

1-1-1992

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Recommended Citation

Daniel R. King, *PROPERTY Mortgages, Liens, and Security: Provide Restrictions and Forms for Lien Waivers and Release*, 8 GA. ST. U. L. REV. (1992).

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PROPERTY

Mortgages, Liens, and Security: Provide Restrictions and Forms for Lien Waivers and Release

CODE SECTIONS: O.C.G.A. §§ 44-14-360 to -361 (amended),
44-14-366 (new)

BILL NUMBER: HB 528

ACT NUMBER: 393

SUMMARY: The Act makes null, void, and unenforceable any waiver of a right to claim a lien in advance of furnishing labor, services, or materials. Further, any lien waiver executed after commencement of a project, whether to induce a progress payment or final payment, must substantially follow the forms set forth in the Act. Within thirty days after entering into a lien waiver conditional on payment, an unpaid contractor must file an Affidavit of Nonpayment or else such amounts owed shall be deemed paid in full and the condition of payment satisfied.

EFFECTIVE DATE: July 1, 1991, O.C.G.A. §§ 44-14-360 to -361;
January 1, 1992, O.C.G.A. § 44-14-366.

History

The sponsor of HB 528 became interested in modifications to the lien laws after being alerted to problems under the former Georgia lien laws by contractors, suppliers, and bankers.¹ One problem was that suppliers of rental equipment on construction jobs were not covered under the previous definition of those entitled to claim a lien.² Another problem was that many times contractors were induced to waive all lien rights to the real property being improved as a precondition to performing work on a project.³ In a typical construction contract, if not waived in advance of the job, the contractor or supplier must waive all

1. Telephone Interview with Rep. Denny Dobbs (Apr. 10, 1991) [hereinafter Dobbs Interview].

2. *Id.*

3. *Id.*

lien rights as a precondition to payment,⁴ whether to receive a progress payment or final payment.⁵

Problems arose, however, when contractors and suppliers waived their lien rights for payment under the contract only to find the payment to be made with a bad check.⁶ Also, due to the wide variety of lien waiver forms in use certain kinds of lien waivers were held to be ineffective.⁷ As a result, suppliers, contractors, owners, and lenders were at times placed in a position of uncertainty with respect to their legal rights on liens.⁸

One objective of the Act was to simplify and clarify the law in this area by codifying the documents and forms needed in order to conform to the way the construction industry operates.⁹ The main objective, however, was to make the law perform its intended function: to protect those who provide materials and labor for the improvement of property by giving them lien rights.¹⁰

HB 528

One provision in the Act expands the list of those entitled to have a special lien on property to include all suppliers furnishing rental tools, appliances, machinery, or equipment for the improvement of real estate.¹¹

The Act amends Code title 44, chapter 14, by adding a new section 366.¹² Code section 44-14-366(a) provides that lien rights may not be waived in advance of furnishing labor, services, or materials.¹³ Further, any purported waiver of lien rights in advance is null, void, and unenforceable.¹⁴

Any lien waiver, to be effective, must substantially conform to the forms in the Code section, and the claimant must have received payment as defined later in the Code section.¹⁵ Two lien waiver forms are codified under the Act: an Interim Waiver and Release Upon Payment form, and an Unconditional Waiver and Release Upon Final Payment form.¹⁶

4. Telephone Interview with Larry McReynolds, Attorney for the Building Materialman's Merchants Association (Apr. 11, 1991) [hereinafter McReynolds Interview]. Mr. McReynolds worked with Rep. Dobbs in drafting the language used in the Act.

5. *Id.*

6. *Id.*

7. *Id.*

8. Dobbs Interview, *supra* note 1.

9. McReynolds Interview, *supra* note 4.

10. Dobbs Interview, *supra* note 1.

11. O.C.G.A. §§ 44-14-360, -361 (Supp. 1991).

12. O.C.G.A. § 44-14-366 (Supp. 1991).

13. O.C.G.A. § 44-14-366(a) (Supp. 1991).

14. *Id.*

15. O.C.G.A. § 44-14-366(b) (Supp. 1991).

16. O.C.G.A. § 44-14-366(c), (d) (Supp. 1991).

However, the Act does not affect a number of other possible agreements involving lien rights. For example, the Act does not affect an agreement by a potential lien claimant to subordinate her lien rights to another party even though such agreement is entered into in advance of furnishing labor, services, or materials.¹⁷ Also, the Act does not affect the enforceability of any waiver of lien rights given in connection with the settlement of a bona fide dispute concerning the amount due the lien claimant.¹⁸ Further, the Act does not affect the validity of a cancellation or release of a recorded claim of lien or preliminary notice of lien rights.¹⁹

The Act also defines "paid in full" for purposes of lien waivers under the Act.²⁰ The Act provides that when a form in the Code section is executed by a potential lien claimant, it shall be binding against the claimant for all purposes subject only to payment in full of the amount set forth in the waiver and release.²¹ Such amounts shall be deemed to be paid in full upon actual receipt of funds,²² written acknowledgement of funds,²³ or thirty days after execution of the waiver and release, unless before expiration of the thirty day period the claimant files a claim of lien or files an Affidavit of Nonpayment.²⁴ The filing of an Affidavit of Nonpayment suspends the operation of the waiver and release.²⁵

A claimant who is paid in full after filing an Affidavit of Nonpayment shall, upon request, execute an affidavit that payment has been received.²⁶ At that time, when the Affidavit of Payment is recorded, the Affidavit of Nonpayment shall be deemed void.²⁷

The original version of the bill contained four lien waiver forms.²⁸ Two were interim and two were final with one conditional upon payment and the other unconditional.²⁹ Because the sponsor determined that two forms would adequately cover the various payment agreements in the construction industry, the series of forms in the as introduced version were reduced to the two forms appearing in the Act.³⁰

17. O.C.G.A. § 44-14-366(e)(1) (Supp. 1991).

18. O.C.G.A. § 44-14-366(e)(2) (Supp. 1991).

19. O.C.G.A. § 44-14-366(e)(3) (Supp. 1991).

20. O.C.G.A. § 44-14-366(f) (Supp. 1991).

21. O.C.G.A. § 44-14-366(f)(1) (Supp. 1991).

22. O.C.G.A. § 44-14-366(f)(2)(A) (Supp. 1991).

23. O.C.G.A. § 44-14-366(f)(2)(B) (Supp. 1991).

24. O.C.G.A. § 44-14-366(f)(2)(C) (Supp. 1991). The Affidavit of Nonpayment must substantially conform to the codified form. *Id.*

25. O.C.G.A. § 44-14-366(f)(5) (Supp. 1991).

26. O.C.G.A. § 44-14-366(f)(3) (Supp. 1991).

27. *Id.*

28. HB 528, as introduced, 1991 Ga. Gen. Assem.

29. *Id.*

30. McReynolds Interview, *supra* note 4.

One of the biggest changes in the bill as introduced and the final version is the Affidavit of Nonpayment that must be filed by an unpaid contractor within thirty days of executing a conditional lien waiver.³¹ The objective of this document is to give contractors and suppliers a right of suspending the effect of the conditional lien waiver if payment is made with a bad check.³² However, this provision may prove to be harmful to contractors.³³ The waiver and release forms, even though conditional upon payment, place the burden on a possibly unsuspecting, unpaid contractor to file the Affidavit of Nonpayment within thirty days.³⁴ It seems unlikely that small contractors and suppliers inside and outside the State will be aware of the action they must take upon execution of these forms if not paid.³⁵

Another potential problem is some language used in the final version of the Act that may be misleading. The second form codified under the Act is entitled Unconditional Waiver and Release Upon Final Payment.³⁶ Contrary to its title, the second form is conditional upon final payment.³⁷ Further, at the end of the second form is a notice that states:

This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it even if you have not been paid. If you have not been paid, use a conditional release form.³⁸

Contrary to the language in the notice, the second form does not waive rights unconditionally and does not state that the contractor has been paid, but rather that the contractor has not been paid.³⁹

31. O.C.G.A. § 44-14-366(f)(2)(C) (Supp. 1991). The issue of nonpayment was addressed in HB 528, as introduced, by language in the waiver and release forms specifying that the payment check must be paid by the bank to make the waiver effective. HB 528, as introduced, 1991 Ga. Gen. Assem. This approach was changed in the House Committee Substitute to the bill, which removed the language requiring payment and inserted instead "the receipt of a check is not full payment until funds are paid to the claimant." HB 528, (HCS), 1991 Ga. Gen. Assem.

32. McReynolds Interview, *supra* note 4.

33. *Id.*

34. O.C.G.A. § 44-14-366(f)(2)(C) (Supp. 1991).

35. McReynolds Interview, *supra* note 4. For example, small roofing or drywalling companies, as well as other contractors or suppliers who are unaware of the Act, may find that under this requirement of the Act, they have been deemed to have waived their lien rights, even though the waiver and release form indicates that payment must be made in order for the waiver to become effective. Therefore, although the overall objective of the Act is to benefit the contractors and suppliers, it may operate to harm contractors and suppliers who are unaware of the operation of this section.

36. O.C.G.A. § 44-14-366(d) (Supp. 1991).

37. *Id.*

38. *Id.*

39. *Id.*

The document does not appear to be enforceable even if the contractor is not paid as the notice states since the contractor may file an Affidavit of Nonpayment.⁴⁰ The notice then refers the contractor to a conditional release form.⁴¹ Still, there is no other release form provided for final payment;⁴² therefore, this language may add confusion to those trying to interpret the operation of the forms.⁴³

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40. See the Form for Affidavit of Nonpayment, located in O.C.G.A. § 44-14-366(f) (Supp. 1991).

41. O.C.G.A. § 44-14-366(d) (Supp. 1991).

42. O.C.G.A. § 44-14-366(b)(1) (Supp. 1991). In addition, only waivers and releases substantially conforming to those codified under the Act may be used.

43. McReynolds Interview, *supra* note 4.