



## CHANGES TO THE NEW JERSEY CONSTRUCTION LIEN LAW

On January 5, 2011 Governor Christie signed into law the changes to the Construction Lien Law (CLL). The bill incorporating these changes had been passed unanimously in both the Assembly and the Senate. The law takes place immediately. Adoption of the changes without the use of a prospective date may cause some confusion and inconvenience at the outset. However, I would expect courts to be lenient with issues that arise during the transition period.

The origin for this legislation arose with The New Jersey Law Revision Commission, a state agency whose purpose is to simplify, clarify and modernize the state statutes. It does so by conducting an ongoing review of the statutes to identify areas of the law that require revision. When the CLL was enacted in 1994 to replace the outdated and little used Mechanic's Lien Law, it was targeted for a review in 10 years. In late 2007, the Commission took up the process of reviewing the CLL, seeking and welcoming input from the construction community. It is fair to say that the changes will reflect the general consensus of those who deal with the CLL on a regular basis.

### HIGHLIGHTS OF THE PROPOSED REVISIONS

**NOTE: The forms of the NUB, lien claim and the amendment to the lien claim have changed. Therefore, make sure that for any filings after January 5, 2011, the new statutory prescribed forms are used.**

#### Clarification of Residential Construction Issues

- a. **Definitions (2A:44A-2)** – The terms “dwelling”, “real property development”, “residential construction”, “residential unit”, and “community association” are defined for the first time, recognizing that condominium and other homeowner associations are affected by the residential lien law and clarification was needed to distinguish whether or not a lien claim affects the common elements and/or individual units.

Residential unit includes mixed use facilities but does not include rental units.

It is now recognized that a “community association” can be a de facto “owner” for purposes of establishing the chain of contracts upon which construction lien claims are based.

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Revision of the terms “residential construction contract” and “residential purchase agreement” further clarify the definition of residential construction, expanding it to include all offsite and onsite infrastructure and site work improvements required under the contract.

- b. Entitlement to lien claim (2A:44A-3)** – The revision distinguishes liens for work and services provided as part of the common elements or common areas of a property development from those for work to individual units. The concept of filing a lien for common element or common area work/services upon the community association is introduced
- c. Perfecting residential construction lien claims and arbitration of claims (2A:44A-20 & 2A:44A-21)** – The NUB has changed to reflect changes to the lien claim form (see section 2A:44A-8 below.) The time frame for lodging for record the NUB is extended to 60 days; time frame for filing residential lien claims to 120 days. Section 2A:44A-21 now modifies the arbitrator’s role, adding provisions that seek to avoid the problems associated with multiple, inconsistent arbitrations.

### Contracts

**Definitions (2A:44A-2)** – A clarification was added to the definition of a “contract” to make it clear that the contract is not only a written document but a written documents that is signed by the party against whom the lien claim is asserted. It was also clarified that a contract can mean a delivery or order slip which refers to the specific project where the materials have been delivered as long as the delivery slip is signed by an authorized agent of the party to whom the lien claim is directed.

### Leaseholds

**Entitlement to lien claim (2A:44A-3)** – Clarification is provided regarding the circumstances under which a landlord may be subject to a lien for improvements made by a tenant. Tenancy improvements result in liens *only* against the leasehold unless the owner has expressly authorized in writing the contract for the improvement, has agreed to pay the majority of the cost of improvement or if the lease or sublease so provides that the owner’s interest is subject to a lien for the improvement.



**Changes to Mechanics of Filing; Lodging for Record; Serving Lien Claim Form; and Amendment of Claim; Form of Bond Added**

- a. **Definitions (2A:44A-2)** – The definition of “filing” is modified making a distinction for purposes of enforcement of the lien claim between parties within the construction chain with notice of the claim and third parties outside the construction chain without notice of the claim.
- b. **Filing of claim (2A:44A-6)** – A distinction between “filing” and “lodging for record” for purposes of enforceability of the lien is now part of this section. The time frames for the filing of residential construction claims and NUBs are extended. See section 2A:44A-21.
- c. **Service of claim (2A:44A-7)** – Service by commercial courier is now included. A lien claim may now be served on a community association and if so served need not be served on individual unit owners. Lien claim forms are to be marked “received for filing” or similar stamp indicating date and time received by county clerks.
- d. **Form of claim (2A:44A-8)** – The claim form is simplified and clarified in accordance with practical concerns.
- e. **Amendment of claim (2A:44A-11)** – The circumstances when a lien claim may be amended are now illustrated: “for any appropriate reason” including performing additional work, partial payment or release of a proportionate share of the interest in real property; however, an amendment is not permissible to cure a violation of section 2A:44A-15.
- f. **Form of bond (2A:44A-31.1)** – This new section provides a form of bond to be used in order to discharge the construction lien.

**Changes to the Calculation and Distribution of Lien Fund**

- a. **Definitions (2A:44A-2)** - The terms “lien claim” and “lien fund” are defined for the first time.
- b. **Calculation of the lien fund (2A:44A-10) and creation of a new section 2A:44A-9.1** – All references to the calculation of the lien fund in



section 2A:44A-10 are excised and incorporated into new section 2A:44A-9.1. 2A:44A-10 now focuses entirely on attachment of the lien and priority of first recorded interests affecting property. See also 2A:44A-22. New 2A:44A-9.1 adopts recent court determinations, better explaining the relationship between the lien claim and the lien fund.

- c. **Payment of lien claims and distribution of proceeds (2A:44A-23)** – This new section is a blend of the current sections 2A:44A-23 and 2A:44A-28, attempting to set forth the process by which lien claims are paid out pro rata from the lien fund. Current section 2A:44A-28 is deleted.

#### **Changes to Enforcement and Discharge of Liens**

- a. **Suit to enforce lien claim (2A:44A-24)** – This new section makes clear the process by which a lien claim may be enforced. As a result, sections 2A:44A-25 (Writs of execution); 2A:44A-26 (Special writs of execution); 2A:44A-28 (Proceeds of sale and distribution) and 2A:44A-29 (Surplus funds) are modified or eliminated. The section pertaining to joinder (2A:44A-16) is merged with this section.
- b. **Discharging the lien claim of record (2A:44A-30 and 2A:44A-33)** – These sections are revised to (i) include a summary proceeding for discharging a lien claim; (ii) impose consequences for not canceling or discharging a lis pendens upon the discharge of the claim; and (iii) enable an owner to obtain a discharge of a lien claim that has been fully paid and satisfied, and the county clerk to discharge a fully paid and satisfied lien claim upon receipt of the owner's submission of the appropriate affidavit.