DAILY JOURNAL OF COMMERCE

March 11, 2011

Time to kill Washington's frivolous lien statute

■ *Attorneys whose clients want to challenge construction liens nowadays almost always ignore the expedited frivolous lien procedure and proceed with a full-blown lawsuit.*

By JOHN RIPER
Ashbaugh Beal

Sometimes a great idea doesn't work out. That has proven true with Washington's frivolous lien statute, and now is the time to kill it and start over.

Twenty years ago the construction industry worked with the Legislature to revamp Washington's lien laws. As part of that effort they had a great idea: Create a simple way to spot frivolous or excessive construction liens, and give courts a quick way to get rid of them.

So in 1991 the Legislature enacted a frivolous lien statute. The idea was simple. If a lien appeared to be frivolous or excessive, the property owner could launch an expedited challenge in court. If the judge agreed the lien was frivolous, it would be expunged from the property's title. If the judge felt the lien was excessive, the court would reduce the lien to whatever amount was deemed reasonable.

The entire challenge would take only a week or so, compared with the normal span of a lien lawsuit, which likely would last a year or more.

As enacted by the Legislature, expedited "frivolous lien" actions also came with incentives for both sides to behave responsibly. If the challenge succeeded and a lien was deemed frivolous or excessive, the challenger would automatically be awarded the reasonable legal fees for pursuing the challenge. But if the lienholder established that the lien was not frivolous or excessive, the challenger would have to pay the liening party's attorney fees for defending it.

Despite the best of intentions, the mechanism for quickly challenging frivolous liens has turned out to be toothless, and generally punitive to the party trying to make it work. In the wake of its 1991 enactment, property owners initiated frivolous lien actions, and the courts began to point out that they hadn't been given much in the way of guidance about how to decide whether a lien should be deemed frivolous.

Riper

The expedited mechanism enacted by the Legislature obviously didn't envision a full trial on the merits, and the courts didn't know how strong the evidence had to be that a lien was frivolous or excessive before they were to dismiss or reduce it.

Last week, the Washington Court of Appeals issued an opinion illustrating why, as the law is now enforced, the frivolous lien mechanism is not worth keeping. The property owner in the case hired a developer to manage a remodel of a Mercer Island home. The developer contracted with a company named Bourgette to perform the construction work. Bourgette did not have any contract directly with the property owner.

Washington lien law requires that contractors give a written notice to property owners at the start of residential construction projects, warning that the property may get liened if the party doing the work doesn't get paid. Failure to give that notice can foreclose the right to maintain any lien. Bourgette didn't provide the requisite notice to the property owner.

After hundreds of thousands of dollars worth of work was performed, Bourgette got into a payment dispute with the developer managing the project. The developer paid only about half of what Bourgette claimed to be owing, and Bourgette liened for the difference. The property owner filed a frivolous lien action asking that the lien be dismissed because the contractor hadn't ever furnished the statutory notice to the owner at the start of the work.

Bourgette responded that, at least in theory, the developer could be deemed to be a "common law agent" of the property owner, which would excuse Bourgette's failure to give the original written notice. Both the trial court and the appellate court declared that, given the way the frivolous lien procedure has developed, the property owner must establish that the lien isn't even "debatably" valid, and that the lien "has no possibility of succeeding."

That standard, in the real world, is almost always impossible to meet. So both in the trial court and on appeal the property owner failed in having the lien declared frivolous. As a result, the property owner was required to pay the liening party's attorney fees, both in the trial court and on appeal.

In order to protect their clients from a similar result, attorneys whose clients want to challenge construction liens nowadays almost always ignore the expedited frivolous lien procedure and proceed solely with a full-blown lawsuit. But the goal of having a mechanism to quickly identify and clear title of frivolous or excessive liens is as important as it ever was. It's a goal that the real estate community, the title insurance community, and the construction community all share. And it is therefore an objective that deserves new attention, to replace what was a great idea in 1991 but that hasn't worked out.

John Riper is the managing partner at Ashbaugh Beal. His practice focuses on construction law and litigation.