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No More Mechanic's Lien Waivers in Pennsylvania (sort of)

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NO MORE MECHANIC'S LIEN WAIVERS IN PENNSYLVANIA (SORT OF)

The Pennsylvania legislature has passed a law revising the Mechanics' Lien Law of 1963, declaring that as of January 1, 2007, a no-lien agreement is against public policy.

Under the previous Law a contractor or subcontractor could waive their rights to file a mechanics' lien claim against the property in a written instrument. Further, a contractor could waive the rights of its subcontractors so long as the subcontractors were provided notice before they provided labor or material on the real property. This was typically done by the filing of a no-lien agreement with the Prothonotary's office in the county in which the property was located.

The new law holds that such no-lien agreements are against public policy and will, beginning in 2007, be considered unlawful and void. The Act states that the amendments only apply to contracts entered into after the effective date of the Act; accordingly, no-lien waivers properly filed for contracts entered into prior to January 1, 2007 are still enforceable and are not impacted by the amendment.

Of course there are exceptions. The prohibition of not waiving lien rights does not apply to residential buildings. Residential buildings are defined by the Act as erection, construction, alteration or repair of a residential building, in which the total contract price between the owner and contractor is less than one million dollars. A residential building is defined as property on which there is a residential building or which is otherwise zoned for residential development, planned development or agricultural use or for which a residential subdivision has received an approval under the Pennsylvania Municipalities Planning Code.

A contractor may still have a subcontractor waive its lien rights against the property of a residential building regardless of contract price so long as the contractor has posted a payment bond guaranteeing payment for labor and materials.

Another important amendment is an expansion of the time required in which to perfect a claim from four months to six. While all the preliminary notices of a claim are still required for alterations and repairs and those of a subcontractor, this expansion provides additional time in which to perfect a claim in the event of non-payment.

As many of you are familiar, when a claim is filed, it relates back to the date of first visible commencement of on-site work. This relation back was sometimes important because gave a mechanics' lien priority over a secured lender when the mortgage was filed after that date. The amendments eliminate this possibility of a mechanics' lien taking such priority by specifically including language in the Act that states that a mechanics' lien is subordinate to a purchase money mortgage and an open-ended-mortgage when the proceeds of which are used to pay for all or a part of the cost of construction of the mortgaged property.

The amended Act still allows a lien wavier but only to the extent the lien waiver is given in consideration for payment of labor and materials that is actually received.

What are the immediate repercussions of the amendments to the Mechanics' Lien Law? In all likelihood, a sophisticated owner will take steps to determine from the contractor all of the subcontractors and material suppliers for a project and assure itself that the contractor is in fact making payments to subcontractors and material suppliers. This may take the form of joint check agreements or obtaining lien waivers for each and every payment made during the life of the project.

While the obvious reason for the amendments was to eliminate lien waivers, some of the operational aspects of the amendments will need court clarification before their operation is clear. Notwithstanding the amendments, construction participants must be mindful of the in and outs of the statutory requirements necessary to perfect a mechanics' lien.

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