

## ABSENT ACTION WITHIN 60 DAYS, GEORGIA STATUTORY LIEN WAIVER DESTROYS BOTH LIEN AND CONTRACT CAUSES OF ACTION

On September 18, 2019, the Georgia Court of Appeals interpreted the lien statute (in a case of apparent first impression) to require affirmative action to preserve breach of contract actions within 60 days of signing statutory lien waivers. It changes existing law by waiving not only liens but breach of contract rights simply by signing an ordinary ‘lien waiver.’ If this holding stands, contractors must change their current practices and act swiftly to protect contract claims.

ALA Construction Services (ALA) hired Controlled Access (C.A.) to provide equipment and services worth roughly \$13,000 for a construction project. To pay two invoices from C.A., ALA required interim lien waivers comporting with OCGA § 44-14-366. When a contractor gives the statutory waiver, OCGA § 44-14-366(f)(1) says it “shall be binding against the claimant **for all purposes**, subject only to payment in full of the amount set forth in the waiver and release.” (Emphasis added.) In defining when that “payment in full” occurs, OCGA § 44-14-366(f)(2) reads,

Such amounts **shall conclusively be deemed paid in full** upon the earliest to occur of: (A) Actual receipt of funds; (B) Execution by the claimant of a separate written acknowledgment of payment in full; or (C) Sixty days after the date of the execution of the waiver and release, **unless prior to the expiration of said 60 day period the claimant files a claim of lien or ... an affidavit of nonpayment....** (Emphasis added.)

The court’s decision follows a strict textual approach to the highlighted language above. C.A. did not take either of the prescribed actions required by Subsection C above and filed suit against ALA for breach of contract. In a reverse-and-render decision granting summary judgment against C.A., the Court of Appeals began its analysis by writing, “When this Court construes a statute, we must presume the General Assembly meant what it said and said what it meant.” It found the language of the statute unambiguous and thus held “the General Assembly intended the Waiver to be binding against the parties for ‘all purposes,’ not just for the purposes of preserving the right to file a lien on the property.” It discounted earlier cases holding that the underlying debt survived the failure of the lien claim—e.g., **Hampshire Homes, Inc. v. Espinosa Constr. Svcs., Inc.**, 288 Ga. App. 718, 655 S.E.2d 316 (2007)—because they did not “consider or

discuss the statute and prescribed form at issue here” and were “unpersuasive because they were decided” under earlier versions of the lien statute.

The case’s implications are disruptive to ordinary construction lien filing and claims practice. Typically, even if a contractor’s lien rights failed, it could file a breach of contract action up to six years after the breach without taking further steps to preserve that action. Now, it would appear that affirmative contractor action—by filing the claim of lien or affidavit of nonpayment—is mandatory to preserve ordinary claims for breach of contract. One might reasonably call this foreshortened claim period an unofficial but effective 60-day statute of limitation. Presumably, this development will cut off large numbers of claims for the unwary or drastically increase the number of liens and nonpayment affidavits that claimants must file to effect their claims. This is likely an unexpected result of a statute intended principally to benefit claimants.

Our advice to contractors and subcontractors is to alert your accounting departments to this new court-created deadline for action and to create an automated process for creating these documents necessary to preserve your claim. Also, while it may not have been your practice to obtain the legal description of the property as a matter of course, it is more important to do so now, as there may be limited time to file your claim once you learn about nonpayment. Both the claim of lien and affidavit of nonpayment require an **accurate** property description (Georgia law is very strict about errors in that description, which may invalidate your lien). Finally, because Georgia lien law is evolving under the new statutory regime—this case is a prime example—we encourage you to seek competent counsel when filing and foreclosing on mechanics liens.

The case is ***ALA Construction Services, LLC v. Controlled Access, Inc.***, Georgia Court of Appeals Case # A19A0923. For further information about this case and advice on how to protect your business and your projects, please call Jonathan Head at (205) 791-7618 or any other member of the Construction Practice Group.



Jonathan Head is a trial lawyer licensed in Alabama and Florida who principally focuses on the construction and manufacturing industries. By leveraging his experience as an in-house lawyer for a large general contractor, Jonathan seeks to provide full service within the core operations of those industries. He has tried cases throughout the Southeast United States and in Maryland. As part of a national construction claims practice, Jonathan has advised clients and made claims for affirmative recovery throughout the United States. He has also been featured in publications such as *Atlanta Business Chronicle*, *Construction Executive* and *Birmingham Business Journal*. To request a consultation, please contact Jonathan at 205-791-7618.