

You snooze, you lose



Lindsey Pesek

Arkansas law has a number of hurdles to maneuver in order to establish an enforceable mechanic's and materialman's lien in the construction industry, many of which must be satisfied well in advance of even filing a

lien. Arkansas lien law is statutory in nature, and only those who comply with the statutory requirements are entitled to obtain and enforce a lien on real estate subject to a construction agreement.

In particular, Arkansas requires stringent notification procedures are followed for a contractor or other potential lien claimant to avail itself to the mechanic's and materialman's lien statutes. These notice requirements, designed to protect the rights of an innocent owner, vary depending on whether the project is commercial or residential in nature.

With respect to a residential construction project (residential real estate consisting of four or less units and generally single family homes), before any construction even commences, a contractor or other potential lien claimant must provide to the owner notice of their rights to claim and enforce a lien on the property. This notice, commonly overlooked by the contractor, must include specific language provided for by

statute, in boldface type and all capital letters, and served in the particular manner outlined in the statute.

The initial notice is a must and is most often the source of problems for all parties to the construction contract. This is mainly because Arkansas courts require strict compliance with all lien notice procedures, including this residential preconstruction notice, and mere substantial compliance will bar any future attempts to assert and foreclose on a lien or bring any breach of contract or unjust enrichment lawsuit against the owner. In other words, if a contractor does not include in their contract the specific notice language before starting work, it will lose the ability to bring any lawsuit against the owner for failure to pay, even if only a single word of the required language is missing.

An exception does exist to the preconstruction notice requirement for direct sales from the contractor to the project owner. Until recently, this exception, known as the "direct sales exception," applied to the residential contractor as established in a 2016 Arkansas Supreme Court case of *Hammerhead Contracting & Development LLC v. Ladd*. This interpretation of the exception effectively protected all general contractors who failed to provide the notice prior to commencing work because, as the dissenting opinion stated in *Hammerhead*, the exception "writes the statute out of the Arkansas

Code" as "there is no situation in which a general contractor will not be sheltered by the direct-sale exception."

On April 1, 2017, nearly one year after the *Hammerhead* decision, the Arkansas legislature passed Act 808 of 2017. It went into effect on Aug. 1, 2017, and amended the Arkansas direct-sale exception by specifically excluding from the exemption home improvement contractors or residential building contractors. Therefore, it appears that under Arkansas law, the direct-sale exception no longer applies to residential contractors.

This recent modification substantially impacts the construction industry in that without ensuring the preconstruction notice is not only provided to an owner, but included in the exact form and substance required by statute, a residential contractor risks losing the ability to take any legal action against an owner.

In short, the Arkansas residential contractor should stay up to date on the preconstruction notice requirements (and all other notice requirements during construction for that matter) to ensure strict compliance and preserve legal rights it might otherwise assume it holds when starting a residential project. ■

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