

## Preconstruction Service Liens: A New Chapter in Utah's Mechanics' Lien Law

by D. Scott DeGraffenried

Mechanics' liens are a technical area of law. There are many requirements, and the nuances have caused many attorneys to wake up in the middle of the night, hoping they complied with certain steps or did not miss one of the many imposed deadlines. And just when construction law attorneys thought we had the system mastered, the Utah Legislature made sweeping changes to Utah's mechanics' lien laws (found in UTAH CODE ANN. § 38-1-1, *et seq.*). During the 2011 general session, the Legislature passed two bills, House Bills 115 and 260, which created two types of mechanics' liens. H.B. 115 created liens for preconstruction services, which are services provided before actual construction commences, such as design, architectural, engineering, and surveying work. H.B. 260 applies to liens for construction services, which are tasks performed in the physical construction of a project. Both bills are now in effect. This article is limited to H.B. 115. The purpose is to explain some of the motivations behind the bill and introduce the mechanics (no pun intended) of the newly-created preconstruction service liens.

### **The Push for H.B. 115**

Utah's previous mechanics' lien statutes gave lien rights to preconstruction service providers. The problem, however, has been defining the priority of their liens.

Mechanics' lien litigation often comes down to one issue: whether a mechanics' lien has priority over other encumbrances on a particular piece of property. This dispute is often referred to as one of "broken priority." It is usually between the mechanics' lien claimants and the bank that holds a trust deed on the property. Under Utah's pre-2011 statutes, all mechanics' liens related back to and took effect as of the date visible construction work commenced on a project. This triggering point is known as the relation back doctrine. If visible work commenced before another encumbrance was recorded, all the lien claimants had priority over the later encumbrance.

The problem for those performing preconstruction services was that they were always at the mercy of construction commencing. An architect could spend months designing a project,



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performing significant services. But if actual construction never commenced, there was no date to establish the architect's lien priority, and therefore no relation back element.

Similarly, if a preconstruction service provider performed services before a trust deed was recorded but construction began after the recording of the trust deed, the provider's lien fell in with the rest of the lien claimants. The lien would be deemed inferior to the trust deed. Simply put, preconstruction service providers were often relegated to an inferior priority position even though they performed their services early in the project.

Many found these scenarios unfair considering the significant value preconstruction service providers render to construction projects. H.B. 115 was enacted to address some of these concerns by carving out a unique priority position for preconstruction service providers. As with all mechanics' lien statutes, there are many requirements for preserving these new lien rights and strict compliance is a must. Before explaining the new priority framework, it is important to understand the steps giving rise to a preconstruction service lien.

### **Process for Securing a Preconstruction Service Lien.**

- ***Preconstruction Services Defined***

Utah's new law provides that parties who perform preconstruction services can hold a preconstruction service lien. Utah Code Section 38-1-2(13) expressly defines what qualifies as a preconstruction service. The services include, among others, design work, consulting, estimating, and feasibility studies. The services must be provided before construction begins and for compensation that is separate from compensation to be paid for construction services.

- ***Notice of Retention***

To hold a preconstruction service lien, a preconstruction service provider must file a notice of retention on the Utah State Construction Registry ("**SCR**")<sup>1</sup>. This provides notice to a project owner of those working on the project. Utah Code Section 38-1-30.5 governs the notice of retention provisions. A notice of retention must be filed within 20 days of the provider commencing work. If the notice is not filed on time, the provider loses its preconstruction service lien rights.

In some instances, preconstruction service providers may have to file multiple notices of retention. If the provider works under one original contract for a project, only one notice of retention is required. (Utah Code Section 38-1-2(10) defines an original contract as a contract between a project owner and a preconstruction or construction service provider.) If a provider works under more than one original contract, separate notices of retention are required for services performed under each original contract, even if the work is performed on the same project.

Certain information must be included in a notice of retention, such as identifying information for both the preconstruction service provider and the person employing the provider, a general description of the preconstruction services, the project's owner, and information defining the project. Utah Code Section 38-1-30.5(1)(f) provides a complete list of the required content.

Preconstruction service providers should also know when preconstruction services end and construction services begin. Under Utah Code Section 38-1-4.7(3), preconstruction services are deemed complete when construction services commence. Construction services commence when the first preliminary notice is filed with the SCR. (A preliminary notice is basically the notice of retention's counterpart for construction services; it provides notice to an owner of potential construction service lien claimants and must also be filed within 20 days of when a construction service provider commences its work.) This represents a change from the old triggering mechanism, which was the actual commencement of construction. If a provider filed a notice of retention but then learns that a subsequent preliminary notice has been filed, the preconstruction services are deemed complete as of the date of that filing. Any services rendered after that date, even if they are technically preconstruction services, will be considered construction services. The construction service lien provisions will then govern. In that instance, a preconstruction service provider would be required to file a preliminary notice to preserve lien rights for services provided after the first preliminary notice was filed.

Also, under Utah Code Section 38-1-3(3), a construction service lien can include amounts claimed for preconstruction services, while a preconstruction service lien cannot include amounts for construction services. We have yet to see how this will ultimately be interpreted. It arguably means that a preconstruction service provider that failed to file a notice of retention and thus lost its preconstruction service lien rights could still file a lien under the construction service lien framework, assuming it filed a preliminary notice. However, the priority rights now granted to preconstruction service providers would likely not be available.

- ***Notice of Preconstruction Service Lien***

If a preconstruction service provider timely filed a notice of retention and was not paid for its services, the next step is to file a notice of preconstruction service lien. According to Utah Code Section 38-1-6.7(1) a provider must record the notice with the county recorder of the county where the project is located within 90 days after completing its preconstruction services. Again, failure to timely comply automatically bars the provider's preconstruction service lien rights.

Like the notice of retention, certain information must be included in the notice of preconstruction service lien. Utah Code Section 38-1-6.73(a) provides a complete list of what is required.

After recording the notice of preconstruction service lien, Utah Code Section 38-1-6.7(4) requires the provider to send a copy of the notice to the property owner via certified mail within 30 days of recording the notice. By doing so, the provider preserves its right to collect attorney fees and costs incurred in filing and otherwise perfecting the lien. If this is not done, the lien will still be valid, but attorney fees and costs cannot be recovered. As with all litigation, fees and costs can be substantial, so compliance is a must.

- ***Perfecting the Preconstruction Service Lien***

The final step is to file a lawsuit to foreclose the lien. Under Utah Code Section 38-1-11(2), the foreclosure lawsuit must be filed within 180 days after recording the lien. In conjunction with the lawsuit, a lien claimant must also record a *lis pendens* with the same county recorder where the lien was recorded, giving public notice of the lawsuit.

By strictly complying with the foregoing steps, preconstruction service providers can secure their lien rights. This is crucial in today's economy; lien rights can provide a means of collecting payment where other traditional remedies (e.g., breach of contract claims) may not be viable.

### **Priority for Preconstruction Service Liens**

Lastly, it is important to understand the newly-granted priority rights for preconstruction service liens. Like the old law, which had a triggering point for priority purposes (the actual commencement of construction), preconstruction service liens now have a unique priority-triggering mechanism: the date on which the first notice of retention is filed. *See* UTAH CODE ANN. § 38-1-4.7(1). In other words, all preconstruction service liens relate back to and take effect as of the date of the first notice of retention. They are deemed superior to subsequent encumbrances. Thus, preconstruction service providers are no longer subject to a floating or otherwise ill-defined priority scheme.

This priority, however, is qualified. Under Utah Code Section 38-1-4.7(2), the priority can be bifurcated if there is an intervening, "bona fide loan." Any preconstruction services provided after the loan will be subordinate to the loan. This will most often apply in the context of construction loans, and is best explained by way of example: Assume the first notice of retention on a project is filed on October 1, 2011, with preconstruction services commencing on that date and continuing through December 31, 2011. Assume further that a construction loan is issued and a trust deed securing the loan is recorded against the project on November 1, 2011. Under this scenario the only portion of preconstruction service liens that will enjoy priority over the trust deed is that pertaining to the services provided before November 1<sup>st</sup>. Any portion of the preconstruction service lien for services after November 1<sup>st</sup> will be inferior to the trust deed.

While priority for preconstruction service liens is not absolute, it gives preconstruction service providers more rights than they previously had. It offers them a clear, ascertainable

priority point. It also demonstrates the Legislature's efforts to strive for balancing competing interests in a complex area of law.

## **Conclusion**

As with any new statute, the new laws for preconstruction service liens will be subject to application in the construction industry and judicial interpretation. Nonetheless, the efforts behind H.B. 115 illustrate an active approach to cure a perceived unfairness. It gives preconstruction service providers a unique priority position. This will hopefully give them confidence, knowing that the services they perform and their ability to get paid now enjoy more protection. And for the attorneys advising them, hopefully we have a better understanding of how the process works and can avoid those middle-of-the-night panic attacks.

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<sup>i</sup> The SCR is an online database where notices and other relevant information pertaining to mechanics' liens are filed. It is found at [www.scr.utah.gov](http://www.scr.utah.gov).