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CONSTRUCTION LAW *Alert*

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Beware Interim Lien Waivers!

by Eric Biesecker & David Luzum, Nexsen Pruet, PLLC

The North Carolina Court of Appeals recently restored order to the use of interim lien waivers in North Carolina. The Court of Appeals issued its opinion in *Wachovia Bank N.A. v. Superior Constr. Corp.*, COA10-1158, on July 19, 2011. [Eric Biesecker](#), [Richard Wilson](#), and [David Luzum](#) of Nexsen Pruet, PLLC, filed an *amicus curiae* brief on behalf of the American Subcontractors Association and ASA of the Carolinas.

Superior Construction was the general contractor for a large condominium project on Oak Island. Superior started its work on April 22, 2005, several weeks before Wachovia recorded its deed of trust on the property. Later, though, Superior signed an interim lien waiver that released Superior's lien rights "on account of any labor performed or [materials furnished] up to and including" May 31, 2005. In 2007, Superior stopped work and filed a claim of lien when the owner failed to pay \$1,286,000.00. The owner also failed to pay its obligations to Wachovia. In the ensuing litigation, Wachovia and Superior fought over who had the better claim to the property.

Wachovia filed a declaratory judgment action seeking a determination that its deed of trust had priority over Superior's lien. North Carolina's lien statutes explicitly grant contractors and subcontractors the right to have their lien priorities relate back to the date of first furnishing of labor or materials. Even though Superior's lien waiver contained no language addressing the priority of its lien for later-furnished labor or materials, the Business Court held that Superior's interim lien waiver released Superior's right to have its lien relate back to its first furnish date. Consequently, the Business Court held that Wachovia's deed of trust trumped Superior's lien rights.

The Business Court's opinion injected uncertainty into the construction process. Interim lien waivers are commonly used on construction projects, but rarely do the parties intend the interim lien waivers to change lien priorities; parties typically employ subordination agreements to change priorities. The Business Court's opinion made it unclear what language may constitute a waiver of lien rights going forward. In light of the Business Court's decision, [Nexsen Pruet](#) attorneys advised potential lien claimants to add language to interim lien waivers to state specifically that the waivers did not change lien priorities.

The Court of Appeals' opinion restored order to the process by correctly interpreting the scope of Superior's interim lien waiver. The Court of Appeals recognized that Superior's waiver functioned merely as an acknowledgment that the owner had paid Superior for all labor and materials furnished through a certain date and that Superior could not file a lien for that labor and material. The lien waiver did not in any way refer to or affect Superior's "place in line."

Although the Court of Appeals reached the correct decision, it left the door open for future interim lien waivers to change lien priorities by using more explicit language than that used in Superior's lien waiver. South Carolina has not yet permitted an interim lien waiver to implicitly alter a contractor's lien priority. However, contractors and subcontractors in both North Carolina and

South Carolina must continue to read and analyze the language of their lien waivers before they sign them.

As *Wachovia v. Superior* demonstrates, lien waivers can be problematic and the importance of careful review cannot be overstated. Failure to take the time to fully understand the scope of a waiver can result in the unintended surrender of important rights. If payment on a project cannot be made to the contractor or subcontractor until it executes a lien waiver, the contractor or subcontractor should make sure the waiver is conditional upon receipt of the funds owed up through the date of the waiver. Contractors and subcontractors should also make sure their lien waivers do not explicitly modify the priority/first furnishing date or waive the ability to lien for retainage. These are but a few considerations that can help prevent headaches down the road.

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