**CONSTRUCTION LIEN LAW**

**FUNDAMENTALS**

BY

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**Construction Lien Law Fundamentals**

This article will provide an overview that should help in maneuvering through the various deadlines and obstacles. Where possible, theory will be replaced with practical pointers and basic information. The law has undergone several major amendments starting in 1995 and ending in 2009, with a minor correction in 2011. One final note, this article deals with improvements to real property and does not deal with improvements or repairs to boats or vessels of any kind as covered by a recent federal case. [[1]](#footnote-2)

General and Background Information

The topic of construction liens can be divided into two broad categories, Residential and Commercial. The initial notices for commercial and residential are different. Residential construction is defined as improvements related to four or fewer dwelling units. Commercial construction is all construction, residential or not, that concerns more than four dwelling units.[[2]](#footnote-3) This is a distinction that has been introduced to the lien laws in the past and reinstated with the advent of the 1995 amendments.[[3]](#footnote-4)

The basic lien statute states:

18-44-101 Liens on buildings, land, or boats.

(a) **Every contractor, subcontractor, or material supplier** as defined in § 18¬44¬107 who supplies **labor, services, material, fixtures, engines, boilers, or machinery** in the construction or repair of an improvement **to real estate, or any boat or vessel** of any kind, by virtue of a **contract** with the owner, proprietor, contractor, or subcontractor, or agent thereof, **upon complying with the provisions of this subchapter, shall have, to secure payment, a lien upon the improvement** and on up to one (1) acre of land upon which the improvement is situated, or to the extent of any number of acres of land upon which work has been done or improvements erected or repaired.

The important thing here is that those who comply with the statute will have a lien. For years, the provisions concerning boats or vessels seemed an archaic throw back. However, there has been a recorded decision regarding the lien law and a vessel.[[4]](#footnote-5) The devil, however, is in the details and the rules to be followed by a lien claimant have been the subject is a great deal of case law and statutory amendment over the years.

The next item of concern is of course, who is entitled to file a lien in the first instance. The list of persons and industries with claims is to say the least illogical. The legislature amended the law in 2009 to at least make it easier to find the list. The statutes were combined from three into two statutes, dealing with potential lien claimants. The first is A.C.A. 18-44-104 concerning contractors, subcontractors and suppliers that furnish soil drain pipe and A.C.A. 18-44-105, which lists architects, engineers, surveyors, appraisers, landscapers, abstractors, or title insurance agents. These groups in addition to the traditional contractor, sometimes known as the prime contractor or general contractor, subcontractors and suppliers. All lien claimants are required to meet the notice requirements in the statutes.

A lien may be claimed for labor, goods and services which can be shown to have been delivered and incorporated into an improvement to real property.[[5]](#footnote-6) Materials delivered to the job site but not used might not be covered by the lien[[6]](#footnote-7), perhaps because those materials could be returned. The burden is placed on the person claiming the lien to show the actual use of the goods or work.[[7]](#footnote-8) In the event, that the contractor has purchased the goods for a particular job, but used them on some other job, there is no lien. However, the diversion of any goods would form the basis for a criminal charge defined as a ‘violation’ and subject to a $2,500.00 fine under A.C.A. 18‑44‑109. The claimant would have a right to claim a lien on the other property, assuming all other criteria are met. The “opposite” problem can and does occur when a supplier applies payments from a contractor, collected from one project to debts from other projects, usually when the lien time has run for one project but not for the other. Under the general law of sales, a creditor may credit payments, however it wishes, when a payment is received from a debtor, without a specific disposition indicated. However, this is not permitted for the purpose of a lien claim, even when the contractor has agreed to this disposition of the monies paid. The only permissible way to credit a payment from one project to a debt from a prior project is with the owner's permission,[[8]](#footnote-9) which an owner is unlikely to do for obvious reasons.

Those supplying labor and services for projects on leased land are also entitled to a lien but with limited rights. Under A.C.A. 18-44-103, improvements on leased land can result in this limited lien right. The lien extends to the improvements on the land and the leasehold interest or right to possession. In the event, that the leasehold has been lost, then the lien claimant has the right to remove the improvements within 60 days. The owner is entitled to rent due for the time period, out of the proceeds of the sale. This would give the lien claimant some negotiating points in dealing with the owner over the improvement, however, this particular provision is not often used. In the case of a long term lease of land where another party owns the buildings, then the lien can extend only to the improvement and not the land. Special care must be taken when dealing with an industry operating on land leased from a city or governmental agency. No lien will attach to either property or the leasehold.[[9]](#footnote-10) A direct lien against the real property may be obtained if it can be shown that the lessee was an 'agent' of the owner for the purpose of the improvement. This can be shown if the claimant can establish that the owner paid for the improvements by allowing a deduction or offset from the rental payments.[[10]](#footnote-11)

Finally, there is another group of persons that may have an interest in a materialman’s lien as an assignee of a lien right. This is an important concept when dealing with factored accounts or collateral for a bank loan. Under A.C.A. 18-‑44‑113, a lien may be assigned or sold[[11]](#footnote-12), but it may not be enforced against the owner or proprietor unless the owner has actual notice of the assignment. However, the lien must have been perfected before it can be assigned.[[12]](#footnote-13) Under the original statute actual notice was held to imply that the notice be reasonably contemporaneous. The length of time was left open with a judicial limit of seven months as being too long.[[13]](#footnote-14) The statute was amended in 2009 to require notice within 30 days of the assignment by same means as required for other notices under the lien statutes.

Priority

One of the most serious issues concerns the priority of the lien, which is to say how do materialman’s liens stack up against all of the other parties with a claim to the real property improved? This is a prime question since a lien only has value if it moves the lien claimant closer to the head of the line. This concept can have serious consequences for anyone whether considering the owner, contractor, subcontractors, suppliers, prior mortgage holders, subsequent mortgage holders and the entity financing the particular project. In reality the competing and very legitimate interests each of these groups has are at the heart of the balancing act codified in the lien laws.

In its simplest form priority deals with the circumstance when a piece of property with an improvement that has a value of $100,000.00 and mortgage or lien claims of $200,000.00. When the property is sold at a foreclosure sale, who gets the sale proceeds and who is unsatisfied? The lien laws deal with the relationship of lien claimants to those with a pre-existing mortgage, those who finance the project, and those whose interests attached after the project. The law of real estate in Arkansas is virtually in all instances defined by the first in time rule. The exception concerns materialman’s liens.

The first case, concerns mortgages filed before the improvement. These pre-existing mortgages are divided into two categories. The first is a standard prior mortgage and a materialmen’s lien, which steps ahead of this type mortgage with respect to the actual improvement, but not the real estate itself. There is an exception to this rule that concerns a mortgage used to secure a loan to pay for the particular improvements, called a ‘construction money mortgage’ which mortgage retains its primacy both in the real property and the improvement.

The second case, concerns the relation of lien claimants for the same project as to each other. This is a second exception to the first in the time rule. All such materialman’s claimants have the same priority as to each other regardless of when the particular work was done, or product was supplied, or the account filed. When there is a shortfall in the funds available for those in this class of claimants, each takes a pro-rata share. When only fifty dollars is available for a hundred dollars in claims, each receives 50%.

The third group, concerns owners and those with mortgages dated after the project. This group is behind those in the first and second group. Such secondary claims are particularly tricky now in dealing with the modern ‘statutory’ foreclosure act and its summary procedures.[[14]](#footnote-15)

**Commencement of Project**

These priorities all are determined by the date on which the project is said to have commenced. A.C.A. 18‑44‑110 (2), states that construction or repair commences when there is a visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair of an improvement to the real estate ***has begun or will soon begin***, including but not limited to the following:

(A) Delivery of a significant amount of lumber, bricks, pipe, tile, or other building material to the site; or

(B) Grading or excavating the site; or

(C) Laying outlines or grade stakes; or

(D) Demolition in an existing structure.

This is very different from the pre-1995 law and the many cases decided under that law. These examples were not chosen at random and each represents a reversal of prior case law as the specific examples under the current statute.[[15]](#footnote-16) This has been the law for more than 15 years, but it has only recently been the subject of an appeal. In May Const. Co., Inc. V. Town Creek Const. & Devl., LLC, 2011 Ark. 281(June 23, 2011), the Arkansas Supreme Court ruled that a project commences when there is an actual visible manifestation on the property consisting of workers and equipment located on the property regardless of the intention of the parties that work not start until after the ‘banking’ was complete.

The court in May Const. Co., Inc. V. Town Creek Const. & Devl., LLC, 2011 Ark. 281, Stated:

However, under the plain language of section 18-44-110, the subjective intent of the parties is not an element of the commencement of construction. In our review of the statute, the circuit court should have examined the "visible manifestation of activity" on the property, including, but not limited to, any of the four enumerated circumstances, to determine whether construction had "commenced" at the time that Chambers filed its construction mortgage. Ark. Code Ann. § 18-44-110(a) (2). In other words, "commence[ment]" of construction is the date upon which a "visible manifestation of activity" has occurred "that would lead a reasonable person to believe that construction . . . has begun or will soon begin. . . ." Id. That "visible manifestation of activity" includes an objective determination of construction activity on the property at any given time.

This particular case should be taken in its context as a preconstruction staging or activity. Once the contractor moves on, even innocently, the project may have ‘commenced’ a lender aware of this would then pull its financing. From this opinion, it is not clear that even moving to a new contractor could save the developer’s ability to finance the project.

Sec. 18‑44‑110. Preference over prior liens Exception

(a)(1) The liens for labor performed or material or fixtures furnished, as provided for in this subchapter, **shall have equal priority toward each other** without regard to the date of filing the account or lien, or the date when the particular labor or material was performed or furnished. All such liens shall date from the time that the construction or repair first commences.

(3) In all cases where a sale shall be ordered and the property sold, and the proceeds arising from the sale are not sufficient to discharge in full all the liens against the property without reference to the date of filing the account or lien, **the proceeds shall be paid pro rata on the respective liens.**

(b)(1) The liens for labor performed or materials or fixtures furnished, as provided for in this subchapter, **shall attach to the improvement** on which the labor was performed or the materials or fixtures were furnished in preference to any encumbrance existing on the real estate prior to the commencement of construction or repair of the improvement. In all cases where the prior encumbrance was given **for the purpose of funding construction** or repair of the improvement, that lien **shall have priority** over all liens given by this subchapter.

(2) The liens, as provided for in this subchapter, shall be enforced by foreclosure, as further provided for in this subchapter, and **the property ordered sold subject to the lien of the prior encumbrance on the real estate**.

(c) The lien for labor performed and materials or fixtures furnished, as provided for in this subchapter, **shall have priority over all other encumbrances that attach to the real estate or improvements thereon subsequent to commencement of construction or repair.**

The even priority means that at least with regard to other lien claimants on the same project, there is no race to the courthouse. Lien claimants are given priority over other liens, but only with regard to the improvement and not the real property. The even priority of Materialmen under the previous statute has been retained.[[16]](#footnote-17) [ The old statute had been interpreted to give subcontractors a leg up ahead of the prime contractor Laborer's and materialmen's claims are ahead of a contractor's Long Vs. Charles T. Abels & Co., 77 Ark 156, 93 S. W. 67 (1906)]

Construction Money Mortgages

In order to establish a construction money mortgagee's priority over materialmen's liens, the following conditions must be satisfied:

(1) the mortgage must be executed and recorded before commencement of the building;

(2) the mortgagee must be unequivocally bound to advance money for construction; and

(3) the recorded mortgage must show that the mortgagee is unequivocally bound.

Once these three requirements are fulfilled, the question basically answered. These requirements were stated in Dempsey V. McGowan, 291 Ark. 147, 722 S.W.2d 848 (1987) based on an earlier case, Planters Lumber Company v. Jack Collier East Company, 234 Ark. 1091, 356 S.W.2d 631 (1962). In Dempsey V. McGowan, 291 Ark. 147, 722 S.W.2d 848 (1987) some of the funds released by the mortgagee were used by the mortgagor for purposes other than construction. The court held, however, that when determining priority of liens it is the purpose for which the funds were supplied rather than the use that is important relying on an even older case Sebastian Building and Loan Association v. Minten, 181 Ark. 700, 27 S.W.2d 1011 (1930). In the case Spickes Bros. Paint Cont. V. Worthen Bank & Trust Co., 299 Ark. 79, 771 S.W.2d 258 (1989) the court stated:

“Although we have encountered cases where a portion of the proceeds from the construction money loan was applied other than for the payment for improvements either with or without the knowledge of the mortgagee, we have never ruled that the materialmen had liens superior to the amount of the construction money mortgage lien as finally determined when the above conditions have been met. See, e.g., Dempsey v. McGowan, supra; House v. Scott, 244 Ark. 1075, 429 S.W.2d 108 (1968); First National Bank v. Conway Sheet Metal Co., 244 Ark. 963, 428 S.W.2d 293 (1968); Planters Lumber Co., Inc. v. Wilson Co., Inc., 241 Ark. 1005, 413 S.W.2d 55 (1967); Ashdown Hardware v. Hughes, 223 Ark. 541, 267 S.W.2d 294 (1954).” [299 Page 83]

The courts have fairly well established that it is the purpose for which the money is lent, rather than the use to which it is put, is the controlling test, once the other requirements have been met, in determining priority of a construction money mortgagee's lien over a materialman's lien.

Pre-existing Mortgages

The provisions of the statute that give priority to prior mortgages have been in the law for many years but case law had in effect rendered this priority without meaning based on the common law rule that treated an immovable improvement as real estate rather than personal property. The distinction between immovable and removable improvements will remain a feature of litigation, but with a new twist. In Simmons First Bank V. Bob Callahan Services, 340 Ark. 692, 13 S.W.3d 570 (2000), the Supreme Court finally gave effect to the legislature’s intention that materialmen would have a priority in improvement. The Simmons Case stated as follows:

Prior to the 1995 amendments, the statutes provided that the improvement had to be removable for the materialmen's lien to have priority over a prior encumbrance on the property. See BB & B Constr. Co., 316 Ark. 663, 875 S.W.2d 48. Former section 18‑44‑130 provided that "[a]ny person enforcing the lien may have the building, erection, or improvement sold under execution, and the purchaser may remove it within a reasonable time after sale." (Emphasis

Page 697 added.) That section was repealed by Act 1298. As it stands now, section 18‑44‑110(b)(2) provides the means for enforcing materialmen's liens:

The liens, as provided for in this subchapter, shall be

enforced by foreclosure, as further provided for in this

subchapter, and the property ordered sold subject to the lien

of the prior encumbrance on the real estate. [Emphasis

added.]

As can be seen from this language, there is no longer a requirement that the improvement be removable for the materialmen's lien to be enforced. This notion is further evident from the recommendations made by the legislative task force created by Act 970 of 1993.

Act 970 provided that the duty of the task force was to examine existing laws concerning materialmen's liens and to determine whether the public and the industry were adequately protected. In its Final Report, the task force recommended that the materialmen's lien "should generally be subordinate to encumbrances on the real estate which predate the improvement, but have priority as to the improvement itself." Final Report of the Arkansas Task Force on Materialmen's Lien and Bonding Notice Requirements, at 11 (November 1994) (emphasis added). The task force recommended eliminating the requirement that the improvement be removable, as it concluded that removability was impossible in most cases. In its place, the task force urged the legislature to "authorize the lien holder to foreclose the lien and force a sale of the property subject to the prior encumbrance in those cases where removal of the improvement is impracticable." Id. at 12. Notably, there was no recommendation that the priority status of the materialmen's lien be conditioned on the removability of the improvement, as Simmons urges.

[**5]We thus reject Simmons's interpretation of Act 1298. Were we to accept its argument, we would be effectively rendering superfluous and meaningless the provision in Section 18‑44‑110(b)(1)** that the materialmen's lien on the improvement has preference over any prior encumbrance other than one given for the purpose of funding the construction. There is simply no indication from that section that the priority of the materialmen's lien is dependent upon the improvement being removable. The question then is whether, practically speaking, the priority of the materialmen's lien on the improvement may be enforced by foreclosure sale [Page 698] of the entire property. We conclude that the only way to adequately protect the competing interests is to require the chancery court to conduct a double appraisal of the property, determining the value of the property prior to construction of the improvement and the value of the property with the improvement. This method is best illustrated by the case law of the Supreme Court of Alabama. Similar to our section 18‑44‑110, the statutory law of Alabama provided that as to the building or improvement, materialmen's liens were given priority over all other liens, mortgages, or encumbrances, whether executed before or after construction began.[fn2] See Empire Home Loans, Inc. v. W.C. Bradley Co., 241 So.2d 317 (Ala. 1970); Baker Sand & Gravel Co. v. Rogers Plumbing & Heating Co., 154 So. 591 (Ala. 1934). Enforcement was also by means of foreclosure sale. Id. **The dilemma faced by the Alabama court was how to adjust the proceeds of the sale in a way that gave the materialmen's lien priority as to the improvement while simultaneously giving priority to the bank as to the real estate**. The solution was to sell the entire property and distribute the proceeds in an equitable manner. The court held:

On principle as well as the authority of our former

decisions, we hold the court of equity has plenary power to

mold its decrees in such form as to conserve the equities of

all parties; and may, when a removal of the building would,

in large measure, operate a destruction of the security,

order a sale of the property as a whole, adjusting priorities

in the proceeds on equitable principles.

Id. at 597 (citations omitted). We believe that this approach best implements our current statutory scheme.

Section 18‑44‑101 provides that every contractor who supplies labor, materials, or services shall have a lien upon the improvement and up to one acre of land, or to the extent of the number of acres upon which improvement has been made. Section 18‑44‑110(b)(1) provides that the materialmen's lien attaches only to the improvement, and thus enjoys priority over prior encumbrances on the property only as to the value of the improvement. Subsection (b)(2) provides that the means of enforcing a materialmen's lien is foreclosure [Page 699] of the entire property, subject to the prior encumbrance on the land. To give meaning to each of these provisions, the chancery court must determine the value of the improvement using the double-appraisal method.

[**6]Accordingly, we reverse and remand this matter to the chancery court to conduct a double-appraisal of the property, determining the value of the property both with and without the improvement.** Pursuant to its plenary powers in equity matters, the chancellor shall then distribute the proceeds of the sale, first to Callahan for the value of the improvement and the remainder to Simmons. See Ark. Code Ann. ' 16 ‑13‑304(a) & (c) (Repl. 1999); Monette Road Imp. Dist. v. Dudley, 144 Ark. 169, 222 S.W. 59 (1920).

The new elements of proof added to trial will require that in applicable situations, the plaintiff give some thought to the value of the improvement and consider presentation of appraisal evidence at trial. Although it would appear that this is a post-trial requirement as part of the sale process and not the issues for trial. Nevertheless if the proof were in the record the court could make its ruling and avoid delay in the conduct of the sale.

Perfection of a Materialman’s Lien

At this point we have dealt with who has a lien, what is covered and where the lien stacks up against others with an interest in the property. How does one go about establishing the materialman’s lien we have been discussing? There are a number of notice and service provisions that must be given and which have been the subject of a number of amendments and a great deal of case law. In an attempt to make this area more understandable, we will deal with the various notices as they come up the process of construction. In this regard it is here that the division between residential and commercial construction has the most impact.

**Pre-construction Notice**

The first deadline relates only to residential construction and occurs before the work of the prime contractor starts when a pre-construction notice is required. The courts have strictly construed these rights because the enforcement of a Materialmen's Lien often means that an innocent property owner's rights will be affected. There is a double standard in the lien laws regarding strict and liberal compliance. In cases where coverage is concerned, whether the situation comes within the lien the interpretation is to be strict. Where the question is not coverage but whether technical requirements are met in a situation unquestionable covered by the lien law the interpretation is to be liberal.[[17]](#footnote-18) The trend of the cases now seems to be away from an older substantial compliance mode toward a strict compliance standard. This initial notice is most often the source of problems for owners, contractors and suppliers. This initial notice must be given before the start of work. The notice if given by anyone is good for everyone on the project. Even though this has been a requirement for more than 40 years at this point, most owner, contractors and suppliers remain apparently unaware of the requirement and dire consequences of failure to give the notice.

A.C.A. 18‑44‑115 (a)(1) states that in cases of residential construction of four units or less no lien may be acquired without receipt of the notice by the owner or the owner’s agent. Under (2) it is the duty of the ‘residential contractor’ or the prime contractor or general contractor to give the notice before the commencement of the work and once given it is good for all lien claimants. This again has been the law for some 40 years. Until 2009 the only means of enforcement was loss of a lien right and a criminal statute which is ignored by Arkansas Prosecuting Attorneys and police. The law has recently added a new means of enforcement which denies the prime contractor a lien or the right to enforce the contract. Under prior law the prime contractor could omit the notice and still be entitled to sue on the work, while at the same time having denied all of his subcontractors, laborers and supplier the right to be paid. The new provision now reads: A.C.A 18-44-115(a)(4) “(4) If a residential contractor fails to give the notice required under this subsection, then the residential **contractor is barred from bringing an action either at law or in equity, including without limitation quantum merit**, to enforce any provision of a residential contract.” This is the same penalty applied for work as an unlicensed contractor. The two exceptions for this section are when there is a payment bond in place and there is a direct sale. The case law on the direct sale provision has not been developed[[18]](#footnote-19), but this section should protect common situations such as retail sales directly to consumers and plumbers electricians and other artisans doing work directly for home owners.[[19]](#footnote-20)

The subcontractors and suppliers always had the right but not the duty to give the notice. However case law largely repealed this right under the old law since the court’s ruled that the notice, no matter who gave it, had to be given prior to the start of work.[[20]](#footnote-21) The 2009 amendments changed this and the notice once given by any subcontractor, laborer or supplier is then applicable to all claims that occur after the notice in A.C.A. 18-44-115(a)(5)(A) and (B)

“(5) (A) Any potential lien claimant may also give notice.

(B) (I) If before commencing work or supplying goods a subcontractor, material supplier, laborer, or other lien claimant gives notice under this section, the notice shall be effective for all subcontractors, material suppliers, laborers, and other lien claimants not withstanding that the notice was given after the project commences as defined under § 18-44-110 (a) (2).

(ii) If the notice relied upon by a lien claimant to establish a lien under this subchapter is given by another lien claimant under subdivision (a) (5) (B) (i) of this section after the project commences, the lien of the lien claimant shall secure only the labor, material, and services supplied after the effective date of the notice under subdivision (a) (5) (B) (i) of this section.

(C) However, no lien may be claimed by any subcontractor, laborer, material supplier, or other lien claimant unless the owner of the residential real estate, the owner's authorized agent, or the owner's registered agent has received at least one (1) copy of the notice, which need not have been given by the particular lien claimant”

The actual pre-construction notice referred to as the “Important Notice” can be served directly on the owner with a signature, sent by return receipt type mail or incorporated into the contract itself. The notice must be conspicuous, in all capital letters and worded exactly as stated.

IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH CONTRACTOR, SUBCONTRACTOR, LABORER, SUPPLIER, ARCHITECT, ENGINEER, SURVEYOR, APPRAISER, LANDSCAPER, ABSTRACTOR, OR TITLE INSURANCE AGENT SUPPLYING LABOR, SERVICES, MATERIAL, OR FIXTURES IS ENTITLED TO A LIEN AGAINST THE PROPERTY IF NOT PAID IN FULL FOR THE LABOR, SERVICES, MATERIALS, OR FIXTURES USED TO IMPROVE, CONSTRUCT, OR INSURE OR EXAMINE TITLE TO THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY SERVICES, FIXTURES, MATERIALS, OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS AND SERVICE PROVIDERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS, LABOR, FIXTURES, AND SERVICES FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIES AND SERVICE PROVIDERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES AND SERVICES PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER OR OTHER SERVICE PROVIDER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER OR OTHER SERVICE PROVIDER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.

SIGNED: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ADDRESS OF PROPERTY

DATE: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER, REGISTERED AGENT OF THE OWNER, OR AUTHORIZED AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CONTRACTOR'

In a perfect world, every residential contract would be in writing and this notice could be easily attached. The legislature has shown over many years that it intends to protect homeowners from the liens to the extent possible through this notice. It is now double important that it be given for everyone on the construction project.

Demand for Information

Since a supplier or subcontractor’s lien depends on the contractor giving the pre-construction notice, how can one determine whether the notice has been given? This has been provided for by statute. The statute is as follows:

A.C.A. 18-44-108. Refusal to list parties doing work or furnishing materials.

(a) The owner or proprietor, material supplier, subcontractor, or anyone interested as mortgagee or trustee in the real estate upon which improvements are made under this subchapter may apply at any time to the contractor or subcontractor for the following:

(1) A list of all parties doing work or furnishing material for a building and the amount due to each of the parties; and

(2) Certification that the owner or agent has received the preliminary notice specified under § 18-44-115(a), if applicable.

(b) Any contractor or subcontractor who, upon request, refuses or fails within five (5) business days to give a correct list of the parties furnishing material or doing labor on the building and the amount due to each or who falsely certifies that an owner or agent has received the preliminary notice specified under § 18-44-115 shall be:

(1) Guilty of a violation and upon conviction shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500); and

(2) (A) Subject to suit by an aggrieved party in the circuit court where the property is located to enforce subsection (a) of this section including, without limitation, by the contempt powers of the circuit court.

(B) The prevailing party in an action under this subdivision (b) (2) shall receive a judgment for any damages proximately caused by the violation of subsection (a) of this section, the costs of the action, and a reasonable attorney's fee.

The rights given here are important, not only to those claiming liens, but also to those subjected to the liens. This statute attempts to make sure that all interested parties can have access to this important information. An owner can, for instance, learn the identity of all the subcontractors and suppliers, so that it is possible to check with them all prior to making payments. The 2009 amendment added the civil enforcement provision that allows private enforcement and an attorney fee to encourage contractors to comply. It also allows owner and contractors to find out who has and has not been paid as a further protection against surprise liens.

**75 Day Notice**

One of the more significant of the changes in recent times is the addition of the 75 Day Notice. The initial version did not cover subcontractors but the court’s added this provision by case law. [[21]](#footnote-22) The seventy-five day notice applies to commercial projects. This allows a claimant only two and a half months to start collection for unpaid bills.

A.C.A. 18-44-115(b) (4) No subcontractor, service provider, material supplier, or laborer shall be entitled to a lien upon commercial real estate unless the subcontractor, service provider, material supplier, or laborer notifies the owner of the commercial real estate being constructed or improved, the owners authorized agent, or the owners registered agent in writing that the subcontractor, service provider, material supplier, or laborer is currently entitled to payment but has not been paid.

(5) (A) The notice shall be sent to the owner, the owners authorized agent, or the owner's registered agent and to the contractor before seventy-five (75) days have elapsed from the time that the labor was supplied or the materials furnished.

The contents of the notice are fairly simple except that this also contains a specific notice that must be included as follows. The requirements are:

“(6) The notice shall contain the following information:

(A) A general description of the labor, service, or materials furnished, and the amount due and unpaid;

(B) The name and address of the person furnishing the labor, service, or materials;

(C) The name of the person who contracted for purchase of the labor, service, or materials;

(D) A description of the job site sufficient for identification; and

(E) The following statement set out in boldface type and all capital letters:

"NOTICE TO PROPERTY OWNER

IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED TO CONSTRUCT OR PROVIDE SERVICES FOR AN IMPROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL, A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY PAYING THE ABOVE NAMED PROVIDER OF LABOR, SERVICES, OR MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE NAMED PROVIDER AND CONTRACTOR JOINTLY."

The notice may be sent by an Officer authorized by law to serve process in civil actions or any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee, or by a commercial delivery service that provides proof of receipt.

Recent case law has added a new wrinkle in that the court indicates that it wants a full description of the work done or goods supplied. In Ground Zero Construction, Inc. V. Creek, 2012 Ark. 243 to claimant in its notice used only the statutory language of the description with stating and specific about what was furnished. The opinion first notes that lien statutes are to be strictly construed as they provide an extraordinary remedy. The court then with regard to the description stated: “As Metropolitan emphasizes, Ground Zero essentially provided *no* description at all. Instead, Ground Zero merely stated that the lien notice was being provided "in connection with sums owed and unpaid *for labor and materials* provided to you in connection with the Walnut Creek properties. . . ." (Emphasis added.) This "description" simply tracks the language of section 18-44-115(e)(2)(C)(i) but in no way actually describes the labor and materials provided by Ground Zero. It would have been a simple matter for Ground Zero to include a short, *general* description of the labor, service, and material provided by it because there was one contained in its contract with Rees. That contract read that the work being provided by Ground Zero was for the "construction [**Page 7]** of water and sewer for a commercial subdivision, Walnut Creek." Yet, Ground Zero failed to include any description whatsoever in its lien notice. Ground Zero counters this point by contending that it complied with the "purpose, spirit, and letter" of the statute because Walnut Creek obviously knew what its claim concerned. This argument is not persuasive.”

The court rejected the wording and held the notice was not sufficient and the lien was denied. This is a cautionary tale and warns that the description of the work done or goods delivered needs to be sufficient to fairly convey to the contractor or owner what was done or supplied. The Ground Zero case was further explained answered by the court in Ahern Rentals, Inc. V. Salter Construction, Inc., 2014 Ark. App. 423, \_\_\_\_ SW 3rd \_\_\_\_ (August 27, 2014). In this case the plaintiff a rental company simply states the claim was for Rented Equipment which court ruled ‘generally described’ to item to satisfy the statute.[[22]](#footnote-23)

The Ahern Rentals, Inc. V. Salter Construction, INC., 2014 Ark. App. 423, \_\_\_\_ SW3rd \_\_\_\_ (August 27, 2014) also addressed the amount claimed, there was a relatively small difference in the amount named in the 75 Day Notice and the 10 Day Notice. The court ruled that the exact amount was not required and failure to prove the amount named in the notices did not invalidate the lien simply limited what was and was not covered by the lien.[[23]](#footnote-24)

**10 Day Notice of Intent to File Lien**.

A.C.A. Section 18‑44‑114 requires that ten days’ notice be given to the owner, and where appropriate, to the contractor prior to filing the lien. This requirement applies to all potential claimants. For many years this requirement applied to all except the original contractor. The 2005 Amendments to the lien law have done away with this exception. Please keep in mind that this other version of the direct sale exceptions for notice has been repealed. The requirements for this notice are less stringent, but no less important. The Notice must state that there is a claim, the amount of the claim, and from whom the money was due, without at least this information it is ineffective.

This and all of the other notices required in the lien law may be served in the same basic way. The means is laid out in the statute.

(b) (1) The notice may be served by any:

(A) Officer authorized by law to serve process in a civil action;

(B) Person who would be a competent witness;

(C) Form of mail addressed to the person to be served, with a return receipt requested and delivery restricted to the addressee or the agent of the addressee; or

(D) Means that provides written, third-party verification of delivery at any place where the owner of the building or improvement maintains an office, conducts business, or resides.

(2) (A) (i) When served by an officer, his or her official return endorsed on the notice shall be proof of the service.

(ii) When served by any other person, the fact of the service shall be verified by affidavit of the person serving the notice.

(B) (i) When served by mail, the service shall be:

(a) Complete when mailed; and

(b) Verified by a return receipt signed by the addressee or the agent of the addressee, or a returned envelope, postal document, or affidavit by a postal employee reciting or showing refusal of the notice by the addressee or that the item was unclaimed.

(ii) If delivery of the mailed notice is refused by the addressee or the item is unclaimed:

(a) The lien claimant shall immediately send the owner of the building or improvement a copy of the notice by first class mail and may proceed to file his or her lien; and

(b) The unopened original of the item marked unclaimed or refused by the United States Postal Service shall be accepted as proof of service as of the postmarked date of the item.

The statute is worded in an attempt to deal with the actual way the U. S. Post Office treats mail as opposed to the way its regulations state that mail will be treated. The use of third party delivery services is adopted from the Miller Act. The green cards need to be retained as they are needed for filing the actual lien. There is also a separate provision for dealing with out of state owner or contractors who abscond.[[24]](#footnote-25)

**Statement of Account A.C.A. 18‑44‑117.**

The actual lien filing is known as a Statement of Account and is filed with the circuit clerk for the county wherein the improvement is located within 120 days of your last work or material delivery. The Statement of Account is what most people refer to when they discuss the filling of a lien on a piece of property. This filing gives one the right to foreclose the lien. As with the pre-construction notice, and 10 day notice, a claimant must comply with this requirement in order to preserve a lien right.[[25]](#footnote-26) The only traditional court exception is if suit, specifically as a lien foreclosure action is filed prior to the expiration of 120 days, but caution should be used in relying on this exception.[[26]](#footnote-27) The new issue at this stage is the description of the property. The prior notices needed only to identify the property. At this stage the statute requires that the account shall contain a correct description of the property to be charged with the lien. The complete property description is often found in the construction documents, if the plans contain a copy of a survey for instance. Most abstract companies for a reasonable fee will perform a “bring to date” or preliminary title search that will include a correct legal and name the other parties with interests. You can also ask for a title binder again for a fee, the requirements section will give you the same information. There is a requirement under a separate statute that the Statement of Account must also contain the name of the person authorized to release it on the record.[[27]](#footnote-28)

The requirements for the statement of account are as follows:

(A) A just and true account of the demand due or owing to him or her after allowing all credits[[28]](#footnote-29); and

(B) An affidavit of notice attached to the lien account.

(2) The lien account shall contain a correct description of the property to be charged with the lien, verified by affidavit.

(3) The affidavit of notice shall contain:

(A) A sworn statement evidencing compliance with the applicable notice provisions of §5 18-44-114 - 18-44-116; and

(B) A copy of each applicable notice given under §5 18-44-114 - 18-44-116.

There is an additional requirement through a different statute that the lien also contains a statement of who prepared the lien, as required for deeds.

If these items are not included the clerk now has the explicit right not to file the lien. This can cause problems when the lien is being filed on the last day.

**And the Countdown Starts When?**

The most important concept is the date when the time for these deadlines starts. The 120 day period refers not to the entire construction project, but rather to the work or delivery of the specific claimant. After the client or company stops work, the time for filing a lien starts, even though others are still working. Even though the liens are all related back to the same date for priority purposes; for purposes of this section, each claimant is considered separately. The 'last work' concept needs some further explanation. Some claimants over the years have tried to extend the time for liens by repairs or adjustments to the work. The 'last work' criterion should be altered to state last substantial work. In one instance, a claimant attempted to get around the 120 day deadline by returning to 're-calibrate' equipment previously installed. The court ruled that the time runs from the last day of substantial work.[[29]](#footnote-30) In cases of goods sold on open account, the time for each delivery of goods for a particular improvement is independent of a second delivery for another improvement. A Statement of Account filed within 120 days of the second delivery confers no lien for the cost of the first delivery. The exception is where there is some proof of an expectation that the supplier was to supply the entire project. Therefore, care should be taken in this situation.[[30]](#footnote-31)

**Attorney Fees**

Another important issue is the matter of attorney fees. Until recently, each party in most cases paid its own attorney. Now, by statute in most commercial situations, the winner is entitled to collect its attorney’s fees from the other party. This concept has been carried over into the lien arena.

18-44-128. Attorney's fee.

(a) When any contractor, subcontractor, laborer, or material Supplier who has filed a lien, as provided for in this chapter, gives notice thereof to the owner of property by any method permitted under § 18-44-115(f) (3) and the claim has not been paid within twenty (20) days from the date of service of the notice, and if the contractor, Subcontractor, laborer, or material supplier is required to sue for the enforcement of his or her claim, the court shall allow the successful contractor, subcontractor, laborer, or material supplier a reasonable attorney's fee in addition to other relief to which he or she may be entitled.

(b) If the owner is the prevailing party in the action, the court shall allow the owner a reasonable attorney's fee in addition to any other relief to which the owner may be entitled.

The best practice here is to include the attorney fee demand and language within both the Seventy-five day Notice and Ten day Notice. This allows the fees to become a part of the lien and thus may be collected from the real property.

**Filing of Foreclosure Complaint**

The final deadline relates to the period of time between the filing of the Statement of Account and the filing of a foreclosure complaint. We have already discussed the 120-day[[31]](#footnote-32) deadline which may generally be tolled by filing suit within 120 days.[[32]](#footnote-33) Filing suit without the Statement of Account is a procedure of last resort. The problem is that the lien obtained may be denied priority as against mortgagees, even when filed after the start of work. The filing of suit within 120 days rather than filing a Statement of Account perfects the lien as between the land owner and contractor. The Arkansas Supreme Court has held that with regard to a mortgagee, whose mortgage was filed after the start of construction, but before the foreclosure was filed, that the contractor was not superior to the lien of the mortgagee.[[33]](#footnote-34) Once the Statement of Account has been filed, the contractor has 15 months to foreclose the lien.[[34]](#footnote-35) After the fifteenth month, the lien is no longer effective, the recent amendments make this explicit.

In order to meet statute of limitation two things must happen. The suit must of course be filed as a foreclosure and a Lis Pendens must be filed:

18-44-119. Limitation of actions.

(a) All actions under this subchapter shall be commenced within fifteen (15) months after filing the lien and prosecuted without unnecessary delay to final judgment.

(b) No lien shall continue to exist by virtue of the provisions of this subchapter for more than fifteen (15) months after the lien is filed, unless within that time:

(1) An action shall be instituted as described in this subchapter; and

(2) A lis pendens is filed under S 16-59-101 et seq.

Care should be taken to make sure that the Lis Pendens is filed along with the complaint. This is a requirement that new to the law since 2005 and may not be included in some popular form books.

**Foreclosure of the Lien**

The contents of a petition to foreclose a materialmen’s lien are similar to the allegations and remedies in foreclosing a mortgage. The complaint must state all items necessary to establish the lien including delivery and incorporation.[[35]](#footnote-36) Where materials are delivered to a project consisting of several lots on which different houses are under construction some special rules on proof may apply.[[36]](#footnote-37) The application of this rule known as the “Kizer” rule may be limited in application by more recent case law.[[37]](#footnote-38)

There are several important aspects of the pleadings in a materialmen’s foreclosure that are unique. The contractor and those up the chain from your position, must be named. The petition must be filed in the county where the property charged with the lien is located. The suit should join all interested parties. Finally, the complaint must contain a proper description of the property. A failure on any of the points will have serious implications.

The requirement that the contractor be named in any suit cannot be over emphasized. A.C.A. 18-44-124, which seems to be a general requirement that all interested persons, should be joined.[[38]](#footnote-39) The interpretation of the courts however, considerably enlarges the scope of this statute. In Johnson v. Southern Elec., Inc., 779 S.W.2d 190, 29 Ark. App. 160 (Ark. App. 1989), the Arkansas court stated:

“Our supreme court has consistently held that Ark. Code Ann. Sec. 18 ‑44‑124 (1987) means that in suits to foreclose materialmen's liens the contractor is a necessary party and must be made a party within the period provided in the act for enforcement of such liens. **Failure to do so results in dismissal of the lien action**. Rasmussen v. Reed, 255 Ark. 1064, 505 S.W.2d 222 (1974); People's Building & Loan Association v. Leslie Lumber Co., 183 Ark. 800, 38 S.W.2d 759 (1931); Cruce v. Mitchell, 122 Ark. 141, 182 S.W. 530 (1916); Simpson v. J.W. Black Lumber Co., 114 Ark. 464, 172 S.W. 883 (1914). These cases hold that **the contractor is a necessary party because the owners know nothing about the nature or amount** of furnished materials that have gone into the construction of their improvement. The contractor is a necessary party, both for his own and the owners' protection, because the owners have a right to look to him for the payment of any judgment that might be recovered against them for materials furnished. The owners should not be compelled to resort to another action against the contractor in which the contractor would be at liberty to claim that he did not owe the materialmen the amount for which the judgment was rendered and the lien enforced. It is the intention of the law to have the contractor defend all such actions and be bound by the judgment rendered.

As we have concluded that Milburn acted as a contractor and was, therefore, a necessary party to appellee's suit, we must also conclude that the trial court erred in not dismissing the action for appellee's failure to make Milburn a party.

The effect of this ruling was that failure to join the contractor resulted in the dismissal of an otherwise properly perfected lien. This has been extended to affect a suit by a supplier to a subcontractor. In Cline v. B.G. Coney Co., 711 S.W.2d 815, 289 Ark. 417 (Ark. 1986), the court further held that subcontractor was necessary party to action and had to be joined within 120 days after completion of work.

The statute provides for situations wherein the land owner and contractor cannot be found. A.C.A. 18‑44‑126 dealing with Warning orders in the event that the owner cannot be found. The Materialmen’s Statutes do not deal with the effect of a disappearing contractor. Fortunately, the rules of Civil Procedure through Rule 4, ARCP, set a similar procedure.[[39]](#footnote-40) Where the location of a party is unavailable, this rule provides a means to cause service by warning order. This must be completed within the 120-day period for the service of a summons. There are no cases dealing with the issue of whether one must start the procedure for the warning order prior to the 120th day or whether the procedure, which takes at least a month, must be complete in that period. In Gipson v. Tyson Foods, Inc., 615 S.W.2d 363, 272 Ark. 485 (Ark. 1981) reversed prior cases and held that failure to join a contractor by a subcontractor prevented by the automatic stay from taking action against the bankrupt contractor will not result in loss of the lien.[[40]](#footnote-41) This reversed an earlier case to the opposite effect.[[41]](#footnote-42) The bankruptcy court procedures contain a procedure for relief from the Automatic stay in stay which at minimum requires 60 days.

Prior to actually filing a foreclosure action, a title binder should be obtained from an abstract company. These can be obtained at a reasonable cost and will bring the title status up to date. The exceptions listed in the policy will contain a list of every person or entity claiming an interest the property by intervening deeds, liens and mortgages. An interested party not joined in the action is not bound by the judgment.[[42]](#footnote-43) From a practical standpoint, joining all the parties and those with any interest in the property will allow the sale, if that is needed, to convey a clear title. A sale that brings a clear title will result in higher bids and more bidders.

The lien and suit must be filed in the county where the project is located. The other general venue provisions related to the home county of the defendant, may not be much help In Tom Cone, Jr. ,Vs. Eugene A. Jurczyk, 261 Ark. 251, 547 S.W.2d 108 (1977) A supplier brought suit to foreclose lien, but the statement of account or lien had been filed in the wrong county. The court dismissed the lawsuit, held that filing of statement of account or lien in county other than one in which building was located did not substantially comply with the materialmen's law.

The petition must contain an accurate description of the property. The description in the initial filings must only be sufficient to identify the property, but the decree must have a complete and accurate description.[[43]](#footnote-44) In Arkhola Sand & Gravel Co., Div. of Apac‑Arkansas, Inc. v. Hutchinson , 726 S.W.2d 674, 291 Ark. 570 (Ark. 1987) the court held that a description of property in a foreclosure action which did not specify where in a 20‑acre tract the property owner's .79 acre was located or how a particular structure could be identified, or even what kind of structure was involved, was not sufficient. The interesting feature of the case is that the contractor was given the opportunity to plead extrinsic evidence to shore up the description but apparently did not do so. The complaint should also contain a full statement of the account. In John E. Bryant & Sons Lumber Co., Inc. v. Moore, 573 S.W.2d 632, 264 Ark. 666 (Ark. 1978), the court did not dismiss a complaint for failure to include copies of the invoices, but only because the defendant did not object.

**Owner Defenses and considerations**

Nothing will surpass vigilance in preventing problems especially those concerning materialmen’s claims. The vigilant owner can demand that the contractor supply an accurate list of those owned money on the project and the amount due each one in order to check on the situation.[[44]](#footnote-45) This right also extends to a mortgage holder who may have assumed other responsibilities[[45]](#footnote-46). An owner is entitled to hold contract funds in the event that the contractor fails to timely pay its subcontractors and suppliers resulting in a lien.[[46]](#footnote-47) In these situations where the contractor is solvent, the owner is owed a defense by the contractor against lien claims.[[47]](#footnote-48) The basic gist of the information statute is that it allows owners and mortgagees to demand and receive a list of subcontractors and suppliers. The practical benefits of this are rather important. Once the list is obtained, then it is possible to learn with some, but not absolute certainty, the complete list of possible claimants. The statute is:

A.C.A. 18-44-108. Refusal to list parties doing work or furnishing materials.

(a) The **owner or proprietor, material supplier, subcontractor, or anyone interested as mortgagee** or trustee in the real estate upon which improvements are made under this subchapter may apply at any time to the contractor or subcontractor for the following:

(1) **A list of all parties doing work or furnishing material for a building and the amount due** to each of the parties; and

(2) **Certification that the owner or agent has received the preliminary notice** specified under § 18-44-115(a), if applicable.

(b) Any contractor or subcontractor who, upon request, refuses or fails within five (5) business days to give a correct list of the parties furnishing material or doing labor on the building and the amount due to each or who falsely certifies that an owner or agent has received the preliminary notice specified under Section 18-44-115 shall be:

(1) Guilty of a violation and upon conviction shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500); and

(2) (A) **Subject to suit by an aggrieved party** in the circuit court where the property is located to enforce subsection (a) of this section including, without limitation, by **the contempt powers** of the circuit court.

(B) The prevailing party in an action under this subdivision (b) (2) shall receive a judgment for any **damages** proximately caused by the violation of subsection (a) of this section, the costs of the action, and a reasonable **attorney's fee**.

The rights given here are important, not only to those claiming liens, but also to those subjected to the liens. This statute attempts to make sure that all interested parties can have access to this important information. An owner can, for instance, learn the identity of all the subcontractors and suppliers, so that it is possible to check with them all prior to making payments.

The new right given under the 2009 amendments allows an aggrieved party a private action for enforcement. The court has the right to consider contempt which is useful when the contractor is insolvent as it should provide motivation to produce the information. The award of damages and fees is an additional inducement. In most instances, the existence of the private right should result in the production of the information. Mortgagees and owners and even other subcontractors can then better protect themselves.

**Contractual Provisions**

The complete contents of a construction contract are certainly beyond the coverage of this section. Most modern contract forms contain a right to demand evidence of payment of subcontractors and suppliers. The prime contract should be checked to make sure that this is included. Even though, as we will discuss, they sanction the use of joint checks, a contract provision giving the right to use joint checks and have any sum so paid to be credited against the contract price is advisable. Contractors may wish to consider a valid Pay When Paid Clause as a hedge against the owner’s nonpayment. The contract should require as a condition of payment that the contractor certify that all funds owed to prior claims from prior progress payments have been paid prior to the receipt of the next payment. This is similar to language that is in the AIA request for progress payment.

Supervision of Construction Project

One of the collateral services performed by architects and engineers on most projects is the supervision of the project which includes the payment of potential lien holders. The presence of the project inspector provides the owner with a point of contact. The first notice of problems may be through an inquiry from an unpaid supplier or subcontractor. If there is no design professional available, then either a construction manager or third party inspector should be considered. The owner should not rely on the bank’s loan disbursement officer to keep up with the project or persons who are not paid. An owner under most contract forms in use today can require that the contractor produce information regarding the project. The 1995 amendments to the Arkansas lien law gave the owner and others the right to such basic information as who is working on the project and how much are they owed. Ordinarily, the contractor will be paid in progress draws. In order to establish the relative value of each of the components of the project, the contractor should produce a Schedule of Values before the start of work. This will aid in making sure that payment on the project is roughly equivalent to the actual job progress. Care should be taken to avoid contract terms that call for percentage payment based on time elapsed and not actual progress. This most often occurs in residential projects where owners are far less knowledgeable. Another pit fall is payment for materials stored in place. The supplier may deliver goods to the site in bulk to save freight or for some other reason. Since the supplier expects to be paid as the work progresses, it is not expecting that the payment will be made until some later point in time. The contractor makes just the opposite argument to the owner to the effect that the supplier needs to be paid at delivery. In this way an unethical contractor can pocket the difference, perhaps intending to make up the payment at the end of the contract. However, neither the owner nor the supplier will be aware of the problem until much later in the process, when the project is finished and the final payment made, leaving the supplier still unpaid by the contractor. The contractor has used the payment for materials stored in place as a means to job borrow. The only way to protect against this is to demand as part of the agreement that the contractor produce a lien release from the supplier prior to making the next progressive draw.[[48]](#footnote-49)

**Surety Bonds - Performance Issues 18-44-501 et Seq.**

One of the surest means to protect against a lien and other problems is to require that the contractor post payment and performance bond. The basic affect is that the completion of the structure as described in the plans will require the payment of only the contract price. Basically, if a contractor takes half of the money with only 25% of the work done and then disappears, the surety will have to make up the difference up to the penal sum of the bond. There are a number of interesting aspects of construction surety bonds or payment and performance bonds that will not be addressed in this text. First, the performance portion of the obligation while extremely important is simply beyond the scope of this material.[[49]](#footnote-50) The focus is on the payment obligations and ways to help obtain payment from a construction surety on the project. The payment bond obligation is more like that of a cosigner on a car note than an insurance contract for a contractor. Confusion often arises on this point not helped by the fact that most surety companies also issue insurance policies. The purpose of a payment bond originally was to make up for the fact that on public jobs there are no Materialmen's Lien rights.[[50]](#footnote-51) Surety bonds are also used in private construction for owners wishing to protect themselves from liens. Rather than the theoretical aspects, we will focus on the practical aspects.[[51]](#footnote-52)

The statutes concerned are confusing and the way that the various statutes have been codified by the Arkansas Code Commission has not helped. The Law covering payment bonds, in addition to the general Insurance Code provisions regarding surety companies, is found at A.C.A. 18‑44‑501 et seq. and at A.C.A. 22‑9‑401 et seq. These statutes appear to be separate but, the courts have interpreted them as if they are simply part of a single whole, rather than as separate statutes.[[52]](#footnote-53)

A construction bond is required for construction by religious and charitable organizations where the construction is for more than $1,000.00.[[53]](#footnote-54) This provision is mandatory.[[54]](#footnote-55) In the event that the bond is not obtained, then anyone except, an original contractor shall have the right to file a lien against the property.[[55]](#footnote-56) The same bond is optional for private construction the situation before us today. The coverage discussion below concerning state bonds also applies to private bonds. This is what is referred to as an Arkansas Statutory Payment and Performance Bond.[[56]](#footnote-57) In the case of private and public bonds, they are valid whether or not filed in the courthouse.[[57]](#footnote-58) However, the bond is supposed to be filed with the circuit clerk.[[58]](#footnote-59) The protection afforded the owner is on two fronts. First, the suppliers and subcontractors will have a remedy against nonpayment in the form of a bond claim. Second, since the surety is to pay claimants, the owner may demand that the surety foot any cost incurred, including bonding around any liens. Third, as alluded before, when the contractor fails to pay its suppliers, it also often does not finish the building. The surety performance bonds will provide a source of funds for completion and correction of the work.

The provision of a surety bond on a residential contract affects the need for the pre-construction notice. This is a right without much substance since as a practical matter no residential construction is bonded. A bond might be possible on larger residential projects. However, the lack of a design professional involvement in residential work and lack of sophistication on the part of homeowners, prevents most owners from even considering such bonds.

**Bonding Around Liens**

One of the better-known means of removing a lien is the statute that allows a party to ‘bond around’ the lien. This statue has been amended recently in several respects. In 2005, the act was amended to allow more service options and to make it clear that a Declaratory Judgment may be granted in the case of liens. In 2009, the act was amended to lower the bond amount and allow a summary proceeding to remove liens that are on their face defective. The act provides:

**18-44-118. Filing of bond in contest of lien.**

(a) (1) In the event any person claiming a lien for labor or materials upon any property shall file such a lien within the time and in the manner required by law with the circuit clerk or other officer provided by law for the filing of such a lien, and if the owner of the property, any mortgagee or other person having an interest in the property, or any contractor, subcontractor, or other person liable for the payment of such a lien shall desire to contest the lien, then the person so desiring to contest the lien may file:

1. With the circuit clerk or other officer with whom the lien is filed as required by law a bond with surety, to be approved by the officer in the amount of the Lien claimed; or
2. An action under subsection (f) of this section to protest the filing of the lien.

(2) The bond shall be conditioned for the payment of the amount of the lien, or so much of the lien as may be established by suit, together with interest and the costs of the action, if upon trial it shall be found that the property was subject to the lien.

(b) (1) (A) Upon the filing of the bond, if the circuit clerk or other officer before whom it is filed approves the surety, he or she shall give to the person claiming the lien, at his or her last known address, three (3) days' notice of the filing of the bond.

(B) The notice shall be in writing and served by any:

Officer authorized by law to serve process in a civil action; or

ii. Form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee.

(2) (A) Within the three (3) days' notice, the person claiming the lien may appear and question the sufficiency of the surety or form of the bond.

(B) At the expiration of three (3) days, if the person claiming the lien shall not have questioned the sufficiency of the bond or surety or if the circuit clerk finds the bond to be sufficient, the circuit clerk shall note the filing of the bond upon the margin of the lien record and the lien shall then be discharged and the claimant shall have recourse only against the principal and surety upon the bond.

(c) (1) If no action to enforce the lien shall be filed within the time prescribed by law for the enforcement of a lien against the surety, the bond shall be null and void. (2) However, if any action shall be timely commenced, the surety shall be liable in like manner as the principal.

(d) If the circuit clerk shall determine that the bond tendered is insufficient, the person tendering the bond shall have twenty-four (24) hours within which to tender a sufficient bond, and unless a sufficient bond shall be so tendered, the lien shall remain in full force and effect.

(e) (1) Any party aggrieved by the acceptance or rejection of the bond may apply to any court of competent jurisdiction by an action which is appropriate.

(2) Upon notice as required by law, the court shall have jurisdiction to enter an interlocutory order as may be necessary for the protection of the parties by:

1. Requiring additional security for the bond;
2. Reinstating the lien in default of the bond, pending trial and hearing; or
3. Requiring acceptance of the bond as may be necessary for the protection of the parties.

(f) (1) A protest under subdivision (a) (1) (B) of this section shall be filed as a civil action in the circuit court of the county where the lien is filed.

(2) The issues in the action shall be limited to whether:

1. The lien was filed in the form required by § **18-44-117;** and
2. All of the applicable requirements of **§5 18-44-114** and **18-44-115** were satisfied.

(3) (A) The summons shall be in customary form directed to the sheriff of the county in which the action is filed, with directions for service of the summons on the named defendants. In addition, the clerk of the circuit court shall issue and direct the sheriff to serve upon the named defendants a notice in the following form:

"NOTICE OF INTENTION TO DISCHARGE LIEN

You are hereby notified that the attached complaint in the above-styled cause, claims that you have not satisfied the requirements for claiming a lien upon the property described in the complaint and seeks to have the lien discharged by the court. If, within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, you have not filed in the office of the clerk of this court a written objection to the claims made against you by the plaintiff, then an order discharging the lien shall be issued immediately by the court. If you should file a written objection to the allegations of the complaint of the plaintiff within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, a hearing will be scheduled by the court to determine whether or not the lien should be discharged."

(B) If within five (5) days, excluding Sundays and legal holidays, following service of the summons, complaint, and notice the defendant or defendants have not filed a written objection to the claim of the plaintiff, the court shall immediately issue an order discharging the lien upon the property described in the complaint.

(C) If a written objection to the claim of the plaintiff is filed by the defendant or defendants within five (5) days from the date of service of the notice, summons, and complaint, the plaintiff shall obtain a date for the hearing of the plaintiff's complaint and shall give notice of the date, time, and place of the hearing to all defendants.

(4) (A) The action shall be heard as expeditiously as the business of the circuit court permits.

(B) Evidence may be presented by affidavit, subject to Rule 56(e), (f), and (g) of the Arkansas Rules of Civil Procedure.

(5) If the circuit court finds that the lien was not in the form required by § **18-44-117** or that the applicable requirements of §§ **18-44-114** and **18-44-115** were not satisfied, then the circuit court shall enter an order discharging the lien.

(6) The prevailing party shall be entitled to a reasonable attorney's fee and the costs of the protest.

(g) Nothing in this section shall be construed to limit the right of an owner, mortgagee, or any other person with an interest in the property to contest the lien by declaratory judgment proceedings under § **16-111-101** et seq.

The procedure for obtaining the bond as outlined in the statute is straight forward and does not in general lead to much controversy from a procedural stand point. For one thing, any claimant should immediately recognize that a bond is a far better debt security than real property. The limitation of the effectiveness is a practical and economic one. Most surety companies are reluctant to write these types of bonds and when they will consider doing so, they will generally require 100% collateral and a hefty premium. For many small companies and individuals this amount is a prohibition. The suggestion in the amendment, that a party can seek a ruling on a lien’s validity via a Declaratory Action is an excellent one. The cost of legal proceedings and the time involved limit the use of this as a stratagem. The practical reality is that such an action can be used to force a claimant to either stand and defend its lien, or foreclose, rather than simply using a faulty or questionable lien to bluff a settlement. These cases have modified this statute and suit against the surety must be filed within 15 months of the date of the filing of the statement of account, Calton Properties, Inc. v. Ken's Discount Bldg. Materials, Inc., 669 S.W.2d 469, 282 Ark. 521 (Ark. 1984) Failure to file within this period will deny any recovery from the surety.

The 2009 amendments allow a summary proceeding to be filed in which liens that are obviously invalid, may be removed more quickly. This should stop lien claimants from filing liens without the proper notices as a way to hold a project hostage. The claimants are aware that they will lose, but the delay imposed by the courts may force a developer or owner to pay even a bad claim to avoid adverse effects on mortgages or sales. In recent years, the Circuit Clerks have been given the right to refuse liens filed without proper notices attached which has also helped to alleviate this problem. This gives an affected party the right to protect its interests in the event of a failure to do so by the clerk. The proceeding is not designed to decide the merits of a claim where the lien is properly filed.

**Use of Joint Checks**

One of the traditional and recognized ways to protect against liens is the use of joint checks. The current statutes recognize and embrace this means of protection. A.C.A. 18‑44‑115, Notice by principal contractor, provides two notices that seem to give the owner a right to use joint checks. These Notices are set out as follows.

The pre-construction Notice:

IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH CONTRACTOR, SUBCONTRACTOR, LABORER, SUPPLIER, ARCHITECT, ENGINEER, SURVEYOR, APPRAISER, LANDSCAPER, ABSTRACTOR, OR TITLE INSURANCE AGENT SUPPLYING LABOR, SERVICES, MATERIAL, OR FIXTURES IS ENTITLED TO A LIEN AGAINST THE PROPERTY IF NOT PAID IN FULL FOR THE LABOR, SERVICES, MATERIALS, OR FIXTURES USED TO IMPROVE, CONSTRUCT, OR INSURE OR EXAMINE TITLE TO THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY**. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY SERVICES, FIXTURES, MATERIALS, OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS AND SERVICE PROVIDERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS, LABOR, FIXTURES, AND SERVICES FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIES AND SERVICE PROVIDERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES AND SERVICES PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER OR OTHER SERVICE PROVIDER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER OR OTHER SERVICE PROVIDER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY. . . .**

And again in the new 75 day notice for suppliers:

"NOTICE TO PROPERTY OWNER

IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED TO CONSTRUCT OR PROVIDE SERVICES FOR AN IMPROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL, A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. **YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY PAYING THE ABOVE NAMED PROVIDER OF LABOR, SERVICES, OR MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE NAMED PROVIDER AND CONTRACTOR JOINTLY."**

While this is a widely recognized solution, however, there are some pitfalls that may be encountered. In Degen v. ACME Brick Co., 312 S.W.2d 194, 228 Ark. 1054 (Ark. 1958) a suit to enforce a materialmen’s lien. The Supreme Court held that where a materialman lien filed prior to delivery of tile had been advised by its owner to collect its money on delivery of material and materialmen’s driver had accepted contractor's checks as material was delivered, but had delayed in depositing the checks, that the materialman was estopped from claiming lien against property after owner had settled account with contractor and contractor's checks were thereafter dishonored for insufficient funds. In Starkey Const., Inc. v. Elcon, Inc., 457 S.W.2d 509, 248 Ark. 958 (Ark. 1970), in a suit between the general contractor, its surety and a subcontractor, the court held that where a general contractor complies with materialmen’s request by including materialmen’s name as payee in progress payment checks and the materialman fails to advise general contractor that it was not taking its money from the checks but was extending credit to subcontractor, that the materialman was estopped from recovering from the general contractor any amount which it had opportunity to receive from subcontractor from progress payments.

The notice required in both residential and commercial projects also give owners the right to use joint checks and hold proceeds, once there is a basis for belief that subcontractors are unpaid. Many owners never read the notices, but the right is there for those owners who are diligent and wish to protect themselves.

**Use of Construction Contract Proceeds**

First and foremost, the owner is required to pay the contractor who is then required to pay the project subcontractors and materialmen from each construction draw. This is a matter of trust between the owner and contractor and, frankly, between the contractor and those that have been hired. In addition to the moral and contractual obligation to pay one’s debts, it is a criminal offense 3[[59]](#footnote-60)4 for a contractor to take any proceeds from a project and not pay the job costs as provided in A.C.A. 18-44-132.3[[60]](#footnote-61)5 The statute states:

“A.C.A. 18-44-132. Criminal offenses; fraud

(a) It shall be unlawful for any contractor, subcontractor, or other person who has performed work or furnished materials for the improvement of any property where the work or materials may give rise to a mechanic's, laborer's, or materialmen’s lien under the laws of this state, this subchapter, §§ 18-44-201 -- 18-44-210 and subchapter 3 of this chapter, or any other statute providing for a mechanic's, laborer's, or materialmen’s lien, or the assignee of such person, knowingly to receive payment of the contract price or any portion of it without applying the money so received toward the discharge of any liens known to the person receiving the payment, or properly record it as required by statutes, with the intent thereby to deprive the owner or person so paying the contractor or other person receiving payment of his funds without discharging the liens and thereby to defraud the owner or person so paying.”

(b) In any prosecution under this section as against the person so receiving payment, when it shall be shown in evidence that any lien for labor or materials existed in favor of any mechanic, laborer, or materialman and that the lien has been filed within the time provided by law in the office of the circuit clerk or other officer provided by law for the filing of such liens, and that the contractor, subcontractor, or other person charged has received payment without discharging the lien to the extent of the funds received by him, then the fact of acceptance of the payment without having discharged the lien within ten (10) days after receipt of the payment or the receipt of notice of the existence of the lien, whichever event shall occur last, shall be prima facie evidence of intent to defraud on the part of the person so receiving payment.”

( c) ... deals with penalties....

Often people complain that statutes are not clear and on that count this statute, stands as the poster child of obscurity. It seems in places to refer to liens already perfected by filing. The most useful reading of this statute is that it requires each person in the materialmen’s ‘food chain’ to pay those down the stream within ten days of receipt of the funds. The problem with this approach is that while it sounds good, the fact is, that making such a purely economic action a felony renders it ineffective. There are virtually no cases filed under this statute, I have cited the only two I am aware of and they were in the 1960's. Prosecutors are simply not going to get involved. Further, the criminal code has a version of this statute which was struck down as unconstitutional in the 1990’s.[[61]](#footnote-62) Other states have adopted a less sever sounding, but far more effective set of statutes, which are called ‘trust fund’ statutes. Whether or not they the trust fund statutes carry criminal penalties, they are effective because they offer a private remedy that an owner, or other party can control.

**Slander of Title**

While litigation is never a first choice, there is another statutory tool available to owners and purchasers in dealing with lien claims. The common law action was known as Slander of Title, which action has been around for many years and has seen some use against lien claims. The action requires proof of malice, however, a notoriously difficult element of any suit. One example is Hicks V. Early, 235 Ark. 251, 357 S.W.2d 647 (1962), the court held that “before [the] appellant could prevail in a slander of title action, it was necessary for him to prove that appellees acted with malice, by filing a materialmen’s lien upon appellant's property.” 3[[62]](#footnote-63)6 In 1995, a statute was added that affects this cause of action even though actually aimed at an entirely different target.

5-37-226. Filing instruments affecting title or interest in real property.

(a) It is unlawful for a person with the knowledge of the instrument's lack of authenticity or genuineness to have placed of record in the office of the county recorder or the office of the Secretary of State any instrument:

(1) Clouding or adversely affecting:

(A) The title or interest of the true owner, lessee, or assignee in real property; or

(B) Any bona fide interest in real property; and

(2) With the purpose of:

(A) Clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property which may prevent the true owner, lessee, or assignee from disposing of the real property or transferring or granting any interest in the real property; or

(B) Procuring money or value from the true owner, lessee, or assignee to clear the instrument from the records of the office of the county recorder or the office of the Secretary of State.

(b) (1) (A) A person who violates subsection (a) of this section is guilty of a Class A misdemeanor.

(B) A person who has a previous conviction under subdivision

(b) (1) (A) of this section upon conviction is guilty of a Class D felony for a subsequent violation of subsection (a) of this section.

(2) However, a person who violates subsection (a) of this section is guilty of a Class C felony if the person violates subsection (a) of this section because of the performance of official duties by the victim and the victim is:

(A) A judge or other court personnel;

(B) A prosecuting attorney or deputy prosecuting attorney;

(C) A state, county, or municipal law enforcement officer or jailer;

(D) An employee of the Department of Correction;

(E) An employee of the Department of Community Correction;

(F) A judge, prosecuting attorney, deputy prosecuting attorney, law enforcement officer, or jailer from another state, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States;

(G) A person elected to a federal, state, or local position; or

(H) A person employed by the Attorney General.

(c) An owner, lessee, or assignee of real property located in the State of Arkansas who suffers loss or damages as a result of conduct that is prohibited under subsection (a) of this section and who must bring civil action to remove any cloud from his or her title or interest in the real property or to clear his or her title or interest in the real property is entitled to three (3) times actual damages, punitive damages, and costs, including any reasonable attorney's fees or other costs of litigation reasonably incurred.

(d) **This section does not apply to a bona fide filing of lis pendens, materialmen's lien, laborer's lien, or other legitimate notice or protective filing as provided by law.**

The statute still requires a show of ‘malice’ in that, a lien claimant whose lien is ‘bona fide’ is protected. But, this adds an incentive to the common law action as it allows triple damages, punitive damages and attorney fees. Given the number of procedural hurdles placed in the way of lien claimants, a case can be made that a lien claimant aware that one of the many notices has not been sent, or received timely does not have a ‘bona fide’ lien is a significant deterrent.

The only cases that speak on this point seem to add weight to the proposition that a lien which the claimant knowingly filed without complying with the deadlines would support a suit under this statute. A party sought damages under this statute because the contractor knowingly filed the lien more than 120 days after the last work was performed. The jury found that the contractor had not ‘knowingly’ filed out of time. While the court did not extensively discuss the application of the statute, the opinion seems to accept that had the lien been filed out of time the outcome would have been different. [[63]](#footnote-64) A new wrinkle has been added by Pruitt V. Dickerson Excavation, Inc., 2010 Ark. App. 849, in which the court affirmed a ruling by a circuit judge that a statement in a lien filing made with probable cause and in good faith, was a protected privilege as part of the preliminary enforcement of a statutory right. The ruling turned on the lack of malice.[[64]](#footnote-65) The court again did not allow that action, but did not rule it out, in a case that meets all of the requirements for the action including malice.

**Releases and Accord and Satisfaction**

Finally, a note about lien releases in use today. A release operates and is effective because once a person has given a release, that person if nothing else, has waived all rights released. While all liens relate to the date of first disturbance of the soil, each lien depends on perfection by its own claimant. A release from a general contractor that purports to release all liens, is effective only against that contractor, and does not release liens that may be the result of that contractor’s subcontractors and suppliers work and materials. The same would hold for an affidavit from a general contractor that “no work had commenced.” 3[[65]](#footnote-66)7 That contractor might be estopped, but not the unpaid subcontractors and suppliers.

The recent case of Pruitt V. Dickerson Excavation, Inc., 2010 Ark. App. 849, introduces some new considerations in drafting a release. In that case, a contract to build some building pads, the contractor encountered rock and apparently negotiations for a change to the contract were not successful. The trial court and the appellate court agreed that on the facts in the case, the rock costs were part of a separate contract. The trial court found and the appellate court agreed that the release signed by the contractor related only to the original contract referred to in the release, and not the costs incurred in attempts to remove the rock.[[66]](#footnote-67) A release of ‘liens to date’ was found, and payment by a check marked ‘final payment’ were found to relate only to the original contract, and not the rock charges as an extra. The check as an accord and satisfaction was found to relate only the original contract and not the change.[[67]](#footnote-68)

1. See A.C.A. 18-44-101. Liens on buildings, land, or boats. This is the basic lien statute, but that it includes…any boat or vessel of any kind…. In many years there has been no case that related to boats until Falcon Steel, Inc. V. Russell Flowers, Inc., 635 F.3d 369 (8th Cir. 2011). Interestingly, the combination is not as far afield as one might think since ancient and modern maritime law imposes a possessory lien on vessels for the cost of repairs that can result in the ‘arrest’ or seizure of a vessel for unpaid repair costs. [↑](#footnote-ref-2)
2. See A.C.A. 18-44-115 (a)(1) and (b)(1)(B) for residential defined as four or fewer units and (b)(2)(A) which defines commercial real estate as five or more units. [↑](#footnote-ref-3)
3. Urrey Ceramic Tile Co. V. Mosely,304 Ark. 711, 805 SW 2d 54 *(1991)* [↑](#footnote-ref-4)
4. Falcon Steel, Inc. V. Russell Flowers, Inc., 635 F.3d 369 (8th Cir. 2011) concerned a steel manufacturer’s lien claim against a barge. The case was removed to federal court and thus decided by the 8th Circuit. [↑](#footnote-ref-5)
5. Stone Mill & Lumber Company Vs. Finsterwalder, 249 Ark 363, 459 S.W. 2d 117 (1970) The court held that to have a lien the claimant must show that the materials were delivered and incorporated in the house. [↑](#footnote-ref-6)
6. Erdman Company V. Phoenix Land & Acquisition CASE NO. 2:10-CV-2045, CASE NO. 2:11-CV-2067 (W.D.Ark. 9-4-2012) “Arkansas plainly burdens lien claimants with showing that the materials they furnished were used in the projects for which they seek liens. E.C. Barton & Co. v. Neal, 263 Ark. 40, 42– 44, 562 S.W.2d 294, 295-96 (Ark. 1978); Del Mack Constr., Inc. v. Owens, 82 Ark. App. 415, 419-20, 118 S.W.3d 581, 584-585 (Ark. Ct. App. 2003). The Arkansas statute providing mechanics' liens states that "[e]very contractor, subcontractor, or material supplier...who supplies...material...in the construction or repair of an improvement to real estate...by virtue of a contract with the owner...,shall have, to secure payment, a lien upon the improvement...." ARK. CODE

   ANN. § 18-44-101 (West 2012). The statute gives liens to those who supply material "in the construction," not to those who merely store materials near the construction. The logic of the statute is clear: those who supply material in an improvement have a lien on the improvement. When a supplier increases the value of real estate, it has a lien on that value increase. See E.C. Barton & Co, 263 Ark. at 43, 562 S.W.2d at 295 (saying of a predecessor statute, "We think the statute was intended to enforce justice; that the party who has enhanced the value of the property by the incorporation therein of his material or labor shall have security in the same...."); Del Mack, 82 Ark. App. at 419-20, 118 S.W.3d at 584-85. Applying the statute's logic to this case, the improvement to Pheonix's real estate for which it contracted with Erdman was not materials delivered and stored on-site, but rather materials incorporated into a structure: a hospital addition. Accordingly, materials not included in that improvement are not subject to Erdman's lien.” [↑](#footnote-ref-7)
7. Actual use Half Moon Gin Co. Vs. E. C. Robinson Lumber Co., 207 Ark 483, 181 S.W. 2d 239 (1944) Burden on claimant to show the use Ragsdell Vs. Gazaway Lumber Co., 11 Ark. App. 188, 668 S.W. 2d 60 (1984) [↑](#footnote-ref-8)
8. Application of a current project’s payments to a prior or other project's debts, even when the contractor agrees, must be with the owner's agreement, otherwise no lien for those funds Howard Building Centre Vs. Thornton, 282 Ark 1, 665 S.W. 2d. 870 (1984) [↑](#footnote-ref-9)
9. Dow Chemical Co. v. Bruce Rogers Co., 501 S.W.2d 235, 255 Ark. 448 (Ark. 1973), in an appeal by private lessee and public lessor [city] from a decree enforcing statutory Materialmen's liens against leasehold interest in land owned by city, the Supreme Court held that public policy forbids attachment of liens on public buildings and land for labor and materials furnished by contractors in construction of public facilities and that leasehold interest of lessee which contracted with city that it would not permit liens to attach. [↑](#footnote-ref-10)
10. To establish the Lessee as the owner's agent requires an agreement between the lessee and owner that the work will be done and that owner will pay for it, payment can be by deduction of costs from rent Whitcomb Vs. Gans, 90 Ark. 676 (1909) and Langston Vs. Matthews, 117 Ark. 626, 173 S.W. 397 (1915). [↑](#footnote-ref-11)
11. cf. Right is assignable to all E. O. Barnett Brothers Vs. Wright, 116 Ark. 44, 172 S.W. 254 (1914) [↑](#footnote-ref-12)
12. Middleton Vs. Hopkins Hardware, 196 Ark. 133, 116 S.W. 2d 1043 (1938) [↑](#footnote-ref-13)
13. Carter Fleming v. Kirby Bldg. Systems, Inc., 603 S.W.2d 421, 270 Ark. 149(Ark. 1980) [↑](#footnote-ref-14)
14. See A.C.A. 18-50-101, et Seq, this act allows a mortgage company to provide notice establish a sale date and sell the property essentially free and clear, this provisions to pay any funds above the first mortgage to the remaining claimants. This assumes the bank has its records and knows the amount due, the recent changes in this market and the banking industry makes these assumptions unreliable. [↑](#footnote-ref-15)
15. These cases have been specifically overturned under the current statute. See Mark's Sheet Metal v. Republic Mtg. Co., 242 Ark. 475, 414 S.W.2d 106 (1967); this court explained that the commencement of buildings and improvements "means some visible or manifest action on the premises to be improved, making it apparent that the **building is going** up or other improvement is to be made . . . This must be done with the intention and purpose then formed to continue the building to completion." and See Jim Walter Homes V. Bowling Bldg. Supply, 258 Ark. 28, 521 S.W.2d 828 (1975), Removing the foundations of old buildings on the premises, commencement of leveling operations and the establishment of cut and fill elevations are not sufficient evidence of commencement. Clark v. General Electric Company, supra. An inspection and measurement of the premises and the placing of a wooden peg to determine the location of a proposed house on the premises are not sufficient. [↑](#footnote-ref-16)
16. Planters Lumber Co. v. Jack Collier East Co., 356 S.W.2d 631, 234 Ark. 1091 (Ark. 1962) even a supplier after the filing date of the mortgage is entitled to the benefit of the first work as the date to which priority relates. [↑](#footnote-ref-17)
17. BOBO v. G. C. SEBREE, 244 Ark. 915, 429 S.W.2d 95 (1968) “The Notice was signed by appellant's attorney. Item (a), the amount claimed, presents no problem since the trial court, in the written opinion, specifically found that the Notice "stated the amount of the claim". (b) In considering the issue here presented, we should first determine whether the lien section involved must be strictly construed or whether it should be liberally construed It is our conclusion that, in this case, the section should he liberally construed to effect its purpose. There are many decisions by this Court wherein it was stated that the lien statute should be strictly construed and there are many decisions where we said it should be liberally construed. Among the first classifications are Flournoy v. Shelton, & Co., et al, 43 Ark. 168; Van Etten v. Cook 54 Ark. 522, 16 S.W. 477 So. Louis Iron Mountain & Southern Ry Co. v. Love,74 Ark. 528, 86 S.W. 395, and the recent case of Dix v. Olds, 242 Ark. 850, 415 S.W.2d 567 relied on, apparently, by the trial court. Among the cases which applied to the liberal construction rule or hold a substantial compliance with the statute is sufficient, are: Anderson v. Seamans, 49 Ark. 475, 5 S.W. 799; Buckley v. Taylor,51 Ark. 302, 11 S.W. 281; Speer Hardware Co. v. Bruce, 105 Ark. 146, 150 S.W. 403; Bruce Brown v. Turnage Hardware, Inc., 181 Ark. 606, 26 S.W.2d 1114: and, Geisreiter v. Standard Lbr. Co., 187 Ark. 893,63 S.W.2d 347. [**Page 919] The above apparent conflicts in the decisions are not as real as they appear.** Briefly stated, it appeal's from the noted opinions, that the strict construction applies where there is a doubt as to whether the subject matter comes within the purview of the statute. For example, in the Dix case, supra, the claimant sought a "lien on all the lands . . . and improvements described in the bill of assurance for work performed "on a street or roadway surfacing contract ". There we properly applied the strict construction rule, and denied the lien. This Rule is very well stated in 18 R. C. L., at page 879, in these Molds ". . . . though a mechanic's lien is said to he a favorite of the law, a statute cannot be so extended as to he applied to cases which do not fall within its provisions." In the case under consideration here we do not have a situation like that in the Dix case Her., no one questions the facts; that appellant furnished appellees' home with carpeting that it cost $1,613.15 that appellees knew he furnished it; that he filed his Notice in dire time, and; that the notice appraised appellees of all these facts, and they were in no way misled. Applying the rule of liberal construction and substantial compliance, we conclude the case must be, and it is hereby reversed.” [↑](#footnote-ref-18)
18. In two recent cases the court has refused on procedural grounds to rule on the direct sale issue. In *Ground Zero Construction, Inc. v. Walnut Creek, LLC*, 2012 Ark. 243, 410 S.W.3d 579 and in Temco Construction, LLC V. Gann, 2013 Ark. 202, 427 S.W.3d 651 (Ark 2013) the court articulated the issue and then refused to rule since the lower court did not explicitly make a ruling on the issue. The opinion drew multiple dissenting opinions based on the fact that a trial court that states it has considered and reject all arguments is sufficient to preserve an issue. [↑](#footnote-ref-19)
19. A.C.A. 15(a)(8) (A) If the residential contractor supplies a performance and payment bond or if the transaction is a direct sale to the property owner, the notice requirement of this subsection shall not apply, and the lien rights arising under this subchapter shall not be conditioned on the delivery and execution of the notice.

    (B) A sale shall be a direct sale only if the owner orders materials or services from the lien claimant. [↑](#footnote-ref-20)
20. Bryant V. Cadena Contracting, 100 Ark. App. 377, 269 S.W.3d 378 (2007) held that the notice if given after the start of work was not effective. This case has been overturned by the 2009 amendments. [↑](#footnote-ref-21)
21. See Books‑a‑million V. Ark Paint. And Spec. 340 Ark. 467 (2000) where in the court treats subcontractors as suppliers apparently unaware of this statute. And, Cannon Remodeling V. the Marketing Co., 79 Ark. App. 432, 90 S.W.3d 5 (2002), The law requires that the notice provisions in the statute are to be strictly construed, thus requiring strict compliance. ***The requirements cannot be satisfied by substantial compliance***. And see Ground Zero Construction, Inc. V. Creek, 2012 Ark. 243 [↑](#footnote-ref-22)
22. Ahern Rentals, Inc. V. Salter Construction, INC., 2014 Ark. App. 423, \_\_\_\_ SW3rd \_\_\_\_ (August 27, 2014) “(6) The notice shall contain the following information: (A) A general description of the labor, service, or materials furnished, and the amount due and unpaid.... Ark. Code Ann. § 18-44-115(b)(6)(A). This subsection was reviewed by our supreme court in Ground Zero Construction, Inc. v. Walnut Creek, LLC, 2012 Ark. 243, 410 S.W.3d 579. The court held that the 75 Day Notice in that case did not comply with section 18-44-115 because it merely tracked the language of the statute without providing any description. Id. at 6, 410 S.W.3d at 582. The supreme court indicated, however, that the contractor could have included the description of work as set forth in its contract with the owner of the project to satisfy the statutory requirement for a general description, which stated that the work was for "construction of water and sewer for a commercial subdivision, Walnut Creek." Page 5 Id. at 6-7, 410 S.W.3d at 582. The supreme court explained that the distinction was that the contractor "failed to include any description whatsoever in its lien notice," and therefore failed to strictly comply with section 18-44-115(b)(6)(A). Ahern claims, and we agree, that pursuant to Ground Zero, a lien claimant is statutorily required to provide only a general description of the work provided in order to strictly comply with the statute. Here, Ahern provided just such a description of the type of services provided to the construction project by expressly providing that the lien amount being sought was for "rental equipment" provided to a particular subcontractor. When compared to Ground Zero, supra, in which the supreme court held that the description of labor, service, or materials furnished listed as "in connection with sums owed and unpaid for labor and materials provided ... "[fn2] was inadequate, but suggested that a listing of "construction for water and sewer..." would have amounted to a sufficient general description, Ahern's description of "rental equipment" is sufficiently descriptive to strictly comply with the statutory requirement to provide a general description of the labor, service, or materials provided. [↑](#footnote-ref-23)
23. Ahern Rentals, Inc. V. Salter Construction, INC., 2014 Ark. App. 423, \_\_\_\_ SW3rd \_\_\_\_ (August 27, 2014) “Notice shall contain a general description of the labor, service, or materials furnished, and the amount due and unpaid. Ahern submits that the statute simply requires the claimant to state "the amount due and unpaid" in

    order to strictly comply, pointing out that there is no qualifying language that would invalidate the lien claim if the amount stated in the 75 Day Notice is different than the amount later sought in future notices or a

    complaint to foreclose on the lien. Nor is there Page 7 any qualifying language in the statute that invalidates the lien claim if the amount sought in the 75 Day Notice includes amounts for profits, which are not lienable. See Hickman v. Kralicek Realty & Constr. Co., 84 Ark. App. 61, 129 S.W.3d 317 (2003) (holding that where a claimant seeks a lien on an amount more than the services, labor, or materials provided, the circuit court must determine the cost of the services, labor, or materials actually furnished and used in the project and disallow a lien for those items which are not lienable, such as profits). In Hickman, supra, the claimant was not barred from pursuing its lien on

    valid amounts allowed for in the statute when it initially sought judgment for an amount more than it could claim in its lien. Id. Rather, it is the burden of the claimant to prove at trial whether he is entitled to the full amount sought in the lien claim. See Del Mack Constr., Inc. v. Owens, 82 Ark. App. 415, 118 S.W.3d 581 (2003). Additionally, there is no case law that invalidates a lien for claiming an amount different than what can be proved at trial as lienable. While acknowledging that the amount stated in Ahern's 75 Day Notice is admittedly $2,348.22 more than what is claimed in its 10 Day Notice and affidavit of account, Ahern argues, and we agree, that the discrepancy is not fatal to its lien claim. We hold that Ahern strictly complied with the requirement of the statute by providing an amount due and unpaid, even if the initial amount provided in the 75 Day Notice was ultimately for more than it could prove as lienable. Whether the amount stated in the 75 Day Notice can be proved at trial is not a requirement of section 18-44-115 when determining strict compliance. To interpret the plain language of section 18-44-115(b)(6)(A) to require the amount stated in the 75 Day Page 8 Notice to be proved in full at trial in order to maintain a valid lien claim would be to imply something that is not expressly stated in the statute, and such an interpretation violates the rules of strict construction. Simmons First Bank, supra. The merits of whether the entire stated amount due and unpaid in the 75 Day Notice is lienable is an issue of proof to be decided by the trier of fact at trial, not through a Rule 12(b)(6) motion. Speights v. Stewart Title Guar. Co., 358 Ark. 59, 186 S.W.3d 715 (2004). [↑](#footnote-ref-24)
24. 18-44-116. Service on nonresident or absconder.

    (a) (1) Whenever property is sought to be charged with a lien under this subchapter, the notice may be filed with the recorder of deeds of the county in which the property is situated if the owner of the property so sought to be charged:

    (A) Is not a resident of this state;

    (B) Does not have an agent in the county in which the property is situated;

    (C) Is a resident of this state but not of the county in which the property is situated; or

    (D) Conceals himself or herself, has absconded, or absents himself or herself from his or her usual place of abode, so that the notice required by § 18-44-114 or § 18-44-115 cannot be served upon him or her.

    (2) When filed, the notice shall have like effect as if served upon the owner or his or her agent in the manner contemplated in S 18-44-114 or § 18-44-115.

    (b) A copy of the notice so filed, together with the certificate of the recorder of deeds that it is a correct copy of the notice so filed, shall be received in all courts of this state as evidence of the service, as provided in this section, of the notice.

    (c) (1) The recorder of deeds in each county of this state shall receive, file, and keep every such notice presented to him or her for filing and shall further record it at length in a separate book appropriately entitled.

    (2) For service so performed, the recorder of deeds shall receive for each notice, the sum of twenty-five cents (25), and for each copy certified, as stated in this section, of each of the notices he or she shall receive the sum of fifty cents (50), to be paid by the party so filing or procuring the certified copy, as the case may be.

    (d) The costs of filing and of one (1) certified copy shall be taxed as costs in any lien suit to which it pertains to abide the result of the suit. [↑](#footnote-ref-25)
25. Rasmussen Vs. C.J. Horner Co., 255 Ark 1030, 505 S.W. 2d 225 (1974) [↑](#footnote-ref-26)
26. Burk Vs. Sims 230 Ark. 170, 321 S.W. 2d 767 (1959) This is a limited exception however. See the recent case of Servewell Plumbing v. Summit Contractors, 362 Ark. 598 (2005) **“**Here, Servewell relies on *Wiggins v. Searcy Federal Savings & LoanAssociation*, 253 Ark. 407, 486 S.W.2d 900 (1972). In*Wiggins*, this court held that "the filing of a suit . . . to preserve and enforce the lien within the 120-day period is a substantial compliance with the statute which cures the omission to file the account with the circuit clerk."*Wiggins*, 253 Ark. at 410. However, this argument is without merit, because Servewell's original complaint —which admittedly was filed within 120 days of its provision of work or labor on the project — was not brought as a lien foreclosure action; instead, as discussed above, the only claims raised in the original complaint were for breach of contract and unjust enrichment.” [↑](#footnote-ref-27)
27. 18‑1‑101. Lien holder form (a) Any attachment, claim, encumbrance, financing statement, lien, mortgage or security agreement filed of record against any real or personal property, and any judgment filed of record against any person, firm or corporation, shall display the name, address, and telephone number of the claim holder, lien holder or the judgment creditor, together with the name and title of the person authorized to release the claim, lien or judgment, or the person's successor.

    (b) Subsection (a) of this section shall not be applicable to any claim holder, lien holder or judgment creditor which is a financial institution insured by the Federal Deposit Insurance Corporation.

    (c) Subsection (a) of this section shall not be applicable to motor vehicle titles.

    (d) Clerks responsible for recording the documents enumerated in subsection (a) of this section, shall ensure the documents presented for filing display the information required by subsection (a) of this section.

    (e) The validity or priority of any attachment, claim, encumbrance, financing statement, lien, mortgage, or security agreement currently on file, or filed of record after the effective date of this act, shall not be affected by the failure of any person to comply with the requirements of this section. [↑](#footnote-ref-28)
28. There is only one reported case McCOY & SON v. ATKINS, 167 Ark. 250, 267 AS 779 (1925) held that an account listing the items charged and showing credits, even though not the nature the credit, whether cash payment of or by goods returns, was sufficient “if it furnishes reasonable information as to the state of his account, and its efficacy is not affected by such inaccuracies as showing credit by cash when it was by goods or where one or more items of credit was composed of credits for several articles.” [↑](#footnote-ref-29)
29. Arkla Gas Co. Vs. Moffitt, 245 Ark. 992, 436 S.W. 2d 91 (1969) [↑](#footnote-ref-30)
30. Streuli Vs. Wallin‑Dicky & Rich Lumber Co., 227 Ark. 885, 302 S.W. 2d 522 (1957) and . Kizer Lumber Co. v. Mosely, 56 Ark. 544, 20 S.W. 409, 410 (1892) [↑](#footnote-ref-31)
31. Transportation Prop. V. Central Glass & Mirror, 38 Ark. App., 827 S.W.2d 667 60 (1992) the statute did not provide that a certain method or procedure be used in computing the 120 days, Ark. R. Civ. P. 81(a) did not exclude the use of Ark. R. Civ. P. 6(a) in computing the statutory 120 ‑day period within which the complaint had to be filed in order to perfect and enforce the statutory lien involved, thus time is counted from the first day after the last day on which work is done. [↑](#footnote-ref-32)
32. Transportation Properties, Inc. v. Central Glass & Mirror of Northwest Arkansas, Inc., 827 S.W.2d 667, 38 Ark.App. 60 (Ark.App. 1992) [↑](#footnote-ref-33)
33. Wiggins v. Searcy Federal Sav. and Loan Ass'n, 486 S.W.2d 900, 253 Ark. 407 (Ark. 1972) There is some question because procedurally, the mortgagee was not named in the suit and no claim of superiority was alleged in the complaint. [↑](#footnote-ref-34)
34. A.C.A. 18‑44‑119. Statute of limitations. All actions under this subchapter shall be commenced within fifteen (15) months after filing the lien and prosecuted without unnecessary delay to final judgment. No lien shall continue to exist by virtue of the provisions of this subchapter for more than fifteen (15) months after the lien is filed, unless within that time an action shall be instituted as described in this subchapter. [↑](#footnote-ref-35)
35. . Stone Mill & Lumber Co. v. Finsterwalder, 459 S.W.2d 117, 249 Ark. 363,, (Ark. 1970) deals with requirement of proof of incorporation. Another aspect is the fact that diversion of materials to some other project is a crime defined as A.C.A 18 44 109. Illegal use of materials.

    Any contractor or subcontractor who shall purchase materials on credit and represent at the time of purchase that they are to be used in a designated building or other improvement and shall thereafter use, or cause to be used, the materials in the construction of any building or improvement other than that designated without the written consent of the person from whom the materials were purchased, with intent to defraud that person, shall be deemed guilty of a misdemeanor if the materials were valued at one thousand dollars ($1,000) or more and shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) [↑](#footnote-ref-36)
36. See Central Lumber Co. v. Braddock Land & Granite Co., 84 Ark. 560, 105 S.W. 583, 584 (1907), In Central Lumber, the Arkansas Supreme Court affirmed that "the materials furnished for the building must be actually used in its construction or repair before it can become a lien," but tempered this rule with a special burden-shifting framework to be applied in cases such as this one, where a materialman delivers the materials to a builder's construction site but does not confirm their subsequent use. Specifically, the court held that if a materialman delivers the material at or near the site of the structure's erection or repair, and the finished structure composed of materials resembling those delivered, then there is prima facie evidence that the material-man's supplies were actually used, and the burden of rebutting this presumption then shifts to the builder or subsequent owner, their "means of information and opportunities to know such fact being superior." see Sebastian Bldg. & Loan Ass'n v. Minten, l8l Ark. 700, 27S.W.2d 1011, 1015-16 (1930) (citing. Van Houten Lumber Co. v. Planters' Nat'l Bank, 159 Ark. 535, 252 S.W. 614, 615-16 (1923) ; Standard Lumber Co. v. Wilson, l73 Ark. 1024, 296 S.W. 27, 27-28 (1927)) . Moreover, in the event that "the materials were furnished for buildings upon the same or contiguous lots and under one entire contract," the court resolved that "all such lots would be jointly liable" for the amount due. Id. at 584. As the rationale for its rule in Central Lumber, the Arkansas Supreme Court explained that "[w]hen materials are furnished under a single contract for buildings to be constructed upon two or more lots, it cannot be expected of the materialman to know how much is used upon each lot." Buret v. B. Ark. Lumber Co., 129 Ark. 58, 195 S.W. 378, 379 (1917) Arkansas Supreme Court has stated that an "attempt to invoke the rule that a lien may be asserted upon two or more lots where materials are furnished under a single contract is without application where it is undisputed that the parties treated each [project] as a separate account and contract." S. Lumber Co.,

    273 S.W.2d at 850. [↑](#footnote-ref-37)
37. Kizer Lumber Co. v. Mosely, 56 Ark. 544, 20 S.W. 409, 410 (1892), The Kizer rule, however, does nothing to alter the basic requirement that a lien claimant show "the materials for which he claims a lien were used in the improvement on which a lien was sought." Del Mack Constr., Inc. v. Owens, 82 Ark. App. 415, 118S.W.3d 581, 534 (2003); Ragsdell v. Gazaway Lumber Co., llArk .App. 188, 668 S.W.2d 60, 61. (1984). Where the debtor rebuts the presumption of actual use which arises by virtue of the supplier's delivery of materials to the construction site, see Cent. Lumber Co. v. Braddock Land & Granite Co., 84 Ark. 560, 105 S.W. 583, 584 (1907), the claimant must demonstrate actual use in some other way and may not, absent the proper showing, file an undifferentiated materialmen's lien with respect to the entire project. See, e.g., Sebastian Bldg. & Loan Ass'n v. Minten, 181Ark.700, 27S.W.2d 1011, 1015 (1930) (disallowing the company's materialmen's lien for paint and oil delivered to the site for construction of two houses because the debtor was able to show the painter used his own paint and oil for the job and the amount of paint and oil furnished by the creditor was far in excess of the necessary amount) A modern discussion in the majority and dissenting opinions in Falcon Steel, Inc. V. Russell Flowers, Inc., 635 F.3d 369 (8th Cir. 2011) is instructive. [↑](#footnote-ref-38)
38. . 18 44 124. Claims against contractors. (a) In all cases where a lien shall be filed under the provisions of this sub-chapter by any person other than a contractor, it shall be the duty of the contractor to defend at his own expense any action brought thereupon. During the pendency of the action, the owner may withhold from the contractor the amount of money for which the lien shall be filed.

    (b) In case of judgment against the owner or his property upon the lien, the owner shall be entitled to deduct from any amount due by him to the contractor the amount of the judgment and costs. If the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally liable. [↑](#footnote-ref-39)
39. . ARCP Rule 4, RULE 4. SUMMONS. . . (f) Service Upon Defendant Whose Identity or Whereabouts Is Unknown. (1) Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tortfeasors. [↑](#footnote-ref-40)
40. . Gipson Crane Rental V. Tyson Foods, 272 Ark. 485, 615 S.W.2d 363 (1981), at Page 488, “We hold that when a potential lien holder is enjoined by a bankruptcy court from proceeding against a contractor, it is unnecessary to make the contractor a party defendant in a lien foreclosure action.” [↑](#footnote-ref-41)
41. . In Rasmussen v. Reed, 505 S.W.2d 222, 255 Ark. 1064 (Ark. 1974) the court held that even when the contractor had filed a bankruptcy petition, the statute was not tolled, and the failure to join the contractor until more than 16 months after the lien filing required that the suit be dismissed. This case was evidently overruled without mention by the text case. [↑](#footnote-ref-42)
42. . A.C.A. 18 44 123. Parties. In all suits under this sub-chapter, the parties to the contract and all other persons interested in the controversy and in the property charged with the lien may be made parties to the suit. Those that are not made parties **shall not be bound** by the proceedings [↑](#footnote-ref-43)
43. . A.C.A. 18 44 127. Judgments. . . .(b) The judgment, if for plaintiff, shall be that he recover the amount of the indebtedness found due, to be levied out of the property charged with the lien therefor, which property **shall be correctly described in the judgment**. [↑](#footnote-ref-44)
44. . The owner, agent or mortgagee has right to demand accurate lists of subs and suppliers and amount due A.C.A. 18‑44‑108. [↑](#footnote-ref-45)
45. . See for lender liability, Spieghts v. Arkansas Sav. & Loan Ass'n, 393 S.W.2d 228, 239 Ark. 587 (Ark. 1965), wherein a mortgage company which exercised control over disbursements of proceeds from construction loan and did not use due diligence in doing so was required to bear loss when contractor, having received most of the proceeds, abandoned project without paying labor and material claimants. [↑](#footnote-ref-46)
46. . A. C. A. 18‑44‑124 (a) [↑](#footnote-ref-47)
47. . The Contractor has a duty to defend all suits and owner can hold money amount of lien 18‑44‑124 (a) [↑](#footnote-ref-48)
48. . The schedule of values will need to be amended to take into account that the materials part of the affected item has already been paid. [↑](#footnote-ref-49)
49. . A.C.A. 18‑44‑506 Gives statutory coverage in general terms the bond is ensure that the contractor "faithfully perform his contract and shall pay all indebtedness for labor or materials furnished or performed." [↑](#footnote-ref-50)
50. . Purpose of a payment bond is to substitute for a bond on public job for the statutory lien. Oliver Construction Co. Vs. Williams, 152 Ark. 414, 238 S.W. 615 (1922) [↑](#footnote-ref-51)
51. A good source for general information is "The law of Con­struction Bonds in Arkansas: A Review" Paul, 9 UALR L. J. 333. [↑](#footnote-ref-52)
52. This situation interesting since the AHTD is exempted from coverage under A. C. A. 18‑ 44‑502, however, A. C. A. 22‑9‑401 that does cover AHTD has been interpreted by courts, if not the Statutory Revision Commission, to be part of same whole and not separate bond statues Berry Asphalt Co. Vs. Western Surety Co., 223 Ark 344, 266 S. W. 2d 835 (1954) [↑](#footnote-ref-53)
53. A. C. A. 18‑ 44‑ 504 Bond required for work over $1,000.00, filed with circuit clerk. [↑](#footnote-ref-54)
54. A.C.A. 18‑44‑504 Bond for work on church or charity is mandatory General Electric Supply Co. Vs. Downtown Church of Christ, 24 Ark. App. 1, 746 S.W. 2d 386 (1988) [↑](#footnote-ref-55)
55. . A.C.A. 18‑44‑504 (b) up held in Milford Vs. Arkmo Lumber & Supply Co., 272 Ark. 462, 615 S. W. 2d 349 (1981) [↑](#footnote-ref-56)
56. . A.C.A. 18‑44‑505 Makes the general bond provisions an option of owner in amount equal to contract. [↑](#footnote-ref-57)
57. . The Bond is valid whether or not filed with Circuit Clerk Lena Lumber Co. Vs. Brickhouse, 173 Ark. 348, 292 S.W. 1007 (1927) ‑ prior law. [↑](#footnote-ref-58)
58. . A.C.A. 18‑44‑507 Before work done or material furnished the bond is to be filed with Circuit Clerk of county where work done. [↑](#footnote-ref-59)
59. , 305 Ark. 217, 807 S.W.2d 32 (1991) [↑](#footnote-ref-60)
60. 35 This statute was upheld in State v. Jacks, 418 S.W.2d 622, 243 Ark. 77 (Ark. 1967). A person charged with failure to discharge mechanics' and materialmen's liens in violation of statute moved to quash information. The lower court granted the motion and the state appealed. The Arkansas Supreme Court, held that this statute meant that acceptance of payment without discharging a mechanics' lien within ten days after receipt of payment or receipt of notice of existence of lien was prima facie evidence of intent to defraud on part of person so receiving payment. This statute was upheld as having a rational connection with the balance of statutes governing mechanics' and materialmen's liens. But also for problems in enforcement see Reno and Stark V. State, 241 Ark. 127, 406 S.W.2d 372 (1966). [↑](#footnote-ref-61)
61. 5-37-525. Defrauding a materialman. Struck down State V. Riggs, 305 Ark. 217, 807 SW 2d 32 (1991) STATUTES — UNCONSTITUTIONAL TO IMPRISON FOR DEBT WITHOUT REQUIRING PROOF OF FRAUD — ARK. CODE ANN. 5-37-525 UNCONSTITUTIONAL. — Ark. Code Ann. 5-37-525 (Supp. 1989), which made it a crime for a contractor or a subcontractor to knowingly refuse to pay for materials, was properly held unconstitutional since it did not contain language that made fraud or fraudulent intent a part or prerequisite of the criminal offense; the Arkansas Constitutional prohibition against imprisonment for debt makes an exception only for cases of fraud; the fraud exception in imprisonment-for-debt clauses does not extend to fraud in its broader concepts. [↑](#footnote-ref-62)
62. 36 See also Bright V. Gass, 38 Ark. App. 71, 831 S.W.2d 149 (1992) [↑](#footnote-ref-63)
63. Swink V. Lasiter Construction, Inc., 94 Ark. App. 262 (2006) at Page 281, “ [8] In his ninth point, Swink argues that the trial court erred in dismissing his counterclaim. The counterclaim alleged that Lasiter improperly filed its lien in violation of Ark. Code Ann. § 5-37-226(a).[fn3] In interrogatory 11, the jury found that Lasiter did not file its lien on October 20, 2003, knowing that it had not performed work within 120 days of filing the lien. Swink's argument is directed to a finding that the jury was not asked to make. He is arguing that Lasiter's lien filing was untimely, while the jury was asked whether Lasiter knew that it had not performed any work within 120 days of filing its lien. Here, Michael Lasiter testified that the last work on the project was on June 23, 2003, and unspecified days in August, within 120 days of the lien. Therefore, substantial evidence supports the jury's answer to interrogatory 11 that Lasiter did not file its lien knowing that no work had been performed within 120 days of the lien filing.” [↑](#footnote-ref-64)
64. Pruitt V. Dickerson Excavation, Inc., 2010 Ark. App. 849 Appellee moved for summary judgment, asserting that the statements in the lien were protected by absolute privilege because they were made as part of judicial proceedings to enforce its lien and that the statements were made in good faith with probable cause. In response to the motion, appellants submitted the affidavit of Johnny Pruitt in which he accused appellee of double billing for the use of its equipment and not charging only for the extra work incurred in removing the rock. Pruitt also averred that appellee's president, Doug Dickerson, told him that the rock removal would cost between $12,000 and $15,000, and certainly not over $20,000. **Page 4** The circuit court granted appellee's motion for summary judgment. The court found that appellee had probable cause to file its lien because of appellants' admitted failure to pay for the extra work removing rock. The court also found that the lien was merely a preliminary step in the statutory procedure and, as such, was privileged. The court dismissed appellants' slander-of-title claim. After the circuit court granted summary judgment on appellants' slander-of-title claim, appellants made several attempts to have either their claim reinstated or appellee's lien dismissed on the basis that the lien waiver for the second draw included the rock removal. The court denied appellants' motions. [↑](#footnote-ref-65)
65. 37 Even in the event such language were used it might not be effective against the contractor, since the actual start of work is not the deciding factor. [↑](#footnote-ref-66)
66. Pruitt V. Dickerson Excavation, Inc., 2010 Ark. App. 849 “For their third point, appellants assert that appellee waived any lien it may have had by executing the lien waivers in June 2007 and in August 2007. The lien waivers reference the parties' original contract and included the file number contained on the original written contract. Inasmuch as the lien waivers clearly provided the exact liens they released, we cannot say that the circuit court clearly erred in finding that only the lien provided by the original contract was released.” [↑](#footnote-ref-67)
67. Pruitt V. Dickerson Excavation, Inc., 2010 Ark. App. 849 For their fifth point, appellants argue that an accord and satisfaction was reached between the parties when appellee cashed a check marked "payment in full." Appellants' argument on appeal is that the mere acceptance of the second $15,000 check containing the notation "paid in full" constitutes an accord and satisfaction. Our court has specifically held that it is not enough for the debtor to merely write "payment in full" or similar language on the check. Dyke Indus., Inc. v. Waldrop, 16Ark.App.125, 697S.W.2d936 (1985). Instead, the validity of an accord and satisfaction is dependent upon the same basic factors and principles that govern contracts generally, Housley v. Hensley, l00 Ark. App. 118, 265 S.W.3d 136 (2007),Page 9 and the burden of proving the agreement is simply the burden of proving a contract: offer, acceptance, and consideration. Id. The defense of accord and satisfaction presents an issue of fact, and appellants had the burden of proving accord and satisfaction. Id. Here, the circuit court found that there was no agreement between the parties whereby the $15,000 would be considered as payment in full for the entire amount due. Appellants do not challenge this finding and we cannot say that it is clearly erroneous. [↑](#footnote-ref-68)