

ALABAMA

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I. Mechanic's Lien Basics

A mechanic's lien is a claim against property for payment arising from work or material improvements. Alabama's mechanic's lien statute (ALA. CODE §§ 35-11-210, *et seq.*) distinguishes between persons in privity of contract with the owner ("original contractors") and lower-tier contractors and suppliers not in privity. Original contractors enjoy "full price" lien rights.¹ A full price lien is a lien to the full extent of the price of the prime contract with the owner.

Others have "unpaid balance" lien rights.² An unpaid balance lien is limited to the amount of the unpaid balance of the prime contract at the time the lienholder gives written notice of intent to lien.³ The notice and procedural requirements differ for both, though, regardless of the classification, liens can be perfected only by complying with specific statutory requirements.⁴ Because mechanics' liens are not recognized in the common law or in equity, strict compliance with the notice and procedural requirements of the statute is required.⁵

A. Requirements

1. Full Price Liens

Original contractors have a full price lien. Material suppliers may elevate their status from unpaid balance lienholder to original contractor by providing written notice to the owner or proprietor in accordance with ALA. CODE § 35-11-210 before delivering any materials to the project site. Otherwise, there is no requirement that original contractors give written notice to the owner before filing a verified statement of lien.

Full price liens are perfected by filing a verified statement of lien in the probate court in the county in which the work was performed⁶ within six months after the last item of work was performed or the last item of material was furnished.⁷ Corrective work performed free of charge does not extend the time to file a lien.⁸

2. Unpaid Balance Liens

Unpaid balance lienholders must file a verified statement of lien in the probate court for the county in which the work was performed within four months of the date they last performed

work or delivered material to the site.⁹ Before filing the verified statement of lien, unpaid balance lien claimants must notify the owner and construction lender in writing of their intent to file a lien in accordance with ALA. CODE § 35-11-218.

B. Filing Suit to Enforce the Lien

After the lien statement has been filed in probate court, original contractors and unpaid balance lienholders must file suit to enforce the lien within six months of the maturity of the entire indebtedness.¹⁰ To enforce the lien, the lien claimant must obtain a judgment against the person or entity from whom the money is owed.¹¹

C. Ability to Waive and Limitations on Lien Rights

The lien may be subordinated, waived, or released by contract.¹² Nevertheless, if a claimant has followed the formalities for obtaining a lien, it is presumed that the right to the lien exists. In that case, the burden is on the defendant to prove the claimant knowingly surrendered or waived its lien.¹³ An original contractor may also waive a lien if he fails to furnish to the owner a list of all materialmen, laborers, and employees who have provided labor or material to the project.¹⁴

II. Public Project Claims

A. State and Local Public Work

Alabama law prohibits the enforcement of liens against property owned by the state, a county or municipal corporation.¹⁵ However, Alabama law requires any person entering into a contract with an awarding authority in the state for the prosecution of any public works to execute payment and performance bonds.¹⁶ Thus, a party who has not been paid on a public project can pursue a bond claim instead of a lien claim.¹⁷

i. Notices and Enforcement

A civil action on the bond may not be filed until forty-five days after written notice to the surety of the amount and nature of the claim.¹⁸ Additionally, the suit may not be filed later than one year from the date of the final settlement of the contract.¹⁹

III. Statutes of Limitation and Repose

A. Statutes of Limitations

The limitations period for commencing actions against architects, engineers, and builders under § 6-5-221 for damage or injury as a result of defective design or construction is two years from the date the cause of action accrues or arises.²⁰ A cause of action accrues or arises when the damage or injury occurs, or in the case of latent defects, when the damage or injury is, or reasonably should have been, discovered.²¹ A cause of action accrues or arises whether or not the full amount of damages are apparent at the time of the first injury or damage and cannot be extended as a continuous wrong.²²

The limitations period under §6-5-221 applies to all civil actions in tort, contract, or otherwise against architects, engineers, and builders regardless of legal theory.²³ Otherwise, the limitations period for breach of a contract not under seal is six years²⁴, breach of warranty involving the sale of goods is four years²⁵, and negligence and fraud is two years.²⁶

B. Statutes of Repose

The Alabama statute of repose for claims involving defective design or construction is seven years after substantial completion.²⁷ Any right or action that accrues thereafter is barred, unless the architect, engineer or builder had actual knowledge of the design or construction defect before the seven-year period expired but failed to disclose it.²⁸

IV. Pre-Suit Notice of Claim and Opportunity to Cure

Alabama does not have a “right to cure” or “right to repair” statute for construction defects.

V. Insurance Coverage and Allocation Issues

There are various kinds of insurance utilized in the construction industry. A non-exhaustive list includes, builder’s risk, inland marine and other forms of property insurance, commercial general liability (“CGL”) insurance, excess and umbrella coverages, professional liability insurance, worker’s compensation and employer liability insurance and business interruption insurance.

A. General Coverage Issues

Under Alabama law, an insurer’s duty to defend is broader than its duty to indemnify.²⁹ Generally, the duty to defend is determined by the allegations of the complaint whether true or groundless.³⁰ If there is any uncertainty as to whether the complaint alleges facts that would invoke the duty to defend, the insurer has a duty to investigate the facts surrounding the incident.³¹ Insurers also have a duty to reevaluate claims when complaints are amended to determine whether coverage has been triggered.

Damage or injury caused by defective construction or poor workmanship may be covered by a CGL policy in Alabama.³² Alabama courts have recognized that, under a CGL policy, poor workmanship can lead to an “occurrence” depending “on the nature of the damage” resulting from the occurrence.³³ Among other formulations, “faulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure to ‘continuous or repeated exposure’ to some other ‘general harmful condition.’”³⁴ Faulty workmanship itself, however, is not “property damage” “caused by” or “arising out of an occurrence.”³⁵ Instead, coverage may exist for damage accidentally caused by or resulting from faulty workmanship, other than the faulty workmanship itself.³⁶

Where poor workmanship leads to an occurrence and property damage, the insured may still have to overcome the “Your Work” exclusion to obtain CGL coverage. The Alabama Supreme Court has recognized that a standard “Your Work” exclusion in a CGL policy applies only where the damage in question was both damage to the contractor’s work *and* damage included in the products-completed operations hazard.³⁷ If the policy provides for products-completed operations coverage, however, then the “Your Work” exclusion does not apply.³⁸ In addition, the “Your Work” exclusion combined with a “subcontractor exception” results in no coverage for damage caused by the insured contractor’s own forces, but allows coverage for damage caused by any subcontractors.³⁹

B. Trigger of Coverage and Notice

The two main types of policies are “claims-made” and “occurrence” policies. The primary difference between these types of policies relates to the timing of coverage. A claims-made policy provides coverage for claims asserted during the policy period, regardless of when the accident or other loss occurred.⁴⁰ A claims-made policy is triggered when the claimant notifies the insurer of the claim.

On the other hand, an occurrence policy provides coverage for all losses that take place during the policy period, regardless of when the claim is made.⁴¹ An occurrence is deemed to have taken place when the claimant was damaged, not when the event causing the damage occurred.⁴²

An insurance policyholder must give notice within a reasonable time, if required by the insurance policy. When asserting a late notice defense, an insurer is not required to show prejudice resulting from a policyholder’s delay in giving notice.⁴³ The reason for the delay and the length of the delay in providing notice are factors considered by the court in determining whether notice was timely given.⁴⁴

C. Allocation Among Insurers

When two or more insurers have primary coverage of the same insurable interest, subject matter, and risk, they share liability in accordance with the proportion that the limits of each policy bear to the total limit of insurance applicable to the loss.⁴⁵ In exposure cases, when a defense arises under multiple policies, defense costs are to be apportioned pro rata among the carriers based upon the time on the risk.⁴⁶ This is due to the inherent difficulty in determining when the exposure responsible for causing the “bodily injury” occurred.⁴⁷

VI. Contractual Indemnification

Alabama does not have an anti-indemnity statute. In fact, Alabama allows a party to seek and obtain indemnification for its own wrongdoings when the parties “knowingly, evenhandedly, and for valid consideration” enter into such an indemnification agreement.⁴⁸ But these provisions are only enforceable if (a) “the contract clearly indicates an intention to indemnify against the consequences of the indemnitee’s negligence,” (b) “such provision was clearly understood by the indemnitor,” and (c) “there is not shown to be evidence of a disproportionate bargaining position in favor of the indemnitee.”⁴⁹

Alabama is a contributory negligence state, does not recognize comparative fault, and there is no contribution amongst joint tortfeasors.⁵⁰ There is generally no common law indemnity, with the only exception being when the one seeking to be indemnified is guilty of passive negligence only.⁵¹ Also, the parties may agree to apportion their respective liability in indemnification provisions.⁵²

VII. Contingent Payment Agreements

Alabama recognizes contingent payment agreements between contractors and subcontractors. Generally, these types of agreements include “pay when paid” and “pay if paid” clauses. “Pay when paid” clauses do not make the contractor’s receipt of payment from the owner a condition

precedent to the payment to the subcontractor; rather, these clauses serve as a timing mechanism for payment. Under a “pay when paid” clause, the contractor cannot delay payment to a subcontractor indefinitely. A contract containing a “pay when paid” clause obligates the contractor to pay the subcontractor within a reasonable time.⁵³

“Pay if paid” clauses, on the other hand, condition the contractor’s payment to the subcontractor on first receiving payment from the owner for the work performed by the subcontractor. Alabama requires that “pay if paid” clauses contain language stating that owner’s payment to the contractor is an express condition precedent to the contractor paying the subcontractor.⁵⁴

VIII. Scope of Damage Recovery

A. Attorney’s Fees

In general, attorney’s fees are not recoverable. However, they may be awarded to the prevailing party as an element of damages when authorized by statute or case law, provided for in a contract, or otherwise allowed during an equitable proceeding.⁵⁵

B. Consequential Damages

As in all contract cases in Alabama, damages must be reasonably certain to support an award. To recover consequential damages, the claimant must prove that the damages were reasonably within the contemplation of the parties at the time of contracting.⁵⁶ But the claimant may only recover consequential damages to the extent they are “capable of ascertainment with reasonable, or sufficient, certainty.”⁵⁷

C. Delay and Disruption Damages

A contractor seeking delay damages from an owner must prove the extra costs were incurred as a result of the owner’s breach or action which gave rise to a breach claim or a claim for equitable adjustment.⁵⁸ Where the total amount of damages is comprised of amounts for which both the owner and the contractor are responsible, the contractor must provide a reasonable basis for apportioning the extra costs.⁵⁹

D. Economic Loss Rule

Alabama recognizes the economic loss rule as a bar to certain tort actions where a defective product damages itself but does not cause personal injury or damage to any other property.⁶⁰ However, the Supreme Court of Alabama has refused to apply the rule in commercial construction cases.⁶¹

E. Interest

Whether a claimant can recover interest in addition to the damages awarded depends largely on the ability to determine the underlying damages with certainty. For instance, where the measure of damage cannot be determined with certainty or is discretionary, prejudgment interest cannot be awarded.⁶²

Yet, where the damages can be ascertained with some certainty, a successful claimant may receive interest in addition to the damages already awarded. In tort cases, the interest is measured from the date of the injury and is assessed at the statutory rate.⁶³ In contract cases, the damages

may be increased by the contractual interest rate from the date of the breach until recovery.⁶⁴ Where no contractual interest rate is stated, the statutory rate is applied.⁶⁵

F. Punitive Damages

Alabama does not allow punitive damages in cases of breach of contract or simple negligence.⁶⁶ Punitive damages are not recoverable as a matter of right unless provided by statute.⁶⁷ However, punitive damages are recoverable when a plaintiff establishes through “clear and convincing evidence” that the defendant “consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.”⁶⁸

G. Liquidated Damages

Liquidated damages provisions are enforceable when construed as reasonable attempts to measure prospective damages rather than a penalty. One seeking to enforce a liquidated damages provision must prove that (a) the liquidated amount is reasonable and (b) the nature and amount of the damages resulting from the delay were not capable of adequate computation at the time of contracting.⁶⁹ These provisions are enforceable when they specify for the payment of a fixed sum for project delays.

Again, the sole caveat in this enforcement is that the liquidated damages provision must not be a penalty.⁷⁰ Where one by his contract undertakes an obligation which is absolute, he is bound to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies could have been provided against by his contract.⁷¹

IX. Legislation Update

On September 1, 2019, the Clarke-Figures Equal Pay Act (H.B. 225) went into effect. The Act is designed to prohibit an employer from paying any of its employees at wage rates less than those paid to employees of another sex or race for equal work unless a wage differential is based on one or more specified factors. These specified factors include: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; (4) a differential based on any factor other than sex or race. Alabama was the 49th State to enact such an “equal pay” law.

¹ ALA. CODE § 35-11-210 (1975).

² *Id.*

³ *Valley Joist, Inc. v. CVS Corp.*, 954 So. 2d 1115 (Ala. Civ. App. 2006).

⁴ *Bailey Mortgage Co. v. Gobble Fite Lumber Co.*, 565 So. 2d 138 (Ala. 1990).

⁵ *Gunther v. Carpet Sys. of Huntsville*, 142 So. 3d 668 (Ala. Civ. App. 2013); *Davis v. Gobble-Fite Lumber Co.*, 592 So. 2d 202 (Ala. 1991); *Hartford Accident & Indem. Co. v. American Country Clubs, Inc.*, 353 So. 2d 1147 (Ala. 1977).

⁶ ALA. CODE § 35-11-213.

⁷ ALA. CODE § 35-11-215; *Southern Sash of Huntsville, Inc. v. Jean*, 235 So. 2d 842 (Ala. 1970).

⁸ *Massey Asphalt Paving, Inc. v. Lee Land Development, Inc.*, 203 So. 3d 1271 (Ala.Civ.App. March 4, 2016).

⁹ ALA. CODE § 35-11-215.

¹⁰ ALA. CODE § 35-11-221.

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- ¹¹ *Ex parte Grubbs*, 571 So. 2d 1119 (Ala. 1990).
- ¹² *Vulcan Painters v. MCI Constructors*, 41 F.3d 1457 (11th Cir. 1995); *Ex parte Renovations Unlimited, LLC* 59 So. 3d 679 (Ala. 2010).
- ¹³ See *Noland Co. v. Southern Dev. Co.*, 445 So. 2d 266 (Ala. 1984).
- ¹⁴ ALA. CODE § 35-11-219.
- ¹⁵ See *Abell-Howe Co. v. Industrial Dev. Bd.*, 392 So. 2d 221 (Ala. Civ. App. 1980); *Scruggs & Echols v. City of Decatur*, 46 So. 989 (Ala. 1908); *Nunnally v. Dorand*, 18 So. 5 (Ala. 1895).
- ¹⁶ ALA. CODE § 39-1-1.
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ ALA. CODE § 6-5-221(a).
- ²¹ See ALA. CODE § 6-5-220(e); *Jones v. Kassouf & Co., P.C.*, 949 So. 2d 136 (Ala. 2006).
- ²² ALA. CODE § 6-5-220.
- ²³ ALA. CODE § 6-5-221(a).
- ²⁴ ALA. CODE § 6-2-34(4).
- ²⁵ ALA. CODE § 7-2-725(1).
- ²⁶ ALA. CODE § 6-2-38(1).
- ²⁷ ALA. CODE § 6-5-221(a).
- ²⁸ *Id.*
- ²⁹ See *Blackburn v. Fidelity & Deposit Co.*, 667 So. 2d 661, 668 (Ala. 1995).
- ³⁰ *Id.*
- ³¹ *Id.*; *Great American Ins. Co. v. Baddley and Mauro, LLC*, 330 Fed. Appx. 174 (11th Cir. 2009); *Perkins v. Hartford Ins. Group*, 932 F. 2d 1392 (11th Cir. 1991); *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789 (Ala. 2002).
- ³² See *U.S. Fid. and Guar. Co v. Bonitz Insulation Co.*, 424 So. 2d 569 (Ala. 1982).
- ³³ *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d 148, 153 (Ala. 2014) (citing *Town & Country Prop., LLC v. Amerisure Ins. Co.*, 111 So. 3d 699, 705 (Ala. 2011)).
- ³⁴ *Id.* at *5(citing *Town & Country Prop., LLC*, 111 So. 3d at 706).
- ³⁵ *Id.* at *6.
- ³⁶ *Id.* at *5 (citing 9A *Couch on Insurance* § 129:4 (3d ed. 2005)).
- ³⁷ *Id.* at *7.
- ³⁸ *Id.*
- ³⁹ *Town & Country Prop., LLC*, 111 So.3d at 703.
- ⁴⁰ *Attorneys Ins. Mut. of Alabama, Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So. 2d 866 (Ala. 1996).
- ⁴¹ *Id.*
- ⁴² *United States Fidelity & Guaranty Co. v. Warwick Dev. Co.*, 446 So. 2d 1021 (Ala. 1984).
- ⁴³ *U.S. Fid. and Guar. Co. v. Baldwin County Home Builder's Ass'n*, 770 So. 2d 72 (Ala. 2000); *Southern Guaranty Ins. Co. v. Thomas*, 334 So. 2d 879 (Ala. 1976). *But see Midwest Employers Cas. Co. v. East Alabama Health Care*, 695 So. 2d 1169 (Ala. 1997) (holding that an excess insurance carrier must show prejudice).
- ⁴⁴ *U.S. Fid. and Guar. Co.*, 770 So. 2d 72.
- ⁴⁵ *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 561 (Ala. 1994).
- ⁴⁶ *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F. 2d 1543 (11th Cir. 1985).
- ⁴⁷ *Id.*
- ⁴⁸ See *Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, 38 So. 3d 722 (Ala. 2009).
- ⁴⁹ *Indus. Tile, Inc. v. Stewart*, 388 So. 2d 171, 175 (Ala. 1980).
- ⁵⁰ *Humana Med. Corp. v. Bagby Elevator Co.*, 653 So. 2d 972 (Ala. 1995); *Parker v. Mauldin*, 353 So. 2d 1375 (Ala. 1977).
- ⁵¹ *Mallory S.S. Co. v. Druhan*, 84 So. 874 (Ala. 1920).
- ⁵² *Holcim*, 38 So. 3d at 728-29.
- ⁵³ *Federal Ins. Co. v. I. Kruger*, 829 So. 2d 732 (Ala. 2002).
- ⁵⁴ *Lemoine Co. v. HLH Constructors, Inc.*, 62 So.3d 1020 (Ala. 2010).
- ⁵⁵ *Shelby County Comm'n v. Smith*, 372 So. 2d 1092 (Ala. 1979).
- ⁵⁶ *HealthSouth Rehab. Corp. v. Falcon Mgmt. Co.*, 799 So. 2d 177 (Ala. 2001).
- ⁵⁷ *Goolesby v. Koch Farms, LLC*, 955 So. 2d 422 (Ala. 2006).

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- ⁵⁸ *U.S. For Use and Benefit of Gray-Bar Elec. Co., v. J.H. Copeland & Sons Constr., Inc.*, 568 F.2d 1159 (5th Cir. 1978).
- ⁵⁹ *Id.*
- ⁶⁰ *Vesta Fire Ins. Corp. v. Milam & Co. Constr., Inc.* 901 So. 2d 84 (Ala. 2004).
- ⁶¹ *Pub. Bldg. Auth. v. St. Paul Fire and Marine Ins. Co.*, 80 So.3d 171 (Ala. 2010).
- ⁶² *Goolsby*, 955 So. 2d at 429.
- ⁶³ See *Nelson v. AmSouth Bank, N.A.*, 622 So. 2d 894 (Ala. 1993); see also ALA. CODE § 8-8-10.
- ⁶⁴ See *Hunt v. Ward*, 79 So. 2d 20 (Ala. 1955).
- ⁶⁵ ALA. CODE § 8-8-10.
- ⁶⁶ *Exxon Mobil Corp. v. Alabama Dep't of Conservation and Natural Res.*, 986 So. 2d 1093 (Ala. 2007); *Bradley v. Walker*, 93 So. 634 (Ala. 1922).
- ⁶⁷ *Alabama Power Co. v. Rembert*, 208 So. 2d 205 (Ala. 1968).
- ⁶⁸ Ala. Code (1975) § 6-11-20(a); See. *Envtl. Infrastructures, L.L.C. v. Rivers*, 12 So. 3d 32, 48 (Ala. 2008).
- ⁶⁹ See *Stonebrook Dev., L.L.C. v. Matthews Bros. Const. Co.*, 985 So. 2d 960 (Ala. Civ. App. 2007) (quoting *Camelot Music, Inc. v. Marx Realty & Improvement Co.*, 514 So. 2d 987 (Ala. 1987)).
- ⁷⁰ *Cove Creek Dev. Corp. v. APAC-Alabama, Inc.*, 588 So. 2d 458 (Ala. 1991).
- ⁷¹ *Id.*