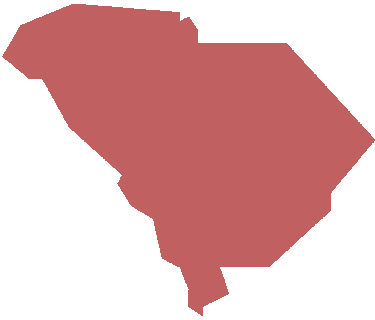


# SOUTH CAROLINA



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LIEN **LAW**  
ONLINE

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## TABLE OF CONTENTS

Frequently Asked Questions .....	1
Lien Law Basics .....	2
Property Subject to Lien Claims .....	2
Parties Entitled to Protection .....	3
Notice Requirements .....	3
Notice of Mechanic's Lien .....	4
Notice of Project Commencement.....	4
Notice of Furnishing Labor or Materials.....	5
Perfecting a Claim of Lien .....	6
Suit to Foreclose Mechanic's Lien .....	6
Procedures for Discharging Liens .....	6
Lien Waivers and Releases .....	7
Lien Priority Issues.....	7
Owner Defenses and Remedies .....	8
Lender Issues .....	8
Costs Includable in Lien Claims .....	9
Attorney Fees for Prevailing Party .....	9
Criminal or Civil Penalties .....	10
Forms .....	11
Notes .....	12

## FREQUENTLY ASKED QUESTIONS

- 1. Does South Carolina law require any notice or filing prior to the performance of the work?** Generally, South Carolina law does not require any notice or filing prior to the performance of the work by a general contractor, subcontractor, or a remote claimant (sub-subcontractor and material supplier, etc.). However, South Carolina statutes do provide a mechanism for general contractors to file a Notice of Project Commencement, which, if properly filed, provides significant protection to general contractors from liens filed by remote claimants. Additionally, remote claimants supplying labor, material or services to such projects may have their lien rights limited if they fail to provide the general contractor with Notice of Furnishing Labor and Materials by certified or registered mail.
- 2. What is the time frame for filing a claim of lien?** Ninety (90) consecutive calendar days (not three (3) months) after the last day on which the claimant supplied labor and/or materials for the project.
- 3. What is the deadline for filing suit to initiate a lien foreclosure action?** Six (6) months after the last day on which the claimant provided labor and/or materials for the project.
- 4. Does South Carolina law impose mandatory notice requirements?** Yes. Claimants must adhere to several mandatory Notice Requirements in order to perfect a mechanic's lien against property in South Carolina.
- 5. Does South Carolina law impose special requirements or limitations on lower tiered subcontractors or suppliers?** Only if the general contractor has filed a Notice of Project Commencement does South Carolina law impose special requirements or limitations on remote claimants. For such projects, remote claimants must provide the general contractor with a Notice of Furnishing Labor and Materials by certified or registered mail or their lien rights may be limited to the amount owed by the general contractor to the subcontractor to or through whom the remote claimant has supplied labor, material or services. Remote claimants are not required to provide any special notice different from subcontractors for projects, which do not have a Notice of Project Commencement in place.
- 6. When is a contractor or supplier deemed to have last performed work or furnished material so as to trigger the start of the lien filing period?** The last day that the claimant furnishes labor, materials or services under the contract triggers the start of both the ninety day Notice of Mechanic's Lien filing and the six month Suit to Foreclose filing requirement. Labor and/or materials used for remedial or warranty work becomes the new "last day" for purposes of calculating the Notice of Mechanic's Lien and Suit to Foreclose for filing periods so long as the warranty work is done pursuant to the contract.
- 7. Does South Carolina law provide a procedure for bonding or otherwise removing the claim of lien?** Yes. The owner or any other person with an interest in or lien on the property may post a Cash Bond or Surety Bond of one and one-third times the amount stated on the Notice of Mechanic's Lien to discharge the property from the lien.
- 8. What construction project participants are not protected by the lien law?** South Carolina mechanic's lien law provides protection to virtually every participant in a private construction project. The South Carolina mechanic's lien statutes entitles anyone who provides labor or materials for the improvement of real property to assert a mechanic's lien. This includes contractors, subcontractors, remote claimants, surveyors, design professionals and even security guards and rental equipment companies. There are no lien rights on a public construction project.

9. **Are certain costs or damages not allowed in a lien claim?** South Carolina provides very good protection in the form of a mechanic's lien upon any debt accrued as a result of labor, materials and services provided and used for the erection, alteration or repair of a building or structure on real estate. This amount includes overhead and profit, which are components of the contract price, the cost of private security guards employed during the project and reasonable rental value for the actual use of tools, appliances, machinery or equipment supplied for use on the project. Also, interest and attorneys fees are added to the lien claim if the claimant is the prevailing party. Whether or not consequential delay or other similar breach of contract damages can be included in a mechanic's lien claim has not been addressed by the South Carolina courts.

## LIEN LAW BASICS

Mechanic's liens are powerful tools to secure payment of debts owed to anyone who provides labor, services or materials for the improvement of real property.<sup>1</sup> The right to a mechanic's lien arises when the labor is performed or the materials are furnished to the property subject to the lien.<sup>2</sup> Nevertheless, a mechanic's lien may not be enforced against the property without the existence of a valid underlying debt.<sup>3</sup>

The right to a mechanic's lien is a statutory right granting lien claimants with the ability to force a sale of the real estate if the mechanic's lien is properly perfected and pursued. Since mechanic's liens are purely statutory, recovery under a claim of lien may be enforced only if the claimant adheres to each and every technical requirement of the statute.<sup>4</sup> Failure to adhere to these technical requirements of the mechanic's lien statutes may result in the loss of the protection of the statutes to the lien claimant. Since the mechanic's lien is merely a debt collection mechanism, any claimant who loses its mechanic's lien rights does not lose the right to collect the underlying debt. Such a party merely loses the right to foreclose on the real estate to collect the debt. Other usual common law debt collection remedies such as suits for breach of contract are still available to such a party. The value of a properly perfected mechanic's lien lies in the value of the real estate and the ensuing pressure it places on all parties ahead of the lien claimant in the payment chain.

## PROPERTY SUBJECT TO LIEN CLAIMS

A mechanic's lien filed in South Carolina creates an encumbrance on the land affected by the project in question. The lien is limited to the interest the owner has on the improvement and land.<sup>5</sup> Such lien rights exist whether the owner holds equitable or legal title.<sup>6</sup> If the person for whom the work is provided owns less than the entire interest in the property (i.e. a life estate), then the mechanic's lien attaches to the property to the extent of the person's interest.<sup>7</sup>

General contractors, subcontractors and others providing labor or materials for tenant improvements should ensure that the landlord (owner of the property) has specifically consented to the work performed. South Carolina courts have ruled that the owner/landlord of property will not be liable to the lien claimant unless there is an express or implied agreement that the owner/landlord may be held liable for the work performed.<sup>8</sup>

South Carolina law provides that publicly owned property cannot be subject to a mechanics' lien.<sup>9</sup> Nevertheless, this does not leave contractors or materialmen without remedy when working on public projects. Pursuant to the South Carolina Consolidated Procurement Code, payment and performance bonds equal to one hundred percent of the contract price are required for contracts in excess of \$100,000.<sup>10</sup>

## PARTIES ENTITLED TO PROTECTION

Anyone providing labor, service or materials “used in the erection, alteration, or repair of a building or structure upon real estate” or “for the improvement of real property” are entitled to assert a mechanic's lien against the property.<sup>11</sup> Providers of labor, services and materials fall into two categories depending upon the party with whom they contracted. The first category applies to contractors who have agreements directly with the owner.<sup>12</sup> The second category of mechanic's liens applies to subcontractors, sub-subcontractors, and materialmen who do not have agreement directly with the owner.<sup>13</sup> Sub-subcontractors and materialmen will be referred to as remote claimants in these materials.

In addition to these parties, several other parties are entitled to mechanic's lien protection under South Carolina law. For example, entities providing rental equipment actually used in the improvement or alteration of real property are entitled to lien claims.<sup>14</sup> Also, well diggers, security guards, grading subcontractors, architects and surveyors are entitled to lien rights as well.<sup>15</sup>

## NOTICE REQUIREMENTS

A Notice of Mechanic's Lien must be served on the owner and filed in the county where the property is located within ninety (90) days after the claimant ceases to labor on or furnish labor or materials for a building or structure.<sup>16</sup> If the property is located in two counties, the lien must be filed in both counties. In addition to the Notice of Mechanic's Lien, the claimant must serve a Verified Statement of Account upon the owner within the same ninety day time frame. This is a **ninety (90) day** deadline, not a three (3) month deadline. Warranty work which is necessary to complete performance under the contract constitutes furnishing labor or materials sufficient to extend the time for filing the Notice of Mechanic's Lien.<sup>17</sup> Once the Notice of Mechanic's Lien is served upon the owner, no payment by the owner to the general contractor can reduce the amount of the claimant's lien rights.<sup>18</sup>

The form used for Notice of Mechanic's Lien depends on the claimant's relationship with the owner whether in direct contract or as a subcontractor/supplier.

For the proper form refer to:

Notice of Mechanic's Lien (Claimant with Direct Contract with Owner)

Notice of Mechanic's Lien (Claimant without Direct Contract with Owner)

## NOTICE OF MECHANIC'S LIEN

The Notice of Mechanic's Lien document must include the following information:

- (1) the identity of the owner of the property to which the labor and/or materials were provided;
- (2) the legal description of the property to which the labor and/or materials were provided; and
- (3) the amount due and owing for the labor and/or material, which was provided.<sup>19</sup>

The description of the property must be sufficiently accurate for identification. Inaccuracies in the description of the property covered by the lien are not fatal to the lien claimant if the property can be reasonably recognized from the description provided.<sup>20</sup> The Notice of Mechanic's Lien must be subscribed and sworn to by the person claiming the lien or by someone acting on its behalf.<sup>21</sup>

The form used for Notice of Mechanic's Lien depends on the claimant's relationship with the owner, whether in direct contract or as a subcontractor/supplier.

For the proper form refer to:

Notice of Mechanic's Lien (Claimant with Direct Contract with Owner)

Notice of Mechanic's Lien (Claimant without Direct Contract with Owner)

A Verified Statement of Account must be filed and served along with the Notice of Mechanic's Lien. The Verified Statement of Account must set forth a statement of a just and true account of the amount due the claimant, with all just credits given.<sup>22</sup> Inaccuracies in the Verified Statement of Account shall not invalidate the lien unless it can be shown that the claimant knowingly and willfully claimed more than is due.<sup>23</sup>

## NOTICE OF PROJECT COMMENCEMENT

South Carolina has recently amended the mechanic's lien statutes to provide general contractors with greater protection and incentives to file a Notice of Project Commencement. The Notice of Project Commencement is a document which the general contractor may file with the Clerk of Court or Register of Deeds in the county or counties where the real property is located providing certain information to claimants. The Notice of Project Commencement must contain the following information:

- (1) the name and address of the person filing the Notice of Commencement;
- (2) the name and address of the owner or developer; and
- (3) a general description of the improvement and the location of the project.<sup>24</sup>

The notice must be filed within fifteen (15) days of the commencement of work and must be accompanied by a filing fee of \$15.00. The name and address of the contractor must be posted at the job site.<sup>25</sup> A Location Notice must also be posted at the job site. The Location Notice must contain the following statement:

The contractor on the project has filed a Notice of Project Commencement at the County Courthouse. Sub-subcontractors and suppliers to subcontractors shall comply with § 29-5-20 when filing liens in connection with this project.<sup>26</sup>

While there is no affirmative duty on general contractors to file a Notice of Project Commencement, the failure to file this notice strips general contractors of certain defenses to mechanic's liens filed by remote claimants. While an owner always has a paid-in-full defense and a right to pro rate just claims based upon the contract balance owed to the general contractor, general contractors do not have such defenses in the event remote claimants file liens and the general contractor has failed to file a Notice of Project Commencement.<sup>27</sup>

If a contractor files a Notice of Project Commencement, the Mechanic's Lien Statutes provide that the aggregate amount of any liens filed by remote claimants cannot exceed the amount due by the general contractor to the subcontractor to whom or through the remote claimants have supplied labor, material, or services.<sup>28</sup> Remote claimants can protect themselves by delivering a Notice of Furnishing Labor and Materials. Filing a Notice of Project Commencement protects general contractors by allowing them to pro rate among all just liens filed by remote claimants where the amount due the subcontractor is insufficient to pay all liens perfected by remote claimants.<sup>29</sup>

## NOTICE OF FURNISHING LABOR OR MATERIALS

Where a general contractor has recorded a Notice of Project Commencement, remote claimants can protect their lien rights by delivering a Notice of Furnishing Labor and Materials by certified or registered mail to the general contractor.<sup>30</sup> Such Notice of Furnishing Labor or Materials shall include:

- (1) The name of the remote claimant who claims payment;
- (2) The name of the person with whom the remote claimant contracted or by whom it was employed;
- (3) A description of the labor, services, or materials furnished and the contract price or value thereof;
- (4) A description of the project where labor, services or materials were used as sufficient for identification;
- (5) The date when the first and the last item of labor service or materials was actually furnished or scheduled to be furnished; and
- (6) The amount claimed to be due, if any.<sup>31</sup>

After receiving such notice, no payment by the general contractor to the subcontractor will lessen the amount recoverable by the remote claimant. However, even if the general contractor has filed a Notice of Project Commencement and remote claimants have provided Notice of Furnishing Labor or Materials, the total aggregate amount of liens on the improvement cannot exceed the amount due by the owner to the general contractor.<sup>32</sup>

## PERFECTING A CLAIM OF LIEN

Assuming the appropriate Notice of Mechanic's Lien and Verified Statement of Account have been filed and served within ninety (90) days of last furnishing of labor or materials, the claimant must commence a suit to foreclose the lien claimed and file a *Lis Pendens* concerning the subject property within six (6) months of the same date.<sup>33</sup> Both of these conditions precedent for enforcement of the mechanic's lien must be completed within six (6) months after the claimant ceases to labor on or furnish labor or material for the project. Failure to commence the suit to foreclose the lien or file the *Lis Pendens* results in a dissolution of the lien.

This six (6) month requirement looks to the same point in time as the ninety (90) day deadline for filing and serving the Notice of Mechanic's Lien and Verified Statement of Account.<sup>34</sup> Furthermore, should the lien claimant fail to file a *Lis Pendens* within this six (6) month time period, the lien must be dissolved by the trial court.<sup>35</sup> The mechanic's lien statutes specially define "commencement" as the date of filing the suit to foreclose the mechanic's lien with the Court of Common Pleas of the county where the property is located.<sup>36</sup>

## SUIT TO FORECLOSE MECHANIC'S LIEN

The content of a lien foreclosure petition is prescribed by statute. According to the statute, the petition must contain the following information:

- (1) a brief statement of the contract giving rise to the claim and the amount due thereon;
- (2) a description of the property subject to the lien;
- (3) all other material facts and circumstances; and
- (4) a prayer for relief that the property is to be sold and the proceeds of the same applied to the discharge of the lien.<sup>37</sup>

The lien foreclosure action may be filed in the county in which the building or property is located.<sup>38</sup> Amendments to the foreclosure petition are allowed as in other civil actions.<sup>39</sup> The claimant may include all other causes of action available to it in the suit to foreclose the lien.

## PROCEDURES FOR DISCHARGING LIENS

At any time after the service and filing of a Notice of Mechanic's Lien, the owner or any other person having an interest in or lien on the property involved may secure the discharge of the property from the mechanic's lien by posting a bond in lieu of the property.<sup>40</sup> This process is commonly called "bonding off" the lien. A party interested in bonding off a lien can post a written undertaking, known as a bond, which discharges the property from the mechanic's lien. The bond must be in an amount equal to one and one-third times the amount claimed in the Notice of Mechanic's Lien.<sup>41</sup> A bond can be in the form of a Cash Bond secured by cash, a bond secured by the pledge of U.S. or South Carolina securities, or a Surety Bond executed by a surety company licensed to do business in South Carolina.<sup>42</sup>

The posting of the bond does not eliminate the claimant's mechanic's lien rights; rather, it merely substitutes the bond for the property upon which the lien existed and the bond becomes subject to the lien. Where a bond is posted, if the claimant obtains a judgment in its favor, the judgment is to be paid from the surety company issuing the Surety Bond or from the proceeds of the sale of so much of the pledged securities as is needed or from the cash deposited for the Cash Bond to satisfy the judgment. All priority issues and defenses available in a foreclosure action against the real estate are applicable to foreclosure actions against bonds.

Once a Mechanic's Lien has been paid or otherwise satisfied, the lien claimant should promptly file a Satisfaction of Mechanic's Lien in the county where the Notice of Mechanic's Lien was filed.

## LIEN WAIVERS AND RELEASES

Many construction contracts require general contractors to obtain Interim Lien Waivers in conjunction with tendering progress payments. Additionally, final payment is often contingent upon obtaining Final Lien Waivers from all subcontractors. Agreements to waive the right to file a claim of lien for labor and materials are against public policy and unenforceable unless payment substantially equal to the amount waived is actually made.<sup>43</sup> The South Carolina statutes do not set out specific forms to be used as lien waivers; however, a sample Interim Waiver and Release of Mechanic's Lien and Final Waiver and Release of Mechanic's Lien are included with the text.

## LIEN PRIORITY ISSUES

South Carolina law recognizes several other lien claims against real property other than mechanic's liens. Some of the other liens commonly encountered arise from mortgages and judicial liens (or attachment liens). Also, oftentimes more than one mechanic's lien arises against the same property.

A mechanic's lien is not enforceable against any mortgage recorded before the filing of the mechanic's lien.<sup>44</sup> This statute applies a *first in time, first in right* priority, as between mechanic's liens and mortgages.

If the interest of the owner and the property is under attachment by a judicial lien at the time of recording of the Notice of Mechanic's Lien, the preexisting attaching creditor shall be preferred to the extent of the value of the buildings and land as they were when the Notice of Mechanic's Lien was recorded.<sup>45</sup> In such a scenario, the court shall ascertain, by a jury or otherwise as the case may require, what proportion of the proceeds of the sale shall be held subject to the attachment as derived from the value of the property when the Notice of Mechanic's Lien was recorded.<sup>46</sup>

In the case of multiple mechanic's lien claimants, where the proceeds of the sale are insufficient to pay all mechanic's lien claimants, they shall share the proceeds equally in proportion to their respective debts.<sup>47</sup> In other words, time of filing is meaningless as between competing mechanic's lien claimants. In the event the proceeds from the sale are insufficient to pay all mechanic's lien claimants, each lien claimant receives a *pro rata* share of the available proceeds. As between a subcontractor or remote claimant mechanic's lien and a general contractor's mechanic's lien, the subcontractor or remote claimant mechanic's lien takes priority.<sup>48</sup>

## OWNER DEFENSES AND REMEDIES

South Carolina lien laws provide some measure of protection to owners in the event a lien claim is brought by a subcontractor or remote claimant who does not have a direct contract with the owner. While subcontractors and remote claimants are granted lien rights against the property, the aggregate amount of such liens may not exceed the amount due by the owner to the general contractor on the contract for the property in question.<sup>49</sup> This is known as the *paid-in-full defense*. In the event the amount due from the owner to the general contractor is insufficient to pay all subcontractor or remote claimants, South Carolina law imposes a duty upon the owner to pro rate among all “just claims” the amount due a contractor.<sup>50</sup> A lien claimant has a “just claim” once the lien attaches to the property.<sup>51</sup> However, any payments by the owner to the general contractor after service of a Notice of Mechanic's Lien **does not** reduce the amount recoverable by the claimant serving the Notice of Mechanic's Lien.<sup>52</sup>

South Carolina also affords protection to landlords and other owners who allow another person or entity to use their property and contract for the improvement of the property. A landlord or other such owner of a building or structure which is in the process of being constructed, altered or repaired (i.e., tenant improvements), may prevent the attaching of any lien for labor on the property not at the time performed or materials not then furnished by giving notice, in writing, to the person performing, furnishing such labor or furnishing such materials that the landlord or owner will not be responsible for the labor or materials.<sup>53</sup> This Owner's Notice of Non-Responsibility protection is applicable only to landlords or owners who are not party to the construction contract and the improvements are not being made for the benefit of the owner.<sup>54</sup> This provision is typically used to protect landlords from liens being filed by contractors, subcontractors and remote claimants who are performing tenant improvement work.

## LENDER ISSUES

As noted above, priorities between mortgages, including those securing construction loans and mechanic's liens are determined by a *first in time, first in right* priority scheme in South Carolina. Future advances made by lenders will relate back to the original recording of the mortgage if the lender does not have notice of the mechanic's lien. A lien claimant may gain priority over future advances made pursuant to a previously recorded mortgage by filing its Notice of Mechanic's Lien and serving the notice on the prior recorded mortgage holder.<sup>55</sup> Lenders receiving service of a recorded Notice of Mechanic's Lien should proceed with caution and determine that they are protected before considering any further funding requests by the owner. While prior disbursements are protected, any disbursements made after service of a duly recorded Notice of Mechanic's Lien will be junior to the mechanic's lien.

## COSTS INCLUDABLE IN LIEN CLAIMS

A mechanic's lien may be placed upon any debt accrued as a result of labor, materials, and services provided for the improvement of real estate or actually used in the erection, alteration, or repair of a building or structure upon real estate.<sup>56</sup> Overhead and profit, when stated as part of the contract price, are proper components of a mechanic's lien.<sup>57</sup> The costs accrued in enforcing or defending against a mechanic's lien, including reasonable attorneys fees, may be recovered by the prevailing party.<sup>58</sup>

The mechanic's lien statutes specifically define the following as "labor" giving rise to lien rights: the preparation of plans, specifications, and design drawings and the work of making the real estate suitable as a site for a building or structure.<sup>59</sup> Additionally, the mechanic's lien statutes provide that work giving rise to a mechanic's lien is considered to include, but not be limited to, the grading, bulldozing, leveling, excavating, and filling of land (including the furnishing of fill soil), the grading and paving of curbs and sidewalks and all asphalt paving, the construction of ditches and other drainage facilities, and the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes.<sup>60</sup> Also, private security guard services provided at the site during construction can give rise to lien rights.<sup>61</sup> Finally, the mechanic's lien statutes specifically define materials furnished to and actually used to include tools, appliances, machinery, or equipment supplied for use on the building to the extent of their reasonable rental value during their actual use.<sup>62</sup>

## ATTORNEY FEES FOR PREVAILING PARTY

The South Carolina mechanic's lien statutes allow for the "prevailing party" to recover its attorneys fees and expenses of litigation in enforcing or defending against the mechanic's lien.<sup>63</sup> The **right** of the prevailing party to an award of attorneys fees in mechanic's lien cases is mandatory. However, the **amount** of the attorney's fee award falls within the discretion of the trial court.<sup>64</sup> The mechanic's lien statutes provide explicit directions in determining the prevailing party for purposes of awarding attorneys fees. The procedure is the same whether the lien claimant has a direct contract with the owner, is a subcontractor or is a remote claimant.<sup>65</sup>

These code sections provide for offers of settlement to be exchanged by the parties not less than fifteen (15) days before the first term of court at which the suit to foreclose is set for trial. The offer of settlement must state that it is made under the applicable statute and specify the amount, exclusive of interest and costs, which the party serving the offer is willing to agree constitutes a settlement of the lien. If a written offer of settlement is made by both parties, the party whose offer is closer to the verdict reached is considered the prevailing party in the action. If there is no difference between the verdict and both offers, neither party is considered the prevailing party for purposes of determining the award of cost and attorneys fees.<sup>66</sup>

In cases where one party or both parties choose not to make a written offer of settlement, the pleadings act as the non-offering party's settlement offer for purposes of determining the prevailing party. For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. If the defendant makes no written offer of settlement, the value of its counterclaim is considered to be a negative offer of settlement. If a defendant has not asserted a counterclaim, its offer of settlement is considered to be zero.<sup>67</sup>

## CRIMINAL OR CIVIL PENALTIES

Some South Carolina statutes other than the mechanic's lien statutes provide protection to general contractors, subcontractors, and remote claimants. These protections include the Prompt Payment Act, a statutory duty to investigate payment claims, the First Lien on Funds Statute and the Payment Protection Act.

The premise of the South Carolina Prompt Payment Act is that a general contractor, subcontractor or remote claimant who has properly performed its contract is entitled to timely payment.<sup>68</sup> Under the Act, contractors, subcontractors and remote claimants are afforded the statutory right to be paid promptly by the party above them in the payment chain as well as a corresponding obligation to make timely payment to those parties below them in the payment chain.

Timely payment under the Act is defined differently depending upon the relationship between payer and payee. Between an owner and a general contractor, payment is timely if made no later than twenty-one (21) days of receipt of a properly submitted payment request for completed work.<sup>69</sup> Assuming adherence to the standard contract documents, receipt of the project architect's certification for payment triggers the owner's twenty-one (21) day payment period. Between a prime contractor and subcontractor, the Act requires payments to be made within seven (7) days after receipt of the progress payment by the prime contractor.<sup>70</sup> This seven (7) day rule applies all the way down the payment chain from subcontractors to their subcontractors to materialmen and suppliers. Failure to make timely payment results in interest accruing at the rate of one percent (1%) per month on the unpaid balance so long as the non-paying party has been notified of the provisions of the Act at the time request for payment is made.<sup>71</sup>

While the Act requires prompt payment upon certification of amounts due, it does not impose a requirement that progress payments due from an owner to a general contractor be paid any more frequently than required by the contract documents.<sup>72</sup> The interest rate and timing provisions of the Prompt Payment Act may be waived by contract in private projects provided the requirements of the Prompt Payment Act are specifically waived, by section number reference to S.C. Code Ann. §§ 29-6-30 and 29-6-50, in conspicuous bold-faced or underlined type.<sup>73</sup>

The Act does not require payment for any disputed amounts; rather, the owner must tender only those undisputed amounts due under a payment request. The Act specifically provides that an owner, general contractor or subcontractor may withhold payment due to “unsatisfactory job progress, defective construction not remedied, disputed work, third party claims filed or reasonable evidence that a claim will be filed, failure of contractor or subcontractor to make timely payments for labor, equipment and materials, damage to owner, contractor, or another subcontractor, reasonable evidence that contract or subcontract cannot be completed for the unpaid balance of the contract or subcontract sum, or a reasonable amount for retainage.”<sup>74</sup>

Where the Prompt Payment Act provides time constraints for making payments among owners, contractors, subcontractors and remote claimants, the Subcontractors' and Suppliers' Payment Protection Act makes “pay-when-paid” clauses ineffective.<sup>75</sup> Specifically, the statute states that “payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor” and any agreement to the contrary is unenforceable.<sup>76</sup>

While not providing a method to force timely payment, another South Carolina statute provides a mechanism for recovery of attorney's fees incurred in collection actions from construction projects covered by a payment bond. This statute imposes an obligation upon a payment bond surety to make a reasonable and fair investigation of the merits of any claim for payment in a construction project covered by the terms of any "regulations, undertaking or statute."<sup>77</sup> In order to trigger this duty, the entity seeking payment must deliver a written demand for payment via certified or registered mail to the party from whom payment is due. Once received, the party owing payment must pay the claim, or whatever portion deemed valid, within forty-five (45) days from the date of mailing of demand, not receipt of the demand. If the surety owing payment fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or the undisputed portion, it will be liable for reasonable attorneys' fees and interest at the judgment rate of 14% from the date of demand.

In addition to these statutes, the South Carolina statutes includes a First Lien on Funds aimed at alleviating the problem of a general contractor's or subcontractor's failure to pay money received on the project down the chain.<sup>78</sup> This statute lends additional support for payment by establishing a first lien in the claimant's behalf on any money reaching the party immediately above them in the payment chain. The First Lien on Funds statute makes failure to respect this lien a misdemeanor punishable by fine up to \$1,000 or imprisonment up to six (6) months.<sup>79</sup>

Unlike mechanic's liens, the First Lien on Funds is self-executing, requiring no written notice of lien or other public filing. As soon as the general contractor or subcontractor directly above the claimant has been paid, the first lien arises in the claimant's favor. Since the lien is a first lien, it takes priority over most other obligations of the contractor, such as assignments, prior perfected security interests or judgments. The scope of the First Lien on Funds statute is extremely broad. It applies to any construction project, including public projects.

## FORMS

Notice of Mechanic's Lien (Claimant with Direct Contract with Owner)

Notice of Mechanic's Lien (Claimant without Direct Contract with Owner)

Verified Statement of Account

Notice of Project Commencement

Location Notice

Notice of Furnishing Labor and Materials

Interim Waiver and Release of Mechanic's Lien

Final Waiver and Release of Mechanic's Lien

Surety Bond

Cash Bond

Satisfaction of Mechanic's Lien

Owner's Notice of Non-Responsibility

Lis Pendens

## NOTES

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- <sup>1</sup> S.C. Code Ann. §§29-5-10 and 29-5-20.
- <sup>2</sup> *Id.* See also, *Shelley Construction Company, Inc. v. Seaguard and Homes, Inc.*, 336 SE2d 488 (S.C. App. 1985).
- <sup>3</sup> *Glidden Coatings and Resins Div. of SCM Corp. v. Suitt Construction Company, Inc.*, 349 SE2d 89 (S.C. App. 1986).
- <sup>4</sup> *Shelley Construction*, 336 SE2d at 490.
- <sup>5</sup> S.C. Code Ann. § 29-5-30.
- <sup>6</sup> *Ridgenway v. Broadway*, 75 SE 132 (S.C. 1912).
- <sup>7</sup> S.C. Code Ann. § 29-5-30.
- <sup>8</sup> *F&D Electrical Contractors, Inc. v. Ponder Coaters, Inc., et al.*, 537 S.E.2d 285 (S.C. App. 2000); *aff'd as modified*, S.C. Sup. Ct. Opinion No. 25498, filed July 22, 2002.
- <sup>9</sup> *Atlantic Coast Lumber Corporation v. Morrison, et al.*, 149 S.E. 243 (S.C. 1929).
- <sup>10</sup> S.C. Code Ann. §11-35-3030(2).
- <sup>11</sup> S.C. Code Ann. ' ' 29-5-10(a) and 29-5-20(A).
- <sup>12</sup> S.C. Code Ann. § 29-5-10.
- <sup>13</sup> S. C. Code Ann. §§ 29-5-20 and 29-5-40.
- <sup>14</sup> S.C. Code Ann. § 29-5-22.
- <sup>15</sup> S.C. Code Ann. §§ 29-5-10(a) and 29-5-21.
- <sup>16</sup> S.C. Code Ann. § 29-5-90.
- <sup>17</sup> *Crystal Pools, Inc. v. Old Claussen's Bakery Partners*, 399 S.E.2d 5 (S.C. App. 1990).
- <sup>18</sup> S.C. Code Ann. § 29-5-50.
- <sup>19</sup> S.C. Code Ann. § 29-5-90.
- <sup>20</sup> S.C. Code Ann. § 29-5-100.
- <sup>21</sup> S.C. Code Ann. § 29-5-90.
- <sup>22</sup> *Id.*

<sup>23</sup> S.C. Code Ann. § 29-5-100.

<sup>24</sup> S.C. Code Ann. § 29-5-23.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> S.C. Code Ann. § 29-5-20(B).

<sup>29</sup> S.C. Code Ann. § 29-5-60(B).

<sup>30</sup> S.C. Code Ann. § 29-5-20(B).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> S.C. Code Ann. § 29-5-120.

<sup>34</sup> *Preferred Savings and Loan Association, Inc. v. Royal Garden Resort, Inc.*, 389 SE2d 853 (S.C. 1990).

<sup>35</sup> *Muller v. Myrtle Beach Golf and Yacht Club*, 399 SE2d 430 (S.C. App. 1990), reversed on other grounds, 438 SE2d 248 (S.C. 1993).

<sup>36</sup> S.C. Code Ann. § 29-5-140.

<sup>37</sup> S.C. Code Ann. § 29-5-160.

<sup>38</sup> S.C. Code Ann. § 29-5-140.

<sup>39</sup> S.C. Code Ann. § 29-5-180.

<sup>40</sup> S.C. Code Ann. § 29-5-110.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> S.C. Code Ann. § 29-7-20(2).

<sup>44</sup> S.C. Code Ann. § 29-5-70.

<sup>45</sup> S.C. Code Ann. § 29-5-320.

<sup>46</sup> *Id.*

<sup>47</sup> S.C. Code Ann. § 29-5-360.

<sup>48</sup> S.C. Code Ann. § 29-5-50.

<sup>49</sup> S.C. Code Ann. § 29-5-40.

<sup>50</sup> S.C. Code Ann. § 29-5-60(A).

<sup>51</sup> *Charleston Lumber Company, Inc. v. GPT, A Florida Partnership*, 400 SE2d 508 (S.C. App. 1991).

<sup>52</sup> S.C. Code Ann. § 29-5-50.

<sup>53</sup> S.C. Code Ann. § 29-5-80.

<sup>54</sup> *Id.*

<sup>55</sup> S.C. Code Ann. § 29-3-50.

<sup>56</sup> S.C. Code Ann. §§ 29-5-10(a) and 29-5-20(A).

<sup>57</sup> *Century Engineering and Construction, Inc. v. Mariners' Cay Development Corp.*, 338 SE2d 631 (S.C. 1985).

<sup>58</sup> S.C. Code Ann. §§ 29-5-10(a) and 29-5-20(A).

<sup>59</sup> S.C. Code Ann. § 29-5-10(a).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> S.C. Code Ann. §§ 29-5-10(a) and 29-5-20(A).

<sup>64</sup> *Utilities Construction Company, Inc. v. Wilson*, 468 SE2d 1 (S.C. App. 1996).

<sup>65</sup> S.C. Code Ann. §§ 29-5-10(b) and 29-5-20(C).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> S.C. Code Ann. §§ 29-6-10, *et seq.*

<sup>69</sup> S.C. Code Ann. § 29-6-30.

<sup>70</sup> *Id.*

<sup>71</sup> S.C. Code Ann. § 29-6-50.

<sup>72</sup> S.C. Code Ann. § 29-6-40.

<sup>73</sup> S.C. Code Ann. § 29-6-50.

<sup>74</sup> S.C. Code Ann. § 29-6-40.

<sup>75</sup> S.C. Code Ann. §§ 29-6-210, *et seq.*

<sup>76</sup> S.C. Code Ann. § 29-6-230.

<sup>77</sup> S.C. Code Ann. § 27-1-15.

<sup>78</sup> S.C. Code Ann. §§ 29-7-10, *et seq.*

<sup>79</sup> S.C. Code Ann. § 29-7-20.