

STATE OF TENNESSEE

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Opinion No 05-184

2005 Tenn. Public Acts, ch. 197: Waiver of Lien

QUESTIONS

1. Following the enactment of 2005 Tenn. Public Acts, ch. 197, are lien waivers ever effective in Tennessee?
2. Specifically, are they effective if given after the work has been performed but before the time for filing has elapsed?
3. Are they effective if given separately from the construction contract?
4. Are they effective if given separately from the construction contract and for consideration?
5. Are they effective if given to an owner who is not a party to a construction contract between a contractor and tenant?

OPINIONS

1. Yes. Although the language of 2005 Tenn. Public Acts, ch. 197 is very broad, to interpret this amendment to Tenn. Code Ann. § 66-11-124 as prohibiting any and all lien waivers under any circumstances would result in a conflict with another portion of the same statute and would lead to a result contrary to the legislative intent, as evidenced by the legislative history of this bill.

2. - 5. These questions present numerous scenarios for agreements to waive liens. Without specific facts, we cannot determine how a court would likely rule regarding the parameters of the lien waiver prohibition. Based upon the legislative history of 2005 Tenn. Public Acts, ch. 197, however, it appears that the bill is intended to prevent parties from being forced to waive their lien rights as a condition of obtaining a contract to perform work. Consequently, the bill is not intended to prohibit the voluntary waiver of liens, such as would occur after the completion of work or at the time of payment; nor does the bill appear to be intended to prohibit the voluntary waiver of liens for consideration.

ANALYSIS

Before July 1, 2005, Tenn. Code Ann. § 66-11-124 read in full as follows:

(a) The acceptance by the lienor of a note or notes for all or any part of the amount of the lienor's demand shall not constitute a waiver of the lienor's lien therefor, unless expressly so agreed in writing, nor shall it in any way affect the period for filing the claim of lien under this part.

(b) Any person other than a laborer may, as a part of that person's contract, waive any right of lien under this part, but a laborer may not waive such laborer's right of lien.

As of July 1, 2005, subpart (b) quoted above has been deleted, and replaced by the following:

(b) Any contract provision that purports to waive any right of lien under this chapter is void and unenforceable as against the public policy of this state.

2005 Tenn. Public Acts, ch. 197.

The new language of paragraph (b) is obviously very broad in scope and could be interpreted literally to prohibit any contract provision purporting to waive any lien, regardless of the context or the circumstances. This interpretation, however, would result in an internal conflict within Tenn. Code Ann. § 66-11-124, insofar as paragraph (a) of this statute clearly continues to permit the valid waiver of liens under certain circumstances, if “expressly so agreed in writing [. . .].” Moreover, interpretation of paragraph (b) in its broad, literal sense could result in the repeal, by implication, of paragraph (a) due to the fact that paragraph (b) was enacted after paragraph (a).

In construing statutes relating to the same subject matter, a court has a duty to avoid a construction that will place statutes in conflict and is to resolve such conflicts, whenever possible, so as to provide a harmonious interpretation of the laws. *Sharp v. Richardson*, 937 S.W.2d 846, 850 (Tenn. 1996); *Parkridge Hospital, Inc. v. Woods*, 561 S.W.2d 754, 755 (Tenn. 1978). We are of the opinion that a court would find this well-recognized rule of statutory construction even more compelling when applied to conflicting provisions within the same statute. Repeals by implication are strongly disfavored by the courts, *Jenkins v. Loudon County*, 736 S.W.2d 603, 607-608 (Tenn. 1987), and courts have a duty to attempt to arrive at a reasonable interpretation that will effectuate the intention of the Legislature, as well as provide for harmonious operation of the laws. *State v. Hicks*, 55 S.W.3d 515, 523 (Tenn. 2001); *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995).

The legislative history of 2005 Tenn. Public Acts, ch. 197, indicates that the intent of the legislature in passing this bill was not to prohibit the waiver of any lien under all possible circumstances.

For example, Representative Curtis described the intent of the bill as follows during the March 31, 2005, hearing of the House Calendar and Rules Committee:

Representative Curtis: Thank you, Mr. Chairman. Members of the Committee. This bill as amended says that a contractor cannot be forced to waive their lien rights prior to entering into a contract. Under current law, we have got some contractors that are being forced to waive their lien rights before they even enter a contract. This simply says that will be unenforceable.

Chairman: You heard the motion properly seconded. Could you explain this again, Representative Curtis?

Rep. Curtis: Say you are the low bidder on a job and I am the contractor and I say now, Larry, I am not going to let you sign this contract until you sign a waiver of a lien. You can never put a lien against this job. Then I get slow at paying and everything else and you don't have a leg to stand on under our current law in Tennessee. This just simply says if I forced you to sign a lien waiver before we ever start the job, it is unenforceable. It has nothing to do [with] when you are collecting money and reducing your lien rights.

Chairman: What if you agree to sign the . . .

Rep. Curtis: That is the same thing. I won't give an analogy but, there is a lot of difference between agreeing to something and agreeing to something with a gun held to your head. [. . .]. And that is basically what we have got. You got a job that you need and somebody is not going to let you sign that contract until you sign away that lien waiver. They are basically holding a gun to your head. It is an economic gun. But they are holding a gun to your head.

Representative Overbey: Thank you, Mr. Chairman. Representative Curtis, does this apply to subcontractors as well as to contractors?

Rep. Curtis: That's correct.

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Representative Fitzhugh: Thank you, Mr. Chairman. Just a follow-up on your question. If it is a truly voluntary deal where the lien rights are given up, can you still have it if

it is a voluntary deal?

Rep. Curtis: The way this is drafted, I don't see, . . . I am not an attorney, Greg, but I don't believe so. It uses the word, it is "unenforceable." I can think of one or two legitimate reasons why somebody would sign away their lien rights. Let's say the job would have to be bonded and the seller didn't have enough financial backing to bond the job. And the general contractor says, I will take care of it, but I want you to sign away your lien rights. Well, all of a sudden that subcontractor is getting something in return for signing away the lien rights. But that is really [not] what that bill is after. This bill is after those that have just been held hostage.

Representative Miller: Representative Curtis, not to belabor this, but a hypothetical situation:

you are a home owner and you are having some work done on your home. And let's say it is on a draw basis. As a contractor, whatever work they perform, receives a draw, but would have to sign a lien waiver.

Rep. Curtis: This has nothing to do with that.¹

During the House debate on House Bill 743, Representative Curtis described the intent of the bill as follows:

Rep. Curtis: Thank you, Mr. Speaker. Ladies and Gentlemen of the House, this bill is amended, what it does, it says that a subcontractor or contractor cannot be forced to sign a waiver of lien before they start working on a job, has nothing to do with a lien waiver at the point of payment. That has to take place. But all it does, it can't be part of a contract and contractors signing away their lien rights before they get to start work on a job.²

Based upon this legislative history, we conclude that the intent of 2005 Tenn. Public Acts, ch. 197 was not to prohibit any lien waiver under any circumstances. Rather, the legislative intent appears to have been to prevent one party to a contract, such as a contractor, from forcing another party, such as a subcontractor, to waive his or her lien rights as a condition to contracting to perform construction work. The legislative history therefore supports the conclusion that the bill was not designed or intended to prevent the voluntary waiver of lien rights when the waiver is executed freely and voluntarily, such as after work has been performed, at the time of payment, or under other circumstances that are free from duress.

¹House Calendar and Rules Committee hearing, March 31, 2005; House Bill 743/Senate Bill 902.

²House floor debate on HB 743, April 4, 2005.

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