



5TH CIRCUIT: Mississippi's Stop-Notice Statute Is Unconstitutional

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In *Noatex Corp v. King Construction of Houston, LLC*, Case No. 12-60385 (5th Cir. Oct. 10, 2013), the Fifth Circuit Court of Appeals issued its long-awaited ruling on the constitutionality of Mississippi's Stop-Notice statute, Miss. Code Ann. Section 85-7-181. The Stop-Notice statute allowed unpaid subcontractors or materialmen to bind money in the hands of the project owner, thereby preventing those funds from being disbursed to the non-paying prime contractor. The Stop-Notice statute was a primary protection for construction subcontractors and suppliers in Mississippi.

The Fifth Circuit upheld the decision of the District Court of the Northern District of Mississippi, and ruled that the statute as written did not contain sufficient procedural safeguards, and thus violated the Constitution's guarantee of due process for the taking of property. Specifically, the Fifth Circuit held that the Stop-Notice statute, which required that a contractor's money be held by the owner once the owner received a written notice from an unpaid subcontractor, was an unconstitutional taking without due process because it (1) did not provide for any notice or hearing prior to the binding of the funds, (2) did not require a posting of any bond by the subcontractor, (3) did not require any showing of exigent circumstances, and (4) did not require the subcontractor to submit an affidavit or other writing setting forth the factual background of the dispute and swearing to its authenticity. Accordingly, the Fifth Circuit held that the Stop-Notice statute was unconstitutional and no longer valid.

The immediate effect of this ruling will be to strip subcontractors and materialmen of any legal recourse against owners in the event that they are not paid by the prime contractor. While subcontractors and materialmen would still retain rights against the prime contractor for breach of contract and unjust enrichment, there are no real protections where there is an absconding or bankrupt general contractor.

The Fifth Circuit's decision in *Noatex* could be the impetus needed for Mississippi to pass a mechanics lien law that extends at least to first tier subcontractors or materialmen, as most of Mississippi's construction industry have sought for years. Currently, Mississippi is the only U.S. state that does not have such a law that applies to the development owner's real property (as distinguished from project funds). Additionally, some members of the Mississippi legislature have already drafted legislation to comply with the Fifth Circuit's due process requirements, although it is currently unknown what additional burdens any new statute, if passed, will place on subcontractors and materialmen.

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