

**DON'T WAIVE GOODBYE TO YOUR MONEY:
USING THE MECHANIC'S AND MATERIALMEN'S LAW TO LEAN LIEN ON
OWNERS**

By
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In Arkansas, and in many other states, an unpaid contractor or material supplier is given a right to be paid for services, labor, or material through the statutory imposition of a lien. This gives a contractor or material supplier an actual property interest in the project being financed. The statute has numerous hoops through which a contractor must jump and it pays to understand them and develop a compliance procedure before starting a job. Failure to comply with the line statutes waives the best chance a contractor has to securing repayment.

Arkansas law defines some of the parties entitled to a mechanic's or materialmen's lien as follows:

1. "Contractor" means any person who contracts orally or in writing directly with a person holding an interest in real estate, or such person's agent, for the construction of any improvement to or repair of real estate;
2. "Subcontractor" means any person who supplies labor or services pursuant to a contract with the contractor, or to a person in direct privity of contract with such person;
3. "Material supplier" means any person who supplies material, goods, fixtures or any other tangible item to the contractor or to a subcontractor, or any individual having direct contractual privity with such persons;
4. "Person" includes an individual, a partnership, a corporation, a limited liability organization, a trust, or any other business entity recognized by law.

In order to qualify for a lien for improvements under the mechanic's lien statute, the potential claimant must come within the class of persons described in the lien statute as entitled to a lien. The courts reject the right of a second tier⁰ lien claimant to a lien under Arkansas law. A third tier subcontractor does not supply labor or materials to a person having a direct contract with a contractor, or to a person who has a direct contract with a person who has a contract with a contractor. The reason behind such cases is that lien statutes are in derogation of the common law and are to be construed strictly since they provide an extraordinary remedy that is not available to every merchant or worker.

In order to obtain a valid lien, strict compliance with the lien statute is required. These requirements are as follows:

1. Ten days notice as provided by Arkansas Code Annotated section 18-44-114.
2. Pre-delivery notice, with language required by Arkansas Code Annotated section 18-44-115 being repeated verbatim. *NOTE: Arkansas Code Annotated section 18-44-115(e) requires a seventy-five day notice be given under certain circumstances. However, this notice must contain the exact language prescribed by the statute and must be delivered in the manner directed by the statute.*
3. The lien must be filed within one hundred twenty days of the day that the last work was performed or material was supplied to the relevant site.
4. The lien claimant has fifteen months from the date of the filing of the lien in which to institute lien foreclosure action. Failure to do so acts as a bar to further action on

the lien.

Any failure to give the notice required under the lien statute may result in the lien being declared invalid.

A mortgage securing repayment of a loan advanced to fund construction will have priority over any mechanic's and materialmen's liens. So, a materialman must ensure that sufficient loan funds exist to pay for materials. A payment and performance bond can also provide this assurance.

If and when the time comes for permanent refinancing of the construction loan, problems may arise as a result of any existing mechanic's and materialmen's liens. "Bonding off" the lien is a potential solution to that problem. If a valid lien is filed, an interested party has the right under Ark. Code Ann. § 18-44-118(a) to file a bond with the circuit clerk in double the amount of the lien claim. The bond removes the lien from the real estate and transfers the lien to the bond, thus removing cloud on title to the real property. In that event, the contracting parties once again are left to resolve their differences. The bond does, however, provide security for any payment to which the claimant may be entitled. The entire maintenance mechanic's lien statute and the problematic scenarios, which it may create for a construction lender and an owner, serve to further drive home the importance of construction documentation and the continued requirement, throughout the construction process of obtaining lien waivers/releases and affidavits of payments prior to disbursal of funds to contractors.

In Arkansas, the Supreme Court has distinguished between the obligations of common law bonds and the obligations of statutory bonds. The terms of a common law bond determine its coverage. The surety may extend or restrict its liability in any manner since the terms of the bond control. The Arkansas Supreme Court has followed the general rule that "A guarantor, like a surety, is a favorite of the law, and his liability is not to be extended by implication beyond the express limits or terms of the instrument or its plain intent." This rule has operated to defeat liability of a surety for attorney's fees, costs and interest, whether the principal paid the claims against it and the surety, but where the payment was made only after litigation was initiated against the surety company for payment. A guarantor, like a surety, is a favorite of the law, and his liability is not to be extended by implication beyond the express limits or terms of the instrument or its plain intent. This rule has operated to defeat liability of a surety for attorney's fees, costs and interest, whether the principal paid the claims against it and the surety, but where the payment was made only after litigation was initiated against the surety company for payment. Accordingly, a careful study of the terms and conditions of the surety bond must be examined and negotiated prior to execution, and certainly prior to making a successful claim for prompt or timely payment.

This type of bond serves the purpose of insuring that the work of the contractor will be completed, and that all subcontractors and suppliers will be paid, thus protecting the Owner from loss due to project abandonment or liability under the lien laws. However, as always, a careful examination of the language in the bond is crucial. Sureties do not enjoy paying on the bond any more than one would expect, and in preparing the bond language, it is safe to assume that its terms and conditions generally favor the surety. Therefore, compliance with the construction contract and the terms and conditions of the surety bond is a condition precedent to any successful claim made on such a bond. Furthermore, the statute of limitations in which one may bring an action on the statutory bond is relatively short. Arkansas Code Annotated Section 18-44-508 provides that no action shall be brought on the bond more than six months from the date

final payment is made on the contract, nor outside the State of Arkansas. Therefore, careful attention must be given to the final inspection of the project work.

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