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## Provision in Washington's Construction Lien Law Provides Important Protections to Lien Claimants Against Coercive Acts of Others

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Most project developers and general contractors respect the right of a potential lien claimant to record a construction lien in order to protect their right to payment. Periodically, however, there are those who seek to put undue pressure on a potential lien claimant to not exercise their lien rights. For example, a developer may threaten to stop doing business with a contractor to try to prevent the contractor from recording a construction lien, or a contractor may threaten to terminate an ongoing business relationship with a subcontractor or supplier to try and prevent their recording of a construction lien.

In 1992, as part of the Washington legislature's amendments to many provisions of the Washington construction lien law, the legislature enacted a statute designed to deter persons from engaging in the above conduct and other similar coercive conduct. That statute, RCW 60.04.035, provides as follows:

The legislature finds that acts of coercion or attempted coercion, including threats to withhold future contracts, made by a contractor or developer to discourage a contractor, subcontractor, or material or equipment supplier from giving an owner the notice of right to claim a lien required by RCW 60.04.031, or from filing a claim of lien under this chapter are matters vitally affecting the public interest for the the purpose of applying consumer protection act, chapter 19.86 RCW. These acts of coercion are not reasonable in relation to the development and preservation of business. These acts of coercion shall constitute an unfair or deceptive act or practice in trade or commerce for the purpose of applying the consumer protection act, chapter 19.86 RCW.

This statute appears to be unique to Washington. Although other states have consumer protection acts that impose liability for coercive conduct, there does not appear to be another state statute such as RCW 60.04.035 that relates specifically to coercive conduct in connection with construction liens.

The legislative history relating to the enactment of RCW 60.04.035 states that it was designed to protect from “intimidation and coercion”. Final Bill Report, E.S.B. 6441, at 2, 52nd Leg., Reg. Sess. (Wash. 1992). The house bill report states that “[a] consumer protection violation is added to make acts of coercion against contractors and material suppliers unfair practices when the coercion is designed to discourage the filing of liens”. House Bill Report, E.S.B. 6441, at 1. 52nd Leg., Reg. Sess. (Wash. 1992).

There is no indication in the available legislative history whether the impetus for proposing the statute was a case or cases in which there had been coercive conduct in relation to construction liens. Regardless, legislators obviously saw the danger of such conduct and acted to provide a remedy.

## **I. Interpretation of RCW 60.04.035**

RCW 60.04.035 does not define the term “coercion” but that term is generally defined as “[c]ompulsion of a free agent by physical, moral, or economic force.” Black’s Law Dictionary (10th ed. 2014).

The statute lists an example of an act of coercion – the threat to withhold future contracts. The statute’s language makes it clear that is just one example.

The one example set forth in the statute does help to shed light on other acts that courts would likely find to be coercive. For example, the act of a developer in threatening to withhold payments owed to a general contractor as retribution for recording a construction lien would most likely be held to be a violation of the statute.

RCW 60.04.035 prohibits attempted coercion as well as completed coercion. Thus, for example, if a contractor threatens a subcontractor in

order to dissuade them from recording a construction lien, and the subcontractor records the lien despite the threat, the contractor may nevertheless be held liable under the statute for attempted coercion. The subcontractor would still need to prove damages however.

Also noteworthy is the fact that the statute not only prohibits coercion intended to prevent the recording of a construction lien, but also prohibits coercion intended to pressure the potential lien claimant into not providing a notice of right to claim a lien. As those familiar with the Washington lien law are aware, if a potential lien claimant is required under RCW 60.04.031 to provide a notice of right to claim a lien, but does not, they lose their lien rights. Thus, coercion that prevents the giving of a notice of right to claim a lien has the same effect as coercion that prevents the actual recording of a construction lien, and therefore gives rise to liability on the part of the offender.

There is so far no guidance from the courts regarding interpretation of CW 60.04.035. As of this writing, there is not a reported case interpreting this statute.

## **II. Remedies for Violation of RCW 60.04.035**

The Washington Consumer Protection Act, codified in RCW 19.86 (“Consumer Protection Act” or “Act”) is an effective remedy because of significant financial effect on those who commit violations of its provisions.

Under the Consumer Protection Act, not only may the Washington Attorney General file suit to enforce the Act, but private parties are entitled to file suit under the Act. Remedies available to a private party are, in addition to the amount of their damages to compensate for their loss, treble damages up to an additional \$25,000, and attorney fees the party has incurred in enforcing remedies under the Act. Further, a private party may sue to enjoin or restrain the offender from committing further violations of the Act.

Despite its name as the “Consumer Protection Act”, the protections of the Act apply not only to individuals, but also to “corporations, trusts, unincorporated associations, and partnerships.” RCW 19.86.010 (1).

Damages can be substantial for the violation of the Consumer Protection Act. For example, if a contractor coerced a subcontractor into not recording a lien that would have secured \$100,000 of labor and materials, and the subcontractor could not collect payment because it did not record a lien, the subcontractor’s damages against the contractor may be proven to be \$100,000, plus treble damages of \$25,000 (the maximum amount of treble damages), plus the subcontractor’s reasonable attorney fees.

Other damages may be awarded depending on the circumstances. For example, should a developer follow through on a threat of withholding the

awarding of a future contract to an otherwise qualified contractor, the contractor's damages, if proven, may include the lost profits from the contract that would have been awarded to the contractor on the other project.

The language of RCW 60.04.035 paves the way for a party to prove a violation of the Consumer Protection Act. Two of the elements for a violation of the Consumer Protection Act are an unfair or deceptive act, and that the act must occur in trade or commerce. The last sentence of RCW 60.04.035 addresses both of these elements, stating that acts of coercion under the statute constitute "an unfair or deceptive act or practice in trade or commerce for the purpose of applying the consumer protection act."

A third element, and often a primary issue in proving claims under the Consumer Protection Act, is whether the conduct at issue is a matter that has an impact on the public interest. RCW 60.04.035 addresses this element, by expressly stating that a violation of RCW 60.04.035 is a "matter vitally affecting the public interest for the purpose of applying the consumer protection act, 19.86 RCW".

Thus, once a violation of RCW 60.04.035 is proven, just two of the required five elements under the Consumer Protection Act are left to be proven – that the claimant suffered damage, and that the damage was caused by the violation.

A defense that is sometimes raised in response to a claim under the Consumer Protection Act is that the act or practice was reasonable in relation to the preservation and development of business. It is unlikely that a court would ever rule that an act of coercion is reasonable, but regardless, RCW 60.04.035 resolves any doubt on this issue the statute expressly states that "[t]hese acts of coercion are not reasonable in relation to the development and preservation of business."

### **III. Conclusion**

Lien rights are valuable rights and the exercise of those rights must be free from coercion.

RCW 60.04.035 helps to compensate a potential lien claimant for the loss of lien rights due to coercion, but it is important to note that the remedies under RCW 60.04.035 are not a substitute for a lien. A potential lien claimant should never give up lien rights in response to coercive conduct of another.

Once lien rights are lost either because the potential lien claimant failed to provide a notice of right to lien if required to give that notice, or failed to record a lien within the 90-day period under RCW 60.04.091, those lien rights cannot be recovered. A lien claimant would not be able to recover lien rights by arguing to the court that they would have sent a required



notice of right to lien or timely recorded their lien but for the coercive conduct of another.

Accordingly, if the potential lien claimant is faced with coercive conduct from a potentially liable party such as an owner or general contractor, the lien claimant should maintain their lien rights, and also strongly consider filing an action or claim against the offending party under CW 60.04.035.

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