



# CONSIDER...

AUGUST 2010

## WHAT'S NEW?

The Firm recently unveiled its new website, available at: <http://www.scott-hookland.com>. The website features biographies of the Firm's attorneys, various lien and bond claim summaries and checklists for Oregon and Washington, and other helpful resources. The Firm now maintains a blog which discusses recent industry developments. The blog can be accessed through the Firm website by going to the "Resources" tab and clicking on "News & Legal Updates". The blog can be accessed directly by going to <http://scott-hookland.blogspot.com>.

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## PROVIDING WORK TO AN UNLICENSED CONTRACTOR IN OREGON MAY RESULT IN A LOSS OF LIEN RIGHTS!

By: Jeff Young

Are you a subcontractor (a contractor who has no direct contract with the owner) or supplier, providing work (services, labor, materials or equipment) to an owner-occupied residential renovation, remodel or repair project at the request of a contractor in Oregon? If you are, you will be prohibited from claiming a construction lien if you provide work to a contractor that is unlicensed at the time you contract with your customer for the project or the time you first deliver work to the project site, whichever is earlier.

This new requirement is part of House Bill 3689 and takes effect January 1, 2011. This requirement does not apply if the work is purchased with cash or consumer credit (i.e. credit cards). Of course, if you have been "paid" in cash or consumer credit, payment discharges your right to record a lien (because the debt is paid).

It is unclear what subcontractors and suppliers may rely upon as proof of a contractor's licensing status. Is a printout of the contractor's licensing status from the CCB website sufficient proof? A telephone call to the CCB? Is a formal written request to the CCB required? House Bill 3689 does grant the CCB the authority to notify a person of a contractor's licensing status and to charge a fee for such a notice. It is possible that the

CCB will adopt administrative procedures to address this provision. Currently, one can review a contractor's license free of charge using the CCB website.

What is clear is that beginning January 1, 2011, House Bill 3689 will require subcontractors and suppliers to verify a contractor's licensing status *for every "residential renovation, remodel or repair project"*. It will not be sufficient to have reviewed the status of a contractor's license upon the opening of a general credit account or upon entering into a master subcontractor agreement.

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## REMEMBER: YOU MAY BE PROHIBITED FROM CLAIMING A LIEN IN OREGON IF YOU DO NOT HAVE A WRITTEN CONTRACT

By: Jeff Young

As you know, Oregon law requires contractors to have a written contract if you perform work on a residential structure or a zero-lot-line dwelling for a property owner and the contact price for that work exceeds or later exceeds \$2,000. Oregon law also requires that the "written contract" contain certain standard contractual terms, either in the contract or attached as an addendum to the written contract. What you may not know, and what many contractors fail to realize, is that they may not be able to claim a lien if a written contract is required by Oregon law and they do not have a written contract. Furthermore, contractors arguably may not be able to claim a lien if that written contract does not contain all of those standard contractual terms. *Make sure that you have a written contract where one is required by Oregon law, and that it contains the standard contractual terms required by Oregon law.*

Presently, those "standard contractual terms" include all of the following:

- (a). A statement that the contractor is licensed by the Construction Contractors Board.
- (b). The contractor's name, address, phone number and license number issued by the board as shown on board records on the date the contract is entered into.

- (c). An acknowledgment of a written offer of warranty, if an offer is required by ORS 701.320, and indication of the acceptance or rejection of the offered warranty.
- (d). A list of notices required under ORS 87.093 or under rules adopted under ORS 701.330 and 701.335(2) [which include the Consumer Protection Notice, the Information Notice to Owner About Construction Liens and the Notice of Procedure].
- (e). An explanation of the property owner's rights under the contract, including, but not limited to, the ability to file a complaint with the board and the existence of any mediation or arbitration provision in the contract, set forth in a conspicuous manner as defined by the CCB by rule.
- (f). Customer's name and address.
- (g). Address where the work is to be performed.
- (h). A description of the work to be performed.
- (i). Price and payment terms.

The CCB currently provides a "CCB Recommended Contract Addendum to Satisfy Contract Terms Requirement" through the Contractor Forms page of its website. However, it should be noted that the most current version of the CCB addendum available as of August 3, 2010 does not include items (f) through (i), above. It should also be noted that the Oregon Administrative Rules promulgated by the CCB change often. As such, you should be sure to seek the advice of competent legal counsel for advice as to the "current" laws and regulations applicable to your case.

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**OREGON CONTRACTORS WITH ONLY RESIDENTIAL  
CCB LICENSE ENDORSEMENT GAMBLE WITH LIEN  
AND COLLECTION RIGHTS ON "SMALL  
COMMERCIAL" PROJECTS**

*By Doug Gallagher*

As a contractor carrying only a residential license endorsement, you may not perform work on "large commercial structures". You may perform work on "small commercial structures". In doing so, however, you may be putting your lien and collection rights in peril. Remember that as of July 1, 2010, a licensed contractor that works outside of its endorsement may still lose its ability to record a valid lien or recover payment.

The challenge is in determining whether a project involves a "small commercial structure". That determination may require information that the subcontractor does not know at the time of bid. A "small commercial structure" is a non-residential structure that also meets any one of three statutory

criteria: One criterion is based on the construction cost of the entire project by all trades. The other two are based on ground square footage and height of interior finish. The paraphrased definition of "small commercial structure" is:

A non-residential structure of any size if the contract price of "all construction contractor work to be performed on the structure as part of a construction project does not total more than \$250,000;"

A non-residential structure that is 10,000 square feet or less in ground area (*including* the exterior walls) and not higher than 20 feet from the lowest flooring to the highest interior overhead finish; **or**

A non-residential structure that is 12,000 square feet or less in ground area (*excluding* the exterior walls) and not higher than 20 feet from the lowest flooring to the highest interior overhead finish if the work is limited to a leasehold or unit that is part of a larger building.

This definition leaves many questions unanswered. For example: What if change orders increase the cost or physical size of the project? Do the excavator subs have lien rights (when the cost or size of the project "fit" the definition) while the electrical sub does not (when the cost or size increased due to change orders)? What if the work on the 12,000 square foot or less "leasehold or unit" also includes work that falls outside of the unit (which is beyond the specifically limited definition of small commercial)? A situation where this might arise concerns electrical or plumbing installations in areas that commercial leases often define as part of the building and not the "unit".

*The safest course of action is simply to continuously maintain both a residential and commercial endorsement.*

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**WASHINGTON LIEN INVALID FOR FAILURE TO USE  
PROPER FORM OF ACKNOWLEDGMENT**

*By: Jeff Young*

Many of us are familiar with lien claims and many of us know that they must be signed and properly verified. In addition, the lien must include the proper acknowledgment as required by Chapter 64.08 RCW. In a recent case, entitled Williams et al. v. Athletic Field, Inc., Division Two of the Washington Court of Appeals

invalidated a lien claim because it did not use the proper form of acknowledgment.

In Williams, an employee of a lien filing service hired by the lien claimant signed the lien claim in her individual capacity. The lien claim identified the contractor, Athletic Field, Inc., as the claimant and the lien filing service, LienData USA, Inc. (a corporation), as the agent for claimant. The acknowledgment signed by the employee stated only: "SUBSCRIBED AND SWORN to before me this 1<sup>st</sup> day of December, 2004", followed by the signature, name and title of the notary public and the date on which her notary commission expires.

The Court of Appeals determined that this acknowledgment was insufficient because it did not satisfy the more complex requirements of a corporate acknowledgment. Specifically, this acknowledgment failed because it failed to identify the employee as an officer or employee of LienData (the claimant's agent), failed to characterize the subscription as the free and voluntary act of LienData, and failed to set forth the employee's authority to act on behalf of LienData. As a result, the lien claim was invalid.

What may be confusing to potential lien claimants, is that the sample Claim of Lien provided in the lien statutes includes an acknowledgment that states "subscribed and sworn to me before me this . . . day of . . ." and that this acknowledgment does not comply with the proper acknowledgment as required by Chapter 64.08 RCW and by Williams.

*Since the lien statutes are to be "strictly construed", the Williams case serves as a reminder that you should carefully follow all of the requirements.*

Note that this does not overrule the prior opinion of the Court of Appeals where it ruled that RCW 60.04.091(2) permits a lien claimant to appoint an agent to sign a lien claim on the claimant's behalf and that an authorized agent can include an authorized employee of a lien filing service hired by the lien claimant to file the lien claim.

Note also that the Court of Appeals determined that the lien claim, albeit invalid, was not necessarily frivolous because the lien claim requirements were subject to legitimate dispute and because there were debatable issues of fact that could not be resolved in a summary frivolous lien

proceeding. As a result, the Court of Appeals awarded attorney fees to the lien claimant for successfully challenging the trial court's order releasing its lien.

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## WASHINGTON CONTRACTOR REGISTRATION BOND CLAIMS: A REVIEW

By: *Jeff Young*

If you provide labor, material or rental equipment to a contractor on a project located in Washington, you may assert a claim against that contractor's registration bond or assigned savings account. Regardless of the amount of your claim, the amount you recover from the bond or assigned savings account can be limited by a number of factors:

1. Bond Amount – Contractors and subcontractors are only required to post a bond or assigned savings account in either the amount of \$12,000 (for general contractors) or \$6,000 (for specialty contractors). Regardless of the amount of your claim, bond sureties are not liable for any sums in excess of the amount of the bond.

2. Higher Priority Claims - Where there are other claims "commenced and pending" against the same bond, those claims will be paid in order of priority pursuant to RCW 18.27.040(4):

- (a). Employee labor and claims of laborers, including employee benefits;
- (b). Claims for breach of contract by a party to the construction contract;
- (c). Registered or licensed subcontractors, material, and equipment;
- (d). Taxes and contributions due the state of Washington;
- (e). Any court costs, interest, and attorneys' fees plaintiff may be entitled to recover. The surety is not liable for any amount in excess of the penal limit of its bond.

As a result, the bond proceeds may be depleted by higher priority claims, leaving little or no bond proceeds available to pay your claim.

3. Amount of Recovery from the Bond – Unless you are a residential homeowner claimant, your recovery from the bond is capped at either \$6,000 (if you are asserting a claim against a general contractor bond) or \$4,000 (if you are asserting a claim against a specialty contractor's bond). Only residential homeowners are entitled to recover the entire amount.

### SCOTT ♦ HOOKLAND LLP

L A W Y E R S

Mailing Address: Post Office Box 23414, Tigard, Oregon 97281 ♦ Street Address: 9185 SW Burnham, Tigard, Oregon 97223  
Telephone: 503-620-4540 ♦ Facsimile: 503-620-4315 www.scott-hookland.com

4. Pro Rata Distribution of Proceeds – In a new Washington Court of Appeals case from Division One, entitled Hosea v. Toth, two homeowners asserted separate claims against a specialty contractor’s \$6,000 bond. Those cases were consolidated for the purpose of distributing the bond proceeds. Toth argued that he was entitled to all of the bond proceeds because he obtained a judgment first. The trial court agreed and awarded Toth the entire \$6,000 bond. The Court of Appeals overturned, upholding the general rule that multiple claimants in the same RCW 18.27.040(4) priority tier (such as Toth and Hosea), with actions commenced and pending against the same bond, will share the bond proceeds on a *pro rata* basis.

Accordingly, if there are other claims “commenced and pending” against the bond, you may only recover a percentage of the bond proceeds as determined by the relative size of your claim compared to the total amount of claims in the same priority tier as yours.

Note that the procedure for payment of bond claims is different than the procedure for payment of assigned savings account claims, which sets forth a “first to judgment” rule. Assigned savings account claims are paid in order of receipt by the Department of Labor and Industries of certified copies of judgments.

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**FIRM NEWS:**

The Firm and the Building Materials Dealers Association are planning a half day seminar on Construction Lien and Bond Law in Oregon and Washington. The seminar will be in October 2010, date to be determined. For more information, please contact BMDA at 503-624-0561 or Jeff Young at [jsy@scott-hookland.com](mailto:jsy@scott-hookland.com) or 503-620-4540.

**Mike Scott** was recently selected for inclusion in the 2011 edition of *The Best Lawyers in America* in the practice area of Construction Law. *Best Lawyers* is widely regarded as a leading referral guide to the legal profession in the United States. First published in 1983, *Best Lawyers* is based on an exhaustive annual peer-review survey. For the new U.S. edition, more than 50% of the lawyers listed in *Best Lawyers* cast more than 3.1 million votes on the legal abilities of other lawyers in the same and related specialties. Because of the rigorous and transparent methodology used by *Best Lawyers*, and because lawyers are not required or allowed to pay a fee

to be listed, inclusion in *Best Lawyers* is considered a singular honor. Congratulations, Mike.

**Doug Hookland** recently authored an article entitled “Mechanic’s Lien Priorities vs. Other Encumbrances” for the *Advocate: A Publication of the Idaho State Bar*. Read the entire article on our website, at: [www.scott-hookland.com](http://www.scott-hookland.com).

**Tara Mellom** is now admitted to practice law in the State of Washington, U.S. District Court for the Western District of Washington, the State of Idaho and the U.S. District Court for the District of Idaho. Tara’s practice will continue to emphasize creditor’s rights, public contracting and construction law.

On April 8, 2010, **Doug Hookland, Doug Gallagher, Jeff Young** and **Tara Mellom** presented a full day seminar on Construction Lien and Bond Law in Oregon and Washington at the Hotel Monaco in downtown Portland on behalf of Lorman Education Services. The seminar was attended by various construction professionals and by attorneys.

This newsletter is published by the law firm of Scott ♦ Hookland LLP for the benefit of its clients and friends and is intended to inform them about legal matters of interest. While this information is meant to be current, we do not promise or guarantee that the information is correct, complete or up-to-date. This information is not intended to and should not be considered to provide legal advice or create an attorney-client relationship. No action should be undertaken in reliance hereon without professional legal counsel.