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New Jersey Makes Significant Amendments to Its Construction Lien Law

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On January 5, 2011, N.J. Governor Chris Christie signed into law [significant revisions](#) to the New Jersey Construction Lien Law (CLL).¹ The amendments are based on the March 2009 New Jersey Law Revision Commission (NJLRC) [report](#) that recommended revisions to the CLL, in response to difficulties and confusion surrounding some of the CLL's key concepts that had become apparent since its enactment in 1994. These amendments, which took effect immediately, are intended to enhance application of the CLL, conform it to numerous court decisions and clarify the procedures to be followed in order to perfect and enforce a construction lien claim.

The most significant changes are summarized below.

Changes Pertaining to Residential Projects

From the beginning, the CLL obligated a claimant seeking to file a lien against a residential project to satisfy a more-stringent set of requirements than those that applied to commercial projects. The New Jersey Legislature stated in the CLL that these more-stringent requirements are necessary, because the ability to buy and sell residential housing is of vital importance to the state's economy. There were, however, two primary concerns with this approach. First, the CLL did not define "residential" construction, and thus, it was unclear which set of lien filing requirements, "residential" or "commercial," applied to certain projects—*e.g.*, mixed-use or multi-dwelling projects. Second, a claimant was required to satisfy these requirements within 90 days of completing its work, which frequently proved challenging.

Pursuant to the amendments, "residential construction" is now defined to include virtually all construction of, or improvements made to, any dwelling or residential unit, including sitework; on-site and off-site infrastructure improvements; and the development's common areas/elements. Projects, including multiple units that are to be sold as residences, are to be deemed "residential construction," and a claimant seeking to file a lien against this type of project is required to follow the residential statutory requirements.

In addition, claimants are now afforded additional time to satisfy the requirements for filing a lien against a residential project. Such claimants must file a Notice of Unpaid Balance and Right to File Lien (NUB) within 60 days from when the claimant last performed work or supplied materials. This amends the prior requirement that the NUB be filed within 30 days.

Furthermore, within 10 days of filing the NUB, the claimant is required to file with the American Arbitration Association and serve a demand for arbitration, for the purpose of having an arbitrator determine, on an expedited basis, the validity and amount of any lien claim that may be filed. Upon satisfying these requirements and receiving the arbitrator's approval to file a lien, the claimant must within 10 days of receiving the arbitrator's determination and also, in all cases, within 120 days from when the claimant last performed work or supplied materials, record the lien claim. The requirement to file a lien against a commercial project within 90 days after the claimant completes its work remains unchanged.

Changes Pertaining to Condominium Projects

Because condominium projects are "owned" by an ever-changing and sometimes large group of individuals and entities, claimants were frequently uncertain against whom to file and serve the lien claim, and the CLL provided little guidance. To address this uncertainty, the CLL amendments now clarify the interest(s) in the real property to which a lien attaches where the work or materials at issue were provided to a condominium project. If the claimant has contracted with the developer, the lien attaches to the developer's interest in the development. If the claimant has contracted with the community association, the lien attaches to the association itself, but not the common elements; and such a lien may not be enforced by foreclosure and sale. Rather, the remedy for a judgment obtained against a community association is a court-ordered assessment against the unit owners. Thus, the residential lien requirements apply to claims arising under a contract with a community association, even though the lien will not attach to a residential unit. If the claimant contracts directly with the unit owner, the lien attaches only to the interest of the unit owner. Where the interest in the property or development is conveyed after work is performed, but before a lien is filed, the lien attaches only to whatever interest was retained by the party who contracted for the work, not the interest that was conveyed.

The Lien Fund

Although courts had consistently held that the CLL is premised upon the concept that a "lien fund" establishes the owner's maximum liability and thereby protects the owner from having to pay twice, the "lien fund" was neither defined nor expressly mentioned in the CLL. The CLL's formula for calculating the lien fund also had been viewed as imprecise and difficult to understand. "Lien fund" is now expressly defined, and the CLL clarifies that:

1. the lien fund is established as of the date the owner is served with a lien claim;
2. the lien fund can never be greater than the unpaid portion of the earned amount of the contract; and
3. no lien that exceeds the amount of the lien fund can attach to the owner's property.

Also added in the amendments is a potentially easier-to-understand formula for calculating the lien fund. The lien fund is treated as if it were a trust fund, and attempts by the owner to limit its liability for lien claims by making improper, fund-shrinking payments are prohibited. For example, the amendments specify that the lien fund is not reduced by:

1. payments not in accordance with the contract;
2. payments for work that had not been completed as of the date the lien was filed;
3. payments of liquidated damages;
4. collusive payments;
5. payments made from retainage to a successor contractor; or
6. setoffs or backcharges unsupported by the claimant's written agreement.

Subject to these restrictions, no lien fund exists if the owner has already fully paid the contractor as of the date the first lien claim is filed.

Claims Arising from Tenant Improvements

The CLL amendments address when a tenant contracts for improvements to the owner's property. Prior to the amendments, courts had determined that a lien could attach to the owner's interest only where the owner/landlord had agreed in writing to

pay for the improvements. The CLL now provides that, if a tenant causes improvements to be made to real property, a lien attaches to the tenant's leasehold interest *and* the interest in the property of anyone who:

1. authorizes the contract for the improvements in a writing that provides that such person's interest is subject to a lien arising from the improvement;
2. has paid or agreed in writing to pay the majority of the cost of the improvement; *or*
3. is a party to the lease or sublease that created the tenant's leasehold, and such lease or sublease provides that the person's fee interest is subject to a lien for the improvement.

As a result of these changes, the property interest of a commercial landlord can be subject to a lien claim if the landlord has agreed in the lease to provide an allowance for fit-out or other improvements by the tenant or, possibly, even if the landlord has authorized the tenant to perform the work. A lien against the interest of a person other than the tenant is limited to the amount such person agreed to pay, less the amount of payments made by such person prior to the filing of the lien.

Procedural Changes

"Lodging for Record" the lien documents. Because the CLL's definition of "filing" a document required "lodging for record and indexing" of it, and a delay over which the filer has no control often occurs between when the county clerk receives a document and when the document is actually recorded and indexed, the amendments now specify that compliance with the CLL's various deadlines is measured by the date on which the document is "lodged for record." A document is lodged for record—and thereby enforceable against parties with notice of the document—when it is delivered to and date-stamped by the county clerk, even though such document has not yet been filed.

Consolidation of arbitration proceedings. The amendments address the problem of potentially inconsistent arbitration findings where multiple arbitrations arise from the same residential project. The CLL now states that, wherever possible, the same arbitrator will determine all claims that arise from a given project. The arbitrator is required to consider the outcome of all previous proceedings relating to the same project in rendering his or her determinations. Furthermore, both the claimant and owner are now able to request consolidation of all arbitrations arising from the same residential project, and the discretion to resolve a request for consolidation is conferred on the arbitrator.

New mechanisms for discharging liens. In situations where the lien claim has been paid in full and the claimant has failed to timely discharge the lien, the CLL now provides two procedures for the owner to initiate a discharge process. First, at any time after the expiration of the 30-day period within which the claimant was supposed to have discharged the lien, the owner may initiate a summary action in New Jersey Superior Court by filing an order to show cause that seeks a discharge order. Second, the owner need only file a discharge certificate and an affidavit setting forth the circumstances of payment to summarily discharge the lien without court intervention, as long as 13 months have elapsed since the date of the lien claim and the owner provided to the claimant notice by certified mail of the owner's intention to file the discharge certificate 90 days prior to taking such action. If, after receiving the owner's notice letter, the claimant fails to deny or dispute the owner's full payment of the claim, the owner may proceed with this discharge method after 90 days. Where the claimant has forfeited a lien claim due to its being "without basis" and failed to discharge the lien upon demand, the owner may file an order to show cause to obtain a discharge. The CLL now defines a claim that is "without basis" to mean "frivolous, false, unsupported by a contract, or made with malice or bad faith or for any improper purpose."

With regard to the procedure by which the owner can discharge a lien by depositing funds in court or obtaining a surety bond in favor of the claimant, the CLL clarifies that the amount of the owner's deposit or bond submitted to discharge a lien arising from a residential project need only equal the earned amount of the owner/contractor's contract as determined by the arbitrator. The bond or deposit submitted by the owner to discharge a lien arising from a commercial project still must equal 110 percent of the amount claimed by the claimant.

New forms are required. The amendments include new and revised forms for the NUB, lien claim, amended lien claim, the discharge surety bond (which stands in substitution of the property target of the lien) and the affidavit to be filed by an owner seeking discharge of a lien. Use of these new forms is required by the CLL, as amended. The new lien-claim form attempts to more clearly illustrate how the lien amount should be calculated by the claimant, including where a lien claim is filed before the contract work is complete, and the claimant is expected to base the claim upon the value of the work completed to date. As noted above, amendment of the lien claim remains permissible, but the CLL now states that a claim may not be amended to cure the claimant's initial filing of a lien claim that was without basis or willfully overstated.

Conclusion

Amendments to the CLL addressed many of the statutory ambiguities that have resulted in confusion and litigation in the years since its adoption. Awareness of and compliance with the new requirements may be key to the successful defense or prosecution of a lien claim, especially considering the tight time frame within which a lien must be perfected or, in some cases, discharged.

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Note

1. New Jersey Construction Lien Law, N.J.S.A. 2A:44A-1 *et seq.*