

Safran Law Offices

Serving the construction industry for over 30 years.

SAFRAN
LAW
OFFICES

NC LIEN LAWS UPDATE & WAIVER OF SUBROGATION PROJECT

ASAC of the Triangle
June 11, 2013

Brian J. Schoolman - Safran Law Offices

**APRIL 1,
2013**

LiensNC



Effective April 1, 2013

Welcome to LiensNC, the North Carolina Online Lien Agent System

Effective for construction projects beginning on or after April 1, 2013, North Carolina law requires appointment of a lien agent. Contractors and subcontractors can then give notice they are working on the project. Appointments are *not* required for (1) improvements under \$30,000 or (2) to the owner's existing residence or (3) for public building projects.

**Step-By-Step
Instructions on Using
LiensNC**

CLICK HERE

SENATE BILL 42 / HOUSE BILL 180

- A lien agent is required for any project valued at \$30,000 or more, either at time of original permitting, or at time of original contracting (if no permit will be required). (44A-11.1(a))
- Primary exception: existing single-family residence occupied by the owner.

NOTICE TO LIEN AGENT

- liensnc.com website: Owners and potential lien claimants can access the site to hire a lien agent, to give notice to the lien agent, and to track who else has given notices.
- The easiest way to utilize the website functions is through a QR reader on a smartphone or tablet device.



SENATE BILL 42 / HOUSE BILL 180

- HB 180 changed (and limited) the ability of a general contractor to cut off a subcontractor's subrogated lien rights. Under the bill, a sub who has filed its claim of lien on the real property prior to any waiver or other action by the GC cannot have its lien rights prejudiced by the GC absent the sub's consent.
- This change only applies to projects begun after April 1, 2013.

SENATE BILL 42 / HOUSE BILL 180

- The effective date of the revisions included in SB 42 and HB 180 is April 1, 2013.
- To date, there appear to have been limited issues with the implementation of the lien agent requirements, or with the liensnc.com website.
 - Any reports or comments?

WAIVER OF SUBROGATION: CONCEPT

- AIA A201-2007 11.3.7

- WAIVERS OF SUBROGATION The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

WAIVER OF SUBROGATION: IMPACT

- Innocent company has employee injured on project, as a result of negligent company.
- Innocent company's insurer pays worker's comp claim.
 - NO CHOICE - worker's comp is strict liability
- Innocent company and insurer prohibited from seeking recovery.
- Innocent company suffers costs, increased insurance premiums, and higher experience modifier.
- Innocent company may even lose business if experience modifier affects ability to be pre-qualified for projects.

WAIVER OF SUBROGATION: (POTENTIAL) REMEDY

- § 22B-5. Construction contracts with waiver of subrogation of workers' compensation insurance claims.
 - Except as otherwise provided in this section, any provision in a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition or excavating connected therewith, entered into in North Carolina that requires any party or the party's insurance carrier to waive any rights of subrogation of any claim or right granted pursuant to the North Carolina Workers' Compensation Act, G.S. Chapter 97, is against public policy and is void and unenforceable.

WAIVER OF SUBROGATION: (POTENTIAL) BENEFITS

- The innocent company's experience modifier is computed over a three-year period, based on a formula set forth by the North Carolina Rate Bureau.
- The ability to recover some or all losses from a claim through subrogation would reduce the actual losses incurred, and therefore lower the numerator in the experience modifier ratio.
- According to insurance reps, a company may even be able to recover a share of overpaid insurance premiums if the subrogation litigation led to a recovery after the modifier ratio had already increased.

WAIVER OF SUBROGATION: ADDITIONAL ISSUES

- “Waiver of immunity” clause to get around sole-source rule for workers comp claims.
- “Additional insured” clause - some forms are better than others to make sure a party is providing mandatory coverage.
- “Anti-indemnity” statutes - Important not to sign contracts that violate the statutes, just in case a court won’t invalidate the broad-form indemnity clause.

WAIVER OF SUBROGATION: NEEDS

- DATA - any company who has been affected by this
- CONTACTS - good relationships with legislators, and with other stakeholders
- ENERGY - Eddie Williams has started this ball rolling. More volunteers are needed

LEGISLATION IN THIS SESSION

NEXT?

- House Bill 857 - Design/Build and Public/Private Partnership
 - ASA National took pride in noting that this bill included surety bonding requirements for P3 projects, so as to protect subcontractors and material suppliers.
 - Passed House. In Senate Committee at this moment.

NEXT?

- House Bill 628 - “Protect/Promote NC Lumber”
 - The bill permits use of energy-efficiency standards only if the system “does not use a material or product-based credit system disadvantaging materials or products manufactured or produced in this State”
 - Regarded by many groups as anti-LEED bill
 - Passed House. In Senate committee today.

NEXT?

- House Bill 901 - Leasehold Liens
 - This bill will establish a study commission to investigate a solution to the *Pete Wall* issue of protecting contractors, subs and suppliers to be paid for furnishing work under a contract with a tenant who holds a leasehold interest.
 - Passed House. In Senate rules committee next.

QUESTIONS?

Contact information:
bschoolman@safranlaw.com

Website:
www.safranlaw.com
www.safranlaw.com/safranlawblog

Twitter:
@safranlaw
@safranlawBJS

Phone:
(919) 828-1396 / (800) 326-3372