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Mississippi Construction Payment Claims: Mississippi Lien, Stop Notice, Payment Bond, Prompt Payment, and Open Account Laws

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MISSISSIPPI CONSTRUCTION PAYMENT CLAIMS: MISSISSIPPI LIEN, STOP NOTICE, PAYMENT BOND, PROMPT PAYMENT, AND OPEN ACCOUNT LAWS

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I. INTRODUCTION

I began writing earlier versions of this Article over a decade ago for the purpose of teaching myself in a more comprehensive way the expansive body of Mississippi law dealing with payment claims in construction. I published periodic updates to the Article at my website which I must say for a few years got no response at all. Then, as public use of the Internet increased—and no doubt as construction claims increased in Katrina's wake—so did the attention the Article begin to gather, sometimes leading to my involvement in new cases. Work on the cases, in turn, led to additional insights that I have tried to work in as soon as they occurred, lest I lose sight of them. I keep the Article now by my desk as a reference in the day-to-day practice of this broad and evolving area of law. I hope my colleagues in the Mississippi practice of construction law and Mississippi construction parties generally will find it to be a useful resource, as well.

II. MISSISSIPPI LIEN LAW CLAIMS

A. Mississippi Construction Liens

1. Construction Claimants Covered

Mississippi Code Annotated section 85-7-131 provides that "[e]very house, building, water well[,] or structure of any kind" is subject to the lien of the statute "for labor done or materials furnished . . . or architectural engineers' and surveyors' or contractors' service rendered" in construction or repairs.[1]

However, it is important to note at the outset that Mississippi law limits the availability of a statutory construction lien to prime contractors and suppliers having a direct contract with the owner, as opposed to a subcontract with another contractor. The statute limits the creation of lien rights

1. MISS. CODE ANN. § 85-7-131 (Westlaw through 2010).

to a contract made "by the owner, or by his agent, representative, guardian[,] or tenant authorized, either expressly or impliedly, by the owner."[2] Subcontracts do not fit those categories. Thus, a prime contractor would have a lien against the owner for unpaid payments since the prime has a direct contract with the owner. However, subcontractors, laborers, and materialmen who have no contract with the owner, but only a contract with the general contractor or with a lower-tier contractor, generally have no statutory right to a lien in Mississippi.[3]

That is not to say subcontractors are without a remedy. Subcontractors and subsuppliers may look to either the remedies of the stop notice statute or to any available payment bond for relief from unpaid claims, as we will see in greater detail below. However, the lien remedy is limited to primes since "[n]o privity [of contract] exists between a subcontractor and an owner."[4]

One should also note that the State of Mississippi and its county and city subdivisions, as the sovereign, are not subject to private liens.[5] One should therefore not attempt to file a lien against the state, counties, or municipalities. Presumably, though, the state and its subdivisions, backed by the power to tax their citizens, will not go broke. So, while a prime contractor hired by the state or municipalities may be limited to the rights of a general creditor against the sovereign, at least the general contractor in theory does not run a credit risk doing business with the state or municipalities. Therefore, while the prime contractor will not have a lien against the sovereign, it should not have a credit risk either. Of course, the risk a prime contractor runs in performing work for private owners is quite different: A prime contractor or a construction manager who has a direct contract with a private owner must have a right to lien the owner's property as security for construction fees.

Justice Jimmy Robertson has noted that "[t]here is no natural law of materialman's liens" and that claimants can have lien rights "only to the extent that they have brought themselves within the terms of the statute" governing liens, section 85-7-131.[6] So, a prime contractor must read the construction lien statute carefully to find his rights and obligations.

2. Tenants

Further, if the work is initiated without the written consent of the land owner by a tenant or guardian, only the structure, or some part thereof, or the estate of the tenant in the land, and not the lot, is subject to the lien.[7] This statute limiting lien rights involving improvements initiated solely by

2. *Id.* § 85-7-135.

3. *See id.*; Brown v. Gravlee Lumber Co., Inc., 341 So. 2d 907, 909 (Miss. 1977).

4. Timms v. Pearson, 876 So. 2d 1083, 1086 (Miss. Ct. App. 2004) (citing Corrugated Indus., Inc. v. Chattanooga Glass Co., 317 So. 2d 43, 47 (Miss. 1975)).

5. Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1321 (Miss. 1989) (citation omitted).

6. Riley Bldg. Suppliers, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 508 (Miss. 1987).

7. MISS. CODE ANN. § 85-7-137; *Brown*, 341 So. 2d at 909.

the tenant dovetails also with section 85-7-135 limiting full lien rights to a contract made "by the owner, or by his agent . . . or tenant authorized, either expressly or impliedly, by the owner."[8] A landlord may therefore prevent his tenant from taking any action that would impose a lien by making it clear the landlord has not given the tenant any permission to create a lien. Thus, for example, a lease may say: "Tenant shall have no authority to permit or create a lien against Landlord's interest in the property."

3. Structures and Land Covered

Section 85-7-131 spells out the extent of the lien, depending on whether the structure is in a city, town, or village (extending to the lot and curtilage); outside of any city, town, or village (extending up to one acre on which the structure stands as selected by the lien holder); or is a water well, oil or gas well, railroad, or railroad embankment.[9] If the services have been rendered upon the whole of a subdivision, the lien extends to the entire subdivision, or to the portion of the property for which the services were required or were furnished.[10]

4. Materials: Presumption by Delivery

The Mississippi lien statute also creates a presumption that material shown to have been delivered to the job was used in the job.[11] The presumption created by proof of delivery can be overcome only by specific proof that the delivered material was later diverted and not incorporated into the project subject to the lien.

5. Equipment Rentals and Leases: The 2010 Amendments

The Mississippi legislature amended and updated the Mississippi lien, stop notice, and private payment bond statutes to include within their protections the claims of unpaid construction "rental or lease equipment suppliers."[12]

6. Lien Notice Requirements

A lienholder must take steps set forth in the lien statutes to perfect the lien by filing notice of the lien if the lien is to have priority over the interests of subsequent innocent purchasers, or over subsequent lenders taking

8. *See* MISS. CODE ANN. § 85-7-135.

9. MISS. CODE ANN. § 85-7-131.

10. *Id.*

11. *Id.*

12. Senate Bill 2800, introduced by Senators Terry Burton and Joe Fillingane, and skillfully supported also in the House of Representatives by Representatives Brandon Jones and Willie Bailey, amended sections 85-7-131, 85-7-135, 85-7-181, 85-7-185, and 85-7-189 to include in each instance "rental or lease equipment suppliers." S.B. 2800, 2010 Reg. Sess. (Miss. 2010). The undersigned author provided the initial draft of the legislation. The author wishes to thank Suzanne Sharpe of Sharpe & Wise, PLLC and Steve Bowning of Hayes Dent Public Strategies for monitoring the successful passage of this important legislation in the 2010 session of the Mississippi legislature. *See also* section III(J) *infra* for further background as to the amendments.

deeds of trust, e.g., a subsequent second mortgage holder.[13] Indeed, a lien is ineffective and nothing more than an inchoate right until notice of the lien is filed as required by the statute, rendering the holder of an unperfected lien nothing more than a common creditor.[14]

The chancery clerk in each county of Mississippi maintains a book entitled "Notice of Construction Liens" as a part of the land records where lienholders may file and record their liens.[15] The statute states the lien "shall not take effect unless and until some notation thereof shall be filed and recorded" in the Notice of Construction Liens book.[16] Thus, the lien must be recorded in the Notice of Construction Liens book to be effective under the statute.

In addition, the potential claimant *may*, but is not required to, record the construction contract under which he is proceeding in the land records with the chancery clerk.[17] If the claimant files the contract before filing the notice of lien, the lien will be held to have been perfected at the time of the earlier filing of the contract.[18] A prime contractor therefore may find it useful to file his contract early on, even before the work starts, to establish his priority position should he later have to file a lien. The filing of the contract is helpful because an owner is less likely to be offended by the early filing of a contract, as opposed to the filing of a lien. The filing of a lien notice, if it follows the filing of the contract, can wait until a payment issue arises, while at the same time the early filing of the contract reserves to the contractor an earlier priority date since by statute the lien notice date is made retroactive for priority purposes to the date that the contract had been filed.[19] Note that the clerk will require filing of the original contract with the original signature to be scanned and returned. The claimant, as a further protection, may also file a notice of lien in the lis pendens book maintained by the chancery clerk, in which case he must notify the owner of the filing.[20] However, in any event, the essential filing to establish a lien is the filing in the Notice of Construction Liens book.[21]

As to priority, the claimant's lien "shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, or notice thereof, in the office of the clerk of the chancery court . . . ."[22] Therefore, timely filing of the notice of lien or, as is also permitted, in addition of the contract is

13. Riley Bldg. Suppliers, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 509 (Miss. 1987).
14. Wortman & Mann, Inc. v. Frierson Bldg. Supply Co., 184 So. 2d 857, 859–60 (Miss. 1966).
15. MISS. CODE ANN. § 85-7-133.
16. *Id.*
17. *Id.* § 85-7-139.
18. *Id.* § 85-7-131.
19. *Id.*
20. *Id.* § 85-7-197.
21. MISS. CODE ANN. § 85-7-133.
22. *Id.* § 85-7-131.

essential to establish priority over later innocent purchasers and mortgage holders.

7. A Construction Lender Who Is Negligent May Lose Priority to a Materialman Who Has Perfected His Lien.

A lender who finances the purchase of land is entitled to a preference for the mortgage securing the loan "over all judgments and other debts of the mortgagor."[23] Mortgage holders who have lent money to finance construction similarly may hold priority over the liens of contractors—or subcontractors and materialmen who subsequently perfect their liens by a stop notice and lis pendens filing—during or following the actual construction. However, the construction lender, if it is to maintain priority over the subsequent lien of a contractor, must be prepared to show that it was reasonably diligent to see that advances of the construction loan went into the project instead of becoming diverted by the borrower to other projects or toward payment of unrelated debts.[24] A construction lender can show it was reasonably diligent by showing that it required the owner to obtain from the prime contractor an affidavit that he did not owe for materials and labor each time the contractor received an advance.[25] In addition, the lender can show that it checked the land records each time it advanced funds to see if contractors or subcontractors had perfected lien rights.[26] However, even a negligent lender who fails to require an affidavit of the owner or contractor will maintain the priority of his lien against a contractor who has failed to perfect his lien by filing the notice of construction lien required by the statute.[27]

8. Commencement of Suit on Lien and Statute of Limitations

The lien statutes provide a relatively short statute of limitations for suit. A claimant must initiate suit on the lien within twelve months after the date the money claimed "*became due and payable, and not after.*"[28] *Notice that the twelve months runs from the payment due date, not the date of the filing of the lien notice.* Thus, one must file both the notice of lien and suit within the twelve months. However, "where there has been a continuous delivery of material, and the time of payment is not fixed by contract, the statute begins to run against the lien from the delivery of the last lot of material."[29]

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23. *Id.* § 89-1-45.

24. Peoples Bank & Trust Co. v. L & T Developers, Inc., 434 So. 2d 699, 704, 714 (Miss. 1983).

25. Wortman & Mann, Inc. v. Frierson Bldg. Supply Co., 184 So. 2d 857, 861 (Miss. 1966).

26. *Id.*

27. Riley Bldg. Suppliers, Inc. v. First Citizens Nat'l Bank, 510 So. 2d 506, 508 (Miss. 1987).

28. MISS. CODE ANN. § 85-7-141 (emphasis added).

29. Billups v. Becker's Welding & Mach. Co., 189 So. 526, 528–29 (Miss. 1939); *see also* Inerarity v. A.S. Wade & Co., 106 So. 828, 829 (Miss. 1926) (barring lien where suit not brought until more than a year after default in monthly installments for materials).

The statute provides that a suit to enforce a lien is to be filed in the circuit court of the county in which the property is located.[30] The statute does not mention county courts. However, while it is the safe choice to file in circuit court, do not be surprised if the circuit court by order refers the matter to county court if the amount involved is not large. The statute should be amended to include explicitly county courts.[31]

9. Joinder

The lien statutes require that any other parties claiming liens on the property be summonsed and made parties to the suit or be allowed to intervene.[32] The statutes provide specific requirements as to what must be included in the claimant's complaint.[33]

10. Attorneys' Fees

If the lienholder is successful in reducing his lien to judgment, the lien statutes authorize the claimant to ask the judge to add the cost of attorneys' fees for the prosecution and collection of the claim.[34] Once the judgment is entered, the claimant may proceed to execute on the lien against the property as set forth in the statutes.[35]

11. Application to Expunge a False Lien

An owner may file an application to have a county court or chancery court expunge a false lien on two days' notice under the statute.[36] A false lien is a lien filed by a contractor or supplier without just cause or just purpose to which he is not entitled under the lien statute.[37] The suit must be brought within one year of the filing of the false lien.[38] Since the statute speaks to one who "falsely and knowingly" files the wrongful lien, one must first send a written demand that the lien be voluntarily removed and then move for the removal when the demand is not met.[39] Also, as a matter of due process, one should take the precaution of having the court issue a summons to accompany the application to be served on the defendant specifying the time, date, and place for the hearing on the application.[40]

Subcontractors who fail to understand that they have no lien rights in Mississippi are often the filers of false liens.[41] The sub may not understand

30. MISS. CODE ANN. § 85-7-141.
31. *See* section VII *infra* as to proposed thoughts for further legislation.
32. MISS. CODE ANN. §§ 85-7-143, 85-7-145.
33. *Id.* § 85-7-141.
34. *Id.* § 85-7-151.
35. *Id.* §§ 85-7-153 to -157.
36. *Id.* § 85-7-201.
37. *Id.*; Manderson v. Ceco Corp., 587 F. Supp. 445, 447 (N.D. Miss. 1984).
38. MISS. CODE ANN. § 85-7-201.
39. *Id.*
40. *See, e.g.*, MISS. R. CIV. P. 81 Form 1DD.
41. *See* MISS. CODE ANN. § 85-7-135; *see also* Wenger v. First Nat'l. Bank, 164 So. 229, 230–31 (1935).

that its remedy falls under the stop notice statute[42] rather than the construction lien statutes. The general contractor may have a duty to the owner under its contract to keep the record clear of liens filed by subs. In that case, the general contractor may need to initiate the application, but should have the owner join with him as a plaintiff in the application to expunge a sub's false lien in order to assure standing for the application.

The false lien statute of section 85-7-201 provides a penalty for the filing of a false lien by the award to the complainant of "the full amount" of the false lien against the filer.[43] The statute is penal in nature, and the penalty is based on its deterrent value, not on attorneys' fees expended or other remedial measures of damages. However, the bar to obtaining the penalty is a high one, for it must be shown that the filer filed the false lien "falsely, knowingly, and without just cause" or "willfully."[44] Filing the lien on the advice of counsel may be a defense.[45] The filing of a release of the lien prior to the filing of the suit or hearing on the false lien may also be a defense.[46] However, the owner may find it more convenient to arrange with the closing attorney and title insurer to bond around the lien rather than to go to the trouble and expense of incurring the legal expense to remove it.

The owner may also be able to state an action for slander of title. "[T]he publication of false and malicious statements, disparaging of plaintiff's property or the title thereto, when followed, as a natural, reasonable[,] and proximate result, by special damage to the owner, are actionable. The false statement may consist of an assertion that plaintiff has no title to the property of which he is the ostensible owner, or that his title is defective, or that defendant has an interest in or lien upon the property."[47] However, "[w]hatever be the statement . . . in order for it to form the basis of a right of action [for slander of title] it must have been made, not only falsely, but maliciously."[48]

Of course, one may also ask for the removal and discharge of a lien simply because the contractor, although acting in good faith, was mistaken in believing he was in compliance with his contract in all particulars, or mistaken that he was owed money by the owner.[49] One can ask the court to declare the lien invalid as a declaratory judgment action.[50]

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42. MISS. CODE ANN. § 85-7-181.

43. *Id.* § 85-7-201.

44. Manderson v. Ceco Corp., 587 F. Supp. 445, 447 (N.D. Miss. 1984).

45. *Id.*

46. *Id.* at 446.

47. Walley v. Hunt, 54 So. 2d 393, 396 (Miss. 1951) (citations omitted).

48. *Id.* (citations omitted); *see also* Reeves Constr. & Supply, Inc. v. Corrigan, 24 So. 3d 1077, 1084 (Miss. Ct. App. 2010) ("[F]or [a] statement to form the basis of a claim for slander of title it must have been made not only falsely but maliciously.") (quoting Williams v. King, 860 So. 2d 847, 850 (Miss. Ct. App. 2003)).

49. *See, e.g.*, New Bellum Homes, Inc. v. Swain, 806 So. 2d 301, 304 (Miss. Ct. App. 2001).

50. *See* MISS. R. CIV. P. 57; *see also* Simmons v. Jaggers, 914 So. 2d 693, 694 (Miss. 2005).

12. The Owner Can Create a Lien or Stop Notice Rights Through an Agent

Under section 85-7-135, Mississippi construction lien rights may be created "when the contract or employment is made by the owner, or by his agent, representative, guardian[,] or tenant authorized" by the owner.[51] Thus, it is true that under some facts a realtor or developer may be found to have been an implied agent for the owner, placing the persons with whom he contracts in privity with the owner, and thus entitling persons who might usually be considered subcontractors to a direct lien, or those under them to the stop notice rights of a direct subcontractor.[52] However, the facts in *Bailey v. Worton* are a bit unusual. There, a subdivision developer granted permission to a realtor, at the realtor's suggestion, to design and build a house on a vacant back lot in order to render the lot more suitable for sale by the realtor, and allowed the realtor to advertise as the seller, making the subdivision owner an undisclosed principal, while the owner's actions cloaked the realtor with the apparent authority of an owner to control all aspects of the design, construction, and sale.[53] *Worton* must be considered under its facts, which are not the usual case where an owner supplies a design to a general contractor to build to suit the owner's own needs and the owner's existence is known to all parties.

Nonetheless, the *Worton* case points out the risk an owner may take if he allows a potential developer/purchaser to jump the gun and start construction before closing on a contemplated sale property to the developer; the owner may find the potential developer/purchaser was his agent for the construction as to affected third parties during the period the owner still had the property before the sale, creating lien or stop notice rights in the affected suppliers. The owner may find out that he, even unwittingly, "had delegated ultimate authority, either intentionally or through his own negligence[,] to [the developer] for the construction of the house."[54] The developer can thus become the owner's agent with "the apparent authority from [the owner] in their dealings with" the construction contractor "to bind [the owner]," thus providing lien or stop notice rights to contractors and suppliers.[55]

13. No Equitable Liens

Liens are the creations of statutes passed by the legislature. A chancellor has no authority to use his equitable powers to create a so-called "equitable lien" where none exists by statute.[56]

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51. MISS. CODE ANN. § 85-7-135.

52. *See* Bailey v. Worton, 752 So. 2d 470 (Miss. Ct. App. 1999).

53. *Id.* at 472–73.

54. *Id.* at 474.

55. *Id.* at 474–75.

56. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., Inc., 791 So. 2d 254, 259 (Miss. Ct. App. 2000).

14. Mississippi Construction Liens and Arbitration

The question can arise how one can pursue arbitration rights while also asserting lien rights. The enforcement of a Mississippi construction lien, after all, calls for the filing of suit in the circuit court within one year, for a declaration of the right to foreclose on the property.[57] The answer is that a contractual agreement to arbitrate construction disputes, as one would find in an American Institute of Architects ("AIA") contract, does not preclude one's right to file a statutory construction lien. The AIA general conditions address the matter.[58] One may have to file the action within the one-year statute of limitations to enforce a lien while requesting the court to stay the action pending the conclusion of an arbitration. Indeed:

> As a general rule, if parties have agreed to arbitrate all disputes arising out of their construction agreement, then arbitration will be considered a precondition to any foreclosure action. The procedure most often followed is to stay the foreclosure action pending arbitration. While the arbitration does not substitute for foreclosing the lien, which under most mechanics' lien statutes may proceed only in a court of competent jurisdiction, the arbitration will decide many of the underlying contractual issues, including the amount to which the lien claimant is entitled.[59]

B. Context with Other Mississippi Liens

In order to place Mississippi construction liens into context, the following is a brief look at the other Mississippi statutory liens, as well.

1. Mechanics' Liens on Vehicles and Articles

Mechanics have a possessory lien over the vehicles they repair for the repair charges so long as they retain possession.[60] However, notice this twist: The lien is only for labor and materials; it does not cover storage

57. MISS. CODE ANN. § 85-7-141 (providing that one must sue in circuit court to enforce a lien within one year of the time the money became "due and payable" and not after).

58. *See, e.g.*, AIA TERMS AND CONDITIONS, A.4.2.5 (AIA Doc. No. A141, 2004 ed.) ("If a Claim relates to or is the subject of a mechanics' lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to initial resolution of the Claim."). *See, e.g.*, Harris v. Dyer, 623 P.2d 662, 665 (Or. 1981).

59. 6 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 20:53 (2008) ("[M]erely filing a mechanic's lien petition is conduct inconsistent with an intent to arbitrate the underlying contractual dispute and hence constitutes a refusal to arbitrate."); *see also* Maurice T. Brunner, Annotation, *Filing of Mechanics' Lien or Proceeding for Its Enforcement As Affecting Right to Arbitration*, 76 A.L.R.3d 1066, § 3(b) (1977).

60. MISS. CODE ANN. § 85-7-107.

costs.[61] Further, the lien over automobiles does not extend to vehicles titled outside of Mississippi.[62] Moreover, in a very broad fashion, a mechanic of "any article" created or repaired at the request of another person has a statutory lien on the item for the cost of construction, repair, or manufacture.[63] So, a mechanics' lien can extend far beyond automobiles to "any item" created or repaired at the request of another. Further, the mechanics' lien in the article can continue after the parting of possession by the mechanic if the appropriate notice of the amount due for labor and materials is unpaid is given to the owner.[64] The mechanics' lien covers only articles which can be held or detached and seized for sale by the sheriff, and should not be confused with construction lien or stop notice rights.

2. Landlord's Lien

A landlord, by Mississippi statute, has a lien in personal property of his tenant located in the leased premises to secure the rent, "whether or not then due."[65] However, the landlord's lien is "subject to all prior liens or other security interests perfected according to law."[66] For example, a lending institution that has taken an automatically perfected purchase money security interest in a mobile home, under section 75-9-302(1)(d), which the law considers a consumer good, trumps a trailer park landlord's lien on a tenant's personal property which attached when the tenant placed the items in the mobile home.[67] The landlord's lien, though, will trump any later-perfected lien.[68] The priority of a landlord's lien in personal property over late perfected liens is recognized also by statute at section 89-7-51, requiring that a creditor acting on a writ of execution not take away goods from leased premises without first satisfying a landlord for any rent outstanding under a lease protected by his lien up to one year's rent.[69] However, the landlord's lien must be prior in time.[70]

3. Condominium Lien

A condominium association can file an assessment of condo fees against the owner as a lien by recording the charges with the chancery clerk.[71] However, there is "a legislative limit on the priority of the condominium assessment lien."[72] The condominium lien has "no force beyond

61. Allstate Ins. Co. v. Green, 794 So. 2d 170, 177 (Miss. 2001).
62. *Id.* at 175.
63. MISS CODE ANN. §§ 85-7-101, 85-7-105.
64. *Id.* § 85-7-105.
65. *Id.* § 89-7-51(2).
66. *Id.*
67. Mullen v. Green Tree Fin. Corp.–Miss., 730 So. 2d 9, 14 (Miss. 1998).
68. *Id.*
69. MISS. CODE ANN. § 89-7-1.
70. *Mullen*, 730 So. 2d at 14.
71. MISS. CODE ANN. § 89-9-21.
72. Tally Arms Condo. Ass'n, Inc. v. Breland, 854 So. 2d 28, 35 (Miss. Ct. App. 2003).

two years from filing, and has effect the second year only if the condo management files a renewal notice."[73]

4. Attorneys' Liens

"Under Mississippi law . . . an attorney has a lien on all writings, documents[,] and money of his client which come into his possession in the course of his professional employment. This lien entitles the attorney to retain possession of those papers, writings[,] or money until all his fees are paid."[74] Further, "Mississippi law also recognizes a 'special' or 'charging' lien which entitles an attorney who, by his services, recovers a judgment, to have his fee satisfied out of that judgment."[75] The attorney must retain possession of the funds to enforce the charging lien, and "must have procured a judgment or decree in favor of his client."[76]

III. MISSISSIPPI SUBCONTRACTOR'S AND MATERIALMEN'S STOP NOTICE LAW CLAIMS

A. Claimants Covered

The Mississippi stop notice statute, known also as the stop payment statute, states that an unpaid subcontractor or laborer of the prime contractor can give notice in writing to the owner of the amount due, claim the benefit of the statute, and from that time on, bind an amount sufficient to cover his claim in the hands of the owner until the claim is resolved.[77]

As we saw in the section on construction liens, only prime contractors and others having a direct contract with the owner have the right to file a notice of construction lien under the Mississippi construction lien statute set forth at section 85-7-131.[78] A subcontractor cannot lien the property of the owner since "[n]o privity [of contract] exists between a subcontractor and an owner."[79] Lien rights are thus reserved in the first instance to the prime who has a contractual relationship with the owner. Indeed, "[t]he [lien] remedy does not extend to subcontractors, who, according to the statutory scheme, must pursue a separate remedy under [section] 85-7-181 [the stop notice statute]."[80]

Therefore the separate remedy for unpaid subcontractors, materialmen, and laborers, who have a contract with the general prime contractor and no direct contract with the owner, is the Mississippi stop notice statute

73. *Id.*

74. Bros. in Christ, Inc. v. Am. Fid. Fire Ins. Co., 680 F. Supp. 815, 818 (S.D. Miss. 1987) (citing Webster v. Sweat, 65 F.2d 109 (5th Cir. 1933)).

75. *Id.*

76. *Id.*

77. MISS. CODE ANN. § 85-7-181.

78. *See* MISS. CODE ANN. § 85-7-135 ("persons favored by lien").

79. Timms v. Pearson, 876 So. 2d 1083, 1086 (Miss. Ct. App. 2004).

80. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377, 386 (Miss. Ct. App. 2004).

set forth at section 85-7-181.[81] The stop notice statute is necessary to provide a remedy to an unpaid subcontractor because "[a]t common law, materialmen and laborers who have dealt only with the prime contractor are general creditors of the prime contractor and have no right to recovery from the project owner."[82] However, a subcontractor's stop notice rights, even where exercised, are limited. Thus, for example, a subcontractor or supplier must first check to see if the general contractor provided a payment bond to the owner for the project before giving a stop notice. *Bond rights are in lieu of stop notice rights, and a stop notice that ignores the presence of a bond is ineffective and may be expunged.*[83]

B. Sub-sub Contractors Excluded

The protection afforded by the stop notice statute does not extend beyond those with subcontracts with the prime contractor. "Subcontractors or materialmen to another subcontractor are not entitled to recovery under this statutory provision."[84] Such remote contractors and materialmen are mere "general creditors" of the parties with whom they have dealt.[85]

C. Quantum Meruit Claims Against the Owner Excluded

A subcontractor may be tempted to argue that its supply of materials for the owner's ultimate benefit should give him common law rights against the owner for the value of his contribution to the project in the form of a quantum meruit claim. An owner, though, is not obligated to the subcontractor in quantum meruit even if the subcontractor remains unpaid and even if the subcontractor's work bestows great value on the owner's project.[86] After all, an implied contract liability in quantum meruit could exist only in the absence of an express contract covering the work. That is not the case where a subcontract exists for the claimant's work.[87] Thus:

> [T]he owner's implied liability that would arise generally from his receiving value from the party furnishing [materials], is taken away by the special contract [the owner] has made [with the prime contractor], and especially by the special contract which [the material supplier] has made with the

81. *Timms*, 876 So. 2d at 1086; Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., Inc., 791 So. 2d 254, 258 (Miss. Ct. App. 2000); Cummings v. Davis, 751 So. 2d 1055, 1058 (Miss. Ct. App. 1999).

82. Serv. Elec. Supply Co., Inc. v. Hazlehurst Lumber Co., Inc., 932 So. 2d 863, 868 (Miss. Ct. App. 2006); *see also* Summerall Elec. Co., Inc. v. Church of God, 25 So. 3d 1090, 1092 (Miss. Ct. App. 2010); Timms, 876 So. 2d at 1086.

83. Ewin Eng'g Corp. v. Deposit Guar. Bank & Trust Co., 62 So. 2d 572, 574 (Miss. 1953) (citing Dickson v. U.S. Fid. & Guar. Co., 117 So. 245, 248 (Miss. 1928)).

84. Associated Dealers Supply, Inc. v. Miss. Roofing Supply, Inc., 589 So. 2d 1245, 1247 (Miss. 1991); *see also* Chic Creations of Bonita Lakes Mall, 791 So. 2d at 258.

85. *Associated Dealers Supply, Inc.*, 589 So. 2d at 1247–48; *accord* Cummings v. Davis, 751 So. 2d 1055, 1058 (Miss. Ct. App. 1999).

86. *Serv. Elec. Supply Co., Inc.*, 932 So. 2d at 870.

87. *Id.*

> person with whom the owner of the property has contracted to complete the work.[88]

Further, the subcontractor has an adequate remedy available under the stop notice statute. If the subcontractor has bound project funds in the owner's hands by a stop notice before the owner's payment of the funds to the prime, providing a sub a separate claim against the owner in quantum meruit would be duplicative of the stop notice remedy provided by statute.[89] And if the subcontractor has failed to avail itself of the stop notice remedy, the owner could hardly be held responsible in quantum meruit despite the sub's failure to proceed under the stop notice statute.[90]

D. Funds Frozen

However, to be effective and enforceable, the claimant must give the stop notice while the owner still owes money to the prime contractor. If the owner has already made final payment to the prime contractor when he receives the stop notice, the stop notice is ineffective and the owner has no liability to the subcontractor.[91] An owner's payments to the prime prior to receiving a stop notice "extinguish" the owner's debt for the amounts paid, precluding liability of the owner under the stop notice statute to the extent of the payments made before receipt of the notice.[92]

Further, the stop notice only requires the owner to withhold payment from the prime of "the amount claimed in *that notice*."[93] Therefore, "the filing of a stop-notice under [section] 85-7-181 benefits only the subcontractor(s) giving actual notice prior to the time the owner pays the prime contractor."[94] A subcontractor failing to timely issue a stop notice could not claim the benefit of another subcontractor's stop notice that was timely issued. Further, the subcontractor giving the stop notice is not required to notify other subcontractors of the stop notice, though the sub must give

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88. *Id.* (quoting Holmes v. Shands, 26 Miss. 639, 1854 WL 3518 (1854)).

89. MISS CODE ANN. § 85-7-181.

90. *See also* Timms v. Pearson, 876 So. 2d 1083, 1086 (Miss. Ct. App. 2004) ("Absent such [stop] notice, an owner has no obligation to a subcontractor who has provided materials or services pursuant to an agreement with a contractor."). *But see* Sumrall Church of Lord Jesus Christ v. Johnson, 757 So. 2d 311, 313–14 (Miss. Ct. App. 2000) (holding that an unpaid prime, by contrast, could elect to proceed either in contract or on quantum meruit as a basis for payment, as long as the contract has reached substantial performance and a rescission or cancellation of the contract would be warranted due to the owner's breach).

91. Summerall Elec. Co., Inc. v. Church of God, 25 So. 3d 1090, 1093 (Miss. Ct. App. 2010) (citing Corrugated Indus., Inc. v. Chattanooga Glass Co., 317 So. 2d 43, 47 (Miss. 1975)); *Timms*, 876 So. 2d at 1086; Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., Inc., 791 So. 2d 254, 259 (Miss. Ct. App. 2000) (quoting Williams v. Taylor, 62 So. 2d 883, 885 (Miss. 1953)).

92. Amerihost Dev., Inc. v. Bromanco, Inc., 786 So. 2d 362, 367 (Miss. 2001) (citing Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613, 619 (Miss. 1969)).

93. *Amerihost Dev., Inc.*, 786 So. 2d at 365 (quoting McNair v. M.L. Virden Lumber Co., 4 So. 2d 684, 689 (Miss. 1941)) (emphasis in original).

94. *Id.*; *see also Summerall Elec. Co., Inc.*, 25 So. 3d at 1093.

notice of any subsequent suit by summons at the time to any other interested parties "so far as known" by him.[95] In short, a sub who has not issued a stop notice while the owner still retains funds owed the prime cannot "ride the coat-tails of those subcontractors and materialmen who actually asserted their rights under the stop notice statute."[96] Nor may a stop notice reach an amount owed by a third party to the owner since the statute does not cover funds "in the possession of someone entirely outside the owner–contractor–subcontractor hierarchy."[97]

Should the owner, short of the filing of an interpleader action, then give priority to stop notices according to the date of their receipt where multiple stop notices are received from subcontractors on the project or distribute pro rata according to relative amounts claimed out of the funds available? This seems to be an uncertainty that has long plagued the statute for owners. The argument has been made that "all such persons [issuing a stop notice] should share ratably in the undisbursed contract funds" since "it is the furnishing of the labor or materials which gives rise to the stop-notice right and not the stop-notice filing itself."[98] Rather than speculating on what a court would approve as to distribution among multiple claimants, one approach is for an owner to give the stop notice claimants a deadline to agree among themselves on a plan of distribution, after which the owner, in the absence of a settlement agreement among the claimants, will file an action for interpleader of the funds held by him as allowed by section 85-7-181 for a determination by the court.

Note also that the argument has been rejected that the general contractor is the agent of the property owner to hold the owner liable to a subcontractor for the general contractor's debt where the subcontractor failed to avail itself of a timely stop notice remedy; nor was there "apparent authority" in the general contractor to bind the owner to pay the general contractor's debt to the subcontractor.[99]

E. Lis Pendens Notice Filing to Back up Stop Notice

If the subcontractor or materialman wants to give teeth to his stop notice to prevent its being ignored by the owner, it can file a lis pendens notice on the land records with the chancery clerk as permitted by section

95. *Amerihost Dev., Inc.*, 786 So. 2d at 366; MISS. CODE ANN. § 85-7-181.

96. *Amerihost Dev. Inc.*, 786 So. 2d at 362. Although normally a subcontractor who fails to assert a timely stop notice has no rights against the owner's funds, an owner who interpleads funds under Mississippi Rule of Civil Procedure 22, naming both the general contractor and the subcontractor as defendants, may create an equitable right in the subcontractor to the interpleaded funds even though, in those limited circumstances, no stop notice was sent by the subcontractor. *See* Noble House, Inc. v. W. W. Plumbing & Heating, Inc., 881 So. 2d 377, 386 (Miss. Ct. App. 2004) (stating that "pursuing statutory remedies is not a prerequisite to a Rule 22 interpleader action").

97. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., Inc., 791 So. 2d 254, 258 (Miss. Ct. App. 2000).

98. William L. Smith & Boswell Stevens Hazard, *Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals*, 47 MISS. L.J. 437, 453 (1976) (citing McNair v. M.L. Virden Lumber Co., 4 So. 2d 684 (Miss. 1941)).

99. *Summerall Elec. Co., Inc.*, 25 So. 3d at 1094–95.

85-7-197. The lis pendens is not a lien, but like a lien will be of concern to lenders of the project. A lis pendens notes a subcontractor has not been paid for its work on the project. If the owner ignores the stop notice and pays the contractor over the stop notice, the stop notice can turn into a lien. Therefore, the lis pendens notice preserves the sub's or materialman's priority position should it have to make a later claim on the property because the owner disregarded the stop notice by paying the general contractor. At the very least, the provision of the stop notice, and the filing of the lis pendens notice along with it, will get the owner's attention. Further, the lis pendens may cause the owner to require the general contractor to provide a payment bond for the claimant's potential benefit to the owner in order to clear the land record of the lis pendens filing. The subcontractor must provide the lis pendens notice to the owner by certified mail, as well as file it with the chancery clerk, all as called for by section 85-7-197.[100]

F. Determining the Status of a Party as the Prime Contractor or Construction Manager–Agent of the Owner

Since the protection of the stop notice statute is limited to subcontractors dealing directly with the prime, the question can arise as to who is the prime contractor for the job. In *Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc.*,[101] one of the corporate co-owners of a Red Apple Inn project maintained on its payroll an employee who supervised the construction of the inn and who hired the electricians, plumbers, framers, roofers, and others to do all the actual construction.[102] The Mississippi Supreme Court found the co-owner was the prime contractor and that the co-owner's ownership status was irrelevant to the determination of its status as the prime. The court accepted the dictionary definition of "prime" as "the party to a building contract who is charged with the total construction and who enters into sub-contracts for such work as electrical, plumbing[,] and the like."[103] Further, "[a]n owner is not excluded from this definition."[104] Thus, the court found that whether a party is the prime should turn on the party's "activities isolated from its ownership."[105] Moreover, the court found that since the supplier in that case supplied to a contractor who had contracted with the co-owner/prime contractor of the inn, the supplier was a sub-sub not eligible to assert stop notice rights under the stop notice statute.[106]

A similar issue can arise for stop notice analysis as to whether a party should be characterized as a prime contractor or as construction manager–agent of the owner. A construction manager is "a mere agent for a project's owner and . . . engages 'trade contractors' in his principal's name

100. *See* MISS. CODE ANN. § 85-7-197.
101. 589 So. 2d 1245 (Miss. 1991).
102. *Id.* at 1248.
103. *Id.* at 1247–48 (quoting BLACK'S LAW DICTIONARY 349 & 621 (5th ed. 1983)).
104. *Id.* at 1248.
105. *Id.*
106. *Id.*

to perform most or all of the actual work."[107] By contrast, "a general contractor is 'in the chain of liability and . . . hires 'subcontractors' in his own name to perform work.'"[108] One indicator would be whether the party hired by the owner was to receive part of the construction cost as compensation in the manner of a contractor or was only to receive a professional fee for management.[109] If the party hired by the owner is found to be a general contractor, then parties it dealt with are subs, whose protection is to be found in the stop notice statute. However, if the party hired by the owner was the owner's direct agent, the parties it dealt with would have lien rights against the owner.[110] Generally, "the existence of a distinction between 'general contractor' and 'construction manager' is a question of fact for trial on the merits," rather than a question of law that can be disposed of by summary judgment.[111]

Prime contractors need to pay attention to the rights that subcontractors and materialmen can have under the Mississippi stop notice statute and the limitations on those rights, since the owner may require that the prime contractor keep the project clear of materialmen's stop notices and lis pendens filings, and may need to move with the owner to clear any invalid stop notices given by sub-subcontractors having no such rights—as where a payment bond exists to protect the subs' interests in lieu of stop notice rights.

G. Resolution of the Stop Notice Claims by the Owner

Once the owner has received a stop notice, the owner should be able to resolve it by paying the subcontractor directly while providing a notice of the payment to the prime contractor. After all, once the stop notice is given, "the subcontractor becomes entitled to payment from the owner up to the amount in which the owner is indebted to the general contractor as of the date the notice is served."[112]

However, another way for an owner to resolve a stop notice—if he receives one while still owing money to the contractor—is to obtain the agreement of the subcontractor to make out a joint check to the prime contractor and the subcontractor of the funds due.[113] But note an owner's

107. Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co., 914 So. 2d 169, 176 (Miss. 2005) (citing Brogno v. W & J Assocs., Ltd., 698 A.2d 191, 194 (R.I. 1997)).

108. *Id.*

109. *Id.* at 177.

110. *Id.* at 180.

111. *Id.* at 175 (citing Baum v. Ciminelli-Cowper Co., Inc., 755 N.Y.S.2d 138, 139–40 (N.Y. App. Div. 2002)).

112. Timms v. Pearson, 876 So. 2d 1083, 1086 (Miss. Ct. App. 2004) (emphasis added); *see also* Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377, 385 (Miss. Ct. App. 2004) ("Once a subcontractor who has not received payment for his work by a contractor provides the property owner with written notice, he is entitled to payment from the owner up to the amount the owner is indebted the general contractor as of the date the notice is served. MISS. CODE ANN. § 85-7-181 (Rev. 1999).") (emphasis added).

113. *See* Sidney R. Barrett, Jr., *Joint Check Arrangements: A Release for the General Contractor and Its Surety*, THE CONSTRUCTION LAW., Apr. 1988, at 7 ("By making the payment check payable jointly to two parties, the maker gives each party the right to control the subsequent negotiation of the

agreement to joint check the prime and subcontractor may not create an enforceable obligation in certain circumstances. Contractual consideration may be lacking to enforce the owner's or contractor's agreement to issue a joint check. The owner may have no contractual relationship or rights against the subcontractor and vice versa.[114] Further, a joint check arrangement is just an agreement as to a way of making payment.[115]

Also, the owner has the option under the statute to pay the amount due by him under the contract with the contractor into the court by interpleader, summons all known claimants against the contract funds into court to make their claims, and thereby escape any potential liability for costs and attorneys' fees that would exist if he unjustly denied the existence of the debt to the prime when the notice was received. Indeed, if the owner can establish it has acted as a mere "disinterested stakeholder," it will be entitled to attorneys' fees for the cost of the interpleader action against the interpleader fund. However, the award of attorneys' fees to the owner who interpleads "is a discretionary matter lying with the trial court."[116]

If the subcontractor initiates the suit, the owner retains the option of paying into court the amount due on the contract, or the amount "sufficient to pay the sums claimed," and again avoid any claim for costs and attorneys' fees. However, if the owner, once sued with the prime contractor, without cause denies the indebtedness sufficient to cover the claims, the court "shall" give judgment to the issuer of the stop notice and award costs and reasonable attorneys' fees to the unpaid subcontractor.[117] Once judgment on the stop notice is entered against the owner, it becomes a lien from the date of service of the original stop notice, enforceable against the owner's property on which the work was done.[118] Thus, a stop notice can turn into a lien against the owner's property if the owner forces the issuer of the stop notice to go all the way and take a judgment against him on the stop notice.

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check. A bank or other holder of the check must require the signature of both payees before negotiating the check. Thus, either payee may block the other from negotiating the check simply by withholding its endorsement. This arrangement theoretically gives each payee the bargaining power necessary to insure that it will receive its proper portion of the proceeds."). *See also* MISS. CODE ANN. § 75-3-116(b).

114. *See* Serv. Elec. Supply Co. v. Hazlehurst Lumber Co., 932 So. 2d 863, 869–70 (Miss. Ct. App. 2006) (A written, signed letter by the owner agreeing to a joint check arrangement was not enforced due to lack of consideration; court stated: "A party's performance of its obligations under contract does not function as consideration supporting a different agreement.").

115. *Id.*

116. Amerihost Dev., Inc. v. Bromanco, Inc., 786 So. 2d 362, 367–68 (Miss. 2001).

117. *Id.* at 367.

118. MISS. CODE ANN. § 85-7-181; *Serv. Elec. Supply Co.*, 932 So. 2d at 869 ("A judgment against the owner under section 85-7-181 operates as a lien commencing on the date the stop notice was served.") (citing Chancellor v. Melvin, 52 So. 2d 360, 364 (Miss. 1951)).

H. Owner's Offset Against Frozen Funds for Incomplete or Defective Performance Under the Prime Contract

The owner has a right to deduct from the amount owed the prime contractor, that would otherwise be reached by a stop notice, the amount required to complete incomplete or defective work by the prime contractor and his subs. "[T]he right of the owner to deduct damages because of the default of the contractor as against the claims of subcontractors, laborers, and materialmen has been recognized."[119] After all, the stop notice statute reaches only any funds the prime contractor "holds that *otherwise* would be paid to the contractor."[120] Thus, the stop notice reaches funds owed the prime, "after subtracting any completion costs or other performance generated setoffs or backcharges," that the unpaid suppliers and subs are entitled to the remaining funds held on the date of the receipt of the notice.[121]

The owner certainly has the right to first determine and make offsets for defects in performance in Mississippi, where our stop notice statute is "by subrogation to the rights of the independent contractor. The materialmen or laborers under such a statute are entitled to a lien only when the contractor is entitled to one, and there is something due or to become due to the principal contractor from the owner."[122] Indeed, such offsets would be appropriate where substantial completion has not been reached. "In the absence of substantial performance, the right to a lien may be denied."[123] Again, in the absence of lien rights by the prime, stop notice rights are diminished accordingly.

The owner must be careful, after receipt of a stop notice, not to pay over to the prime contractor additional monies to repair the prime contractor's defective work that otherwise would not be owed by the owner. Otherwise, such misspent funds become chargeable against the owner in the subcontractor's action.[124]

More generally, when considering an owner's retaining funds against the prime for defects, an owner has a right in both contract and in common law to retain (or recover) funds to cover the cost of repairing defects; the contractor, after all, has a legal obligation to perform in a workmanlike manner.[125] A contractor is in material breach of his duty to perform construction in a workmanlike manner where there is a "failure to perform a substantial part of the contract or one or more of its essential terms or

119. 56 C.J.S. *Mechanics' Liens* § 322 (2010).

120. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., Inc., 791 So. 2d 254, 257 (Miss. Ct. App. 2000) (emphasis added).

121. E.G. Gallagher, *Unpaid Subcontractor's or Supplier's Right to Payment out of Contract Funds*, THE CONSTRUCTION LAW., Jan. 1990, at 9.

122. Chancellor v. Melvin, 52 So. 2d 360, 365 (Miss. 1951).

123. 53 AM. JUR. 2D *Mechanics' Liens* § 247 (1966).

124. McNair v. M.L. Virden Lumber Co., 4 So. 2d 684 (Miss 1941).

125. New Bellum Homes, Inc. v. Swain, 806 So. 2d 301, 307–08 (Miss. Ct. App. 2001) (residential construction defects); Gerodetti v. Broadacres, Inc., 363 So. 2d 265, 268 (Miss. 1978) (commercial construction defects).

conditions, or if there is such a breach as substantially defeats its purpose."[126] However, where the defects cannot be repaired at a reasonable cost or without economic waste, or the repairs would be impractical, the court should only award the diminished value of the property determined by an appraiser, as opposed to the repair cost.[127] The jury should be instructed on the cost rule and the diminished value rule as appropriate.[128] Application of the diminished value rule can result in a greatly reduced damages figure compared to the cost of repair.[129]

I. Joinder

A subcontractor is not required to give notice to other unpaid subcontractors that he is giving the owner a stop notice. However, upon filing suit, a stop payment claimant is obligated to summons into one action all other known interested parties "so far as known," and other claimants may intervene if not summoned by the claimant.[130] Therefore, for example, where a general contractor defaults and abandons the work, a subcontractor suing an owner on a stop notice should also name as defendants the defaulting general contractor and all the other subcontractors known to it who have presented stop notices to the owner and/or who have made lis pendens filings to back up their stop notices on the record. The named subcontractor defendants can then cross-claim against the owner and against the general contractor. In the suit, the parties will also want to deny the claims of any subcontractors who, for example, have filed a lien instead of issuing a stop notice to which it would be entitled and filing a lis pendens notice. The owner may answer and assert its right to retain contract proceeds sufficient to finish the project, after which it will interplead the contract funds that remain as permitted by the Mississippi stop notice statute.

J. Equipment Rentals and Leases: The 2010 Amendments

The Mississippi legislature, effective July 1, 2010, amended the Mississippi lien, stop notice, and private payment bond statutes to include unpaid equipment renters and lessors under the protections of those statutes for the first time. Therefore, a Mississippi construction equipment supplier who is unpaid for the rental or lease of equipment to a general contractor now has right to claim the benefit of the Mississippi stop notice statute of

126. McCoy v. Gibson, 863 So. 2d 978, 980 (Miss. Ct. App. 2003) (residential construction defects) (quoting Gulf S. Capital Corp. v. Brown, 183 So. 2d 802, 805 (Miss. 1966)).

127. *Gerodetti*, 363 So. 2d at 268.

128. *Id.*

129. *See, e.g.*, Johnson v. Black Bros., Inc., 879 So. 2d 525, 528–29 (Miss. Ct. App. 2004) (diminished value of a house due to an uneven floor was $25,000 as determined by an appraisal; the cost of repairing the floor was $228,000, or more than ten times as much, so the chancellor correctly chose to award the owner only the diminished value of his residence).

130. MISS. CODE ANN. § 85-7-181; Amerihost Dev., Inc. v. Bromanco, Inc., 786 So. 2d 362, 365–66 (Miss. 2001).

section 85-7-181, as would any other direct supplier to the general contractor.[131]

Formerly, the United States Court of Appeals for the Fifth Circuit had held that the term "materials" in the stop notice statute (section 85-7-181) did not include equipment, just as the same term "material" in the private bond statute (section 85-7-185) had been held not to include equipment unless the parties to the bond wrote coverage in for equipment.[132] The Mississippi legislature has now effectively overturned *Coatings Manufacturers v. DPI, Inc.* on the issue of equipment rentals by its passage of amendments in 2010 that include in the Mississippi lien, stop notice, and private bond statutes the same protections for "rental or lease equipment suppliers" as other material suppliers have enjoyed for nearly a century or more.

The Mississippi stop notice statute dates back to 1857,[133] and the private bond statute dates back to at least 1918.[134] The Mississippi mechanics' lien statutes to ensure payment of improvements to real estate date back to at least the Mississippi Code of 1906.[135] In the early 1900s—when the Mississippi legislature amended the statutory lien, stop notice, and private bond protections—construction equipment was not the significant factor on construction jobs that it is today, with the result that construction equipment rentals were not mentioned in the statutes. The new 2010 amendments close a prior inequity in the lien laws since, as the sponsors of the amendments noted, equipment rental hours are just as much consumed on construction jobs today as nails, lumber, or any other "materials." Further, sponsors of the legislation noted that providing a payment remedy to the renters and lessors of equipment should have the effect of expanding credit to smaller contractors by creating greater confidence in those extending credit for equipment rentals that the rental charges will be paid.

Further, renters of equipment on public jobs, by contrast, had always been protected under the provisions of Mississippi's Little Miller Act,[136] which considers the unpaid rent as "materials."[137] The 2010 amendments represent an important, long overdue update of Mississippi's liens, stop notice, and private bond statutes.

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131. The author, who provided a draft of the legislation, wishes again to thank Senators Terry Burton and Joey Fillingane for sponsoring the bill in the Mississippi Senate, Representatives Brandon Jones and Willie Bailey who oversaw passage in the House, and Suzanne Sharpe of Sharpe & Wise, PLLC and Steve Browning of Hayes Dent Public Strategies for monitoring the bill to a successful passage.

132. Coatings Mfrs., Inc. v. DPI, Inc., 926 F.2d 474, 478–79 (5th Cir. 1991).

133. Smith & Hazard, *supra* note 97, at 452; *see also Amerihost Dev., Inc.*, 786 So. 2d at 364 (setting out the 1918 amendments to the stop notice statute).

134. *Coatings Mfrs., Inc.*, 926 F.2d at 478.

135. *See* McKenzie v. Fellow, 52 So. 628, 628 (Miss. 1910).

136. MISS. CODE ANN. §§ 31-5-51 to -57.

137. Houston Gen. Ins. Co. v. Maples, 375 So. 2d 1012, 1016 (Miss. 1979).

K. Assignments by the Prime

Section 85-7-183 provides that no prime contractor can assign, transfer, or otherwise seek to defeat the stop notice or other rights of its subcontractors, laborers, and materialmen, and that all such assignments, transfers, and other dispositions are subordinate to the rights of the subcontractors, laborers, and materialmen, as well as the owner, except where the prime contractor protects such parties by entering into a performance bond subject to the private bond statute of section 85-7-185.

IV. MISSISSIPPI PAYMENT BOND LAW CLAIMS

A. Mississippi Private Construction Job Payment Bonds

1. Bonding Around a Stop Notice: A General Contractor's Provision of a Payment Bond to an Owner Dissolves a Sub's Stop Notice Rights.

Mississippi law does not require contractors on private projects to furnish performance or payment bonds. *However, the first inquiry one should make on a private job is whether there is a payment bond, since payment bond rights, where they exist, are in lieu of statutory lien or stop notice rights.* In other words, a subcontractor's stop notices become legally ineffective where the general contractor provides to the owner a payment bond protecting subcontractors and suppliers. As a result, a general contractor, faced with a sub's stop notice claim that could delay the owner's closing with its lender—preventing final payment to the general, and by the general, to all the other subs—can get rid of the sub's stop notice by "bonding around the lien." The general contractor can simply provide to the owner a payment bond obtained from a surety/insurance company that will cover the amount of the stop notice claim. The contractor's provision of a payment bond dissolves the stop notice rights of the sub as a matter of law.[138]

> If the contractor does not give the bond provided by the statute, laborers and materialmen have an equity . . . in the funds due the contractor by the owner of the building. But where a bond is given as provided by the statute, such funds are released from such equity or trust in favor of materialmen and laborers and go into the hands of the contractor untrammeled. The purpose of the bond section of the statute was to provide for the protection of materialmen and laborers, the bond being in lieu of their equity in the funds arising out of the building contract.[139]

138. Dickson v. U.S. Fid. & Guar. Co., 117 So. 245, 248 (Miss. 1928).

139. Ewin Eng'g Corp. v. Deposit Guar. Bank & Trust Co., 62 So. 2d 572, 574 (Miss. 1953) (citing *Dickson*, 117 So. at 248). *Accord* Redd v. L & A Contracting Co., 151 So. 2d 205, 207 (Miss. 1963); *see also* Jesco, Inc. v. Jeffreys Steel Co., Inc., 571 F. Supp. 801 (N.D. Miss. 1983) ("Under [*Dickson*], where the contractor has given bond, as here . . . *no* lien, either at law or equity, may be asserted against monies due a contractor under a construction contract or purchase order.") (emphasis in original).

Also, the prime contractor can achieve the same protection from stop notices at the start of the project by providing to the owner a payment bond.

One hastens to add that if the prime contractor posts a performance bond instead of a payment bond, Mississippi law automatically writes into the performance bond payment provisions protecting subcontractors, laborers, and materialmen of the general contractor at section 85-7-185. Therefore, the private bond statute requires protection of tier 1 contractors and materialmen below the bonded contractor but, unlike the Little Miller Act, which protects also the next tier upon their giving timely notice of claims, the private bond statute does not require that the bond protect the tier 2 sub-subs and materialmen of subs.[140]

2. Motion to Expunge Stop Notice and Lis Pendens Filing Given the Presence of a Payment Bond

What, though, if the subcontractor stubbornly refuses to remove a stop notice and accompanying lis pendens notice even in face of the contractor's providing him a copy of a bond? In that case, the contractor, preferably joined by the owner (to ensure standing), should apply to the county or chancery court to have the lis pendens notice immediately enjoined and expunged under the authority of section 85-7-201. That section, the false notice statute, allows application to the county or chancery court on two days' notice to expunge the inappropriate lis pendens filing from the land records, to enjoin the further filing of such notices, and for an award to the injured party of a penalty in the full amount of the wrongful filing if filed "falsely and knowingly."[141]

The Mississippi Court of Appeals has noted a chancellor's right to examine whether a recorded materialmen's lien is void and of no effect, and whether the lien should be enjoined.[142] Although a more cumbersome claim, the supreme court has held that it is also possible for an owner to assert an action for slander of title where the false filing of a lien is malicious.[143]

3. Remote Materialmen

The Mississippi Supreme Court has held that the private bond statute for private projects (section 85-7-185) requires that the bond provide protection only to persons furnishing labor or materials to the contractor who provided the bond to the owner; it does not protect remote materialmen having no direct contract with the contractor who gave the bond.[144] For example, the court held in *Alabama Marble Co. v. U.S. Fidelity & Guaranty*

140. *See* section IV(A)(3) *infra*.

141. MISS. CODE ANN. § 85-7-201.

142. Cummings v. Davis, 751 So. 2d 1055, 1058 (Miss. Ct. App. 1999).

143. Walley v. Hunt, 54 So. 2d 393, 393 (Miss. 1951).

144. U.S. Fid. & Guar. Co. v. Maryland Cas. Co., 199 So. 278, 282 (Miss. 1940); Ala. Marble Co. v. U.S. Fid. & Guar. Co., 111 So. 573, 574 (Miss. 1927).

Co.[145] that a bond provided by the prime contractor for the construction of the Lamar Life Building in Jackson did not cover the claim of a provider of marble to a subcontractor on the job.[146] The law, though, does not preclude the general contractor's bond from affording greater protection to remote materialmen than the statute requires, so one must read the bond to learn if its scope is broader than the statute requires. Further, if the prime contractor requires a subcontractor to provide a bond, the private bond statute then requires that materialmen who have dealt with the bonded subcontractor be protected under the bond.

4. Equipment Rentals and Leases: The 2010 Amendments

The passage of amendments to the lien, stop notice, and private bond statutes by the Mississippi legislature that became effective on July 1, 2010, to include unpaid "rental or lease equipment suppliers," has updated those laws to at last bring equipment renters and lessors within their protections. While modern bond forms had usually specified equipment rentals in addition to "labor and materials," the Mississippi private bond law of section 85-7-185 had previously, as we have seen, left equipment lessors out simply because they were not much in evidence on construction jobs when the statutes were first adopted in the early 1900s.

The old cases involving the Mississippi private bond statute, in which the courts had strictly construed the terms "labor and materials" to exclude unpaid equipment rentals, are now effectively abrogated as to the issue of equipment rentals by the 2010 legislative passage of Senate Bill 2800 amending the statutes.[147]

However, even as far back as 1956, the Mississippi Supreme Court did find coverage for equipment repairs, as well as fuel and oil consumed, in *Seaboard Surety Co. v. Bosarge*,[148] where the private performance bond specifically covered the contractor's obligation to provide "equipment," as well as labor, supervision, and tools to complete a housing project.[149] The 2010 amendments, though, are a much-needed update to the Mississippi lien, stop notice, and private bond statutes that now explicitly include unpaid equipment renters and lessors within their protections.

5. Commencement of Suit and Joinder in Suit on Bond

The Mississippi private project bond statutes provide that if the prime contractor provides only a performance bond to guarantee his performance to the owner (the bond obligee), then, in that case, the performance bond

145. 111 So. 573 (Miss. 1927).

146. *Id.* at 574.

147. *See, e.g.*, W. Cas. & Sur. Co. v. Stribling Bros. Mach. Co., 139 So. 838, 840–41 (Miss. 1962); Great Am. Ins. Co. v. Busby, 150 So. 2d 131, 135, 137 (Miss. 1963); Carruth v. Standard Accident Ins. Co., 329 F.2d 690, 692–93 (5th Cir. 1964); and Coatings Mfrs., Inc. v. DPI, Inc., 926 F.2d 474, 478 (5th Cir. 1991).

148. 84 So. 2d 517 (Miss. 1956).

149. *Id.* at 519.

by statute also acts as payment bond securing payment to the subcontractors providing labor or materials to the contractor providing the bond.[150] The statute also provides that if a claimant brings suit on the private project bond, other persons furnishing labor or materials under the contract may intervene in the action to have their rights determined under the bond.[151] However, unlike the public project bond requirements under the Little Miller Act, the private bond statute does not require that the bond be sufficient to cover the full amount of the prime's or subcontractor's contract.[152] Therefore, the statute provides that the owner or prime to whom a performance bond was given (the obligee) has the first priority in the bond proceeds for the satisfaction of his claim for damages ahead of subcontractors.[153] Remaining payment claimants on the performance bond are left to share in the available bond proceeds on a pro rata basis after the owner's/obligee's claims are satisfied.[154] If the prime contractor provided a payment bond in addition to a performance bond, the unpaid subcontractor–claimant would look first to the payment bond and its terms to make a claim.[155]

If the contractor on a private project provided only a performance bond—rather than a performance bond accompanied by a payment bond—only the owner, or the prime to whom the bond was given (the obligee), on a private project can bring suit within the first six months following either notice of abandonment or completion and final settlement of the contract.[156] Thereafter, if the bond obligee has not brought suit, and if the bond has not been exhausted by the obligee, any third party supplying labor or materials can initiate suit on the performance bond for payment.[157]

Once suit is brought by a party eligible to relief under the performance bond, any other party entitled to bond relief may intervene in the action and be made a party to the suit, since by statute only one action can be brought on the performance bond for performance and payment claims.[158] Similarly, if a private project payment bond was provided, Mississippi law provides that there can be only one action on the payment bond into which other payment claimants may intervene.[159] However, while section 85-7-191 states there can be only one action on the private project bond, the supreme court has refused to uphold the one action rule on constitutional grounds against a claimant who had no notice of the suit.[160]

150. MISS. CODE ANN. § 85-7-185.
151. *Id.*
152. MISS. CODE ANN. § 85-7-193.
153. *Id.*
154. *Id.*
155. MISS. CODE ANN. § 85-7-191.
156. *Id.* § 85-7-187.
157. *Id.*
158. *Id.* § 85-7-191.
159. *Id.*
160. Am. Fid. Fire Ins. Co. v. Athens Stove Works, Inc., 481 So. 2d 292, 295 (Miss. 1985).

6. Statute of Limitations for Payment Claims on Private Jobs

The Mississippi legislature reworked the private job bond limitations statute (section 85-7-189) in 2005 to more nearly match the limitations periods contained in the public bond limitations statute (section 31-5-53).[161] The statute of limitations for suit on a private job payment bond remains a relatively short period of one year.[162] However, whereas before suit on a payment bond could not be commenced before a notice of abandonment or the complete performance and final settlement of the general contractor's contract, now the limitations period requires that suit "be commenced with one (1) year after the day on which the last of labor was performed or material was supplied by the person bringing the action and not later."[163] Thus, for a subcontractor suing on a payment bond, the limitations period runs from its own last supply of labor or materials to the job. The one year does not run, say, from the general contractor's completion of the entire project, or from the owner's occupancy. The legislature made the same change a year earlier in 2004 to the payment bond section of the public bond statute, running the limitations period in from the last supply of materials or labor by the party bringing the action.[164]

By contrast, the limitations period under the statute on an owner's suit on a private project performance bond (section 85-7-189(1)) still runs from final completion or occupancy.[165] Also compare the one-year limitations period on a payment bond (running from the last supply of labor or materials) with the limitations period on a statutory lien which runs one year after the date the money claimed "*become due and payable, and not after.*"[166] The statute of limitations on a lien, therefore, runs from the date the invoices became due, as opposed to a payment bond claim which runs from the last supply of labor or materials.

It may be of some note that there is a Fifth Circuit Court of Appeals case, applying Mississippi law, in which that court held that where the bonding company takes over a defaulting contractor's contract and supplies a substitute contractor whose work turns out to be defective, the bonding company can subject itself to the normal six-year statute of repose for deficiencies (section 15-1-41), rather than the one-year bond statute of limitations (section 85-7-189), if it elected to serve as the contractor.[167] However, the bonding company would not have a liability for the substitute contractor's deficiencies if it chose to rebid the contract, supplying a new contract to the owner, rather than simply appointing the substitute

161. 2005 Miss. Laws ch. 461, § 2 (H.B. 1290).
162. MISS. CODE ANN. § 85-7-189(2).
163. *Id.*
164. 2004 Miss. Laws ch. 452, § 1 (H.B. 1581).
165. MISS. CODE ANN. § 85-7-189(1).
166. *Id.* § 85-7-141 (emphasis added).
167. Cooper Indus., Inc. v. Tarmac Roofing Sys., Inc., 276 F.3d 704, 712–13 (5th Cir. 2002).

contractor to complete the contract in default.[168] The one-year bond statute of limitations applies only to laborers and materialmen to the job and owners who themselves have supplied labor or materials.[169]

7. Priorities in Recovery: Attorneys' Fees

As noted previously, where only a performance bond is provided, if the recovery on the bond turns out to be inadequate to satisfy all parties to the action, the bond obligee is to be satisfied first as to all claims and damages before judgment is given for remaining parties on a pro rata basis.[170] Section 85-7-193 also authorizes the award of reasonable attorneys' fees in an action on a private job where only a performance bond is given—which can also act as a payment bond—in an amount to be set by the judge, but further only if the amount of the bond was not sufficient to cover the full amount due by the contract or by judgment otherwise.[171]

8. Interest

Prime contractors and subcontractors on private projects who do not receive timely payment will be able to charge interest/penalty as permitted by the Mississippi Prompt Payment Act.[172]

9. Bonding Under Alter Ego Entity

In *Beco, Inc. v. American Fidelity Fire Insurance Co.*,[173] the Mississippi Supreme Court held that a prime contractor and his surety could not evade responsibility where a private bond was with Bob Wolfe Electric Co., a d/b/a name for Bob Wolfe, individually, but the assertion was made that the work was done by his family's corporation, Wolfe Electric Company, Inc.[174] Under the circumstances the court found that the individual and corporate identities were mere alter egos and "the fiction of separate corporate identity" would be disregarded.[175]

B. Mississippi Public Job Payment Bonds

1. Bid Bonds

A bid bond provides relief to the owner in the event the contractor whose bid has been accepted refuses to proceed with signing the contract and construction. A performance bond, by contrast, covers construction

168. *Id.*
169. *Id.* at 714.
170. MISS. CODE ANN. §§ 85-7-193, 85-7-185.
171. Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp., 743 So. 2d 954, 971 (Miss. 1999) ("Since Seaboard/St. Paul's bond was sufficient to cover the full amount of judgment in this case, Kimmins is not entitled to attorneys' fees under [section] 85-7-193.")
172. *See* section V *infra* for descriptions of MISS. CODE ANN. §§ 87-7-3 (interest due primes) & 87-7-5 (penalties due subs on late payment).
173. 370 So. 2d 1343 (Miss. 1979).
174. *Id.* at 1346.
175. *Id.*

performance. Public authorities in Mississippi, in their discretion, may require contractors to post bid bonds with bids on public construction contracts.[176] Cities, for example, may impose the requirement of a bid bond pursuant to section 21-17-5, which gives cities control over management of their finances.[177] Generally, there is no statutory requirement that the public authority require a bid bond from contractors.[178] However, the private financing and construction of dormitory facilities for the Institutions of Higher Learning requires that bids be accompanied by a check or

> bid-bond payable to the board in a sum not less than five percent of the gross construction cost of the facility to be constructed as estimated by the board . . . . The bid security . . . shall be forfeited if the successful bidder fails to enter into the lease contract and commence construction . . . within the time limitation set forth in the notice.[179]

Further, where the public authority chooses to require a bid bond, it may accept cash or its equivalent, including a personal check or irrevocable letter of credit, in lieu of the bid bond.[180]

2. Performance and Payment Bonds Required for Public Works: The Mississippi Little Miller Act

The Mississippi legislature in 1980 enacted the Little Miller Act, which follows closely the model of the Federal Miller Act.[181] Mississippi requires general contractors on public projects to provide bonds covering performance and payment because a claimant could have no lien rights against the property of the state.[182] The state, as sovereign, is not subject to private liens or stop notices.[183] Thus, section 31-5-51(1) to (2) provides that for projects exceeding a cost of $25,000, anyone entering a contract with the state, any county, city, or other public authority must furnish a performance bond "in favor of or for the protection of such public body, as owner" and "in an amount not less than the amount of the contract."[184] The statute further requires that the contractor provide a payment bond "in an amount not less than the amount of the contract."[185]

a. Payment Bond Claimants Covered

Mississippi's Little Miller Act states the following:

176. Op. Att'y Gen. (1990), 1990 WL 548140.
177. Op. Att'y Gen. (1990), 1990 WL 547943.
178. *See* Op. Att'y Gen. (1990), 1990 WL 548140.
179. MISS. CODE ANN. § 37-101-43.
180. Op. Att'y Gen. 96-0536 (1996), 1996 WL 508568, at 3; Op. Att'y Gen. 95-0581 (1995), 1995 WL 526173.
181. The Miller Act appears at 40 U.S.C. §§ 3131 to -34.
182. Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1321 (Miss. 1989).
183. *Id.*
184. MISS. CODE ANN. § 31-5-51(1)(a) (emphasis added).
185. *Id.* § 31-5-51(1)(b) (emphasis added).

> (2) Every Person who has furnished labor or material unused in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished and who has not been paid in full therefor before the expiration of a period of ninety (90) days after the date on which the last of the labor was performed by him or the last of the materials was furnished by him and for which such claim is made . . . shall have the right to sue on such payment bond for the amount, or the balance thereof that is due and payable, but unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment.[186]

Justice Jimmy Robertson in *Key Constructors, Inc. v. H & M Gas Co.* noted especially that the provision in the Little Miller Act for the claims of sub-subcontractors, "[s]ection 31-5-51(3), appears to have been taken verbatim from that portion of the Miller Act addressing the rights of persons furnishing labor or material to subcontractors on Federal public works projects."[187] That provision of the Mississippi Little Miller Act provides the following:

> (3) Any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving *written notice to said contractor* within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be given in writing by the claimant to the contractor or surety at any place where the contractor or surety maintains an office or conducts business. Such notice may be personally delivered by the claimant to the contractor or surety, or it may be mailed by certified mail, return receipt requested, postage prepaid, to the contractor or surety. No such action may be maintained by any person not having a direct contractual relationship with the contractor-principal, unless the notice required by this section shall have been given.[188]

The notice that is critical here is to the general contractor, although the section goes on to state that "such notice" can be sent on as well to the

186. *Id.* § 31-5-51(2) (emphasis added).
187. *Key Constructors, Inc.*, 537 So.2d at 1321.
188. MISS. CODE ANN. § 31-5-51(3) (emphasis added).

surety.[189] The Mississippi Court of Appeals has stated in a Little Miller Act case that it "is crucial that the notice state a claim directly against the general contractor . . . ."[190] Further, "[t]he purpose of the notice requirement of the Miller Act is to alert a general contractor that payment will be expected directly from him, rather than from the subcontractor with whom the materialman dealt directly."[191] Note also that the AIA payment bond form[192] contains its own provisions as to the ninety-day notice by parties having contracts with subcontractors, stating the notice must be given in the first instance to the general contractor within ninety days and then to the surety within thirty days.

The Little Miller Act at subsection (4) goes on to provide that the "only persons" protected by the payment bond required under the Act are (a) first tier subcontractors and material suppliers below the prime contractor; (b) second tier sub-subcontractors and material suppliers below subcontractors who give notice within ninety days of their last addition of labor or materials;[193] and (c) laborers who have performed work on the project site.[194] The Little Miller Act leaves out of its requirements protection for materialmen of materialmen, and for subs below the sub-sub level, although the bond can be written more expansively since the parties are always free to contract to provide greater protection.[195]

Still, though, the Little Miller Act's protections are fairly broad, certainly more so than the Mississippi lien and stop notice statutory schemes they are in lieu of. The Mississippi Court of Appeals in a 2004 case stated: "Since Mississippi's Little Miller Act is modeled after the Federal Miller Act, 40 U.S.C.A. [ ]§ 270a–d (redesignated as 40 U.S.C. §§ 131–33), the Mississippi Supreme Court has found federal court decisions interpreting the Federal Miller Act instructive and persuasive when interpreting Mississippi's Little Miller Act."[196]

Therefore, the larger body of law available concerning the Federal Miller Act may be consulted in the analysis of Mississippi Little Miller Act cases.

For example, a Federal Miller Act case discussing the reach of compensation claims a supplier of labor can make could be relevant in a Little Miller Act case. In *United States ex rel. Sherman v. Carter*,[197] a case construing the analogous Miller Act, the U.S. Supreme Court noted:

189. *Id.*

190. Younge Mech. Inc. v. Max Foote Constr. Co., 869 So. 2d 1079, 1082 (Miss. Ct. App. 2004).

191. United States *ex rel.* Jinks Lumber v. Fed. Ins. Co., 452 F.2d 485, 487 (5th Cir. 1971).

192. AIA PAYMENT BOND FORM (AIA Doc. No. A312, 1984 ed.).

193. *See* section V *infra.*

194. MISS. CODE ANN. § 31-5-51(4).

195. *See infra* sub-subsection b.

196. Younge Mech. Inc. v. Max Foote Constr. Co., 869 So. 2d 1079, 1082 (Miss. Ct. App. 2004) (citing Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1321 (Miss. 1989)).

197. 353 U.S. 210 (1957).

> The Act, however, does not limit recovery on the statutory bond to 'wages.' The parties have stipulated that contributions to the [employee health and welfare trust] fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. The unpaid contributions were a part of the compensation for the work to be done by Carter's employees. The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective-bargaining agreements.
> . . . In fact, the surety's obligations extended to some persons who had no contractual relationship with Carter. For example, persons who contributed labor and material to Carter's subcontractors were entitled to the Act's protection. As long as Carter's obligations relating to compensation for labor have not been satisfied, his employees will not have been 'paid in full' and the Miller Act will not have served its purpose.[198]

b. Materialmen

An issue can arise as to whether a materialman is a supplier to an on-site subcontractor within the protection of the Little Miller Act bond, or merely a "materialman to a materialman" outside the protection of the bond. In *United States ex rel. Clark v. Lloyd T. Moon, Inc.*,[199] for example, the Southern District of Mississippi determined that the plaintiff fabricator of steel joists and decking had supplied his products to another steel material supplier of the prime contractor, not to a "subcontractor" of the prime contractor for the project.[200] The plaintiff materialman was therefore only a third tier "materialman to a materialman" outside the scope of the protection of the bond.[201] Among the factors indicating the middleman the materialman supplied to was just another materialman was the fact that the entity supplied "did no on-site work, either installing its products or supervising their installation"; gave no performance bond to the prime; did not receive progress payments; included sales tax in its price; and supplied prefabricated, standard items rather than a complex, integrated system.[202] Custom manufacturing alone is not determinative.[203]

198. *Id.* at 217–18.
199. 698 F. Supp. 665 (S.D. Miss. 1988).
200. *Id.* at 668.
201. *Id.*
202. *Id.* at 667 (citing Aetna Cas. & Sur. Co. v. United States, 382 F.2d 615, 617 (5th Cir. 1967)).
203. *Id.* at 666–67.

c. Equipment

Mississippi has followed the traditional rule that only materials or the portion of equipment, i.e., rentals, actually used or consumed in the construction of the project are reimbursable under a public works bond. In *Houston General Insurance Company v. Maples*,[204] the Mississippi Supreme Court upheld the liability of the bond surety to reimburse a fuel supplier, "since the fuel was necessary for the equipment's operation[,] which was essential to the construction."[205] However, the court held that a supplier of tires for heavy equipment could not seek reimbursement for the entire price of tires.[206] The court remanded for further testimony on a portion of the tires' useful life consumed on the project.[207] The court did uphold a claim under the bond for heavy equipment rental payments, noting that the equipment was essential to the project, "just as laborers would have been had the equipment not been used."[208] The key is in the proof that the specific materials were intended for the use or consumption in the construction of the public project.[209]

d. Diversion of Materials

However, the Mississippi Supreme Court, in an opinion by Justice Jimmy Robertson, has recognized also that a supplier of material to a contractor may have no control over the contractor's diversion of materials from the intended public project to another project not covered by the bond.[210] In *Key Constructors, Inc.*, a supplier of fuel to a subcontractor brought suit under the Little Miller Act on the bond.[211] The prime contractor and obligee on the bond attempted to defend against the claim by stating that the subcontractor had diverted the fuel to other unbonded projects that he was working on.[212] The court held that the claim of diversion was immaterial to the action on the debt to the materialman, citing opinions noting that a materialman's claims should not be denied where the materialman supplied materials in good faith to a subcontractor for the prosecution of the contemplated public work.[213]

The supreme court in *Key Constructors, Inc.* also held that the prime contractor could not defend against bond liability to the materialman of the

204. 375 So. 2d 1012 (Miss. 1979).

205. *Id.* at 1015–1016.

206. *Id.* at 1016.

207. *Id.*

208. *Id.*

209. *See also* United States *ex rel.* Miss. Rd. Supply Co. v. H.R. Morgan, Inc., 542 F.2d 262, 267 (5th Cir. 1976) ("The amount of such [equipment] rents . . . represent the approximate value of the equipment's useful life which is dedicated to construction of the project.").

210. Key Constructors, Inc., v. H & M Gas Co., 537 So.2d 1318 (Miss. 1989).

211. *Id. at* 1321.

212. *Id.* at 1323.

213. *Id.*

subcontractor by asserting that he also had a claim against the subcontractor and was owed a set off.[214] The court stated: "The right of a materialman to make a demand on the contractor and/or his surety was legislatively created so that the supplier could distance itself from contractor/subcontractor disputes, thus assuring its prompt payment."[215]

e. Notice Requirement

The Little Miller Act imposes no notice requirement on tier 1 subcontractors, laborers, or materialmen having a direct contractual relationship with the prime contractor as a condition precedent to suit on the bond.[216] However, as we have seen, second tier sub-subcontractors and materialmen of subs not having a direct contractual relationship with the prime cannot proceed against a surety bond under the Little Miller Act without first meeting the Act's rather difficult ninety-day notice requirement.[217] The Act requires sub-subs and materialmen of subs to the general contractor to give written notice of the claim to the prime contractor within ninety days of the claimant's last furnishing of labor or material for which the claim is made.[218] The notice must state "with substantial accuracy" the specific amount claimed, the specific subcontractor to whom the material was furnished or for whom the labor was done, and who has not made payment.[219] The notice may be delivered in person or by prepaid certified mail, return receipt requested. In addition, the claimant may give notice to the surety, but the critical notice is the notice to be given to the general contractor.[220]

Nonetheless, the Southern District of Mississippi stated it was willing to overlook the certified mail/return receipt requirement for mailing where "the only failure to comply with the statute was the failure to send notice by certified mail, and where there is no dispute but that actual notice was received by the proper party."[221] Also, notice that the strict ninety-day notice requirement may not be applicable if the subcontractor was required to give a separate payment bond. In that case, the subcontractor becomes the principal on the subcontractor bond, and the *direct* suppliers to the sub providing the subcontractor bond should be able to make claims on the subcontractor payment bond without having first sent a notice of nonpayment within ninety days of the last transaction. However, note further in

214. *Id.* at 1324.
215. *Id.*
216. MISS. CODE ANN. § 31-5-51(3).
217. *Id.*
218. *Id.*
219. *Id.*
220. *See* United States *ex rel.* Jinks Lumber Co., Inc. v. Fed. Ins. Co., 452 F.2d 485, 487 (5th Cir. 1971) ("The purpose of the notice requirement of the Miller Act is to alert a general contractor that payment will be expected directly from him, rather than from the subcontractor with whom the materialman dealt directly. Without a statutory period, materialmen might delay claims unreasonably, thus frustrating the general contractor's need to be able to commit his funds to other activities."). *See also* Younge Mech., Inc. v. Max Foote Constr. Co., Inc., 869 So. 2d 1079, 1082 (Miss. Ct. App. 2004) (citing the *Jinks* case as authority in its analysis of the Mississippi Little Miller Act).
221. Bros. in Christ, Inc. v. Am. Fid. Fire Ins., 692 F. Supp. 701, 703 (S.D. Miss. 1988).

that case that even though the general contractor may have given a Little Miller Act bond, the subcontractor's bond is a private bond on a private subcontract—even on a public building—meaning the subcontractor bond's reach is governed by the Mississippi private bond statute, which limits relief to those supplying directly to the subcontractor providing the subcontractor bond, not further tiers down.[222]

f. Commencement of Suit and Statute of Limitations

The Little Miller Act provides that public project bond claimants within the protection of the Act who have remained unpaid for at least ninety days following their last furnishing of labor or materials for the public project "shall have the right to sue" on the payment bond.[223] Thus, claimants must go unpaid at least ninety days from the due date to sue on the bond. The legislature amended the Act in 2004 to create a statute of limitations for suits on a payment bond that runs from the date of the last furnishing of labor or materials. The Act now provides that "[w]hen suit is instituted on a payment bond . . . it shall be commenced within one (1) year after the day on which the last of the labor was performed or material was supplied by the person bringing the action and not later."[224]

Prior to July 2004, the one year for suit on a payment bond began from performance and final settlement of the contract. Further, the Mississippi Supreme Court had stated that "a suit instituted on a payment or performance bond may not be commenced until notice of the final settlement or abandonment by the primary obligee has been published."[225] However, the 2004 amendment changed all that as to payment bonds. Thus, while the right to sue for nonpayment does not accrue until the ninety-first day following the last supply of materials and labor for which the claim is made,[226] the litigation on the bond can now commence prior to the performance and final settlement of the contract, and indeed must commence within one year after the day on which "the last of the labor was performed or material was supplied by the person bringing the action."[227]

The Little Miller Act does not follow the old rule that there can only be one suit brought on a payment bond, with all claimants required to intervene. The Act permits multiple suits against the payment bond on state and local projects.

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222. *See infra* subsection C and the cases cited there.

223. MISS. CODE ANN. § 31-5-53(c).

224. *Id.* § 31-5-53(b).

225. Stanton & Assocs. v. Bryant Constr. Co., 464 So. 2d 499, 503 (Miss. 1985).

226. MISS. CODE ANN. § 31-5-51(2).

227. *Id.* § 31-5-53(b). Also, compare the limitations period of the lien statute, section 85-7-141, which runs one year from the time the claim "became due and payable," with the limitations of the public bond statute, running one year after "the last of the labor was performed or material was supplied" by the claimant, section 31-5-53(b).

g. Venue

The Act provides that venue for a suit on a public performance or payment bond is available in the county in which the contract—or part of the contract—was performed, or in a county where service of process may be obtained on the prime contractor or surety on the bond.[228]

h. Right to Examine the Bond

The prime contractor cannot stonewall a potential claimant's request to examine the bond and its coverage provisions. The Little Miller Act provides that the prime contractor shall furnish a certified copy of the contract and bonds on the project upon request to "[a]ny person supplying labor or materials for the prosecution of the work."[229]

i. Attorneys' Fees

The Little Miller Act authorizes the judge to impose an award of reasonable attorneys' fees against either the payment bond defendant or the bond claimant—that is, against either side—if either party proceeds in the action on the defense or claim unreasonably for mere delay, without just cause, or in bad faith.[230] The Mississippi Supreme Court upheld a substantial award of attorneys' fees jointly against a general contractor and its surety under section 31-5-57, as well as under the Mississippi Litigation Accountability Act,[231] in *Tupelo Redevelopment Agency v. Gray Corp.*[232] There, the prime contractor delayed payment to the subcontractor on a public job "for no apparent reason," and the prime knew the sub "was entitled to the money, but withheld the money and has continued to do so."[233] Also, the prime induced the sub to help persuade the public owner to release retainage and "to believe that it would get its money[,] when in fact [the prime contractor] Gray had already assigned the entire retainage to its bank."[234] Further, the prime in the subsequent litigation requested payment from the public owner of the amount it owed to the sub, but continued to refuse to pay the sub the amount it admitted owing the sub throughout the proceeding "without substantial justification." Therefore the supreme court found that an award of attorneys' fees under the statute was within the discretion of the lower court.[235]

In the earlier case *Key Constructors, Inc.*, the Mississippi Supreme Court recognized that section 31-5-57 allows the award of attorneys' fees upon the provision of appropriate evidence, but nonetheless threw out the portion of the judgment entered below awarding attorneys' fees against the

228. MISS. CODE ANN. § 31-5-53(c).
229. *Id.* § 31-5-55.
230. *Id.* § 31-5-57.
231. *Id.* §§ 11-55-1 to -15.
232. 972 So. 2d 495, 519 (Miss. 2007).
233. *Id.*
234. *Id.*
235. *Id.*

bond defendants where the plaintiff failed to show what a reasonable legal fee would be on the basis of the expert testimony of another attorney.[236] The court stated of attorneys' fees that one "may not merely pull a figure out of the thin air."[237] One should check first, of course, to see if there is an attorneys' fees provision in the construction contract that one can cite in addition to the statute.

j. Interest

Prejudgment interest is awardable on liquidated, fixed amounts sought under the Little Miller Act as in other cases since the bond is to insure "prompt payment."[238]

k. Supervisors' Failure to Require a Bond

If a board of supervisors fails to require a bond for public project, the board members are not individually liable for their negligence.[239]

C. Analysis of Subcontractor Payment Bonds: A Subcontractor Bond Even on a Public Job Normally Falls Under the Mississippi Private Bond Statute, Not the Federal or Mississippi Miller Acts[240]

While perhaps at first blush it may seem surprising, it is an important concept for the Mississippi construction law practitioner to grasp that even on a public building a subcontractor's bond should be analyzed under the Mississippi private bond statutes, not under the Federal or Mississippi Miller Acts. That is, if the general contractor on a public job puts up a Miller Act or Little Miller Act payment bond—as it must in favor of the government—it does not follow that the bond of the prime's subcontractor, which the prime can require, also is to be analyzed under the public bond statutes. In fact, since the subcontractor's payment and performance bonds run in favor of the prime contractor as the obligee, not the government, the subcontractor's bond, like the subcontractor's contract itself, is a private, not a publicly required contract, even though it involves work on a public building. The subcontractor's bond therefore is to be analyzed under the Mississippi private bond statute, not under the Federal or Mississippi Miller Acts.[241]

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236. 537 So.2d 1318, 1324–25 (Miss. 1989); *see also Tupelo Redevelopment Agency*, 972 So. 2d at 519.

237. *Key Constructors, Inc.*, 537 So.2d at 1325.

238. *See* Stanton & Assocs. v. Bryant Constr. Co., 464 So. 2d 499, 503 (Miss. 1985) ("[P]rejudgment interest aims at protecting a creditor who has a specific liquidated claim from suffering damage by a debtor's unreasonable delay in payment.").

239. Pidgeon Thomas Iron Co. v. Leflore County, 99 So. 677 (Miss. 1924).

240. My thanks to my construction law colleague Robert C. Williamson, Jr., of the Williamson Law Firm in Jackson for first bringing the point of law of this section to my attention in our periodic discussion of Mississippi construction law.

241. Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201, 208 (N.D. Miss. 1968) (citing Davis Co., Inc. v. D'Lo Guar. Bank, 138 So. 802, 805 (N.D. Miss. 1932)).

Analysis of the subcontractor bond under the Mississippi private bond statute, as opposed to the Mississippi and Federal Miller Acts, can have real consequences because the protection of unpaid parties under the private bond statute is limited to only the next subcontractor with whom subcontractor providing the bond dealt with directly, i.e., only to the next tier down.[242] The private bond statute is not as expansive in its reach as the Mississippi and Federal Miller Acts are.[243]

In *Monroe Banking & Trust Company v. Allen*, the court noted that the analysis of the subcontractor bond did not turn on the fact that a public building was involved: "Although the prime contracts made by Building Service [the general contractor] were apparently for public constructions, the subcontracts between Building Service and Allen [the subcontractor] are wholly private contracts, and thus governed by the provisions of [section] 372 *et seq.* of the Code."[244]

In the Mississippi Supreme Court case that the Northern District of Mississippi cited in *Allen*, the court noted that although the main prime contract was for the construction of a bridge for Hinds County over the Pearl River:

> This subcontract was between the Davis Company, Inc., a private corporation, and M.B. Dabney, an individual. Dabney had no contractual relations, either formal or otherwise, with Hinds County, and he was under no direct contractual obligations to the said county. He was under contractual obligations with a private corporation, which, in turn, was obligated to the county; and the contract between this private corporation and Dabney was purely a private contract; and this being true, the rights and obligations of the parties thereto are governed by . . . sections 2275 and 2276, of the Code of 1930 [Section 2276 of the Code of 1930 is now section 85-7-185 of the Mississippi Code, also known as the Mississippi private bond statute.].[245]

The protections of a subcontractor bond on a public project, therefore, must be analyzed separately from those of a prime contractor's bond required by the state or federal government under the Miller Acts.

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242. *Id.* at 207–08 (citing Ala. Marble Co. v. U.S. Fid. & Guar. Co., 111 So. 573, 574 (Miss. 1927)).

243. *See also* U.S. Fid. & Guar. Co. v. Md. Cas. Co., 199 So. 278, 282 (Miss. 1940) ("It is now settled in this [s]tate that [s]ection 2276 [now the private bond section, section 85-7-185] does not cover labor and materials furnished to a subcontractor" with whom the party providing the bond did not deal.) (citing *Ala. Marble Co.*, 111 So. At 574).

244. *Allen*, 286 F. Supp. at 208 (citing *Davis Co., Inc.*, 138 So. at 805).

245. *Davis Co., Inc.*, 138 So. at 805; *see also* U.S. Fid. & Guar. Co. v. Dedeaux, 152 So. 274 (Miss. 1934) ("The effort of appellees [materialmen suing on the subcontractor bond] to bring themselves within sections 5971 [to] 5976 [old public works statute] by suing the principal contractors instead of the subcontractors is ineffective, because the bills and petitions of appellees show that the materials were furnished and charged to the subcontractors, not to the principal contractors, and the bond sued on is the bond of the subcontractors, not that of the principal contractors.").

D. Mississippi Highway Construction Project Payment Bonds

1. Bond Coverage

Mississippi has a specific statute setting forth bonding requirements for State Transportation Commission construction contracts.[246] The statute, substantially rewritten in 2003 and 2004, requires bonds for "[a]ll contracts by or on behalf of the commission for construction, reconstruction[,] or other public work . . . except maintenance . . . ."[247] Bonds for construction must be in an amount equal to the contract price, meaning "the entire cost of the particular contract let."[248] If change orders increase the price after the contract is signed, the statute authorizes the Transportation Commission to require additional bonding.[249] The bonds must cover the contractor's performance and payment "of all persons furnishing labor, material, equipment[,] and supplies."[250]

2. Equipment

Since heavy equipment plays a major role in highway construction, the legislature since 1968 has provided in the transportation contracts statute specific definitions for "equipment," as well as "labor" and "materials" as they relate to equipment.[251] The statute states "equipment" includes

> the reasonable value of the use of all equipment . . . which [is] reasonably necessary to be used and which [is] used in carrying out the performance of the contract, and the reasonable value of the use thereof, during the period of time the same are used in carrying out the performance of the contract.[252]

Equipment therefore includes equipment rentals or the value of the use of owned equipment during the contract period.[253]

The statute states that "labor" includes all reasonably necessary repair work on equipment used in the construction.[254] It defines "materials" and "supplies" as including repair parts reasonably necessary to the efficient operation of equipment used on the job.[255]

3. Materialmen

As is true in the case of the Little Miller Act, an issue can arise as to whether a supplier on a highway construction project is a materialman or

246. MISS. CODE ANN. § 65-1-85.
247. *Id.* § 65-1-85(1).
248. *Id.* § 65-1-85(1)(f).
249. *Id.*
250. *Id.*
251. *Id.* § 65-1-85(2).
252. MISS. CODE ANN. § 65-1-85(2).
253. *Id.*
254. *Id.*
255. *Id.*

subcontractor within the protection of the bond, or merely a materialman to a materialman outside the bond's protection. In *Webb v. Blue Lightning Service Co.*,[256] for example, the court held that supplier of gasoline and diesel fuel to a gravel company for use in the mining of gravel which in turn sold the mined gravel to the bonded contractor was not eligible for reimbursement under the bond.[257] The claim was simply for material sold to another materialman.[258] By contrast, in *Mississippi Road Supply Co. v. Western Casualty & Surety Company*,[259] the court upheld the claim of a materialman who had furnished supplies directly to a subcontractor on a highway construction.[260]

4. Procedures and Notice

Since the procedural provisions of the former public works statutes had been held to apply to highway bonds, one would assume that the procedural provisions of the Little Miller Act supplement section 65-1-85 and should be followed in highway bond actions.[261] Thus, for example, the Little Miller Act should be consulted for the time for bringing suit and notice of suit.

5. Special Notice Requirement for Equipment Providers

Providers of equipment to subcontractors for road construction should take special note of the strict notice of nonpayment requirement in section 31-5-31. Section 31-5-31 provides that any person who leases, rents, or sells to a subcontractor equipment to be used in a road construction contract where the general contractor must be bonded must (1) notify the general contractor that credit is being extended to the sub and stating the terms; and (2) if the sub defaults, notify the general of the nonpayment within thirty days after payment is due.[262] Failure of the equipment provider extending credit to comply with the nonpayment notice provision of the statute abrogates any right to proceed against the bond for the equipment leased, rented, or sold.[263]

E. Can Sureties in Mississippi Be Liable for Punitive Damages?

If the surety is slow to investigate and pay a claim, or pays only after the start or conclusion of suit against it, can the claimant also seek punitive damages against the surety for bad faith punitive damages? As we have seen, the Mississippi Little Miller Act at section 31-5-57 authorizes the imposition of attorneys' fees against a general contractor and its surety if the trial judge finds that the defenses raised to an action on the bond were "not

256. 116 So. 2d 753 (Miss. 1960).
257. *Id.* at 757.
258. *Id.* at 755.
259. 150 So. 2d 847 (Miss. 1963).
260. *Id.* at 851.
261. *See* Dixie Contractors, Inc. v. Ballard, 249 So.2d 653 (Miss. 1971).
262. MISS. CODE ANN. § 31-5-31.
263. *Id.*

reasonable, or not in good faith, or merely for the purpose of delaying payment."[264] The same statute, though, does not authorize the payment of punitive damages against a surety. Further, the Mississippi private works statutes at section 85-7-193 may authorize attorneys' fees in the limited circumstance where only a performance bond is given which proves to be insufficient otherwise to cover all claims.[265] But again, the statute does not authorize imposition of punitive damages against a surety.

A surety, after all, is not an insurance company. A surety contract creates a credit relationship—not an insurance relationship—and a surety is not a fiduciary to either the principal or obligee. The *Encyclopedia of Mississippi Law* aptly summarizes the law on the subject as follows: "As for creditor's claims, Mississippi follows an inflexible rule that a surety cannot be held responsible for punitive damages. While the surety may be in privity with the principal, that does not imply control, and the surety will not be held responsible for exemplary damages."[266]

In *United States Fidelity & Guaranty Co v. Stringfellow*, the Mississippi Supreme Court stated: "We agree that a surety is not liable for punitive damages . . . . "[267] In *Cooper v. United States Fidelity & Guaranty Co.*, the court noted "the general rule that sureties are not liable for or in respect to exemplary or punitive damages."[268] In *Lizana v. Kelly*, the court stated: "In the absence of a statute, sureties on official bonds are not liable for exemplary damages."[269]

The important distinctions between a surety and an insurer are noted at length in a recognized treatise on construction law as follows:

> The role of a surety is different from that of an insurer because:
> 1. The surety bond is a financial credit product, not an insurance indemnity product;
> 2. The surety has a "contractual" relationship with two parties that often have conflicting interests, causing the surety to balance these interests when responding to claims;
> 3. The surety bond form customarily is written or furnished by the obligee rather than the surety;
> 4. The surety customarily is requested to assure performance of construction contracts that are sufficiently large to warrant bonding and typically are entered into by parties

264. MISS. CODE ANN. § 31-5-57 ; *see also* Tupelo Redevelopment Agency v. Gray Corp., 972 So. 2d 495, 519 (Miss. 2007).

265. Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp., 743 So. 2d 954, 971 (Miss. 1999).

266. 8 JEFFREY JACKSON & MARY MILLER, ENCYLOPEDIA OF MISSISSIPPI LAW § 69:23 (2009) (citing U.S. Fid. & Guar. Co. v. Stringfellow, 182 So. 2d 919 (Miss. 1966); Cooper v. U.S. Fid. & Guar. Co, 188 So. 6 (Miss. 1939); Lizana v. Kelly, 69 So. 292 (Miss. 1915)) (emphasis added).

267. 182 So. 2d at 818.

268. 188 So. 6.

269. 69 So. 292.

> with commercial sophistication, relative parity of bargaining power and access to ample legal and technical advice;
> 5. The bond premium usually is paid by the contractor to the surety out of the contract price, rather than directly by the obligee to the surety, although it is not uncommon of obligees to reimburse contractors for the premium; and
> 6. The pricing of the premium by the surety is not based upon risk of fortuitous loss, but assumes reimbursement to the surety from the principal and indemnitors for any loss.
> These distinctions between suretyship and insurance have been sufficient for many courts to conclude that a surety's liability, even for "intentional breach of the bond," is limited to breach of contract damages, whether plead as a tort or as a breach of the implied covenant of good faith and fair dealing, because the bond relationship is not a "special relationship."
> [T]he suretyship relationship did not involve any special element of reliance or fiduciary duty like the insurance relationship so as to warrant the creation of a claim for tortious bad faith against the surety.[270]

Thus, while a surety's conduct may render it liable for attorneys' fees as authorized by the Little Miller Act, sureties are not the equivalent of insurers for the issue of punitive damages in Mississippi. Punitive damages claims brought against sureties in Mississippi must be analyzed apart from the duties of insurers and fiduciaries.[271]

V. MISSISSIPPI CONTRACTOR AND SUBCONTRACTOR LATE PAYMENT REMEDIES

A. Mississippi Prompt Payment Laws and Stopping Work

1. Prime Contractor's Statutory Claims for Interest

Mississippi has prompt payment laws applicable to both an owner's obligation to promptly pay the prime contractor on a private or public job, and, as noted below, applicable as well to the prime's obligations to promptly pay his subs. The statutes dealing with owners state that if the owner fails to make a timely partial progress or interim payment to the

270. 4A PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 12:7 ("Suretyship and 'bad faith'") (citing Great Am. Ins. Co. v. Gen. Builders, Inc., 934 P.2d 257 (Nev. 1997)).

271. An award of attorneys' fees against the surety under the Little Miller Act can be significant enough. Again, see *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So. 2d 495, 517–23 (Miss. 2007), in which veteran Mississippi construction lawyer Thomas W. Prewitt, as attorney for Ragland Engineering and Ragland Construction—even in the absence of a punitive damages award—successfully moved for, and was sustained by the Mississippi Supreme Court in obtaining, an award for his clients of $340,220.53 in attorneys' fees based on a quantum meruit claim against Gray Corp. and the surety, Hartford, under section 31-5-57 of the Little Miller Act and section 11-55-1 of the Mississippi Litigation Accountability Act.

prime contractor—within thirty calendar days of the due date on a private job; within forty-five days on a public job—the prime contractor is entitled to collect from the owner interest from the due dates at the rate of one percent per month until paid (twelve percent annual percentage rate).[272] Similarly, if the owner fails to make a final payment to the prime contractor, the prime contractor may claim statutory interest of one percent per month until paid (twelve percent annual percentage rate).[273] Note that the annual percentage interest rate allowed to prime contractors is a higher rate of interest than the general legal rate of interest of eight percent provided for contracts generally under section 75-17-1(1). Further, the prompt payment law acts as a stop-gap measure providing for interest to a general contractor even if the contractor failed to have an interest provision in his contract with the owner.

When, though, is a final payment considered due to the prime contractor so that the one percent per month interest charges can begin? In the case of private jobs, the interest statute provides that final payment is due upon the earliest of any of the following, provided that any surety for the contractor has first given consent in writing to the final payment:

> (i) Completion of the project, or substantial completion in accordance with the terms of the contract;
> (ii) Upon the owner's beneficial use or occupation of the premises (unless the owner's occupation continued during a renovation); or
> (iii) When the project architect or engineer certifies the project is complete, whichever event shall first occur.[274]

In the case of public jobs, the events triggering the due date of a final payment are the same as the three listed above for private jobs, except that in addition a certification of completion by the state or municipal authority can also trigger the final payment due date if that is the earliest of the listed events to occur.[275]

2. Subcontractor's and Supplier's Penalty Claims for Late Payment

Prime contractors, on both private and public jobs, can become liable to pay a late payment penalty in Mississippi for late payment to subs and suppliers after receipt of payment from the owner, but only "[i]f the contractor without reasonable cause" withheld payment.[276] Also, the late payment statutes do not apply in the case of private jobs for construction of single-family residences.[277]

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272. MISS. CODE ANN. §§ 87-7-3(a) (private jobs), 31-5-25(a) (public jobs).
273. *Id.* §§ 87-7-3 (private jobs), 31-5-25 (public jobs).
274. *Id.* § 87-7-3(b) (private jobs) (emphasis added).
275. *Id.* § 31-5-25(a) (public jobs).
276. *Id.* §§ 87-7-5 (private jobs), 31-5-27 (public jobs).
277. *Id.* §§ 87-7-5 (private jobs), 31-5-27 (public jobs).

A payment to a prime's sub or supplier is considered late by statute if the payment is withheld more than fifteen days of receipt of payment from the owner.[278] If the prime receives only partial payment from the owner, the sub or materialman must still be paid, but pro rata for their part due from the owner's payment.[279] The penalty for the prime's late payment sounds astoundingly large—one-half of one percent *per day* from the time of the owner's payment to the prime—but is capped at fifteen percent of the outstanding balance due to the sub or supplier.[280] Since the statute speaks in terms of the interest as a penalty, the statutory penalty in favor of subcontractors and suppliers is in addition to any contractual claims for interest created by the late payment.[281]

But note again that the late penalty kicks in only if the general contractor withholds payment to the sub or supplier "without reasonable cause."[282] If the general contractor has a claim against the sub or supplier for the defective work or materials, the general contractor's withholding of payment is reasonable to the extent that the general contractor has a good faith claim for damages. In many cases, the general contractor will have reserved the right to offset payment to the sub or supplier in the subcontract by any amount by which the general contractor has a claim for damages against the sub or supplier.

3. Right to Stop Work for Nonpayment Under AIA Contract

a. Prime Contactor's Right to Stop Work

An owner's failure to timely pay the prime contractor can lead to the prime's stopping work and, if nonpayment continues, to termination of the contract for breach under AIA contract provisions. However, the contractor must be careful to observe the notice requirements. The AIA General Conditions for Construction provide that the prime contractor can stop work until payment is made:

> If the architect does not issue a Certificate of Payment within seven days of the Application for Payment through no fault of the contractor; or
> if the owner does not pay the contractor within seven days of a due date under the contract; and
> the contractor gives 7 days additional written notice to the owner and architect that the work will stop if payment is not made.[283]

278. MISS. CODE ANN. §§ 87-7-5 (private jobs), 31-5-27 (public jobs).

279. *Id.* §§ 87-7-5 (private jobs), 31-5-27 (public jobs).

280. *Id.* §§ 87-7-5 (private jobs), 31-5-27 (public jobs).

281. *Id.* §§ 87-7-5 (private jobs), 31-5-27 (public jobs).

282. *Id.* §§ 87-7-5 (private jobs), 31-5-27 (public jobs).

283. AIA GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, § 9.7 (AIA Doc. No. A201, 2007 ed.).

b. Prime Contractor's Right to Terminate AIA Contract

The prime contractor, after stopping work for nonpayment, can then terminate the contract and sue for payment and damages:

> If the work is stopped for nonpayment for thirty consecutive days through no fault of the contractor or of a subcontractor or of a sub-sub contractor; and
> the contractor provides seven additional days' written notice of termination.[284]

c. Subcontractor's Right to Stop Work or Terminate AIA Contract

The subcontractor can stop work until payment is made after the contractor's failure to make timely payment for seven days as called for by the agreement, and after provision of seven days' additional written notice by the subcontractor to the contractor that work will stop until payment of the amount owed is received.[285]

VI. Mississippi Open Account Claims

A. Open Account Claims

If all other relief is unavailable under the bond, lien, and stop notice statutes, and there is no formal written contract such as a credit application, but only an open account based only on invoices, a claimant should consider the Mississippi open account statute.[286] The Mississippi open account statute provides a statutory means for the court to add attorneys' fees for collection to the debt when it renders judgment for the plaintiff, even though there was no formal written contract that one could look to for an attorneys' fees provision.[287]

An open account is an unwritten contract under which a seller agrees in advance to extend credit to a buyer for purchases.[288] An open account is therefore "an account based on continuing transactions between the parties which have not closed or been settled."[289] That is, a suit on an open account is "an action to collect on a debt created by a series of credit transactions," albeit the agreement was unwritten.[290] An open account is

284. AIA General Conditions of the Contract for Construction, §§ 14.1.1 to 14.1.3 (AIA Doc. No. A201, 2007 ed.).

285. AIA General Conditions of the Contract for Construction, § 4.7 (AIA Doc. No. A201, 2007 ed.).

286. Miss. Code Ann. § 11-53-81.

287. *Id.*

288. McArthur v. Acme Mech. Contractors, Inc., 336 So. 2d 1306, 1308 (Miss. 1976) (citation omitted).

289. Douglas Parker Elec., Inc. v. Miss. Design & Dev. Corp., 949 So. 2d 874, 876 (Miss. Ct. App. 2007) (quoting Franklin Collection Serv. v. Stewart, 863 So. 2d 925, 930 (Miss. 1978) (citation omitted)).

290. Allen v. Mac Tools, Inc., 671 So. 2d 636, 644 (Miss. 1996) (citations omitted).

therefore "a form of oral contract" that does not exist where there is a written contract.[291]

A remote supplier (a sub-sub or below), for example, would use the open account statute where the supplier without a written contract with the entity it was supplying to provided supplies and issued invoices that remain unpaid. The open account statute provides authority for the judge to add attorneys' fees to the debt where the debtor fails to pay thirty days after the claimant has made a written demand correctly setting forth amount owed together with an itemized statement of the account.[292]

However, the court will not permit the use of the open account statute as authority to add attorneys' fees to the debt if the claim is based on a written contract rather than an open account, and the written contract fails to contain an attorneys' fees provision.[293] "Daniels [the seller] is not entitled to attorneys' fees under this section [11-53-81] because his claim against Yazoo [the buyer] is based on contract rather than open account."[294] Therefore, "the federal court has stated that attorneys' fees are not available under section 11-53-81 when the claim is based on contract."[295]

Indeed, since "[a]n open account is an unwritten contract," the open account statute has no application and is not available where there is a written purchase order, written credit agreement, or other signed contract that is the basis of the plaintiff's claim.[296] Therefore, where there is a written credit application or other written contract, one can look only to the terms of the written agreement for a right to add attorneys' fees for collection to the debt, and not to the open account statute.[297]

Also, to recover attorneys' fees under the open account statute, the plaintiff must succeed in recovering a judgment for the amount sued for, or at least within, "a few dollars" of the claim. Attorneys' fees will not be granted where the court finds liability on some invoices but not others. Similarly, the court will not award attorneys' fees where the judgment is "partially in favor of both parties," with liability found on only portion of invoices sued on, since in such a case the open account claimant is not the "prevailing party."[298] However, "while courts must strictly construe the attorneys' fees on the open accounts statute," the cases require only that the

291. *Douglas Parker Elec., Inc.*, 949 So. 2d at 876 n.1 (citing *McArthur*, 336 So. 2d at 1308).

292. MISS. CODE ANN. § 11-53-81.

293. C.R. Daniels, Inc. v. Yazoo Mfg. Co., 641 F. Supp. 205, 210 (S.D. Miss. 1986) (involving a contract created by the purchaser's written purchase orders accepted by the seller).

294. *Id.*

295. H & E Equip. Servs., LLC v. Floyd, 959 So. 2d 578, 583 (Miss. Ct. App. 2007) (citing *Daniels*, 641 F. Supp. at 210).

296. McArthur v. Acme Mech. Contractors, Inc., 336 So. 2d 1306, 1308 (Miss. 1976); *Daniels*, 641 F. Supp. at 210 (citing Westinghouse Credit Corp. v. Moore & McCalib, Inc., 361 So. 2d 990, 992 (Miss. 1978)).

297. *See also* Stanton & Assocs. v. Bryant Constr. Co., 464 So.2d 499, 503 (Miss. 1985) ("Instead of being an open account, '[s]crutiny of the declaration indicates that it is a suit sounding in contract . . . .'") (quoting *Westinghouse*, 361 So. 2d at 992).

298. Barnes, Broom, Dallas & McLeod, PLLC v. Estate of Cappaert, 991 So. 2d 1209, 1214 (Miss. 2008).

amounts stated in the demand letter and in the complaint be "a correct amount."[299] The amount demanded in the complaint can vary from the amount stated in an earlier demand letter if the variance reflects credits for payments received between the time of the demand letter and the later filing of the complaint.[300] Further, "once a prima facie case is made on open account, the burden of proof shifts to the account debtor to prove that the amount claimed is incorrect."[301]

Moreover, an open account claimant should be cautioned that if it brings suit under the statute, but fails to prove any of the invoices are owed so that the defendant prevails, the statute entitles the defendant to attorneys' fees to be set by the judge.[302] So, the statute can cut either way. Thus, where a defendant prevails on the plaintiff's claims and, in addition, wins on a counterclaim establishing an open account debt against the plaintiff for which the defendant made demand before filing the counterclaim, the defendant is entitled to attorneys' fees as the prevailing party under the statute.[303]

The Mississippi Court of Appeals has held that the open account statute is not applicable to add attorneys' fees in favor of the defendant if the open account claim concludes in the pretrial stage by either the plaintiff's voluntary dismissal of the claim, or by a successful summary judgment granted to the defendant to preclude the open account claim, and where the parties thereafter go on to litigate the plaintiff's claims on the plaintiff's alternative theory of contract.[304]

Further, the Mississippi Supreme Court has refused to recognize an open account claim where the account listed dates and hours worked but there was no agreement as to the hourly rate.[305] The open account claim must be for a liquidated amount or sum certain.[306] That is, an open account "must contain a 'final and certain agreement on price.'"[307]

In *H & E Equipment Services, LLC v. Floyd*, the court addressed what is necessary to prove in court to have invoices entered into evidence under the business records exception to the hearsay rule of Mississippi Rule of Evidence 803(6).[308] The court affirmed the exclusion of invoices where the witness testified only broadly that he was the custodian of the records and that the invoices, many of which were computer generated reprints, were

299. *Id.*

300. Gulf City Seafoods, Inc. v. Oriental Foods, Inc., 986 So. 2d 974, 978 (Miss. Ct. App. 2007).

301. Natchez Elec. & Supply Co., Inc. v. Johnson, 968 So. 2d 358, 360 (Miss. 2007) (citations omitted).

302. MISS. CODE ANN. § 11-53-81.

303. Par Indus. v. Target Container Co., 708 So. 2d 44, 55 (Miss. 1998).

304. H & E Equip. Servs., LLC v. Floyd, 959 So. 2d 578, 583 (Miss. Ct. App. 2007) (citing Hughes Equip. Co. v. Fife, 482 So. 2d 1144, 1145 (Miss. 1986) *and* C.R. Daniels, Inc. v. Yazoo Mfg. Co., 641 F. Supp. 205, 210 (S.D. Miss. 1986)).

305. Stanton & Assocs. v. Bryant Constr. Co., 464 So.2d 499, 502–03 (Miss. 1985).

306. *Id.*

307. Douglas Parker Elec., Inc. v. Miss. Design & Dev. Corp., 949 So. 2d 874, 877 (Miss. Ct. App. 2007) (quoting Motive Parts Warehouse, Inc. v. D & H Auto Parts Co., 464 So. 2d 1162, 1166 (Miss. 1985)).

308. H & E Equip. Servs., LLC v. Floyd, 959 So. 2d at 581.

generated in the ordinary course of the business.[309] There was no attempt by counsel to ask the specific litany of points listed in Mississippi Rule of Evidence 803(6).[310] The witness therefore failed to explain how the documents were created using the company's information, or to state that the invoices were originally created at or near the time the charges were incurred, and that the reprints of the invoices contained the same information as the originals without alteration as to the amounts due.[311] *Floyd* is the kind of trial lawyer's nightmare that every lawyer should read before trying to introduce invoices into evidence, with the message being to follow closely the language provided in the business records exception rule.

Although a fine point, while an open account is a specific "form of oral contract," an open account claim may be distinguishable from other forms of oral contract claims.[312] An open account "results where the parties intend that . . . the account shall be kept open and subject to a shifting balance as additional related entries of debits or credits are made, until it shall suit the convenience of either party to settle and close the account . . . ."[313] By contrast, a claim based on only an oral contract may set a specific contingency to occur that will trigger the payment obligation other than completion of the work and invoicing.[314] In *Douglas Parker Electric v. Mississippi Design & Development Corp.*, a fact issue for trial was whether an oral agreement set the payment obligation for electrical work to a barge to occur upon the sale of the barge or upon the payment to the owner of insurance.[315] Either way, payment would not become due upon the mere completion of the work and the presentation of an invoice.[316] Bear in mind, though, that oral understandings are irrelevant if there was a written agreement or contract meant to embrace the whole of the parties' agreement.

B. Reasonableness of Attorneys' Fees Claimed

"In collection suits, there is a rebuttable presumption that one-third of the judgment obtained is reasonable, where the fee is calculated to be no more than $5,000."[317] The case also notes a list of other factors that can be taken into account, e.g., time and labor required and preclusion of other employment to the attorney by the time consumed by the representation.

309. *Id.*
310. *Id.*
311. *Id.*
312. *Douglas Parker Elec., Inc.*, 949 So. 2d at 876 n.1.
313. *Id.* at 877.
314. *Id.* at 876.
315. *Id.*
316. *Id.* at 877.
317. Gulf City Seafoods, Inc. v. Oriental Foods, Inc., 986 So. 2d 974, 979 (Miss. Ct. App. 2007) (citing Dynasteel Corp. v. Aztec Insus., Inc., 611 So. 2d 977, 986 (Miss. 1992)).

C. *Statute of Limitations*

The statute of limitations for claims on unwritten contracts in Mississippi, including Mississippi open account claims, is three years after the accrual of the cause of action.[318] However, there is an exception to consider. The accruing of the cause of action can be extended by new assurances or promises of payment.[319] Indeed, the doctrine of equitable estoppel tolls the running of the statute of limitations where a debtor knows or has reason to know that his assurances and promises of later payment cause a party to delay filing suit based on the assurances.[320] In *Douglas Parker Electric, Inc.*, the debtor's alleged promises to pay for electrical work upon the later sale of the barge or payment to him of insurance proceeds created a material issue of fact as to the start date for the running of the statute of limitations for payment.[321]

D. *Affidavit to Account Statute Repealed*

From time to time, I still see an account sworn to as if I am to respond in kind for my client. However, the old affidavit to open account statute (formerly section 13-1-141) that allowed a creditor to plead an affidavit to open account, and thereby require the defendant to file a counter-affidavit showing where the account was wrong, or have judgment entered against him for the account, was repealed in 1991. The current statute on open account, section 11-53-81, conforms to modern pleading rules in that it does not require the defendant to swear to the answer.[322] Rather, the current statute and rules of procedure allow for the presentation to the judge of a motion for summary judgment on the account accompanied by an affidavit, or a trial on sworn testimony, following an exchange of pleadings and the opportunity for both sides to engage in discovery.

VII. UNJUST ENRICHMENT

Plaintiffs sometime assert claims of implied contract theory of unjust enrichment. "An unjust-enrichment action is based on a promise, which is implied in law, that one will pay a person what he is entitled to according to

318. MISS. CODE ANN. § 15-1-29.

319. Harrison Enters., Inc. v. Triology Commc'ns, Inc., 818 So. 2d 1088, 1096 (Miss. 2002).

320. *Douglas Parker Elec., Inc.*, 949 So. 2d at 878–79 (citing PMZ Oil Co. v. Lucroy, 449 So. 2d 201, 206 (Miss. 1984)).

321. In the construction context, the *statute of limitations* applicable to contractors' contractual claims for payment may be contrasted with the *statute of repose* applicable to owners' claims for construction defects. An owner has six years to sue the contractor for construction defects. MISS. CODE ANN. § 15-1-41. Further, unlike the exception noted above for the statute of limitations on payment claims, "[n]o action may be brought" for defects "more than six (6) years after the written acceptance or actual occupancy or use, whichever occur[s] first" on a project, no matter what. Not even fraudulent concealment—which can toll application of a statute of limitations per section 51-1-67—provides an exception tolling a statute of repose. Steve Windham v. Latco of Miss., Inc., 972 So. 2d 608, 610 (Miss. Ct. App. 2007). The statue of repose "incorporates a policy judgment" by the legislature that at the end of the six years following actual occupancy without a suit being filed, "contractors . . . are entitled to close their books" on their projects, defective or not. *Id.* at 613.

322. MISS. CODE ANN. § 11-53-81.

'equity and good conscience.'"[323] However, use of the theory is limited since "[u]njust enrichment only applies where there is no legal contract . . . ."[324] Further, unjust enrichment is not applicable in the absence of misleading statements or conduct leading to unjust enrichment.[325]

VIII. In Conclusion: Some Thoughts for Further Legislation

Since at least the 1993 legislative session,[326] and no doubt before, attempts to obtain a comprehensive rewrite of the Mississippi lien and stop notice statutes to protect lower tier sub-sub contractors and suppliers, in a way at least equal to the payment protections provided by the Mississippi and Federal Miller Acts, have gone down to defeat. The advocates for comprehensive change note that the current system can be quite cruel to lower tier sub-subcontractors and suppliers upon a first tier subcontractor's default in the absence of a payment bond. The opponents point out that the present lien and stop notice statutes have the virtue of protecting owners from any danger of ever having to pay twice, and do so in an uncomplicated way.[327] As noted above, once the owner has paid out all the final contract funds to the general contractor, for example, and the owner no longer has project funds to be "bound in his hands," stop notices sent thereafter under section 85-7-181 become legally ineffective.[328] Further, the Mississippi lien and stop notice statutes arguably present a less complicated scheme of protection than the lien laws of many other states because they do not require pre-lien notices or warnings to the owner to get lien waivers lest he have to pay twice, once to the general and then to an unpaid sub, for the same work.

The advocates for comprehensive change have included Mid South Building Material Dealers Association (MBMDA) and the Subcontractors Association. Advocates for maintaining the present system have included the Mississippi Bankers Association and the Mississippi Association of REALTORS.

Nonetheless, narrowly tailored, incremental improvements to the Mississippi laws are possible as the Mississippi legislature's 2010 passage of Senate Bill No. 2800 showed—adding equipment renters and lessors to the protections of the state lien, stop notice, and private bond laws. There are

323. Langham v. Bechnen, No. 2009-CA-00388-COA, 2010 WL 2490926, at *4 (Miss. Ct. App. June 22, 2010) (quoting 1704 21st Ave., Ltd. v. City of Gulfport, 988 So. 2d 412, 416 (Miss. 2008)).

324. *Id.* (quoting Powell v. Campbell, 912 So. 2d 978, 982 (Miss. 2005)).

325. *Id.* at *5.

326. See, e.g., Senate Bill 2533 introduced into the 1993 regular session (authored by Mississippi construction lawyer David Mockbee) which attempted to add comprehensive provisions to the Mississippi stop notice statue, Section 85-7-181.

327. *See* Summerall Elec. Co., Inc. v. Church of God, 25 So. 3d 1090, 1094 (Miss. Ct. App. 2010) (stating that the stop notice procedure of section 85-7-181 should not be bypassed, for were it otherwise, "[i]t is regrettably true that either the [subcontractors] will lose their labor and materials in the amounts stated or that the [o]wners will be forced to make a double payment," but it is the subs who are in a better position than the owner to prevent a loss by simply following the stop notice statute's procedure.) (quoting Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613, 618 (Miss. 1969)).

328. Timms v. Pearson, 876 So. 2d 1083, 1086 (Miss. Ct. App. 2004).

still incremental improvements to be made that should be non-controversial. The statute for enforcement of liens—including, by extension, the lien on project funds of a stop notice—for example, section 85-7-141 provides that a suit to enforce a lien is to be filed in the circuit court of the county in which the property is located.[329] The statute does not mention county courts, though the county courts have concurrent jurisdiction "in all matters of law and equity" up to $200,000.[330] Nonetheless, the absence in section 85-7-141 of any mention of county courts—or chancery courts for that matter—can leave the practitioner hesitant to file to enforce a lien in any other court but a circuit court, even if the controversy involves only a claim for a few thousand dollars. I see no good reason not to amend the statute to explicitly include at least the county courts to remove any doubt about authority to enforce a lien there.

Further, the statute of limitations applicable to enforcement of liens of section 85-7-141 requires the filing of suit "within twelve months next after the time when the money due and claimed by the suit became due and payable, and not after."[331] So, a practitioner may ask, must one file suit to enforce a lien within a year of the date when the first invoice in a series of invoices for deliveries to a job site of men and material became "due and payable, and not after"? True, there is some authority, as noted earlier, that "where there has been a continuous delivery of material, and the time of payment is not fixed by contract, the statute begins to run against the lien from the delivery of the last lot of material."[332] But who wants to risk relying on those old cases which one's opponent will be looking to distinguish? My thought is that section 85-7-141 should be amended to provide the same limitation on actions to enforce Mississippi construction liens one finds under the Mississippi Little Miller Act, that is, obligating the filing of an action "within one (1) year after the day on which the last of the labor was performed or material was supplied by the person bringing the action and not later."[333] Such an amendment would have the virtue of allowing suit to enforce a lien for unpaid invoices measured explicitly from the date of the claimant's last presence on the job, and would end the confusion and inconsistency created by having different start points for the running of the limitations that are in the current Mississippi lien and payment bond statutes. I therefore advocate that the Mississippi legislature consider amending section 85-7-141, both as to the courts in which one can enforce a lien (adding county courts), and as to the start of the running of the statute of limitations for doing so (from the claimant's last supply of labor or materials).

329. MISS. CODE ANN. § 85-7-141.

330. *See id.* § 9-9-21.

331. *Id.* § 85-7-141.

332. Billups v. Becker's Welding & Mach. Co., 189 So. 526, 528 (Miss. 1939); *see also* Inerarity v. A.S. Wade & Co., 106 So. 828, 829 (Miss. 1926) (barring lien where suit not brought until more than a year after default in monthly installments for materials).

333. MISS. CODE ANN. § 35-5-53(b).