

## CONCURRENT SESSION

### LIEN & BOND ISSUES

Update on 2013 Lien Law Changes

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DEADLINES, DRAFTING, AND NEW  
DEVELOPMENTS IN THE LAW

# NC LIEN AND BOND LAW

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# What is a mechanic's lien?

- A mechanic's lien is an encumbrance on real property that secures a claimant's right to payment for labor and materials furnished on the property
- A properly filed mechanic's lien has the same effect on the property as a mortgage or other encumbrance and could entitle the lien claimant to foreclose

# Who has mechanic's lien rights?

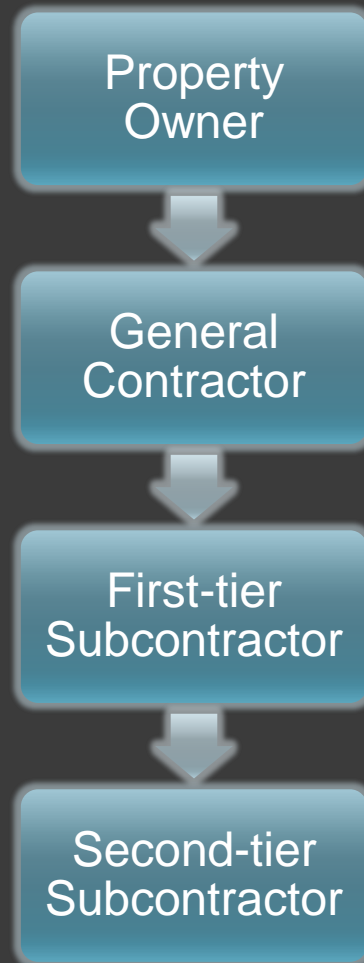
- People or businesses that furnish labor and/or materials for improvement of real property pursuant to an express or implied contract
- Contractors, subcontractors, or material suppliers who have not received payment for their work



# Who has mechanic's lien rights?

- ④ General Contractor - one who contracts directly with the real property owner
- ④ First-tier Subcontractor – one who contracts with the general contractor
- ④ Second-tier Subcontractor – one who contracts with a first-tier subcontractor

# The Chain of Contracting



# Labor and material: defined

“Labor and material” includes labor, professional design or surveying services, materials, or rental equipment furnished pursuant to an express or implied contract with the owner of the real property for improvement of the property.

N.C.G.S. §44A-8



# General Contractors

- If not paid timely for duly furnished labor or materials, general contractors can assert mechanic's liens directly on real property

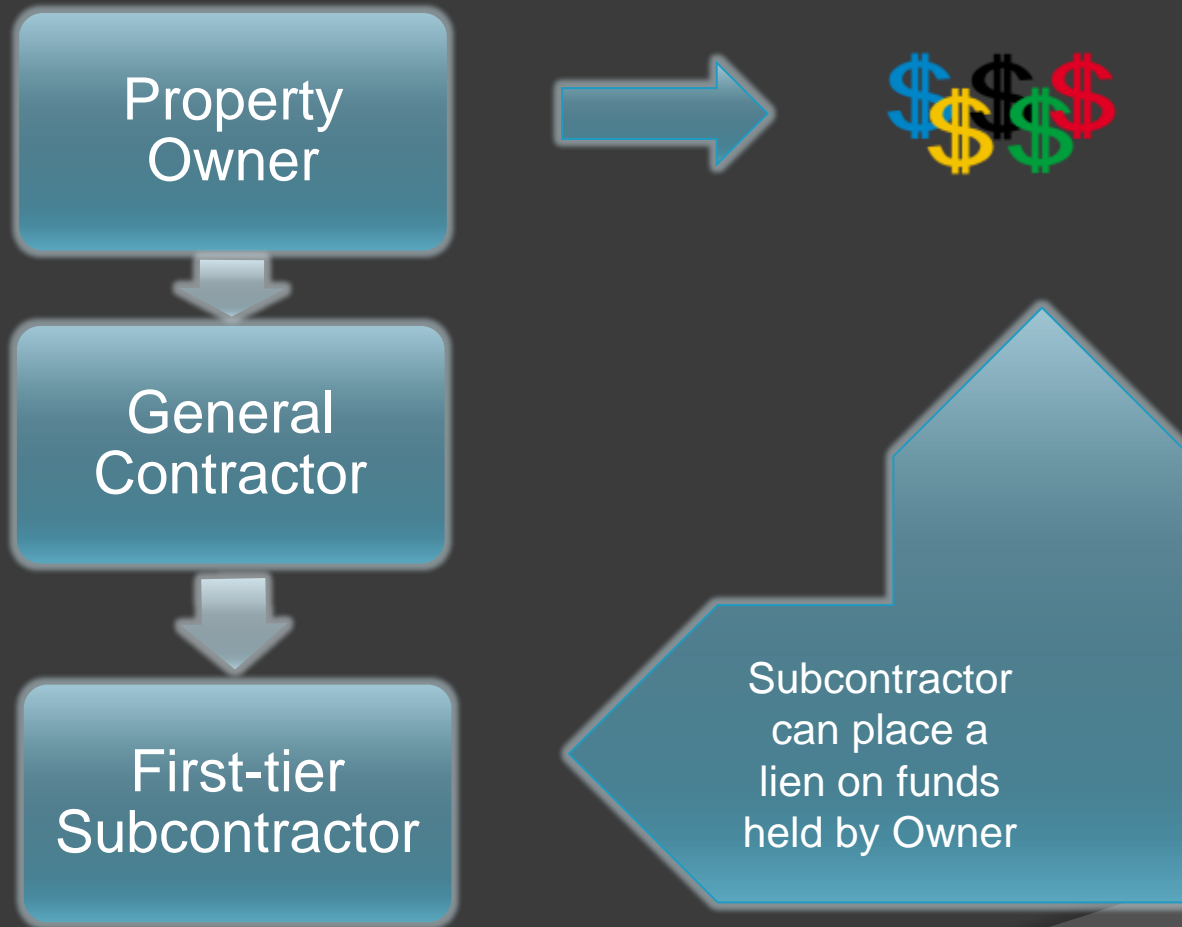


# Subcontractors

- Subcontractors generally do not have direct lien rights
- May have a lien upon funds held by the owner or general contractor
- If lien upon funds held by owner, can assert a subrogated lien upon the property



# Lien Upon Funds



# Lien Filing in North Carolina

- ◎ Phase 1: Pre-Notice and the Lien Agent Requirement
- ◎ Phase 2: Filing, Serving, and Perfecting the Lien

# Phase 1:

## NC's Lien Agent Requirement

- Effective 4/1/13, N.C.G.S. § 44A-11.2 requires private owners of projects more than \$30,000 to designate a “lien agent” for any improvement to real property
- A “lien agent” is a title insurance agency assigned to the project and insure title to real property
- Potential lien claimants must notify the lien agent of their existence to preserve lien rights that might arise later

# NC's Lien Agent Requirement

## WHO, WHAT, WHEN, WHY, & HOW?

- Who? Contractors & subcontractors who want to preserve the right to file liens
- What? Must serve [Notice to Lien Agent](#)
- When? Within 15 days of first furnishing
- Why? Prevention of “hidden liens”
- How? Ideally, via [www.liensnc.com](http://www.liensnc.com)

# Notice to Lien Agent

## NOTICE TO LIEN AGENT

- (1) Potential lien claimant's name, mailing address, telephone number, fax number (if available), and electronic mailing address (if available):
- (2) Name of the party with whom the potential lien claimant has contracted to improve the real property described below:
- (3) A description of the real property sufficient to identify the real property, such as the name of the project, if applicable, the physical address as shown on the building permit or notice received from the owner:
- (4) I give notice of my right subsequently to pursue a Claim of Lien for improvements to the real property described in this notice.

Dated: \_\_\_\_\_  
\_\_\_\_\_

Potential Lien Claimant

\_\_\_\_\_

# Notice to Lien Agent

If not served via [www.liensnc.com](http://www.liensnc.com), a Notice to Lien Agent may be served via one of the following methods:

- (1) Certified mail, return receipt requested.
- (2) Signature confirmation as provided by the United States Postal Service.
- (3) Physical delivery and obtaining a delivery receipt from the lien agent.
- (4) Facsimile with a facsimile confirmation.
- (5) Depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2).
- (6) Electronic mail, with delivery receipt.

N.C.G.S. § 44A-11.2(f)



# Notice to Lien Agent

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.

LiensNC is an on-line application created specifically to help users file these appointments and notices as well as search for filings - quickly and easily. By properly using the online system, you will be notifying the lien agent of your involvement in the project. It's that easy!

[Filing Location Information](#)  
(For use when applying for a building permit or for filing with the system.)

[Online](#)  
Address: 19 W. Hargett Street, Suite 507 / Raleigh, NC 27601  
Email: [support@liensnc.com](mailto:support@liensnc.com)  
Fax: 913-489-5231

**GET STARTED**

**Quick Links:**

- [Appointment of Lien Agent - filing directions](#)
- [Notice to Lien Agent - filing directions](#)
- [Overview of Process and History](#)

To get started, we encourage you to refer to the [Guide](#) area of this site to find additional information for your specific role in the construction project. First Time Users will need to create a user account to access LiensNC. Returning users can login with their existing account credentials.

**Technical Support: 1-888-690-7384**  
(Technical support available during normal business hours - Answering service available 24/7)

# Notice to Lien Agent

The screenshot displays the LiensNC website interface. The browser's address bar shows the URL: <https://apps.liensnc.com/scr/appointment/details.html?entryNumber=420273&printable=>. The website header includes the LiensNC logo and navigation links: Home, Search, History, Cart, and Guide. A user account menu is visible with 'Account' and 'Log Out' options.

The main content area is titled 'POST AT JOB SITE' and 'Details: Appointment of Lien Agent'. It specifies 'Entry #: 420273' and provides filing information: 'Filed on: 02/17/2016' and 'Initially filed by: Hearthstone2011trina'.

Under the 'Designated Lien Agent' section, the 'Investors Title Insurance Company' is listed with the following contact details:  
Online: [www.liensnc.com](http://www.liensnc.com)  
Address: 19 W. Hargett St., Suite 507 / Raleigh, NC 27601  
Phone: 888-695-7384  
Fax: 919-489-5231  
Email: [support@liensnc.com](mailto:support@liensnc.com)

The 'Owner Information' section lists 'Hearthstone Luxury Homes, LLC' with the address: 5718 BELMONT VALLEY COURT, RALEIGH, NC 27612, United States. Contact details include Email: [dogsdon@arhomes.com](mailto:dogsdon@arhomes.com) and Phone: 919-900-7090.

An 'Action' dropdown menu is open, showing options: 'Copy To New', 'Notice to Lien Agent' (highlighted), 'Appointment of Lien Agent', 'Track This', 'Related Filings Report', and 'Closing Notice'.

The 'Print & Post' section features a QR code and instructions for contractors and suppliers/subcontractors. Contractors are instructed to 'Please post this notice on the job site.' Suppliers and subcontractors are instructed to 'Scan this image with your smart phone to view this'.

The Windows taskbar at the bottom shows the system clock as 11:43 AM on 2/17/2016, along with various application icons.

# Notice to Lien Agent

The screenshot shows a web browser window with the URL <https://apps.liensnc.com/scr/notice/add.html?parentId=420273&copyTo=true>. The page title is "File: Notice to Lien Agent". The LiensNC logo is in the top left, and navigation links (Home, Search, History, Cart, Guide) are in the top right. A "Log Out" button is also present. The main content area is titled "File: Notice to Lien Agent" and shows "Linked to: 420273" with a "Change" button. Below this, a box contains the following text:

**Done by:** Potential Lien Claimants (Contractors, 1st, 2nd or 3rd tier subcontractors/suppliers, rental equipment providers, design professionals)  
**For:** Providing notice that the Potential Lien Claimant is providing lienable labor, services or materials to the real property (the Project Property)  
**When:** At any time before, during or after providing of the labor, services or materials by the Potential Lien Claimant to the real property. However, the notice must be filed prior to conveyance or mortgage of the real property by the Owner to an unaffiliated third party, or for those first providing lienable labor, services or materials to the Project Property within the last 15 days prior to such conveyance or mortgage, the Notice to Lien Agent must be filed within 15 days of the Potential Lien Claimant's first furnishing to the Project Property.

To read the full law, refer to [Chapter 44A, Article 2, of the NC General Statutes](#).

Below this, the "Potential Lien Claimant Information" section contains the following form fields:

- Name:  Required
- Street 1:  Required
- Street 2:
- Country:  United States

The Windows taskbar at the bottom shows the time as 11:45 AM on 2/17/2016.

## Phase 2:

### Filing, Serving & Perfecting the Lien

- The new lien agent requirement does not change long-standing deadlines and procedure for filing liens
- A lien claimant still must file and serve a Claim of Lien on Real Property in compliance with N.C.G.S. §§ 44A-11 & 44A-12
- Must also file suit to perfect the lien pursuant to N.C.G.S. § 44A-13

# Drafting the Claim of Lien

The Claim of Lien on Real Property must contain the following:

- (1) Name and address of the person claiming the claim of lien on real property:
- (2) Name and address of the record owner of the real property claimed to be subject to the claim of lien on real property at the time the claim of lien on real property is filed and, if the claim of lien on real property is being asserted pursuant to G.S. 44A-23, the name of the contractor through which subrogation is being asserted:
- (3) Description of the real property upon which the claim of lien on real property is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)
- (4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
- (5) Date upon which labor or materials were first furnished upon said property by the claimant:
- (5a) Date upon which labor or materials were last furnished upon said property by the claimant:
- (6) General description of the labor performed or materials furnished and the amount claimed therefor:

I hereby certify that I have served the parties listed in (2) above in accordance with the requirements of G.S. 44A-11.

N.C.G.S. § 44A-12(c).

# Drafting the Claim of Lien

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

\_\_\_\_\_ COUNTY

\_\_\_\_\_ COURT DIVISION



Always file in the  
county where real  
property is located



Select District or  
Superior court  
based upon  
amount in  
controversy

# Drafting the Claim of Lien

- (1) Name and address of the person claiming the claim of lien on real property
- (2) Name and address of the record owner of the real property claimed to be subject to the claim of lien on real property at the time the claim of lien on real property is filed and, if the claim of lien on real property is being asserted pursuant to G.S. 44A-23, the name of the contractor through which subrogation is being asserted:

# What's in a Name?

- ⦿ Correct spelling and including corporate suffixes is crucial, particularly for the record owner of the property
- ⦿ “Owner NC, LLC” not “Owner”
- ⦿ Indispensable resources:
  - Register of Deeds
  - County tax databases
  - NC Secretary of State – Business Search (<http://www.secretary.state.nc.us/search/index/corp>)



# Drafting the Claim of Lien

- ◎ (3) Description of the real property upon which the claim of lien on real property is claimed:
  - (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)

# Description of Real Property

- Take special care to accurately identify the parcel upon which the lien is being asserted
- The wrong street address can result in lien being invalidated
- So can a street address that does not match a legal description or book and page number

# Drafting the Claim of Lien

(5) Date upon which labor or materials were first furnished upon said property by the claimant

- Date of first furnishing is the date to which the lien will “relate back” and take effect
- This crucial date potentially gives the claimant priority over other lien holders and mortgagees

# Drafting the Claim of Lien

(5a) Date upon which labor or materials were last furnished upon said property by the claimant:

- Also crucial, this date determines the lien claimant's deadlines for filing the lien and a lawsuit to enforce
- Dates should be provided by client or attorney

# Drafting the Claim of Lien

## What constitutes “furnishing of labor and/or materials?”

- ⦿ For a GC: the first day the GC, or its subcontractors, did anything at the site. (*Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 295 N.C. 661 (1978))
- ⦿ Not necessarily the invoice or contract date
- ⦿ Per the N.C. Supreme Court:
  - Must be required by the contract
  - If furnished/delivered at different times, must be under the same contract
  - Performed in “good faith.”  
*Priddy v. Kernersville Lumber Company*, 258 N.C. 653 (1963)

# Drafting the Claim of Lien

(6) General description of the labor performed or materials furnished and the amount claimed therefor:

- ⦿ A general description and summary is sufficient; an itemized list is not required
- ⦿ May include work performed or delivery of supplies or materials to a project site

# Filing the Claim of Lien

- Must file and serve the lien within 120 days of the claimant's date of last furnishing. N.C.G.S. §§ 44A-12
  - If deadline falls on a weekend, use the preceding Friday as deadline
- Claim of Lien on Real Property: filed with the clerk
- Notice of Claim of Lien upon Funds: NOT necessarily filed with the clerk

# Filing the Claim of Lien



- A Claim of Lien on Real Property must be filed with the Clerk of Court
- County where property is located
- Filing fee: \$6.00, plus an additional 25 cents per page
- If a Notice of Claim of Lien upon Funds is being served for the claimant, attach the Lien upon Funds to the Claim of Lien and file with Clerk of Court



# Serving the Claim of Lien

Within 120-day deadline, file and SERVE:

- ⦿ Record owner of the real property, and
- ⦿ If the lien claimant is a subcontractor, the lien must also be served upon the party through whom the lien claimant is asserting subrogation.
  - For first-tier subcontractors – the general contractor
  - For second-tier subcontractors - the first-tier subcontractor and the general contractor.

N.C.G.S. § 44A-11(a)(1)

# Serving the Claim of Lien

Permissible methods of service:

- Personal delivery
- U.S. Mail
- Authorized commercial carriers such as FedEx and UPS.



N.C.G.S. § 44A-11

Note that per N.C.G.S. § 44A-11(b), proof of receipt is not required for proper service of a Claim of Lien.

# Serving the Claim of Lien



How to select the proper address? A wrapper addressed to party required to be served with the Claim of Lien is deemed to be properly addressed if it uses any of the following addresses:

- (1) The address for the party to be served listed **on the permit** issued for the improvement.
- (2) The address for the party to be served listed with the **tax rolls** for any county in North Carolina.
- (3) The **address of the registered agent** for the party to be served listed with the North Carolina Secretary of State's office. N.C.G.S. § 44A-11(c).

# Drafting the Lien upon Funds

Notice of a Claim of Lien upon Funds shall set forth all of the following information:

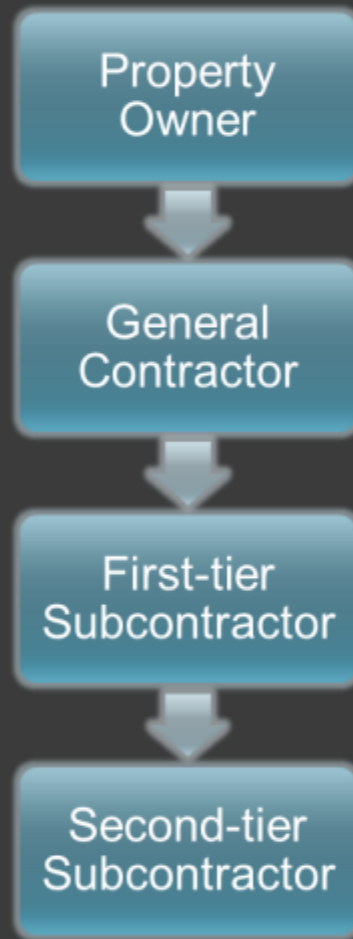
- (1) The name and address of the person claiming the lien upon funds.
- (2) A general description of the real property improved.
- (3) The name and address of the person with whom the lien claimant contracted to improve real property.
- (4) The name and address of each person against or through whom subrogation rights are claimed.
- (5) A general description of the contract and the person against whose interest the lien upon funds is claimed.
- (6) The amount of the lien upon funds claimed by the lien claimant under the contract.

N.C.G.S. § 44A-19(a)

# Serving the Lien upon Funds

- ⦿ A Notice of Claim of Lien upon Funds is always served and sometimes filed
  - File with any accompanying Claim of Lien  
N.C.G.S. § 44A-19(d) – (e)
- ⦿ Must serve upon “the obligor”
  - Obligor: the party who owes money to the party with whom the lien claimant contracted
  - When in doubt: serve all parties upward in the “chain of contracting”

# Serving the Lien Upon Funds



# Serving the Lien upon Funds

Unlike with Claims of Lien, a lien claimant must prove delivery of a Lien upon Funds

- Service may be completed pursuant to Rule 4 of the NC Rules of Civil Procedure
- Certified Mail, personal delivery, or service via commercial carrier are acceptable

N.C.G.S. § 44A-19(d)

# Filing Suit to Enforce the Lien

- ⦿ For a Claim of Lien to remain enforceable, the claimant must file suit to enforce within **180 days** of the lien claimant's last date of furnishing of labor or materials on the project
- ⦿ May file "in any county where venue is otherwise proper"
- ⦿ If a lien lawsuit is filed in a different county from the county where the project is located, the lien claimant must file a lis pendens in each county where the project is located.

N.C.G.S. § 44A-13.



# Cancelling the Claim of Lien

A Claim of Lien can be cancelled by any of the following:

- (1) Acknowledgment of the satisfaction of the claim before the clerk of court, enabling the clerk to record notice of satisfaction of the lien
- (2) Lien claimant submits a signed, notarized satisfaction or cancellation of lien presented to the clerk of superior court, enabling the clerk to cancel the lien by entry of satisfaction on the record
- (3) Lien claimant fails to enforce the claim of lien on real property with a lawsuit
- (4) Lien lawsuit is dismissed or finally determined adversely to the claimant

# Cancelling the Claim of Lien

(5) Whenever a sum equal to the amount of the claim or claims of lien on real property claimed is deposited with the clerk of court, to be applied to the payment finally determined to be due, enabling the clerk of superior court to cancel the lien

(6) Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the claim or claims of lien on real property claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said claim or claims of lien on real property, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property of record.

N.C.G.S. § 44A-16(a)

# Cancelling the Claim of Lien

**NOW COMES** Lien Claimant, pursuant to N.C.G.S. §44A-16, and hereby cancels and discharges the Claim of Lien and Claim of Lien upon Funds which it previously asserted with the Clerk of \_\_\_\_\_ County Superior Court.

1.        Name and address of entity discharging lien:
2.        Name and address of owner of property involved:
3.        General Contractor:
4.        General description of real property as to which lien is being discharged:
5.        Date claim of lien was asserted:

WHEREFORE, the lien claimant, through its attorney, hereby cancels its claim of lien against the above-described property.

Date: \_\_\_\_\_

Lien Claimant: \_\_\_\_\_

# Payment Bonds

- **Payment bond:** a surety bond posted by a contractor to guarantee that its subcontractors and material suppliers on the project will be paid
- Contractors seeking to secure payment for past-due sums on public construction projects will likely turn to bonds



# Federal Bond Deadlines

- ⦿ In order to preserve its rights to claim payment under a federal payment bond, a claimant must file suit on the bond:
  - No sooner than **90 days** after
  - But within **one year** of, its last date of furnishing of labor and material on a project. 40 U.S.C. § 3131(b)(4).
- ⦿ A second-tier subcontractor serve a notice of its claim to the general contractor within **90 days** of the claimant's last furnishing of labor or material to the project. 40 U.S.C. § 3131(b)(2).
- ⦿ The notice must actually be received by the general contractor within the 90-day period.



# State Bond Deadlines

- ⦿ In order to preserve its rights to claim payment under a state payment bond, a claimant must file suit on the bond:
  - No sooner than **90 days** after
  - But within **one year** of, its last date of furnishing of labor and material on a project. N.C.G.S. § 44A-27(a).
- ⦿ Second- and lower-tier subcontractors and suppliers must provide notice to the general contractor within **120 days** of the claimant's last date of furnishing of labor or materials to the project. N.C.G.S. § 44A-27(b).

# **North Carolina Lien and Bond Law: Deadlines, Drafting, and New Developments in the Law**

Caroline L. Trautman, Attorney  
Anderson Jones, PLLC  
Raleigh, North Carolina  
March 18, 2016

## **Mechanic's Liens and Liens on Funds**

### **Claim of Lien**

Mechanic's liens secure a claimant's right to payment only on privately owned property. (For publicly owned property or projects, see the section below on payment bonds.) Generally, a person who or business that performs labor or provides material for improvement of real property in North Carolina has the right to a lien on the real property to secure payment of past-due debts for the labor or materials. The definition of said labor and materials includes labor, professional design or surveying services, materials, or rental equipment furnished pursuant to an express or implied contract with the owner of the real property for improvement of the property. N.C.G.S. § 44A-8.

Liens not only benefit contractors who contract with a real property owner. Subcontractors (those who contract with another contractor instead of the owner) may also have lien rights and be potential lien claimants. Per the lien statute a lien claimant who contracts directly with the owner of the real property is a "contractor" or also commonly referred to as a "general contractor." A lien claimant who contracts with the general contractor is a "first-tier subcontractor," and a subcontractor who contracts with a subcontractor of a contractor is a "second-tier" contractor, and so on. N.C.G.S. § 44A-7. These distinctions are important, as they determine the extent of the claimant's lien rights.

A general contractor who has not been paid for labor or materials furnished to improve real property is entitled to assert a lien directly on the property title. Subcontractors are not necessarily entitled to do so, and any direct lien rights of subcontractors are subrogated. To the extent the subcontractor has a valid Lien upon Funds held by the owner (as further described below), the subcontractor can step into the shoes of the contractor and thereby assert against the owner any lien on Real Property available to the general contractor. This process of stepping into the shoes and enjoying the rights of another is called subrogation. N.C.G.S. § 44A-18.

## Notice of Claim of Lien on Funds

Generally, subcontractors are entitled to assert a Lien upon Funds held by upper-tier subcontractors, the general contractor, and/or the property owner. A subcontractor who is not paid timely cannot file a “direct” Claim of Lien on the real property, but can serve a “Notice of Claim of Lien on Funds” on the contractor with whom it contracted, the general contractor, or the owner. If a property owner owes funds to the general contractor or the general contractors owes the first-tier subcontractor, a lower-tier subcontractor serving a Notice of Claim of Lien on Funds creates a secured interest in favor of the subcontractor lien claimant against the owed funds. N.C.G.S. § 44A-18. After being served with a Notice of Claim of Lien on Funds, if any party higher in the chain of funds disbursement pays another party instead of the lien claimant (or otherwise makes a payment without insuring that the lien claimant’s claim is satisfied or sufficient funds are withheld to satisfy the claim), then that party becomes directly liable to the lien claimant to the extent of the wrongful payment. N.C.G.S. § 44A-20.

## **Procedure for Lien Filing**

General contractors and first- or lower-tier subcontractors and suppliers are typical lien claimants. Contractors and subcontractors may file a Claim of Lien or serve a Notice of Claim of Lien upon Funds themselves, but many parties prefer to have a legal practitioner perform the work to ensure it is done correctly and timely.

The lien filing process generally includes two main phases: 1) preserving the lien rights through pre-notice, and 2) filing, serving, and perfecting the lien. This process entails serving a Notice to Lien Agent within 15 days of the first date of furnishing labor and materials on the project; filing a mechanics lien with the clerk of court and serving the lien (and the Notice of Claim of Lien Upon Funds, if applicable) within 120 days of the lien claimant’s last date of furnishing of labor and materials on the project; and filing a lawsuit to perfect the lien within 180 days of the last date of furnishing. (See N.C.G.S. §§ 44A-11.2, 44A-12, and 44A-13.) If the lien claimant files suit in a county other than the county where the project is located and the mechanic’s lien is filed, a lis pendens must also be filed in the county where the project is located. N.C.G.S. § 44A-13.

## Phase 1: “Pre-Notice” and the New Lien Agent Requirement

On April 1, 2013, North Carolina law began requiring project owners to designate a “lien agent” for most improvements to privately owned property. A lien agent is a title insurance company or agency. Owners must designate a lien agent for any improvement to real property exceeding \$30,000.00 in costs at the time the original building permit is issued. Exceptions exist, including one for improvements made to an existing single-family residential dwelling unit used by the owner as a residence. N.C.G.S. §§ 44A-11.2

The new statute contains detailed provisions on when and how project owners must designate lien agents for projects. On projects where owners have designated a lien



agent, potential lien claimants must take measures during the early stages of a project to preserve their right to later file a lien.

Specifically, potential lien claimants must send a Notice to Lien Agent so that it is received within 15 days after their first furnishing labor or materials on or for the improvement. N.C.G.S. §§ 44A-11.2(l)(1). Failure to give a timely Notice to the Lien Agent by the Contractor, Subcontractors, Suppliers, or Designers will probably result in all lien rights being lost if the owner sells or otherwise transfers some interest in the property (such as a conveyance, refinance, or mortgage) prior to the filing and service of a Claim of Lien on Real Property on the Owner. The statute allows potential lien claimants to send the Notice to Lien Agent by a number of means, which are set forth in further detail below.

If the potential lien claimant does not send a “Notice to Lien Agent” within 15 days of its date of first furnishing, the potential claimant’s lien rights may still be protected by either: (1) sending the “Notice to Lien Agent” prior to the date of recordation of a conveyance of the property interest in the property to a bona fide purchaser who is not an affiliate, relative, or insider of the owner, and (2) filing a Claim of Lien on Real Property prior to the recordation of a conveyance of the interest in the property to a bona fide purchaser who is not an affiliate, relative, or insider of the owner. N.C.G.S. §§ 44A-11.2(l)(2).

Lien agents can potentially prevent “hidden liens.” If lien claimants notify the owners of their liens through their title insurance companies, the owners, their title insurance companies, and their banks will be aware of any liens on Real Property before closings occur. Arguably, the notice to lien agent requirement is beneficial for lien claimants, especially subcontractors, because *known* liens on Real Property will likely prevent real estate closings from occurring; therefore, owners have an incentive to resolve lien claims to enable closings to take place. This only follows, however, if owners know about the lien claims. Assuming that lien claimants properly serve their Notices to Lien Agent, real estate closings can be wonderful opportunities for them to get paid.

### **Drafting the Notice to Lien Agent**

Per N.C.G.S. § 44A-11.2(i), the Notice to Lien Agent must include:

- (1) the potential lien claimant’s name, mailing address, telephone number, fax number (if available), and email address (if available)
- (2) the name of the party with whom the potential lien claimant contracted;
- (3) A description of the real property sufficient to identify the real property, such as the name of the project, if applicable, the physical address as shown on the building permit or notice received from the owner;

(4) a “notice of rights” statement as follows: “I give notice of my right subsequently to pursue a Claim of Lien for improvements to the real property described in this notice.”

A Notice to Lien Agent completed on the form attached as Exhibit “A” can be served via one of the following methods set forth in N.C.G.S. § 44A-11.2(f):

- “(1) Certified mail, return receipt requested.
- (2) Signature confirmation as provided by the United States Postal Service.
- (3) Physical delivery and obtaining a delivery receipt from the lien agent.
- (4) Facsimile with a facsimile confirmation.
- (5) Depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2).
- (6) Electronic mail, with delivery receipt.
- (7) Utilizing an Internet Web site approved for such use by the designated lien agent to transmit to the designated lien agent, with delivery receipt, all information required to notify the lien agent of its designation pursuant to N.C.G.S. § 44A-11.1 or to provide a notice to the designated lien agent pursuant to this section.”

Note that proper service via option 7, [www.liensnc.com](http://www.liensnc.com), involves logging into the website and filling out the form found there. There is no cost for utilizing this website or for serving a Notice to Lien Agent via the website.

### Phase 2: Filing, Serving, and Perfecting the Lien

After a potential lien claimant has preserved its lien rights by serving a Notice to Lien Agent, the lien claimant must also comply with the statutory deadlines and procedure for filing and serving a Claim of Lien and/or Notice of Claim of Lien upon Funds. A contractor, subcontractor, or supplier wanting to secure its right to payment for labor and materials furnished on a privately owned project must file and serve a Claim of Lien within 120 days of the last date they furnish labor and materials on a project and perfect their liens with a lawsuit within 180 days of the last date of furnishing. N.C.G.S. §§ 44A-12(b), 44A-13(a). Again, the statute provides that the Claim of Lien must be filed and served before the 120-day deadline expires. Because the portion of the statute pertaining to the 120-day lien deadline does not refer to the North Carolina Rules of Civil Procedure, a literal interpretation of the statute suggests that if the deadline falls on a weekend, the lien claimant must file and serve on or before the Friday prior to the deadline.

A Claim of Lien must be **filed** in the clerk of court's office in the county in which the project is located. . N.C.G.S. § 44A-12(a). The fee for filing a Claim of Lien is \$6.00, plus 25 cents per each additional page

Pursuant to N.C.G.S. § 44A-11, the Claim of Lien must be **served** on the record owner of the real property, and, if the lien claimant is a subcontractor claiming lien rights through subrogation, the lien must also be served upon the party through whom the lien claimant is asserting subrogation. For first-tier subcontractors, this party will be the general contractor; for second-tier subcontractors, this will include both the first-tier subcontractor the claimant contracted with as well as the general contractor. Permissible methods of service under the statute include personal delivery, U.S. Mail, or "an authorized depository under the exclusive care and custody of a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2)," such as FedEx and UPS. Note that per N.C.G.S. § 44A-11(b), proof of receipt is not required for proper service of a Claim of Lien.

The statute provides that a wrapper addressed to party required to be served with the Claim of Lien is deemed to be properly addressed if it uses any of the following addresses:

- (1) The address for the party to be served listed on the permit issued for the improvement.
- (2) The address for the party to be served listed with the tax rolls for any county in North Carolina.
- (3) The address of the registered agent for the party to be served listed with the North Carolina Secretary of State's office. N.C.G.S. § 44A-11(c).

A Notice of Claim of Lien upon Funds is often served with a Claim of Lien, but the statutory requirements for the Notice of Claim of Lien upon Funds differ in a few important respects. First, unlike a Claim of Lien, a Notice of Claim of Lien upon Funds is not always filed with the clerk's office. A Notice of Claim of Lien Upon Funds, by itself, should never be filed with the clerk's office; however, if a Notice of Claim of Lien Upon Funds is being served along with a Claim of Lien for the same lien claim, the lien claimant should attach the Notice of Claim of Lien Upon Funds to the Claim of Lien being filed. N.C.G.S. § 44A-19(d) – (e). Secondly, **pursuant to N.C.G.S. § 44A-19(d), a Notice of Claim of Lien Upon Funds must be served on "the obligor" in accordance with Rule 4 of the North Carolina Rules of Civil Procedure.** This means that Certified Mail, or delivery by sheriff or a process server, are acceptable methods of service; the lien claimant must be able to confirm receipt of a Notice of Claim of Lien upon Funds. The best practice is to serve all parties upward of the lien claimant (such as the general contractor, owner, and any upper-tier subcontractors) in the contracting chain as potential obligors.

Finally, following proper filing and service of a Claim of Lien and/or a Notice of Claim of Lien upon Funds, some lien claimants may also need to file and serve a lawsuit to further secure the right to payment. Pursuant to N.C.G.S. § 44A-13, a civil action to enforce a Claim of Lien on Real Property may be filed “in any county where venue is otherwise proper” and must be filed within **180 days** after the lien claimant’s last date of furnishing of labor or materials on the project. If a lien lawsuit is filed in a different county from the county where the project is located, the lien claimant must file a lis pendens in each county where the project is located. N.C.G.S. § 44A-13.

### **Drafting the Claim of Lien**

N.C.G.S. § 44A-12(c) sets forth in detail the information that must appear on all Claims of Lien on Real Property and also requires that liens be filed using a form substantially similar to the one attached to this manuscript as Exhibit “B.” The required content is as follows:

#### **Caption:**

**STATE OF NORTH CAROLINA**

**IN THE GENERAL COURT OF JUSTICE**

\_\_\_\_\_ **COUNTY**

\_\_\_\_\_ **COURT DIVISION**

#### **(1) Name and address of the person claiming the Claim of Lien on Real Property**

This is the contractor or subcontractor who actually entered into a contract to furnish the labor and materials at issue. Be careful to verify that the name, including any part of the business name such as “Inc.” or “LLC” is accurate.

#### **(2) Name and address of the record owner of the real property claimed to be subject to the Claim of Lien on Real Property at the time the Claim of Lien on Real Property is filed; and, if the Claim of Lien on Real Property is being asserted pursuant to G.S. 44A-23, the name of the contractor through which subrogation is being asserted**

Correctly identifying the property owner and, if applicable, the contractor with whom the lien claimant contracted, is essential for proper lien drafting. Incorrectly identifying the record owner of the property – including misspelling the owner’s name or failing to include any part of the business name such as “Inc.” or “LLC” – could invalidate the lien and result in the lien not being found in a duly performed title search. Often, lien claimants are unsure or mistaken as to who actually owns the subject property; they may or may not have the correct address. General contractors, who contract directly with the owner, are more likely to have this information, but subcontractors might not. To verify this information, use county tax records and search via the Register of Deeds to find the correct property owner.

Subcontractors filing Claims of Lien on Real Property will need to specify that the lien is a “subrogated lien.” Because the lien statute only affords direct foreclosure rights to

parties who contracted with the owner, subcontractors are entitled to direct lien rights only if they are subrogated to the rights of the general contractor. N.C.G.S. § 44A-23. As of January 2013, the statute now requires first-tier subcontractors asserting a Claim of Lien to list the name of the contractor through which subrogation is being asserted and to serve the lien on that party. N.C.G.S. § 44A-12(c)(2). To ensure compliance with these requirements, take care to properly identify, and locate the correct address of, the contractor with whom the lien claimant had a contract.

**(3) Description of the real property upon which the Claim of Lien on Real Property is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)**

The description of the property is another crucial aspect of the lien; the property must be described with sufficient specificity for a title searcher with no information about the property to be able to determine what property is being liened. Pursuant to § 44A-12(c)(3), a metes and bounds description is not required, but “street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.” Id. Note that conflicting information – such as an address for one parcel and a tax and block number for a different parcel – could invalidate the lien, as could incorrect information.

**(4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials**

The statute requires that the full name, or business name, of the party with whom the lien claimant contracted, be listed on the lien along with the address. This information should appear on the lien claimant’s contract. For first-tier subcontractor claimants, this party will be the general contractor. For general contractors, this party will be the owner. As outlined above, take special care to accurately identify the property owner. For contractors and subcontractors, the North Carolina Secretary of State is a good resource for confirming the proper spelling of a business name once this party has been identified.

**(5) Date upon which labor or materials were first furnished upon said property by the claimant:**

This is one of the most important dates to verify when drafting a Claim of Lien because, once filed, the lien will “relate back” to this date. N.C.G.S. § 44A-10. The date of first furnishing is not necessarily the date the contract was signed; it is the date the lien claimant first furnished labor or materials to the project.

**(6) Date upon which labor or materials were last furnished upon said property by the claimant**

The date of last furnishing is also crucial to proper Claim of Lien drafting, and it determines the deadline for filing and serving the claim of lien, which in North Carolina is 120 days from the date of last furnishing. The lien claimant must **file and serve** the lien before the 120-day deadline has expired.

**(7) General description of the labor performed or materials furnished**

Pursuant to N.C.G.S. 44A-12(c), “a general description of the labor performed or materials furnished is sufficient. It is not necessary for a lien claimant to file an itemized list of materials or a detailed statement of labor performed.”

**Drafting the Notice of Claim of Lien on Funds**

N.C.G.S. § 44A-19 sets forth in detail the information that must appear on all notices of Claims of Lien on Funds and also requires that liens be filed using a form substantially similar to the one attached to this manuscript as Exhibit “C.” The required content is as follows and generally is held to the same drafting standards as outlined above for Claims of Lien:

**(1) Name and address of the person claiming the Lien upon Funds**

**(2) General description of real property where labor performed or material furnished:**

**(3) The name and address of the person with whom the lien claimant contracted to improve real property.**

Note that this is the party upward in the chain with whom the claimant had a contract. For first-tier subcontractors, this party is the general contractor. For second-tier subcontractors, this party will be the first-tier subcontractor.

**(4) The name and address of each person against or through whom subrogation rights are claimed.**

The drafter should include the names and addresses of every party upward in the chain of contracting from the lien claimant. For a second-tier subcontractor, this should include the first-tier subcontractor, the general contractor, and the real property owner.

**(5) General description of undersigned lien claimant’s contract including the names of the parties thereto:**

Here, the drafter should include the “tier” of the contract (whether it is a first-, second- or lower-tier subcontract) and generally describe the nature of the labor and/or material the claimant is furnishing per the contract.

**(6) The amount of Lien upon Funds claimed pursuant to the above described contract:**

The amount of funds being claimed, excluding any interest or attorney’s fees, should be set forth here.

## Payment Bonds

Contractors seeking to secure payment for past-due sums on public construction projects will likely look to payment bonds to do so. A payment bond is a surety bond posted by a contractor to guarantee that its subcontractors and material suppliers on the project will be paid. The contractor (known as the “principal”) contracts with and pays an insurance company (the “surety,”) for a bond certifying that the surety will pay any claimants or obligees – i.e., subcontractors. Payment bonds are required for federal construction contracts with a sum totaling more than \$100,000.00 in sum and North Carolina public construction contracts with a sum totaling more than \$300,000.00. 40 U.S.C. § 3131(b), N.C.G.S. § 44A-26. Payment bonds exist not only on public projects; many private property owners require contractors to procure payment bonds.

A basic understanding of the procedure for seeking payment from a bond is helpful for paralegals who work with construction attorneys. As with liens, complying with the proper procedure and deadlines is crucial to preserving a claimant’s right to payment on a bond. The procedure depends on whether the project is state, federal, or private.

### Federally-owned Projects

The federal bond statute, also known as the Miller Act, is codified at 40 U.S.C. §§ 3131-3134. The Miller Act requires general contractors to procure bonds that serve as security for payments to first- and second-tier subcontractors, similar to the security that lien rights provide on private projects. Note that third- and lower-tier subcontractors do not have rights as bond claimants under the Miller Act.

In order to preserve its rights to claim payment under a federal payment bond, a claimant must file suit on the bond **no sooner than 90 days after, but within one year** of its last date of furnishing of labor and material on a project. 40 U.S.C. § 3131(b)(4). Importantly, a second-tier subcontractor intending to make a claim on a federal payment bond must also serve a notice of its claim to the general contractor within 90 days of the claimant’s last furnishing of labor or material to the project. 40 U.S.C. § 3131(b)(2). (The notice **must actually be received by the general contractor within the 90-day period**; *Pepper Burn’s Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340 (4th Cir. 1992)). Per 40 U.S.C. § 3133(b)(2), the notice:

- Must be in writing;
- Must state with substantial accuracy the monetary amount claimed;
- Must name the party to or for whom the labor or material was furnished;
- Must be delivered by any means that provides written verification of delivery or by any means by which the United States marshal of the district in which the project is located may serve summonses.

Typically, bond notices not only notify the general contractor but also are directed to the surety. A form bond demand letter for a federal project is attached as Exhibit “D.”

### State-owned Projects in North Carolina

North Carolina's state payment bond statute is codified at N.C.G.S. § 44A-27, which is also known as the Little Miller Act. It operates similarly to the federal Miller Act in that it requires payment bonds on public construction projects of a certain sum and outlines the procedure by which claimants must preserve their right to payment from the surety. North Carolina's bond statute, however, generally affords bond rights to all subcontractors who have furnished labor or materials on a public project, regardless of the tier of the contract (unlike the federal Miller Act, which only extends to the right to first- and second-tier subcontractors).

Under the Little Miller Act, bond claimants are prohibited from filing suit against the payment bond until **90 days** after the claimant's last date of furnishing or labor or materials to the project, but they must do so within **one year** of the date of last furnishing. N.C.G.S. § 44A-27(a). Second- and lower-tier subcontractors and suppliers must provide notice to the general contractors within **120 days** of the claimant's last date of furnishing of labor or materials to the project. N.C.G.S. § 44A-27(b).

Per the statute, the claimant must send the notice by certified mail to any office where the general contractor regularly maintains business or served in any manner provided by law for the service of summonses. N.C.G.S. § 44A-27(c).

Typically, bond notices not only notify the general contractor but also are directed to the surety. A form bond demand letter for a North Carolina public project is attached as Exhibit "E."

### Privately Owned Projects

Bonds issued on privately owned projects often contain procedures similar to the ones codified for state and federal projects, and claimants will have to comply with these procedures to preserve their claims for payment. Consult the bond certificate for information on deadlines and how to make a claim for payment.



## **EXHIBIT “A”**

### **NOTICE TO LIEN AGENT**

- (1) Potential lien claimant's name, mailing address, telephone number, fax number (if available), and electronic mailing address (if available):
- (2) Name of the party with whom the potential lien claimant has contracted to improve the real property described below:
- (3) A description of the real property sufficient to identify the real property, such as the name of the project, if applicable, the physical address as shown on the building permit or notice received from the owner:
- (4) I give notice of my right subsequently to pursue a Claim of Lien for improvements to the real property described in this notice.

Dated: \_\_\_\_\_

\_\_\_\_\_

Potential Lien Claimant

## **EXHIBIT “B”**

### **CLAIM OF LIEN ON REAL PROPERTY**

- (1) Name and address of the person claiming the Claim of Lien on real property:
- (2) Name and address of the record owner of the real property claimed to be subject to the Claim of Lien on Real Property at the time the Claim of Lien on Real Property is filed and, if the Claim of Lien on Real Property is being asserted pursuant to G.S. 44A-23, the name of the contractor through which subrogation is being asserted:
- (3) Description of the real property upon which the Claim of Lien on Real Property is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)
- (4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
- (5) Date upon which labor or materials were first furnished upon said property by the claimant:
- (5a) Date upon which labor or materials were last furnished upon said property by the claimant:
- (6) General description of the labor performed or materials furnished and the amount claimed therefor:

I hereby certify that I have served the parties listed in (2) above in accordance with the requirements of G.S. 44A-11.

---

Lien Claimant

Address

**EXHIBIT "C"**

NOTICE OF CLAIM OF LIEN UPON FUNDS BY FIRST, SECOND, OR THIRD TIER  
SUBCONTRACTOR

To:

1. \_\_\_\_\_, owner of property involved.

(Name and address)

2. \_\_\_\_\_, contractor.

(Name and address)

3. \_\_\_\_\_, first tier subcontractor against or through

(Name and address) whom subrogation is claimed, if any.

4. \_\_\_\_\_, second tier subcontractor against or through

(Name and address) whom subrogation is claimed, if any.

General description of real property on which labor performed or material furnished:

\_\_\_\_\_

General description of undersigned lien claimant's contract including the names of the parties thereto:

\_\_\_\_\_

The amount of Lien upon Funds claimed pursuant to the above described contract:

\$ \_\_\_\_\_

The undersigned lien claimant gives this Notice of Claim of Lien upon Funds pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated \_\_\_\_\_

\_\_\_\_\_, Lien Claimant

\_\_\_\_\_ (Address)

**EXHIBIT “D”**

**NOTICE OF CLAIM OF LIEN UPON FUNDS BY SUBCONTRACTOR MORE  
REMOTE THAN THE THIRD TIER**

To:

\_\_\_\_\_, person holding funds against which Lien upon Funds is claimed.

(Name and Address)

General description of real property on which labor performed or material furnished:

---

---

---

General description of undersigned lien claimant's contract including the names of the parties thereto:

---

---

The amount of Lien upon Funds claimed pursuant to the above described contract:

\$ \_\_\_\_\_

The undersigned lien claimant gives this Notice of Claim of Lien upon Funds pursuant to North Carolina law and claims all rights to which he or she is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated: \_\_\_\_\_

\_\_\_\_\_, Lien Claimant

\_\_\_\_\_ (Address)

**EXHIBIT “E”**

**VIA USPS CERTIFIED MAIL**

**CMRRR NO.: #**

Surety Name

Surety Address

**VIAUSPS CERTIFIED MAIL**

**CMRRR NO.: #**

General Contractor / Principal Name

General Contractor Address

Travelers File No.: \_\_\_\_\_  
Bond No.: \_\_\_\_\_  
Contract No.: \_\_\_\_\_  
Project Name &  
Location: \_\_\_\_\_

RE:    Lien Claimant Name / General Contractor Name

Dear Ms. Surety:

This office represents (BOND CLAIMANT) to collect an amount owed under a subcontract with (GENERAL CONTRACTOR or FIRST-TIER SUBCONTRACTOR) in the amount of \$XXXXXX for labor, material, supplies, and equipment furnished to the above referenced project. (GC/FIRST-TIER) has a contract agreement with (GENERAL CONTRACTOR), the principal on both Projects for which (SURETY) provided payment bonds. Please accept this letter as notice of (BOND CLAIMANT)’s claim under the above referenced bond pursuant to 40 U.S.C. § 3133(b).

There is no dispute regarding this contract balance owed to (BOND CLAIMANT). The amount stated is the true and correct balance due and owing to (BOND CLAIMANT) from (GC/FIRST-TIER). Being there is no issue of fact that work has been performed, payment is owed, and payment has not been made, kindly forward payment in the amount of \$XXXXXX to our office within five days of receipt of this notice and this claim will be satisfied.

If payment is not received and legal action becomes necessary, appropriate measures will be taken to recover not only the amount due, but also court costs, interest, and attorney's fees, if applicable.

Sincerely,

Counsel for Bond Claimant

**EXHIBIT "F"**

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

**CMRRR No.:**

Surety Name

Surety Address

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

**CMRRR No.:**

General Contractor Name

General Contractor Address

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

**CMRRR No.:**

Project Owner Name

Project Owner Address

**RE:   Bond Claimant / General Contractor**  
**Project Name and Description**  
**Bond No.: \_\_\_\_\_**  
**Name of Contracting Body: (Owner name)**  
**Principal: General Contractor**

To Whom It May Concern:

Please be advised that this office represents (BOND CLAIMANT) in the above referenced matter. (BOND CLAIMANT) pursuant to a subcontract agreement with (GENERAL CONTRACTOR) provided labor and materials on (PROJECT). (BOND CLAIMANT) performed masonry work on the Project. (BOND CLAIMANT) is owed the total sum of \$XXXXXX plus interest on the principal at either the rate of Twelve percent (12%) per annum (1% per month), pursuant to N.C. Gen. Stat. § 143-134.1, or Eight percent (8%) per annum, the legal rate of interest from the date of each invoice is due, whichever is higher, plus all attorney's fees and collection costs pursuant to the contract and N.C. Gen. Stat. § 44A-35 for labor and materials supplied on the Project.

To the extent required by the Payment Bond and North Carolina General Statutes Chapter 44A, this letter is notice of a bond claim as stated above.

Sincerely,

Attorney for BOND CLAIMANT

**EXHIBIT "G"**

**NORTH CAROLINA**

**IN THE GENERAL COURT OF JUSTICE  
BEFORE THE CLERK**

\_\_\_\_\_ **COUNTY**

\_\_\_\_\_ **M** \_\_\_\_\_

_____	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	
_____	)	<b>NOTICE OF LIS PENDENS FOR LIEN FILINGS</b>
<b>Defendant.</b>	)	
	)	
	)	

The Plaintiff in the above-entitled action hereby serves this Notice of *Lis Pendens* and with respect thereto provides the following information:

1. Liens on Real Property have been filed and asserted against the above named Defendant party and the real property referenced in the attached two lien documents located in \_\_\_\_\_ County, North Carolina.

2. The purpose of this Notice is, *inter alia*, to notify all affected parties of the existence of Liens upon certain property located in \_\_\_\_\_ County, North Carolina, as is more fully described below and to seek funds against Defendant to satisfy said Liens listed below:

Said lien alleges that, *inter alia*, Plaintiff provided labor, equipment, and furnished materials for the real property described below pursuant to a contract with \_\_\_\_\_ which said Defendant owes Plaintiff the sum of at least **(\$XXXXXX)** for the \_\_\_\_\_, plus interest, both prejudgment and post judgment at the rate of 1% per month and all attorneys fees pursuant to North Carolina General Statute §44A-35 and court costs and other costs.

3. Upon information and belief, Defendant \_\_\_\_\_ is the present Owner of said property.

4. The property to which the labor, equipment, materials and other related goods and/or services were furnished by Plaintiff is described as follows:

**[Insert Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described]**

5. Plaintiff filed Claim of Lien \_\_\_\_ M \_\_\_\_ in \_\_\_\_\_ County,  
North Carolina on or about \_\_\_\_\_.

This the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.