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THE SUBCONTRACTORS' REVENGE: CLAIMS OF LIEN UPON FUNDS

One of the key benefits of the Notice of Claim of Lien Upon Funds, in addition to being fairly effective, is that it doesn't have the same 120 day/180 day filing requirements associated with Claims of Lien on Real Property. Instead, the only temporal limitations are the first to occur of (1) the money owed to the person ahead of you being paid to them, or (2) the expiration of three years from the date on which you have a claim for money owed.

Under N.C. Gen. Stat. § 44A-18, *et seq.*, subcontractors from the first tier (those in contract with the general contractor) all the way down to those more remote than the third tier (those that are three or more levels removed from the general contractor) "who furnished labor, materials, or rental equipment at the site of the improvement shall have a lien upon funds that are owed" to the person/company with whom they contracted. However, each level or tier of subcontractor – to some degree – has differing rights than the next.

For example, a first-tier subcontractor "shall have a lien upon funds that are owed to the contractor with whom the first tier subcontractor dealt and that arise out of the improvement on which the first tier subcontractor worked or furnished materials." N.C. Gen. Stat. § 44A-18(a). In other words, the first-tier subcontractor has a lien on money owed to the general contractor by the owner – simple as that. A second-tier subcontractor (or even a third-tier subcontractor) has a lien on funds owed to whomever is immediately upstream from them – not necessarily the general contractor. With that noted, however, second- and third-tier subs are "subrogated" (*i.e.*, they have the same rights) to the lien upon funds that may have been served by the first- or second-tier sub immediately ahead of them. Unfortunately, for subcontractors that are fourth-tier or lower, they don't have the same rights as those ahead of them – they are cut off after tier three.

So, what happens when a subcontractor sends its Notice of Claim of Lien Upon Funds? What *should* happen is that the "obligor" (*i.e.*, whoever owes the money to the person that owes the money to the subcontractor) is obligated to "retain any funds subject to the lien or liens upon funds . . . up to the total amount of such liens upon funds as to which notices of claims of lien upon funds have been received." N.C. Gen. Stat. § 44A-20(a). In other words, whoever owes a subcontractor money should not pay out any further monies if doing so diminishes the "pot" of funds below what the subcontractor is owed. If the "obligor" doesn't retain the appropriate funds but, instead, pays out over the lien, they may become personally liable for such a "wrongful payment." See N.C. Gen. Stat. § 44A-20(b). To go one step further, if the "obligor" is also the owner of the property where the project is located, the

subcontractor who served the Notice of Claim of Lien Upon Funds becomes entitled to file a Claim of Lien on Real Property up to the amount of the wrongful payment. See N.C. Gen. Stat. § 44A-20(d).

In an ideal world, a subcontractor's service of a Notice of Claim of Lien Upon Funds would mean that the appropriate "obligor" would have to deal with that subcontractor before paying anyone else. While this is not always the case – it depends on how much money is being held upstream – it generally does not make owners happy to know that subcontractors are owed money on their projects. Though the time limits on a Notice of Claim of Lien Upon Funds aren't as stringent as Claims of Lien on Real Property, it's always advisable that a subcontractor who is owed money call their counsel and get their Claim of Lien on Real Property filed within 120 days of their last date of furnishing, coupled with the simultaneous service of a Notice of Claim of Lien Upon Funds, to best secure payment. Like they say in the real estate industry, "time kills deals." But, here, what time "kills" is claims.

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