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“Direct Sales”: Must Residential Contractors Provide Pre-Construction Notices of Intent to File Materialman’s Liens?

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Generally, residential contractors in Arkansas must give a homeowner notice of intent to file a lien prior to the beginning of construction work on the residential property. See Ark. Code Ann. § 18-44-115(a)(3). If a contractor fails to provide this pre-construction notice, the contractor cannot acquire a lien on the residential property. See Ark. Code Ann. § 18-44-115(a)(1).

Arkansas recognizes an exception, however, if the homeowner “orders materials or services *directly* from the lien claimant.” Ark. Code Ann. § 18-44-115(a)(8)(B) (emphasis added). This is known as the “direct sale” exception. The direct sale exception was created to protect a property owner from finding liens placed on their property by third parties unknown to the owner, as the exception only applies to parties with whom the owner directly purchases services or materials. The direct sale exception does not apply to third parties hired by a general contractor that never directly contract with the owner.

In *Hammerhead Contracting & Development, LLC v. Ladd*, the Arkansas Supreme Court determined that the “direct sale” exception to the pre-construction notice statute applies to general contractors where: (1) the owner orders materials or services directly from the contractor; (2) the owner is in direct privity with the contractor; and (3) there are no undisclosed suppliers or laborers. 2016 Ark. 162, at 7, 489 S.W.3d 654, 659. The Court arrived at this conclusion by construing the words “[a] sale shall be a direct sale only if the owner orders materials or services from the lien claimant” set forth in Ark. Code Ann. § 18-44-115(a)(8)(B) in their ordinary and usually accepted meaning.

This case has important potential effects upon construction law in Arkansas. Ark. Code Ann. § 18-44-107(1) defines “contractor” as “any person who contracts orally or in writing *directly* with a person holding an interest in real estate, or such person's agent for the construction of any improvement to or repair of real estate.” (emphasis added). As the dissenting opinion in *Hammerhead* notes, this statutory definition of “contractor” seems to indicate “a property owner’s dealings with a general contractor . . . are always going to fall within the direct-sale exception.” *Hammerhead*, 2016 Ark. 162,

at 9, 489 S.W.3d at 660. Effectively, the majority's opinion in *Hammerhead* "writes the statute out of the Arkansas Code" as "there is no situation in which a general contractor will not be sheltered by the direct-sale exception." *Id.* A residential homeowner, by entering into a residential construction contract with a contractor, orders construction "services" directly from the contractor.

While pre-construction notices may no longer be required from residential contractors, until this area of the law is further explored, contractors are advised to continue providing notices of intent to file a lien prior to the beginning of any construction work. The *Hammerhead* court was divided 4-3. While an avenue may exist to file a lien even if the pre-construction notice was not given, contractors need to be sure they are fully compliant with Arkansas's statutory law.

If you have questions about this or any other areas of construction law, please contact Philip Elmore at 479-444-5203 or pelmore@qgtlaw.com.