than final payment, the waiver and release must follow substantially the following form, and the priority of such claimant's lien rights, except as to retention, shall upon such payment thereafter run from the day after the date specified in such Interim Waiver and Release upon Payment form:

(F) See Attachment "A" showing Section 44-14-366 with all recommended changes inserted in tracked format

(c) THE SECOND PROBLEM - THE "UNCONDITIONAL" WAIVERS UPON FINAL PAYMENT (§ 44-14-366 (d) AND (f))

(1) Background and Nature of Problem

The statutory "Unconditional Waiver and Release Upon Final Payment" form specified in O.C.G.A. § 44-14-366 (d) presents several problems arising primarily out of its conflicting terminology indicating that it is, on the one hand, "conditional" upon receipt of payment and, on the other hand, "unconditional" upon execution. This ambiguous and schizophrenic character creates unnecessary and, we believe, unintended risk and confusion regarding its use and application. For example:

As previously discussed, the overall tenor and import of Section 44-14-366 is to condition any lien or bond waiver and release upon payment of the amount requested for payment – either regarding an interim progress payment or a final payment. Specifically:

- (a) Subpart (b) (2) clearly applies to ALL waiver forms and "conditions" the waiver and release upon receipt of payment: i.e. "No oral or written statement by the claimant purporting to waive, release, impair, or otherwise adversely affect a lien or bond claim is enforceable or creates an estoppel or impairment of claim of lien or claim upon a bond unless: . . . (2) The claimant **has received payment for the claim** as set forth in subsection (f) of this Code section.
- (b) Subpart (f) (1) also applies to all waivers and releases "provided for in this Code section" in providing that such waiver, whether regarding interim or final payments, "shall be binding against the claimant [giving the waiver] for all purposes, **subject only to payment in full** of the amount set forth in the waiver and release" (emphasis added).
- (c) Subpart (f) (2), again purportedly applicable to all waivers under Section 366, provides that waiver upon payment of "such amounts", whether interim progress

payment or final payment, turns on the concept of when such amounts were **“paid in full”**.

- (d) Subpart (d) prescribes the form to be employed when a claimant “is requested to execute a waiver and release **in exchange for or in order to induce payment of final payment**” (emphasis added), again suggesting that the waiver form is contemplated in some instances to be given in advance of and for the purpose of inducing such final payment. (Emphasis added).
- (e) The text in the body of the waiver form specified in Subpart (d), that the waiver and release is to be **“[u]pon receipt of \$ _____,”** (emphasis added) clearly indicates an intention that the waiver is to be conditional upon such payment in the same manner of the “Interim” waiver form in Subpart (c), discussed above.

However, the bold faced text in the title and the footer of this waiver form relative to final payment clearly is inconsistent and contradictory of the “conditional” nature of the waiver form. The title states unequivocally that this waiver form is **“UNCONDITIONAL”**. (although the title to the form also states that it is effective “UPON FINAL PAYMENT,” again suggesting a “conditional” waiver). More critically, the bold face “NOTICE” specified at the bottom of this statutorily prescribed waiver form is unequivocal in noting that **“THIS DOCUMENT WAIVES RIGHTS UNCONDITONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT YET BEEN PAID. IF YOU HAVE NOT YET BEEN PAID, USE A CONDITONAL RELEASE FORM.”** Such language is unequivocal in indicating that waiver and release of lien and bond rights under this form occurs upon its execution regardless of whether the claimant has been, or is ever paid the final payment requested.

If this statement in the Notice were correct in its intended import, then the Affidavit of Nonpayment” mechanism set forth in Subpart (f)(2) of this Section 366 would simply not apply since whether a potential line claimant is deemed paid after the passage of the specified period of time is simply irrelevant to the effectiveness of this “unconditional” waiver and release. At best, this presents a significant risk to the lien claimant that, notwithstanding the contrary statutory indications of intent that waiver forms under Section 44-14-366 are to be only “conditional” upon payment, this form could easily be judicially interpreted to be, as its title and notice indicates, as “unconditional” and effecting waiver immediately upon execution irrespective of receipt of payment. In such a case, then lien rights could not be rescued by use of the “Affidavit of Payment” under Subpart (f) of this Section, since payment or nonpayment is irrelevant to the waiver becoming effectual.

This problem is exacerbated by the current industry practice in which owners generally require of their contractors and contractors of their subcontractors the submission of this statutory “Unconditional” waiver form as a part of the application for final payment and indeed as a precondition of even processing such a final payment application. Thus, owner’s are effectively requiring contractors to waive all lien and bond rights unconditionally, using this

waiver form for “Final Payment,” as a precondition to entitlement to receive final payment. In turn, since most subcontract relationships provide that the subcontractor is not entitled to receive payment until the contractor has received corresponding payment from the owner, subcontractors are also being required to unconditionally release their lien and bond rights as a precondition to entitlement to receive the final payment. Since Contractors are generally not required to advance payment to the subcontractor prior to receipt of the corresponding payment from the owner, and are understandably reluctant to do so, the requirement of use of the “unconditional” waiver from requires waiver of lien and bond rights irrespective or and prior to actual receipt of such final payment – which is directly contrary to the stated purpose of the entire waiver provisions of Section 366. While the NOTICE portion of the “Unconditional” waiver form specified by Subpart (d) does explicitly state that “IF YOU HAVE NOT YET BEEN PAID, USE A CONDITIONAL RELEASE FORM”, few owners and contractors will actually accept such a “conditional” form (the only such form otherwise specified is the “Interim” waiver from under Subpart (c)) in conjunction with application for “final” payment. Thus, while such an interim conditional form could be effectual in waiving all lien and bond rights conditionally upon later receipt of payment, by capturing the entire period of performance in the stated period through which the waiver applies, it is generally not acceptable in the application for final payment regardless of this cautionary note. As a practical matter, owners and contractors want, and generally require, a waiver from relative to “final” and not “interim” payment, and the form specified in Subpart (d) is the only current option.

The solutions discussed below are suggested in order to eliminate this internal conflict and ambiguity and the resulting confusion and risk by either:

(1) Expressly making the statutory waiver and release form under § 44-14-366 (d) “conditional” upon actual receipt of final payment in accordance and consistent with the “Interim” conditional; waiver form in Subpart (c) and the general tenor of the entire Section 366; or nature its (i.e. OPTION “A”, below) or

(2) Amending the form in Subpart (d) and other portions of Section 366 to confirm that it is indeed intended unequivocally to be “unconditional” and to clarify the usage of the “conditional” form in Subpart (c) where the final payment has not yet been received (i.e. OPTION “B”, below.

(2) The Proposed Solutions – OPTION “A”

(A) Assuming the original intention, as indicated in all other parts of the Section, was to make lien and bond waiver forms only “conditional”, this waiver from must be amended to clarify and affirm that intention and effect. This would require

- (1) Modification of the title to read simply “WAIVER AND RELEASE UPON FINAL PAYMENT”, deleting the term “UNCONDITIONAL”
- (2) Deletion in its entirety the current “notice” specified for this form.

- (B) Further, in lieu of the current “Notice” content, once this form has modified to render it clearly “conditional” then the same “Notice” recommended in Part II(b)(2)(B), above, relative to the “Interim” waiver form should be used on this form also.
- (C) Since this would then bring this waiver form clearly within the operation of the Subpart (f) (2) (C) relative to the presumption of payment and the related Affidavit of Nonpayment procedures, it may be warranted to consider extending the period for final payment to seventy five (75) days for final payment (instead of the 60 days for interim progress payments) allowing for the typically longer period for implementation of final payment which include release of retainage. However, as a practical matter, since the time period for filing the claim of lien commences to run upon the date of the last contract work or furnishing of materials by the lien claimant, and not the date upon which such final payment is contractually due to be made under the prime contract, this issue may really only affect the prime contractor. By the time application for final payment is made at the prime contract level, many of the potential lower tier lien claimants (the subcontractors or suppliers) may already have to had filed their lien claims in order to meet the three month (or 90 days as one of the other Subcommittees has proposed as a revision) statutory timeframe for filing of their lien claim to preserve their rights..
- (D) Again, while perhaps reaching beyond the stated criteria for modification, if this provision is going to be “opened up” for purposes of amendment, it is recommended that for clarity purposes, as well as consistency with the corresponding text of the “Interim” waiver form, as modified per Part II (b) (2) (D) above, the language regarding the payment bond rights should be modified as shown below:

Upon the receipt of the sum of \$ _____, the mechanic and/or materialman waives and releases any and all liens or claims of liens ~~or any right against any labor and/or material bond~~ 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 building or premises.

- (E) See Attachment “A” showing Section 44-14-366 with all recommended changes inserted in tracked format

(2) *The Proposed Solutions – OPTION “B”*

- (A) Assuming the intention is to make this lien and bond waiver form truly “unconditional”, this waiver form must be amended to clarify and affirm that intention and effect. This would require

(1) Amendment of the introductory clause in Subpart (d) to read: