

This article introduces the practitioner to construction lien law in Michigan. Part I discusses construction liens in general, including liens on commercial real property. Part II discusses residential construction liens, including the Homeowner Construction Lien Recovery Fund.

Part I Construction Liens

A contractor, subcontractor, supplier, or laborer who provides an improvement to real property may acquire a construction lien under the Michigan Construction Lien Act (CLA).¹ The lien attaches to the interest of the owner or lessee who contracted for the improvement to the real property and any after acquired interest.² Construction liens can arise in both commercial and in residential construction projects. Some of the procedures applicable to the creation and enforcement of a lien will differ depending upon whether the project is deemed “residential” under the CLA. As will be seen in Part II, the definition of residential in the CLA is narrower than common usage.

The purpose of the CLA is to protect the rights of lien claimants to receive payment for labor or materials and to protect owners from paying twice for such services.³ The CLA states that it is a remedial statute that is to “be liberally construed to secure the beneficial results, intents, and purposes” of the Act. The CLA provides that substantial compli-

ance with the Act is sufficient for purposes of establishing construction liens thereunder.⁴

In the commercial setting, the owner or lessee contracting for the improvement is required to record a notice of commencement with the register of deeds for each county in which the real property to be improved is located.⁵ The notice of commencement includes a legal description of the property to be improved; the name, address, and capacity of the owner or lessee contracting for the improvement; and the name and address of the general contractor.⁶ The notice of commencement will also identify any designee appointed by the owner.⁷ A designee is a person appointed by the owner to receive all notices and instruments required to be served upon the owner under the CLA.⁸ Any information contained in the notice of commencement that is incorrect will not “adversely affect the rights of a lien claimant as against the property” of the owner or lessee who prepared the notice.⁹

The notice of commencement supplies a lien claimant with all information necessary to prepare and thereafter make service of a construction lien. In addition to recording, the owner is required to post a copy of the notice of commencement in a conspicuous place on the property during the duration of the performance of the work.¹⁰ The owner is required to supply a copy of the notice of commencement within 10 days of a receipt

of a written request by certified mail from a lien claimant.¹¹ The failure to post the notice of commencement will make the owner liable for the “actual expenses sustained by the lien claimant in obtaining the information otherwise provided by the posting.”¹² A general contractor or subcontractor who has possession of the notice is also obligated to provide a copy to a requesting party.

Within 20 days of supplying the first labor or material, the lien claimant who does not have a contract directly with the owner is required to provide the owner (or the owner’s designee, if named) with a notice of furnishing.¹³ Individual laborers, as defined in the Act, are provided 30 days after the wages are due and unpaid within which to serve the notice of furnishing.¹⁴ The notice of furnishing identifies the claimant as a supplier of labor or material to the project.¹⁵ The notice of furnishing alerts the owner to the need to secure lien waivers from such claimant at the time of making payment to the general contractor. The failure of the owner, lessee, or designee to provide the notice of commencement upon request will operate to extend the time within which a lien claimant who has requested a copy of the notice of commencement must provide a notice of furnishing.¹⁶ The failure of the owner to record the notice of commencement extends the time for a subcontractor or supplier to provide the notice of furnishing.¹⁷

Construction

How lien law in Michigan affects commercial and residential property

BY LAWRENCE M. DUDEK AND MARILYNN K. SMYTH



Liens

The failure of a lien claimant to provide the notice of furnishing within the required time period is not fatal to the ability of the claimant to assert a lien. The lien claimant will remain entitled to assert a claim of lien for any labor or materials provided after the untimely notice of furnishing.¹⁸ The claimant will also be entitled to recover for labor or material supplied prior to the date of supplying the notice of furnishing except to the extent that the owner made payments "pursuant to either a contractor's sworn statement or a waiver of lien . . . for work performed or material delivered by the lien claimant."¹⁹

The claimant is further required to record a claim of lien with the register of deeds for the county where the property is located within 90 days of providing the last labor or material to the property.²⁰ The claim of lien will include the name and address of the claimant, the contract price, the balance owing, the identity of the owner of the property, the first and last dates of supplying labor and material, and a legal description of the property that was improved.²¹ A subcontractor or supplier must include a proof or service of a notice of furnishing with its claim of lien.²² The claimant must serve the claim of lien upon the designee, if one is named in the notice of commencement, or upon the owner if the notice of commencement does not identify a designee, within 15 days of recording the lien.²³

The requirement to record the claim of lien within 90 days of the last work is strictly enforced, and the failure to record the lien within 90 days of the last work will invalidate the lien. The Michigan Court of Appeals recently held that if the lien is in proper recordable form and is delivered to and accepted by the register of deeds within the 90-day period, but formally recorded after expiration of the 90-day period, the lien will be enforceable.²⁴

The 90-day period is measured from the last date that labor or material was supplied, and may include activities such as final clean-up. The 90-day period runs from the date of performance of extra work, where the extra work is performed in good faith and at the owner's request.²⁵ However the later performance of warranty work will not constitute additional work that extends the 90-day deadline.²⁶ In prosecuting or defending a construction lien, the contractor or supplier's records, such as job tickets, payroll records, time sheets, and delivery tickets, should be examined. This will assist in determining the amount owed as well as the last date that labor or material was supplied. In some instances the claimant may be using an invoice date as the last date of work when, in fact, the last labor or material had been supplied at an earlier date.

A general contractor may properly include in its lien the amounts that are owing to its subcontractors.²⁷ A dispute may exist

about the amount that the lien claimant is entitled to recover, for example, where extras are disputed.

A lien claimant may not properly include wholly speculative amounts in its claim of lien.²⁸ If an excessive amount is claimed in bad faith, the claim of lien will be invalid and unenforceable in its entirety.²⁹ A lien claimant would act in bad faith, for example, where the lien includes amounts for labor or materials that were not furnished.

In a good faith dispute as to the amount owed, the lien claimant may assert entitlement to the entire amount claimed and the court will ultimately reduce the lien by any amounts that are determined not owing. While the lien claimant may include disputed amounts in the claim of lien, it would be prudent to itemize and explain the basis for the amount claimed and to include a statement as to any amounts disputed by the owner. This will help avoid a later determination that the lien claimant acted in bad faith.

A contractor is required to provide the owner with a sworn statement when payment is due from the owner or when the contractor requests payment from the owner.³⁰ A contractor is also required to supply a sworn statement upon demand of the owner.³¹ Prior to making payment, the owner should always require a sworn statement from the contractor. The sworn statement should be signed under oath by the contractor and identify all subcontractors and suppliers, the type of improvement furnished, the total contract price, the amount already paid, the amount currently owing, and the amount owed as laborers' wages, fringe benefits, and withholdings.³²

The owner should require waivers of lien from each of the subcontractors or suppliers identified on the sworn statement and any entities or persons who served a notice of furnishing or claim of lien.³³ The types of waivers of lien include a full unconditional waiver, a partial unconditional waiver, a partial conditional waiver, and a full conditional waiver. The effectiveness of a conditional waiver is conditioned upon the lien claimant's receipt of payment. If the lien claimant does not receive payment, the waiver is of no effect.

Sometimes, the disbursing agent for the construction lender will disburse the first draw to the contractor based upon the receipt

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Unless an owner pays pursuant to sworn statements and lien waivers, the owner risks that an unpaid contractor or supplier will later record a lien against the property.

If a residential builder is required to be licensed under the Occupational Code, but is not so licensed, he or she may not claim a construction lien against the owner's interest in the property.

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of conditional waivers from the contractor. At the time of subsequent draws, the contractor will be required to produce unconditional waivers for the prior draw in addition to waivers for the new draw. Prior to making final payment the owner should always require full unconditional waivers from the contractor and all subcontractors and suppliers.

Unless an owner requires a sworn statement and lien waivers, the owner risks that an unpaid contractor or supplier will later record a lien against the property. A lien waiver may not be required in advance of the performance of the work, and it is against public policy to require a waiver as a condition to enter into a construction contract; such a waiver is valid only to the extent that payment was made by the owner.³⁴

If the sworn statement identifies unpaid subcontractors or suppliers who have not supplied waivers of lien, the owner may withhold an amount sufficient to pay these claimants from the amount that would otherwise be payable to the contractor and make payment directly to the subcontractors and suppliers of the amount that is stated as owing in the sworn statement. The owner is required to provide five days' advance notice prior to making such direct payments to the subcontractors and suppliers.³⁵ The owner may also want to withhold any amounts owing to subcontractors who have provided the owner with a notice of furnishing and are not identified on the sworn statement. However, prior to making any payment to the omitted subcontractor or supplier, the owner should require the contractor to prepare an amended sworn statement or otherwise consent to the payment.

The receipt of a sworn statement that does not identify one or more subcontractors or suppliers that have provided a notice of furnishing should set off alarms for the owner. At best, the contractor keeps sloppy records. At worst, the contractor may be attempting to conceal the fact that subcontractors and suppliers are not being paid. It may be prudent for the owner to investigate the status of payment to subcontractors and sup-

pliers directly to determine if they have been paid and to confirm the authenticity of lien waivers tendered by the contractor.

A construction lender will typically make disbursements of the construction loan proceeds it draws based upon the percentage of completion of the work. At the time of each disbursement, the lender will increase the amount of mortgage title insurance to insure the priority of the mortgage lien in amount equal to the proceeds disbursed. While this title policy protects the construction lender's interest, it does not afford protection to the owner. It would be prudent for the owner's counsel to advise the owner of the benefit to be obtained in seeking to increase the owner's amount of title insurance for the amount of all construction loan disbursements.

The construction lien claimant is required to bring an action for the enforcement of the lien within one year of recording.³⁶ A lis pendens must be recorded within the one-year period in order to preserve the lien.³⁷ The lien claimant must provide a sworn statement to the owner prior to filing the complaint and must allege compliance with this requirement in its complaint.³⁸ Where the form of sworn statement is deficient, but substantially complies with the statute, the court may permit an amendment of the sworn statement.³⁹

The lien claimant is required to join all persons who have an interest in the property at the time of filing suit, which would be divested or impaired as a result of the foreclosure.⁴⁰ Other competing claimants may file cross claims.⁴¹ The court will determine the enforceability and priority of the various liens and competing interests and enter judgment.⁴² The court may award reasonable attorneys fees to a prevailing lien claimant. The court may assess reasonable attorney's fees against the lien claimant if the court finds that the lien claimant's enforcement action was "vexatious."⁴³

Finally, the judgment will set the time for payment and for sale of the property to satisfy the liens if payment is not made and the applicable redemption period. The sale is

conducted in the manner provided by statute for foreclosure of execution levy.

Part II Construction Liens on Residential Property

The CLA contains additional protection for owners of residential property. Homeowners are protected against the claims of unlicensed contractors, and also against the risk of having to pay twice for an improvement where the contractor has been paid in full. For purposes of the CLA, a residential structure is "an individual residential condominium unit or a residential building containing not more than two residential units, the land on which it is or will be located, and all appurtenances thereto, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement."⁴⁴ Therefore, "residential structure" for purposes of the CLA does not include residential construction being built on speculation. This definition is important when dealing with residential lien foreclosures and the Homeowner Construction Lien Recovery Fund.

To enforce a construction lien against residential property a lien claimant must conform to some additional requirements over and above those for non-residential property. These additional requirements, if not followed, may completely defeat the right to a lien.

Under the Occupational Code, what is considered residential is much broader than in the CLA, and deals more with the type of work being performed.⁴⁵ Both "residential builders" pursuant to Section 2401(a) of the Occupational Code, and "residential maintenance and alteration contractors" pursuant to Section 2401(b), are required to be licensed through the State of Michigan before engaging in such work.

Licensing

If a residential builder is required to be licensed under the Occupational Code, but is not so licensed, he or she may not claim a construction lien against the owner's interest



in the property.⁴⁶ If a builder is required to be licensed under the Occupational Code as a residential builder, he may not even sue in court to collect money due to him unless licensed.⁴⁷

In *Stokes v Millen Roofing Co.*,⁴⁸ the court held that an unlicensed contractor's failure to obtain a residential builder's license constituted a bar to its seeking compensation for installing slate on the homeowners' roof. Because the contractor was not licensed, its construction lien was also invalid. Finally, in overruling *Republic Bank v Modular One LLC*,⁴⁹ the court held that the unlicensed contractor could not have equitable relief (i.e. a suit in equity for the value of the labor and materials supplied) because such relief would defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction.

Who is required to be licensed? The definition of "residential builder" is very broad and generally includes a person who undertakes the construction of a residential structure for consideration.⁵⁰ However, the Occupational Code does identify some exceptions to the licensing requirement.⁵¹ These exceptions include building a structure for the builder's own use and occupancy, contracts where the total price is less than \$600 and, probably the broadest exception, a person "who engages solely in the business of performing work and services under contract with a residential builder or a residential maintenance and alteration contractor licensed under this article."⁵² Subcontractors and employees working for licensed contractors are therefore exempt from the licensing requirement.

Written Contracts

A contractor is not entitled to a construction lien against the interest of any owner or lessee in a residential structure unless the contractor has a written contract with the owner or lessee.⁵³ A contractor is a person in direct contract with the owner or lessee.⁵⁴

This definition could include a material supplier if selling material directly to the owner, even though a supplier may not think of itself as a contractor.

In order for a contractor to be entitled to a lien against a residential structure, the contract must state that the contractor may be required to be licensed⁵⁵ and in addition, if the contractor is required to be licensed, that the contractor is so licensed and its license number. As with all contracts it must also be definite enough to be enforceable with the material terms and conditions defined, such as scope of work and contract price. Problems often arise between contractors and homeowners because their contracts fail to contain sufficient specifications as to quality, quantity, and the specific materials to be incorporated.

Homeowner Construction Lien Recovery Fund

The Homeowner Construction Lien Recovery Fund is a safe harbor created by the legislature for owners of residential property who paid their contractor in full, but were nonetheless confronted with construction liens recorded against their property by subcontractors, suppliers, or laborers who had not been paid. As a result of this very real danger that homeowners would end up having to pay twice for an improvement in order to prevent a foreclosure, the legislature determined that owners of residential property needed protection without eliminating liens entirely. What resulted was Part 2 of the CLA, where the Homeowner Construction Lien Recovery Fund (fund) was created.⁵⁶

The money in the fund is generated by mandatory \$50 payments from persons applying for a residential builder's license, a residential maintenance and alteration contractor's license, an electrical contractor's license, an authorized master plumber's license, or persons applying for a license under the mechanical contractors' act.⁵⁷ A person may also become a member of the fund by voluntarily

paying the \$50 fee.⁵⁸ Once the fee is paid, a person is a member of the fund forever. If the fund ever drops below \$1,000,000, the director of licensing and regulation may assess an additional \$50 per member.⁵⁹ With the exception of laborers, in order for a lien claimant to receive payment from the fund, it must be a member of the fund prior to the date of entering into the contract that gives rise to its lien claim.⁶⁰

MCL 570.1203 provides the means by which homeowners who have paid their contractor for the improvement (taking into account all modifications to the contract) can avoid construction liens recorded against their property. Section 203(1) provides that the claim of the construction lien shall not attach to a residential structure, to the extent payments have been made, if the owner or lessee files an affidavit with the court indicating that:

- It has paid its contractor for the improvement and the amount of the payment.
- It has not colluded with any person to obtain a payment from the fund.
- It will cooperate with the department of licensing and regulation in the defense of the fund.⁶¹

The proper analysis, according to the court of appeals in *Erb Lumber v Gidley*, is to look to the extent to which a homeowner has paid the contractor for the improvement provided by the lien claimant, as opposed to payment for the overall project.⁶² Although the statute seems to imply that upon the filing of the affidavit, a lien is automatically avoided, in order for homeowners to take advantage of this statutory provision they actually have to be sued by a lien claimant foreclosing its lien or sue the lien claimant seeking an order from the circuit court to have the lien removed. (Normally, homeowners wait out the lien claimant to see whether suit to foreclose will be commenced within the one year statutory period of limitations.)

If a homeowner successfully causes the lien to "not attach" to the property, he or she is dismissed from the foreclosure lawsuit, and the suit then continues between the lien claimant and the fund, which is represented by the State of Michigan Attorney General.

If a homeowner successfully causes the lien to “not attach” to the property, he or she is dismissed from the foreclosure lawsuit, and the suit then continues between the lien claimant and the fund, which is represented by the State of Michigan Attorney General. In essence, the lien “reattaches” to the fund. For a lien claimant to successfully collect from the fund, it must satisfy each and every statutory requirement set forth in MCL 570.1203(3).

The requirements that lien claimants must satisfy in order to collect from the fund are as follows:⁶³

- That the claimant has a valid lien.
- That payment was made by the owner to the contractor or subcontractor (this should be satisfied by the fact that the homeowner has been dismissed from the litigation).
- That the contractor or subcontractor retained or used the money paid to it by or on behalf of the homeowner, without having paid the person claiming the construction lien.
- That the claimant is a member of the fund.
- That the claimant has not colluded with anyone to obtain payment from the fund.
- That the lien claimant is licensed if so required.⁶⁴
- That the claimant has made a reasonable effort to obtain payment from the contractor or subcontractor with whom it has a direct contract.
- That the contractor or subcontractor with whom the person claiming the construction lien contracted is licensed if required by law to be licensed.⁶⁵

The Attorney General vigorously defends the fund, and will ensure complete compliance with these requirements before consenting to a judgment in favor of the lien claimant. Part 2 of the CLA is not subject to the liberal construction provisions of Part 1.⁶⁶

The fund makes payments to a lien claimant only after the court finds that a subcontractor, supplier, or laborer is entitled to payment from the fund, and enters a judgment. This does not, however, prevent the Attorney General from entering into consent judgments with lien claimants to whom it

has agreed that payment is due from the fund.⁶⁷ Once a judgment is entered in favor of a lien claimant against the fund, a check is cut out of the fund within five weeks or less.

Contractors may not collect from the fund, since payment from the fund presumes that the contractor has already been paid. There is a payment limit of \$75,000 per residential structure, and if the total payable exceeds \$75,000, lien claimants with valid claims against the fund collect in pro rata shares.⁶⁸

When the fund makes payment it is because there has been a finding that the contractor received payment from the homeowner yet failed to make payment as required to its subcontractors, suppliers, or laborers. Therefore, the CLA provides that the fund, through the State of Michigan Department of Consumer & Industry Services (department) shall be subrogated to the rights of the person to whom the payment was made.⁶⁹ Hence, as a matter of course, when the fund is sued by a lien claimant, the fund files a cross claim against the contractor for indemnification. When a lien claimant receives judgment against the fund, the fund requests and generally receives a judgment in an equal amount against the contractor, or takes an assignment of the lien claimant’s contract claim.

In addition, if the department makes a payment from the fund, the department automatically enters a complaint against the contractor’s license with the appropriate licensing agency to be addressed by the disciplinary proceedings under the appropriate licensing law.⁷⁰ Eventually, contractors lose their licenses unless they pay the fund back for the money paid out on their behalf.

Although successful lien claimants generally are entitled to an award of fees, granted in the court’s discretion, in residential foreclosures involving payment from the fund, the lien claimant is not entitled to an award of attorneys’ fees.⁷¹

Conclusion

The authors caution that this article provides only a very general overview of the Construction Lien Act and is intended to familiarize practitioners with the existence of construction liens and the issues presented.

The practitioner should, of course, always consult the statute and applicable case law when dealing with an issue under the lien act. ♦



Part I of this article was authored by Lawrence M. Dudek, who is a senior member of Miller, Canfield, Paddock and Stone. Mr. Dudek is the chair of the Real Property Law Section of the State Bar of Michigan and former chair of the Special Committee on Construction Law for the Real Property Law Section.



Part II of this article was authored by Marilyn K. Smyth, a partner with May, Simpson & Strote in Bloomfield Hills, Ms. Smyth practices in the areas of real estate, title, and construction litigation and is the current

chair of the Special Committee on Construction Law for the Real Property Law Section.

Footnotes

1. MCL 570.1101 et seq.
2. MCL 570.1107.
3. *MD Marinich, Inc v Michigan Nat Bank*, 193 Mich App 447, 484 NW2d 738, appeal denied 497 NW2d 184, 441 Mich 921, reconsideration denied 500 NW2d 472.
4. MCL 570.1302.
5. MCL 570.1108.
6. MCL 570.1108(2).
7. MCL 570.1108(2)(d).
8. MCL 570.1104(3).
9. MCL 570.1108(4).
10. MCL 570.1108(8).
11. MCL 570.1108(5).
12. MCL 570.1108(11).
13. MCL 570.1109.
14. MCL 570.1109(2).
15. MCL 570.1109(4).
16. MCL 570.1108a(11).
17. MCL 570.1108(10).
18. MCL 570.1109(5).
19. MCL 570.1109(6).
20. MCL 570.1111(1).
21. MCL 570.1111(2).
22. MCL 570.1111(4).
23. MCL 570.1111(5).
24. *Central Ceiling & Partition, Inc v Department of Commerce*, 249 Mich App 438, 642 NW2d 397, (2002). The lien will not be enforceable if ultimately rejected by the register of deeds as not being in proper form. *Northern Concrete Pipe, Inc v Sinacola Companies—Midwest, Inc*, 461 Mich 316, 603 NW2d 257 (1999).

25. *Bolhuis Lumber and Mfg Co v Van Tubergen*, 250 Mich 686, 230 NW 910 (1980).
26. *Woodman v Walter*, 204 Mich App 68, 514 NW2d 190 (1994).
27. *Halpin v Garman*, 192 Mich 71; 158 NW 29 (1916); *Spicer v Dugrey*, 221 Mich 264; 190 NW 646 (1922).
28. *Brennan v White*, 97 Mich 182, 185; 56 NW 354 (1893); *Superior Products Co v Merucci Bros, Inc*, 107 Mich App 153, 158; 309 NW2d 188 (1981).
29. *Tempo, Inc v Rapid Electric Sales & Service, Inc*, 132 Mich App 93; 347 NW2d 728 (1984).
30. MCL 570.1110(1)(a).
31. MCL 570.1110(1)(b).
32. MCL 570.1110(4).
33. MCL 570.1115(1).
34. MCL 570.1115(1).
35. MCL 570.1106(6).
36. MCL 570.1117.
37. MCL 570.1117(2).
38. MCL 570.1117(7).
39. In *Alan Custom Homes, Inc v Krol*, 256 Mich App 505; 667 NW2d 379 (2003), the court of appeals held that the “substantial compliance” provision of the Act, MCL 570.1302(1), applies to MCL 570.1110(8), and allowed amendment of the sworn statement.
40. MCL 570.1117(4).
41. MCL 570.1117(6).
42. MCL 570.1118(2). As between each other the claims of lien have equal priority. MCL 570.1119(1). The questions of priority as to other interests are addressed in MCL 570.1119 and are beyond the scope of this article.
43. MCL 570.1118(2).
44. MCL 570.1106(3).
45. MCL 339.2401.
46. MCL 570.1114.
47. MCL 339.2412.
48. 466 Mich 660; 649 NW2d 371 (2002).
49. 232 Mich App 444; 591 NW2d 335 (1998).
50. MCL 339.2401(a).
51. MCL 339.2403.
52. MCL 339.2403(b), (f) and (e).
53. MCL 570.1114.
54. MCL 570.1103(5).
55. MCL 570.1114(a).
56. MCL 570.1201 et seq.
57. MCL 570.1201(1)(a).
58. MCL 570.1201(1)(c).
59. MCL 570.1201(2).
60. MCL 570.1201(1)(b), (1)(c) and (3).
61. MCL 570.1203(1).
62. *Erb Lumber, Inc v Gidley*, 234 Mich App 387 (1999).
63. MCL 570.1203(3).
64. See MCL 339.2401, and the exceptions found in MCL 339.2403.
65. See MCL 339.2401, and the exceptions found in MCL 339.2403.
66. *Brown Plumbing & Heating, Inc v Homeowner Construction Lien Recovery Fund*, 442 Mich 179 (1993).
67. MCL 570.1203(6).
68. MCL 570.1204.
69. MCL 570.1205(2).
70. MCL 570.1206.
71. MCL 570.1118(2).