

RESOURCES

Post-Bankruptcy Enforcement of Lien Rights

If you are interested in mechanics' liens rights and construction law and how those rights may be treated in a bankruptcy case, you should read the attached decision of Senior District Judge Howard of the United States District Court for Eastern District of North Carolina, entered February 23, 2012. There has been great uncertainty created by a couple of previous bankruptcy decisions in the Eastern District of North Carolina Bankruptcy Court that, in essence, ruled that the automatic stay of the Bankruptcy Code prohibited the post-petition filing of a claim of lien on funds by a subcontractor. Yesterday, in dicta, in one of those cases on appeal, Judge Howard vacated an order of the Bankruptcy Court on grounds of mootness, but in so doing, he noted that the Bankruptcy Court's decision "turned the construction industry's standard operating procedures on its head". He also questioned if the Bankruptcy Court's decision is "in accord" with North Carolina statutory law and constitutional protections afforded to subcontractors, and was "concerned" that the Bankruptcy Court "may have erred" in ruling that the lien does not arise until the filing of the claim of lien after bankruptcy. Normally, if an appellate judge determines that the appeal should be dismissed on procedural grounds, there is no discussion whatsoever on the merits of the appeal. Judges typically do not render advisory opinions and will only rule when necessary. Here, contrary to customary appellate practice, Judge Howard chose to express his views on the validity of the claim of lien on funds even though he dismissed the appeal as moot. While Judge Howard did not come out and say definitively that the Bankruptcy Court was wrong, he sure went out of his way to send a strong signal to the Bankruptcy Court that its decisions were wrong. Stay tuned for future developments. There is a case currently pending before one of the Bankruptcy Judges in this same judicial district involving this same issue. Arguments were recently held, the presiding Bankruptcy Judge has taken the matter under advisement and a decision is expected soon.

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