

Construction Lien Law Basics: What You Don't Know May Cost You

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Note: This is the first of two articles on construction law issues. The second article will appear in the spring issue of the *Counselor* and will focus on construction contracts.

As interest rates drop to 40-year lows, many individuals are taking advantage of the low rates to remodel their current homes or construct new houses. Businesses have also taken advantage of low interest rates by building or remodeling offices, warehouses, and other facilities.

Whenever improvements are made to real estate, it is important for the contractor and the property owner to be aware of Wisconsin's construction lien law. Construction liens are a valuable tool available to contractors who have difficulty collecting payments due from land owners for labor and/or materials supplied for improvement projects. At the same time, property owners should understand some construction lien law basics in order to protect their property from unwanted liens.

A construction lien is a claim against land by a person or business



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who supplied labor, materials, or services to an improvement being made on real estate. If a contractor, subcontractor, or material supplier is not paid for labor and/or materials supplied, the individual or business has the right to place a lien on the improved property as long as various notices are given by the claimant to the property owner. The notices must be given timely, and differ depending on the lien claimant's role in the improvement project and the classification of the project.

Lien claimants fall into two categories. A "prime contractor" is an individual or business that enters into a contract with an owner of land who is not personally acting as the general contractor. Generally, an individual who provides labor or materials is a prime contractor if that party is dealing directly with the owner. On the other hand, "subcontractor" is an individual who provides labor or materials who does not deal directly with the owner.

The notices required to perfect a lien also vary depending on the nature of the construction project. First, it must be determined whether the project is private or public. Private projects are projects not involving public improvements or works. If a project is a private project, it must be classified as either a small or large project. Most improvement projects end up being classified as small private projects. An example is the construction or improvement of a single-family residence.

On private small projects, prime contractors who hire subcontractors or material providers are required to provide notice to the owner informing the owner that subcontractors will be used and that the subcontractors retain lien rights if not paid by the prime contractor. The notice can be included in a written contract or be prepared separately and served personally or by registered mail on the owner within ten (10) days after the first labor or materials are furnished.

On the other hand, subcontractors must, within sixty (60) days after furnishing the first labor or materials, give notice in writing informing the owner of certain lien rights available to the subcontractor (the "60-Day Notice").

On private small projects, all prime contractors and subcontractors must, within six (6) months from the date they last furnished labor or materials, file a Claim for Lien in the office of the clerk of circuit court in the county in which the lands affected by the lien are situated. However, before a Claim

for Lien can be filed, the property owner must be served personally or by registered mail with return receipt requested, a written Notice of Intent to File a Claim for Lien at least thirty (30) days before filing the Claim for Lien. This Notice must contain a description of the work performed, the amount of the claim, and a description of the land and improvement to which the lien claim relates.

If within two years of filing the lien claim a lien claimant has not been paid, the lien claimant must commence an action against the owner in order to foreclose the lien. This will require the filing of a legal action in the circuit court of the county in which the property lies. If the property owner's obligation is paid in whole or in part at any time throughout the process, then full or partial lien waivers or satisfactions can be provided to the owner.

A simple example is instructive. Don and Suzanne own a single-family home in a nice subdivision of Madison and they contract with Jim's Construction to build an addition. Jim's Construction subcontracts with other professionals to complete the improvement, including an electrician. The addition is completed and Don and Suzanne pay Jim's Construction the entire amount due under the contract. At the time it receives payment, Jim's Construction provides Don and Suzanne with a contractor's Affidavit and lien waiver which state that all of the subcontractors have been paid. Five months later, Don and Suzanne receive a Notice of Intention to File Claim for Lien from a company who supplied electrical components to the electrician. The Notice states that the supplier was not paid by the electrician for the supplies and that if it is not paid, it will file a lien on Don and Suzanne's property.

In the example, the electrical supply company may or may not be able to legally perfect its lien rights. If the material supplier provided Don and Suzanne with the 60-Day Notice and the Notice of Claim for Lien is served within five (5) months of labor or materials last being furnished, then the electrical supply company will likely be able to perfect its lien rights. Unfortunately, the homeowner may pay twice for the same improvements.

However, a common defense used by homeowners in this situation is if one of the notice requirements was not served in a timely or appropriate fashion. If the statutory notice requirements are not satisfied, then the subcontractor is not permitted to file a lien. To place a construction lien on property where the notice requirements are not fulfilled may

lead to a claim of slander being brought against the lien claimant.

As the example makes clear, if you are involved in an improvement project on real estate as contractor or owner, it is important to be aware of Wisconsin's construction lien law. In many cases, you would be well advised to consult an attorney who is versed in this area of the law. Failure to do so may cost you. ■



Paul A. Johnson is a partner with Lathrop & Clark. He practices primarily out of the firm's Lodi office. His practice focuses on real estate, landlord/tenant and general practice law.



Chris A. Jenny is an associate with Lathrop & Clark whose practice focuses on representing individuals and businesses with all of their planning needs, including estate planning, real estate and small business planning. In addition to practicing in the Madison office, Chris is also a member of the firm's Poynette office.

Alternatives to Child Support

By: *Ann C. Krummel*

Child support is often the single greatest source of conflict for parents in the dissolution of a marriage. While use of the “Percentage of Income” guideline for calculating child support is generally well known, recent changes in Wisconsin law require that support obligations be expressed as a fixed sum unless certain exceptions apply. Parents who previously paid a percentage of their actual earnings each month can no longer expect that their payment will change with their income: a “fixed sum” order is one that requires payment of the same dollar amount each month, regardless of changes in earnings.

Fixed sum payment orders may cause hardship for a parent whose income fluctuates; for example, someone who is paid on commission or a self-employed professional. And of course, children’s needs are not necessarily constant on a month-to-month basis over the course of a year. For example, day care expenses for working parents typically increase in the summer, during school vacation months. Faced with the prospect of a rigid, court-ordered obligation that establishes a fixed dollar payment on a monthly basis, even two parents who are fully committed to the financial support of their children may find themselves in substantial disagreement over “how much” is fair.

Providing for Children: Child Support Policy in Wisconsin

Most parents want to provide for their children even though their marital relationship has ended. Few would disagree that children should remain at a standard of living substantially equal to what they would have enjoyed had there been no divorce. This is the standard Wisconsin courts consistently apply in deciding child support cases. If the commitment to a child’s care and a willingness to cooperate in protecting the child from conflict are shared priorities, many parents want meaningful ways to provide financial support without the disadvantages of a fixed sum order. Fortunately, Wisconsin courts have upheld agreements between parents that did not establish traditional, monthly child support payments, but met the needs of the children with alternative financial arrangements.

Finding Fairness: Other Approaches to Financial Support for Children

Under a carefully drafted Marital Settlement Agreement, the cost of extra-curricular activities, enrichment, tuition or other expenses may be made one parent’s individual responsibility. Under this approach, the parent’s financial contribution is made by direct payment to a service provider. If the parents are confident of their ability to agree on their child’s future involvement, these agreements may be expressed in general, open terms. If specific activities, such as dance or karate classes, are already part of the child’s life, these may be identified as such in the agreement and included accordingly. Agreements of this nature do commit a parent to payment without knowing in advance what the exact cost will be. On the other hand, parents who assume specific costs in lieu of a monthly payment enjoy the certainty of knowing that their money goes directly to benefit the child.

A Settlement Agreement might also establish formula reimbursements between the parents, such as a monthly payment calculated as a percentage of actual expenses: For example, one parent might agree to pay the other “45% of day care costs incurred during working hours...” on a weekly or monthly basis. Again, this type of arrangement commits a parent to payments that may vary. It also requires regular accounting and communication between parents, as well as prompt and consistent payment to succeed. On the other hand, fluctuations in cost are



borne fairly by both parents. Since both income streams are available to meet demand, there is less likelihood that the child's needs will go unmet provided reimbursement payments are made as agreed.

What Are the Disadvantages to a Non-Traditional Support Arrangement?

Child support agencies will no longer provide legal assistance to establish arrears or collect payments due under any orders other than fixed sum obligations. Unfortunately, child support orders do sometimes go unpaid. An alternative support arrangement may motivate payment from a separated parent by assuring that dollars paid are actually being spent for the benefit of the child and by providing flexibility. However, a parent who is given the opportunity to provide alternative financial support misuses this option if payment is withheld for other purposes. Fixed sum child support payments established by court order do offer the advantage of being easily monitored. Collection and payment through the Wisconsin Child Support Trust Fund program, and use of the "KIDS" computer system to track receipt and disbursement make it easy to determine whether a required payment was made in full and on time. In cases where enforcement of an absent parent's child support obligation through legal action is likely to be needed, a fixed sum order may be more appropriate.

A parent who does not receive fixed sum monthly payments also loses the ability to make independent decisions as to how child support dollars should be spent. The success of any alternative arrangement will depend on a continued, cooperative dialogue between parents and willingness to choose compromise. It is fair to observe that these methods of cost sharing do nothing to eliminate the potential for parental conflict over the expense of raising children. If those issues are the origin of the parent's decision to divorce, alternative support arrangements may only continue that conflict.

Exceptions to the Fixed Sum rule

As part of a Settlement Agreement, and only as part of an Agreement, parents may establish an order that expresses the payment as a percentage of the payer's income. The parents themselves may agree that each payment must be a percentage of the payer's income rather than a fixed sum, but the court may no longer write orders that create formulas for payment in contested child support cases. The court is

also prohibited from approving percentage-expressed orders included in a Settlement Agreement unless the paying party has no other court-ordered support obligations, no State benefits have been provided, and all other obligations in the Agreement are also expressed as a percentage of income.

A carefully prepared Marital Settlement Agreement that includes percentage-expressed child support payments should also include a procedure for monitoring compliance. A recipient parent should have clear means of determining whether the full amount due under the formula has been paid. Verification of income will be needed for accurate computation of the obligation and comparison against payments received. Therefore, annual disclosure is an appropriate part of the agreement, either through use of W-2 forms or income tax returns. Since payment reconciliation services for percentage-expressed orders will no longer be provided by child support agencies, this burden now falls to the parents.

Conclusion

It is important to know how courts make decisions in child support cases when two parents cannot agree. However, courts have very limited options, and new rules make court orders more rigid than ever. That is why it is also important to know that parents who are willing to reach agreement have a greater range of alternatives. A creative approach, carefully drafted as part of a comprehensive Marital Settlement Agreement, can reduce conflict for parents by providing fair and flexible ways to provide financial support for children. ■



Ann C. Krummel brings 10 years experience as a Family Court Commissioner to her practice with Lathrop & Clark. She was a member of the State Child Support Guidelines Review Advisory Committee, whose recommendations are the basis for current revisions to the Percentage of Income Child Support Standards.

Notes From The Chair

John C. Frank, Partnership Chair

Over 30 years ago when I started practicing law, a lawyer who advertised for his services could be subject to disciplinary procedures and potential disbarment. Times have changed. While lawyer advertising is still subject to ethical scrutiny, it is now not unusual to encounter lawyer advertisements.

For many firms with practices that involve representation of a client on a single isolated matter, such as recovery for personal injury, advertising may be important to let clients know of the firm's existence and experience. Some firms have also engaged in less direct, "institutional" advertising which is designed to provide recognition of the firm's name in a positive manner.

In spite of the removal of the ethical ban on advertising, our firm has generally sought to rely on word of mouth communications from satisfied clients rather than using advertisements. However, recently we have become a sponsor of a radio program on WTDY-AM (frequency 1670). The program, entitled "Aging Matters", is hosted by Carol Koby and can be heard at 11:00 a.m. to noon on Saturdays. We are proud to support and sponsor the program because we believe that the program provides the elderly and their caregivers with useful information and results in a genuine public service.

While we plan to remain one of the more "quiet" firms in the Madison area with respect to advertising, we encourage our clients dealing with issues of aging to tune in to the radio program. ■



John C. Frank has been with Lathrop & Clark for over thirty years. His practice areas currently include estate planning and administration, real estate and tax law.

Summer Visitors

Lathrop & Clark Ducks

Lathrop and Clark had an interesting visitor to its rooftop patio this summer. A mother duck decided to nest in a flower planter located on the patio. Staff members helped make the soon-to-be mother more comfortable by placing a baby swimming pool on the patio. After a few days of hissing, the duck became comfortable with members of the firm eating lunch next to her on the patio. Everyone was very excited when one of the ducklings hatched on July 23. Unfortunately, the crows were also excited about the duckling and the rest of the unhatched eggs. After some coercion, staff members Joann Nicholls and Nadia Riese escorted the mother and her duckling to our elevator where they made a nonstop ride to the ground floor where mother and duckling were ushered out the door to return to the "wild." ■



Background lightened to show nesting duck.

Ken Axe was recently appointed vice chair for United Way's Safe Communities Strong Neighborhoods Community Solution Team. ■ **Ken** also wrote a column "Get it in Writing" in the August 2002 Greater Madison Chamber of Commerce's *Business Beat* publication. ■ **David Rohrer** was awarded an AV® rating in the Martindale-Hubbell legal directory. The ratings in the directory are established by a confidential peer review by members of the Bar. ■ **Paul Johnson** was featured in a National Geographic piece on Curling that aired on the National Geographic Channel during February 2002. The piece was shot at the Arlington Curling Club during the Men's Bonspiel and focused on the social aspects of the game. ■ **David Weller** has been appointed Secretary of RFDF, Inc. RFDF is a non-profit corporation that provides assisted living to the elderly and developmentally disabled. ■ **Frank Sutherland** presented a seminar regarding liability and litigation arising out of the presence of mold in Wisconsin schools to the Wisconsin School Attorneys Association in October 2002. ■ **Frank** was also appointed to and is serving on the school oversight committee for Highpoint Christian School. ■ **Chris Jenny** presented a seminar regarding legal issues for new business owners for the fourth time to the StartSmart - Business Planning Series at the Wisconsin Women's Business Initiative Corporation. ■ **Jeff Clark** was recently elected to the State of Wisconsin Elder Law Section Board of Directors of the State Bar of Wisconsin. ■ In honor of National Alzheimer's Disease Awareness Month, **Jeff** also discussed legal and financial planning considerations at "The ABC's of Alzheimer's and Dementia" workshop held in Baraboo on November 9, 2002. ■ **Joanne Harmon Curry** has been appointed to the Gender Equity Committee of the Wisconsin State Bar Association. ■ **Joanne** also presented an overview of federal and state regulatory issues affecting students and employees in schools at the Charter School Developers' Conference in Madison in July 2002. The conference brought together Charter School developers from 4 states around the region. ■ **Chris Jenny** and **Frank Sutherland** were awarded the 2001 Volunteer of the Year award by the Community Action Coalition for South Central Wisconsin, Inc. (CAC), in recognition of their commitment to improving the lives of low-income people in Dane County. ■ **Chris** and **Frank** each presented seminars through the CAC to entrepreneurs regarding the legal issues associated with starting a new business. ■

David Rohrer, Frank Sutherland and **Jeff Clark** presented a 2 1/2 hour workshop for all school principals in the Roman Catholic Diocese of Madison on May 1, 2002. ■ **David Uphoff** and **Jeff Clark** participated in the Alzheimer's Association, South Central Wisconsin Chapter, "The Narrowed Road" workshop on October 26, 2002, in Madison. The Narrowed Road is a four-part workshop for families with a member recently diagnosed with Alzheimers or a related dementia. David and Jeff's presentation was about legal and financial planning considerations. ■

New Faces



Josh C. Kopp graduated magna cum laude from the University of Wisconsin-Platteville with a Bachelor of Science degree in Political Science in 1998. Josh graduated with honors from the University of Wisconsin Law School in 2002. Josh initially started working at Lathrop & Clark in January 2001 as a law clerk for the Business, Tax and Real Property, Probate and Trust Teams. Josh continued to work for Lathrop & Clark as he completed law school. Josh is a member of the American, Wisconsin, and Dane County Bar Associations, and is admitted to practice before the Supreme Court of the State of Wisconsin and the United States District Court for The Western District of Wisconsin. Josh's practice focuses on representing individuals and businesses in transactional and litigation matters, including estate planning, real estate and business matters. Josh's recreational interests include woodworking, reading and downhill skiing. He and his wife, Alicia, enjoy traveling and hope one day to travel around the world. ■

In Memory

James F. Clark (1920 - 2002)

Attorney James F. Clark, the “Clark” in the Lathrop & Clark LLP firm name, died on October 4, 2002. Mr. Clark retired from the active practice of law in 1998 after more than 50 years of service to clients, community, and the legal profession.

Mr. Clark joined a predecessor firm to Lathrop & Clark in 1948 and opened its Poynette office in that year. Beginning in 1950, Mr. Clark represented numerous Wisconsin school districts, a reputation for which he is probably best known in legal circles. He was named the Wisconsin Association of School Boards’ first general counsel in 1961 and represented WASB until his retirement. He was one of the founders of the Wisconsin School Attorneys Association, served as past president of the National School Boards Association Council of School Attorneys, and, in 1994, was awarded the Tipler Medal for Distinguished Service in School Law by WASB.

He was also a past president of the Columbia County Bar Association and served in various capacities with the State Bar of Wisconsin, including as an elected member of the Board of Governors. He was a former chairman of the St. Thomas Catholic Church (Poynette) Parish Council and a past president and member of the Arlington Lions Club, as well as a member of the Knights of Columbus and Elks Club.



Mr. Clark also distinguished himself in our office as the firm’s presiding partner and a long-standing member of the firm’s Steering Committee. In addition, during his service as Chairman of the firm’s School, Municipal, Labor and Employment Team, the representation of school district clients flourished. Under his guidance and leadership, Lathrop & Clark currently boasts one of the largest school district clientele in Wisconsin.

A devoted Wisconsin badger football fan, as well as a very competitive golfer and curler, Mr. Clark continued to play softball in the Poynette area until he was nearly sixty years old.

Those of you who had the privilege of receiving Mr. Clark’s sage counsel, as well as those of us who benefited tremendously from working with him, will forever remember the lasting impact of a truly great lawyer and friend. It is a challenge to the current complement of attorneys at Lathrop & Clark to emulate Mr. Clark’s service to clients, work ethic, and commitment to community and the profession. ■

By: Michael J. Julka

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Designed by Phill Thill Design, Inc.

Printed by Advertisers Press Inc.

Mailed by Accurate Business Service of Madison, Inc.

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