**HOW MISSISSIPPI’S 2014 CONSTRUCTION LIEN LAW FOR MISSISSIPPI SUBCONTRACTORS, MATERIALMEN, ENGINEERS AND SURVEYORS CAME TO BE LAW**

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 Mississippi’s new construction lien law extending lien rights for the first time to Mississippi subcontractors, materialmen and design consultants, is the start of a new, fairer era for the Mississippi construction industry. The new Mississippi lien law went into effect under Governor Phil Bryant’s signature on April 11, 2014.[[1]](#footnote-1) Robert P. Wise, Esq. of Sharpe & Wise PLLC, and his colleague, Trey Copeland, Esq. of the Jernigan Copeland & Anderson PLLC law firm, wrote the initial draft of the new law, SB 2622, at the request of the Mississippi Legislature.[[2]](#footnote-2) Suzanne Sharpe was a lead legislative strategist for passage of SB 2622. Our two firms negotiated the final draft of SB 2622 in the 2014 Mississippi Legislature among the nine trade groups and their often competing interests in the new construction lien law.[[3]](#footnote-3)

 The new law extends lien rights for the first time in Mississippi’s history to subcontractors and materialmen. The new lien provides the same scope of payment protections for subcontractors and materialmen that have long existed in Mississippi on public jobs by providing payment protections down to the second tier on private jobs.[[4]](#footnote-4) The new law also extends lien rights to consulting engineers and land surveyors who had never had any statutory means of securing payment for their services in Mississippi.[[5]](#footnote-5)

 Enactment of a lien law to protect Mississippi subcontractors and materialmen on private jobs is the culmination of a twenty year effort. Year after year, since at least the 1993 Mississippi legislative session forward, proponents of broader lien rights introduced bills in the Mississippi Legislature to reform Mississippi’s narrow lien law. Every year before the 2014 session the lien reform bills met defeat.

 Until 2014 the only construction parties with a lien right on the owner’s property in Mississippi for unpaid work were the general contractor and designers and surveyors with a direct contract with the owner.[[6]](#footnote-6) The lien statute had remained virtually unchanged[[7]](#footnote-7) since its adoption over a hundred years earlier in 1906[[8]](#footnote-8). Subcontractors of the general contractor had only a Stop Notice right[[9]](#footnote-9) in funds in the hands of the owner under a stop notice statute dating back to 1857 in antebellum times.[[10]](#footnote-10) Second tier subcontractors (a sub to a sub) and second tier materialmen (a materialman to a sub) were mere general creditors with no security in either the project funds or properties they improved for the benefit of owners by their labor and materials.[[11]](#footnote-11)

 Although Mississippi adopted construction payment bond statutes in 1980 to protect subs and materialmen on public jobs down to the second tier level (the Mississippi Little Miller Act[[12]](#footnote-12)), the Mississippi lien law for ensuring payment of work on private projects remained the most narrow lien law in the United States until the new lien law adopted in April 2014.[[13]](#footnote-13) Proponents of broader lien rights argued that without broad lien rights, chronic underbidding had become a problem in Mississippi, with the deficit in project proceeds ultimately taken out on unprotected lower tier subcontractors and suppliers. Reformers pushed every year to include liens for subs and materialmen, but the lien law reform bills all died in the Mississippi Legislature through 2013.[[14]](#footnote-14)

**THE *NOATEX* DECISION CLEARS THE WAY FOR REFORM OF THE MISSISSIPPI CONSTRUCTION LIEN LAW**

The Federal Courts cleared the way for Mississippi lien law reform by holding Mississippi’s old Stop Notice statute (Miss. Code Ann. § 85-7-181) unconstitutional. The United States Fifth Circuit Court of Appeals on October 10, 2013, affirming an opinion of the United States District Court for the Northern District of Mississippi, held the Mississippi Stop Notice statute unconstitutional in *Noatex Corp. v. King Const. of Houston, L.L.C.*.[[15]](#footnote-15) The Fifth Circuit also implied anyone trying to fix the old Stop Notice statute would have little to work with. The Fifth Circuit held the Stop Notice statute an attachment provision that was “profound in its lack of procedural safeguards.”[[16]](#footnote-16) The Fifth Circuit stated, “[t]he statute deprives the contractor of a significant property interest, the right to receive payment and to be free from any interference with that right.”[[17]](#footnote-17)

**THE PUSH TO EXPAND LIEN RIGHTS IN THE 2014 MISSISSIPPI LEGISLATURE**

We presented to the initial draft of SB 2622 to expand lien rights to a Joint Meeting of the Judiciary A Committees of the Senate and House at which, somewhat unusual for such a meeting, both the Lt. Governor, Tate Reeves, and the House Speaker, Rep. Philip Gunn, were also present. Senator Briggs Hopson and Rep. Mark Baker presided. An immediate question asked by the Committee members, though, was whether the old Stop Notice statute could just be fixed. We argued, given the strength of the Fifth Circuit’s rejection of the Stop Notice Statute as an unlawful attachment, that even if procedural safeguards could be built into the old statute, any attempt to resurrect the statute would only lead to more court challenges.[[18]](#footnote-18) More than that, we saw the final demise of the old statute (never in our view an adequate remedy for subs and materialmen) as the long sought for opportunity to press for expansion of lien rights in Mississippi on private jobs. We argued that the new bill needed to provide lien rights down to at least the first and second tier subcontractors and materialmen to match the coverage those tiers had already had for over thirty years on public jobs under the Mississippi Little Miller Act. The needs of Mississippi design professionals also needed to be addressed. Both Chairmen Hopson and Baker urged all the industry parties to work together toward a final single draft. Further, the Chairmen set a tone of urgency by announcing to the assembled trade groups without qualification that the Mississippi Legislature would not leave subcontractors and materialmen hanging without a remedy after *Noatex,* but would enact a lien law in the 2014 session.

A lot of face to face negotiation and the input into the final draft of SB 2622 by nine diverse interest groups followed. Sharpe & Wise PLLC has long been an advocate of expanded lien rights for the benefit of Mississippi subcontractors and materialmen. As drafters and Legislative strategists advocating passage of the new lien law along with Trey Copeland of Copeland Jernigan & Anderson, PLLC, we are gratified by the passage of the new law. The new lien law expands Mississippi rights for the benefit of Mississippi subcontractors and materialmen and consulting engineers and surveyors who were in dire need of such rights.

However, there are many procedural requirements and strict deadlines that Mississippi subcontractors, materialmen and design consultants will have to follow to preserve their lien rights. You will find lists of the most important requirements along with a link to the new law on this website, [www.sharpewise.com](http://www.sharpeandwise.com)

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1. Enacted by Senate Bill 2622 as Miss. Code Ann. § 85-7-401 to § 85-7-433. [↑](#footnote-ref-1)
2. We wish to thank Kurt Sorensen of H & E Equipment Services, Inc. and Kristal Bonner of Hajoca Corporation for sponsoring the time Robert Wise and Suzanne Sharpe put into providing drafting and legislative strategy for the passage of SB 2622, and for their valuable direction, feedback and input that made a successful outcome possible. We also thank our construction law colleague, Trey Copeland, Esq. of Copeland Jernigan and Anderson, PLLC, for his work in the drafting, and especially for Trey’s patientskill in leading the difficult negotiations among sharply competing industry interests. We must especially thank Lieutenant Governor Tate Reeves whose strong leadership was critical to the successful passage of a lien law reform bill in Mississippi in 2014. We thank also the Judiciary A Chairmen, Sen. Briggs Hopson and Rep. Mark Baker, who along with Lt. Governor Tate Reeves, championed passage of the bill in the 2014 Mississippi Legislature to expand Mississippi lien rights for the benefit of Mississippi’s citizens. [↑](#footnote-ref-2)
3. SB 2622 as finally adopted received the input and support for passage from the following nine Mississippi trade groups involved in Mississippi construction industry. We recognize and thank them all:

	1. Associated Builders & Contractors, Inc. (ABC Contractors)
	2. American Subcontractors Association of Mississippi
	3. American Rental Association
	4. Construction Suppliers Association (formerly the MBMDA)
	5. Home Builders Association of Mississippi
	6. Mississippi Association of Road Builders
	7. Mississippi Bankers Association
	8. Mississippi Concrete Industries Association
	9. American Council of Engineering Companies of Mississippi [↑](#footnote-ref-3)
4. The Mississippi Little Miller Act provides payment bond protections on State public works down to second tier subcontractors and materialmen, miss. Code ann. §§ 31-5-51 to -57. [↑](#footnote-ref-4)
5. Previously engineers and surveyors in Mississippi only had a lien right under miss. Code ann. § 85-7-181 if they had a direct contract with the owner instead of working as a consultant to the architect. [↑](#footnote-ref-5)
6. Under Miss. Code Ann. § 85-7-131 before its amendment in 2014. [↑](#footnote-ref-6)
7. In 2010 the Mississippi Legislature made an incremental change to the lien, stop notice and private bond statutes to include renters and lessors of equipment at the urging of H&E Equipment Services, Inc. See Robert P. Wise, *Mississippi Construction Payment Claims: Mississippi Lien, Stop Notice, Payment Bond, Prompt Payment and Open Account Laws,* 29 Miss. C.L. Rev. 539, 544 (2010). [↑](#footnote-ref-7)
8. See McKenzie v. Fellows, 52 So. 628, 628 (Miss.1910). [↑](#footnote-ref-8)
9. Formerly at MISS. CODE ANN. § 85-7-181 until repealed by SB 2622. [↑](#footnote-ref-9)
10. See William L. Smith and Boswell Stevens Hazard, *Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals,* 47 MISS. L.J. 437, 452 (1976). [↑](#footnote-ref-10)
11. Associated Dealers Supply, Inc. v. Miss. Roofing Supply, Inc.*,* 589 So.2d 1245, 1247 (Miss.1991) (“Subcontractors or materialmen to another subcontractor are not entitled to recovery under this statutory provision.”). [↑](#footnote-ref-11)
12. See Ron A. Yarbrough, *Rights and Remedies Under Mississippi’s New Public Construction Bond Statute,* 51 Miss. L.J. 352 (1981). [↑](#footnote-ref-12)
13. See Robert F. Cushman and Stephen D. Butler, *Fifty State Construction Lien and Bond Law* (Second Edition 2013). [↑](#footnote-ref-13)
14. For example, Steve Browning, lobbyist for the Construction Suppliers Association (formerly the MBMDA), worked to keep the cause of lien law reform alive for many of those years by having broad lien bills introduced at the start of each legislative session, an important effort that helped prepare the way once *Noatex* made reform a necessity. [↑](#footnote-ref-14)
15. *Noatex Corp. v. King Const. of Houston, L.L.C.,* 732 F.3d 479, 485 (5th Cir. 2013). [↑](#footnote-ref-15)
16. *Id.*  [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. A counter-proposal surfaced at the meeting to fix the Stop Notice statute by requiring notice and an injunction hearing to enforce it. Our response was that requiring an injunction suit and court hearing for every stop notice was a lawyer’s dream but a client’s nightmare. By contrast, any layman can file a construction lien. [↑](#footnote-ref-18)