

# Chapter VI

## REMEDIES FOR PAYMENT DISPUTES

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### Introduction<sup>1</sup>

This chapter discusses payment problems between owners, contractors, subcontractors and suppliers/materialmen and will address the following questions:

- (1) When does a contractor or subcontractor have the right to stop work for lack of payment?
- (2) If a subcontractor does not pay a supplier/materialman, may a contractor pay the supplier/materialmen directly?
- (3) What right does a subcontractor have to make claim against a payment bond or lien a project?

#### A. RIGHT TO STOP WORK FOR NON-PAYMENT

##### 1. **Work Stoppage**

Contractors can create a right to stop work for nonpayment by adding such terms and conditions to the contract. In fact, all of the relative rights of each party involved in a construction project originate in the contractual agreement. In order to protect your right to stop work for non-payment, it is critical that you include a right to stop work provision in your contract.

Many contracts contain language allowing an unpaid contractor or subcontractor to suspend its performance for non-payment. These provisions allow contractors to temporarily stop work if payment is not made on time. Written notice to the owner or architect of the impending work stoppage is frequently provided for. For example, in Article 9.7.1 of AIA Document A201 (1997 Edition), the consequences for non-payment are specifically outlined; that Article provides:

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents. (Emphasis Supplied).

Similarly, AIA Document A401, Contractor-Subcontractor Agreement (1997 Edition) contains a provision at Article 4.7.1 which reads:

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement the Subcontractor may, without prejudice to other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the

Subcontractor's reasonable costs of shutdown, delay and remobilization  
(Emphasis Supplied).

Note that these provisions also provide for extension of the time for completion and adjustment of the contract price to cover the contractor's reasonable costs in the event of a work stoppage.

Although these provisions provide for stopping work or suspension of work until payment is received, they do not terminate the contract. The right to stop work allows a contractor to temporarily suspend its performance, but requires the contractor to return to the site upon receipt of payment. Termination of the contract is a more serious remedy, with different and more permanent consequences. If the non-payment is persistent and repeated or if the nonpayment continues for a longer period of time, the result can be contract termination.

## **2. Contract Termination**

Contractual language may provide for termination of a contract under certain circumstances. For example, you may include this provision in your contract:

The Contractor may terminate the Contract if Work is stopped for 30 consecutive days through no act or fault of the Contractor or a Subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor because the architect has not issued a Certificate of Payment and has not notified the Contractor of the reason for withholding certification. . . or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents.

Article 14.1.1, AIA Document 201 (1997 Edition). If you choose to include a provision which allows you to terminate the contract, do so with the utmost of care and specificity. A prudent contractor will also include a related provision that outlines what should happen after the termination, i.e. the right to receive payment for work completed, etc.

## **3. Conditions Precedent Generally**

In addition to outlining the consequences for non-payment, the contract may include terms and conditions justifying non-payment or any other action that is foreseeable or desirable. For example, "pay when paid" clauses, terms which condition payment to a subcontractor upon the receipt by the general contractor of payment from the owner, if worded properly, will be upheld by the courts.<sup>2</sup> These provisions make the owner's payment to the general contractor a condition precedent to the general contractor's obligation to pay its subcontractors, even if the subcontractors have fulfilled their contractual obligations.

Including language that creates a condition precedent<sup>3</sup> may be beneficial should a payment dispute arise. Essentially, a condition precedent clause requires another party to complete some action before one is obligated to perform. One may include the language "payments to the Subcontractor shall be made after receipt by the Contractor of payment from the Owner for such work" in order to make it clear that there is no obligation to pay the subcontractors until the general contractor is paid by the owner. Remember, in the event of a dispute, the courts will look to the contract to determine the parties' intent. Courts are reluctant to construe contractual provisions as conditions precedent unless compelled to do so by the language of the contract. Therefore, if you intend to condition your payment or performance on another's actions, a condition precedent clause must clearly say so.

Before stopping work for non-payment, a contractor should be aware of all of the payment terms in the contract. The Contractor must examine any requirements to be met before suspending its contract performance.

#### **4. Payment Disputes In The Absence Of Specific Contractual Language**

If the contract does not specifically outline the consequences for non-payment, then the contractor's rights are governed by general contract law principles. Whether failure to make timely payments gives a contractor the right to stop work depends on several factors, including but not limited to:

1. The amount withheld in relation to the total contract price;
2. The length of time the amount is withheld;
3. Whether the owner has acted in good faith in withholding payment; i.e., does the owner have a legitimate excuse in withholding payment;
4. The extent to which the owner has assured payment upon completion of the contract; and
5. Custom in the industry.

While it is possible that, when applying general contract principles a court will rule in the contractor's favor and hold that a work stoppage was justified, it is always better to eliminate uncertainty by drafting a contract which reserves the right to stop work for non-payment.

Stopping work on a project is a decision that must be carefully and objectively considered. Although stopping work can be the most effective means to assure payment, if a contractor is not justified in stopping work on a project, the owner will complete the project on its own and recover from the contractor the cost to complete the work in excess of the contract price.

#### **B. CONSTRUCTION LIENS**

The Michigan Construction Lien Act, MCLA 570.1101 et. seq., affords protection to those persons performing labor, or supplying material or equipment for the improvement of real property. The protection is in the form of a construction lien which attaches to the real estate on which the construction project is located or to which the improvements were made.

The Lien Act outlines requirements and procedures which must be followed by all parties who may be affected by the lien, including the project owner, the general contractor, subcontractors, materialmen, suppliers, and laborers. In many cases, the filing of a valid and timely lien will result in the prompt settlement of a claim. However, if payment on the lien is not made within a certain period of time, then a lawsuit must be commenced to foreclose on the lien. Either way, the Act helps ensure that those who perform improvements on real property are compensated.

##### **1. Residential v Non-Residential Structures.**

The Act distinguishes between residential and non-residential structures. The Lien Act's definition of "residential structure" differs from the commonly accepted definition of the term. It is more narrow. According to the Lien Act, a "residential structure" is:

An individual residential condominium unit or a residential building containing not more than 2 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.

While the procedure for obtaining a lien against a residential structure is nearly identical to obtaining a lien against a non-residential structure, there are differences with respect to the rights of the residential owner and those supplying labor and materials to a residential structure. For purposes of this article, the discussion will be limited to non-residential structures only.

## **2. Public v Private Projects.**

In Michigan, construction projects are classified as either public or private projects. Public projects, those owned by federal, state, or local governments, are not subject to the attachment of liens as a matter of public policy. To protect subcontractors and suppliers on public projects, federal and Michigan laws require the "Principal Contractor" to furnish a Performance Bond for the protection of the "Governmental Unit" and a Payment Bond for the protection of those supplying labor, material, or both, to the construction project.

Private projects comprise all projects other than those owned by duly empowered governmental agencies. Individuals and businesses own most private projects but it is important to note that nonprofit organizations, such as hospitals, are also private owners, if they are not a part of a government agency.<sup>4</sup>

## **3. Parties Entitled to File a Lien.**

Each contractor, subcontractor, supplier, or laborer who provides an "improvement" to real property has a right to a lien upon the interest of the owner or lessee who contracted for the improvement, the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has required the improvement. The Act contains a non-exclusive laundry list of services which are defined as "improvements." These services provide a basis for a lien: surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract.<sup>5</sup>

The contract for improvement need not be in writing (except in certain instances with respect to residential property) and, unlike many states, the contract need not be directly with the owner or lessee. A written contract, however, is certainly recommended and is a more common practice.<sup>6</sup>

## **C. NOTICE OF COMMENCEMENT**

### **1. General Requirements.**

At the inception of any improvement to real property, the owner must record a Notice of Commencement. The Notice must be recorded by the owner or lessee contracting for the improvement in the Office of the Register of Deeds in the county where the construction project is located.

The Notice of Commencement must include 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. The Notice of Commencement must also identify any individual that the owner has appointed to be its designee, or the person appointed by the owner to receive all notices and instruments that must be served upon the owner by the Construction Lien Act.

A Notice of Commencement must be in a format similar to and contain all the information as shown in Appendix 1.<sup>7</sup>

### **2. An Owner's Responsibility With Respect to A Notice of Commencement.**

The Notice of Commencement must be recorded before commencement of any actual physical improvement to the property and the Notice must be posted in a conspicuous place at the jobsite. Failure to record the Notice of Commencement extends the time within which a subcontractor, supplier or laborer is required to provide a Notice of Furnishing. Failure to post or keep posted a copy of the Notice of Commencement renders the owner or lessee liable to a subcontractor, supplier or laborer for all actual expenses incurred in obtaining the information.

Also, the owner, lessee or designee must furnish a copy of the Notice of Commencement to the general contractor. Within ten (10) days after receiving a written request by certified mail from a subcontractor, supplier, or laborer, the owner, lessee or designee must furnish a copy of a Notice of Commencement to the party so requesting. Failure to furnish a copy of a Notice of Commencement to a subcontractor, supplier or laborer extends the time required for a subcontractor or supplier to furnish a Notice of Furnishing. Failure to furnish a copy of a Notice of Commencement to a general contractor renders the owner or lessee liable to the general contractor for all actual expenses incurred by the general contractor in obtaining the information otherwise provided by the Notice of Commencement.

Lastly, the owner should take care to provide accurate information in the Notice of Commencement. However, if erroneous information is included in the Notice of commencement, this will not adversely affect the rights of a lien claimant as against the property.

### **3. Contractors' and Subcontractors' Responsibility with Respect to a Notice of Commencement.**

The Notice of Commencement supplies the lien claimant with all information necessary to prepare and subsequently make service of a construction lien. A contractor or subcontractor who has been provided with a copy of a Notice of Commencement, must respond within ten (10) days after a written request by certified mail from one who has a direct contract with the contractor or subcontractor and provide to the requesting party a copy of a Notice of Commencement with a blank Notice of Furnishing. Failure of a contractor or subcontractor to do so renders the contractor or subcontractor liable for expenses incurred in obtaining the information.<sup>8</sup>

## **D. NOTICE OF FURNISHING**

A lien claimant who does not have a direct contractual relationship with the owner must serve the owner, or its designee, with a Notice of Furnishing. A Notice of Furnishing is served on the owner or owner's designee (the person designated by the owner to receive notice) and the general contractor. The purpose of the Notice of Furnishing is to provide notice to the owner and general contractor as to the identity of the parties working on the project site. The Notice of Furnishing identifies the claimant as a supplier of labor or materials for the construction project. The owner is put on notice of its need to secure lien waivers from each identified supplier when it makes payment to the general contractor.

The statute requires that the Notice of Furnishing be in the form set forth in Appendix 2.

### **1. Requirements for Subcontractors/Suppliers.**

A subcontractor or supplier is required to provide a Notice of Furnishing to the designee or owner/lessee and the general contractor, either personally or by certified mail, within 20 days after furnishing the first labor or material to the project.

The failure of a lien claimant to provide a Notice of Furnishing within the time specified in the Act does not defeat its right to a construction lien for work performed after the Notice of Furnishing is served. Additionally, the failure of a lien claimant to provide a Notice of Furnishing within the Act's time constraints does not defeat the lien claimant's right to a construction lien for work performed or materials furnished before the service of the Notice of Furnishing, except to the extent that payments were made by or on behalf of the owner or lessee to the contractor pursuant to a contractor's sworn statement or waiver of lien in accordance with the Act for work performed or material delivered by the lien claimant.

### **2. Requirements for Laborers.**

A laborer must provide a Notice of Furnishing to the designee or owner/lessee and the general contractor, either personally or by mail, within 30 days after wages were contractually due but not paid. As for a laborer's fringe benefits and withholdings, a Notice of Furnishing must be served on the designee and

general contractor, either personally or by certified mail, by the fifth day of the second month following the month in which fringe benefits or withholdings from wages were contractually due but not paid.<sup>9</sup>

The failure of a laborer to provide a Notice of Furnishing as required will not defeat the laborer's lien for those wages, fringes and withholdings for which the Notice of Furnishing is required, but may affect the priority of the Claim. A laborer may authorize an agent, like a union, to prepare and serve a Notice of Furnishing; however, the Notice must contain all the information listed in Appendix 2 for each laborer.<sup>10</sup>

### **3. Proof of Service of Notice of Furnishing.**

Those who serve owners, lessees, and designees with a Notice of Furnishing must also attest that the notice was actually served. The Proof of Service of Notice of Furnishing accomplishes this requirement. Appendix 3 is a recommended form of Proof of Service of Notice of Furnishing. The Proof of Service should set forth the following:

1. The date notice was served;
2. The method of service, whether by certified mail, regular mail (laborers only) or personally; and
3. The party or parties who were served (general contractor, if any, and designee or owner/lessee).

If payment is not made and a Claim of Lien needs to be filed, the Proof of Service of Notice of Furnishing must be attached to and recorded with the Claim of Lien. Therefore, a subcontractor, supplier or laborer should properly complete a Proof of Service of Notice of Furnishing at the time of serving the Notice of Furnishing, and keep the Proof of Service in case a Claim of Lien needs to be recorded.

## **E. CLAIM OF LIEN**

A claimant must record a Claim of Lien to commence its claim against the property.

### **1. Time Limitation For Recording A Claim of Lien.**

The Claim of Lien must be recorded within 90 days after the last labor or material is furnished by the lien claimant to the project site. The 90-day period begins on the last date that labor or material is supplied, including clean-up, but clean-up or equipment pick-up cannot be delayed in an attempt to stretch out the last day of furnishing.

Although the Michigan Lien Act is to be liberally construed and remedial in nature, the 90 day requirement for recording a lien is not flexible. Substantial compliance with the 90 day recording requirement is not sufficient to claim a lien.

### **IMPORTANT!**

- a. The Act allows 90 days (not 3 months) to file your lien.
- b. The Act does not allow any extensions of the 90 day requirement.

**2. Where to Record a Lien.** The Claim of Lien must be recorded with the Register of Deeds in the County where the Project is located. If the property is located in two counties, the lien must be recorded with the Register of Deeds for both counties. A small fee will be charged by the Register of Deeds for recording the Claim of Lien.

**3. Information Required in a Claim of Lien.** A Claim of Lien must, by statute, be in the form set forth in Appendix 4, or in the case of a laborer, in the form set forth in Appendix 5. The Claim of Lien must contain the following information:

1. First day of work;
2. Last day of work;
3. Legal description of project (from the notice of commencement or title search);
4. Name of the owner or lessee (from notice of commencement or title search);
5. The total amount of the contract, including extras and payments received;
6. If a laborer, the gross hourly rate;
7. The amount of the lien.

The Proof of Service of Notice of Furnishing must be attached to the Claim of Lien at the time it is recorded.<sup>11</sup>

#### **4. Serving the Claim of Lien on Other Parties.**

A copy of the Claim of Lien must be served, either personally or by certified mail, upon the owner or designee named in the Notice of Commencement within 15 days after the date the Claim of Lien is recorded with the County Register of Deeds.

If a designee has not been named or has died, then service is to be made on the owner or lessee. Appendix 6 is a recommended form of Proof of Service of Claim of Lien. The Proof of Service should set forth the following:

1. The date the Claim of Lien was served;
2. The method of service, whether by personal service or certified mail; and
3. The name of the party served.

If a lawsuit is commenced to foreclose on the Claim of Lien, then the Proof of Service of Claim of Lien must be attached to the Complaint.

Please note that you may not include entirely speculative amounts in the Claim of Lien. It is advisable that the lien amount be itemized in order to prove that you are not acting in bad faith.

#### **F. SWORN STATEMENTS**

A Sworn Statement is a statement under oath by a contractor or subcontractor listing each subcontractor, supplier, and laborer with whom the person issuing the Sworn Statement has contracted to furnish labor or material to the project. The Sworn Statement must be in the form as shown in Appendix 7. The contractor or subcontractor is not required to list material furnished out of his or her own inventory and which has not been purchased specifically for the purpose of performing the contract.

A Sworn Statement is required:

##### **A. From a contractor when:**

1. Payment is due from the owner or lessee, or when a contractor requests payment from the owner or lessee; or
2. A demand for the sworn statement is made by or on behalf of the owner or lessee.

##### **B. From a subcontractor when:**

1. A demand is made for a sworn statement by or on behalf of the owner or lessee; or
2. Payment is due to the subcontractor from the contractor, or when the subcontractor requests payment from the contractor.

The statute allows the owner/lessee the right to withhold monies due the contractor in an amount sufficient to pay all sums due to subcontractors, suppliers, or laborers as shown on the Sworn Statement. The owner/lessee may, from the amounts withheld, pay subcontractors, suppliers, or laborers, amounts they are due as shown on the Sworn Statement. They may also withhold any amounts owing to subcontractors and materialmen who have provided a Notice of Furnishing, but are not shown in the Sworn Statement. However, if the owner elects to pay direct to subcontractors, suppliers or laborers, then the owner must provide at least five (5) business days' notice to the general contractor of his intent to do so. Subsequent direct payments to subcontractors, suppliers, or laborers need not be preceded by the five (5) day notice unless the owner returns to the practice of paying all sums to the general contractor.<sup>12</sup>

As a general rule, the owner or lessee, the mortgagee, and general contractor have the right to rely on a Sworn Statement to avoid a subcontractor, supplier or laborer's lien, unless the subcontractor, supplier, or laborer has provided a Notice of Furnishing. For this reason it is important that a subcontractor, supplier, or laborer serve its Notice of Furnishing as soon as possible, in case they are omitted from a Sworn Statement. Also, before making any disbursements, it is important for the owner or lessee, mortgagee and general contractor to require that a Sworn Statement be furnished and to review all Notices of Furnishing provided.

## **G. WAIVERS OF LIEN**

There are four types of lien waivers:

1. Partial Unconditional Waiver (Appendix 8)
2. Partial Conditional Waiver (Appendix 9)
3. Full Unconditional Waiver (Appendix 10)
4. Full Conditional Waiver (Appendix 11)

The statute requires that each waiver be in substantially the format set forth in Appendixes 8 through 11. Although there are four types of waivers, there are only two options to consider:

1. Is the waiver for partial or full payment?
2. Is the waiver conditioned on actual receipt of payment?

For example, a Partial Conditional Waiver is given for a partial payment and is conditioned on receipt of actual payment. Likewise, a Full Unconditional Waiver acknowledges payment in full and is not conditioned on receipt of payment. Lien rights cannot be waived before work is performed even if the waiver is a term or condition of the construction contract or subcontract.<sup>13</sup>

### **1. Lien Foreclosure.**

Within one year after the date the Claim of Lien was recorded with the County Register of Deeds, a court action must be started. The court proceeding must be brought in the circuit court in the county where the project is located and all parties who have claimed an interest to the property must be joined in the action.

### **2. Bonding Off The Lien.**

If a lien is recorded against the construction project, the Lien Act provides for a bond, in the sum of twice the amount of the lien, to be filed with the County Clerk. Filing the bond has the effect of vacating or discharging the lien. Suit must still be brought within one year from the date the lien is recorded; however, the suit is brought against the bond instead of against the property.<sup>14</sup>

## **H. CONSTRUCTION BONDS FOR PUBLIC PROJECTS**

Contractors cannot lien public projects. Instead, the contractor must look to bonds and the bonding statutes to protect itself.

For state public projects, before any contract for construction amounting to over \$50,000 is awarded, the contractor must furnish the municipality with a performance bond and a payment bond. The bonds become binding upon the awarding of the contract to the contractor. Claimants under a payment bond are entitled to recover on the contractor's bond even though the laborer or material supplier is not a party to the bond. Prosecution of these claims must follow statutory procedures. A claimant under a payment bond may institute the action in the appropriate court in the municipality in which the contract was performed within one year from the date final payment was made to the contractor.

In Michigan, generally there are three types of bond statutes which apply to public construction projects:

1. State and local government projects (except state highways);
2. State highway projects; and
3. Federal government projects.

The requirements for each type of project are highlighted in the following summary:

<b><u>REQUIREMENTS:</u></b>	<b><u>PROJECTS:</u></b>		
	<b><u>State and Local</u></b>	<b><u>State Highway</u></b>	<b><u>Federal</u></b>
On which construction projects is a payment bond required?	Projects exceeding \$50,000.00 in amount.	All projects.	Projects exceeding \$25,000.00 in amount.
What is the required amount of the bond?	Not less than 25% of the contract price.	Amount to be determined by the Michigan Department of Transportation	Varies depending on the contract terms.
Who may make a claim on a payment bond?	One who has furnished labor and/or material used or reasonably required for use on the project.	Those who have performed labor or furnished materials/supplied used in the project.	Every person who has furnished labor or material in the prosecution of the work.
Written Notice Requirements for those <u>who do not</u> have a direct contract with the principal contractor.	Two Notices Required: (a) Notice to principal contractor within 30 days of first furnishing stating the labor/materials being furnished and identifying the party contracting for the improvement, and b) Notice to the principal contractor & the governmental unit within 90 days of last furnishing labor or materials stating the amount	Within 60 Days after last furnishing to the project, serve notice to the Mich. Dept. of Trans. of the amount claimed and the name of the person for whom the labor or materials were furnished (does not apply to those supplying labor only).	Within 90 Days after last labor or materials furnished, send notice to the principal contractor of the amount claimed and the person for whom materials or labor were furnished

claimed and the person for whom the materials or labor were furnished.

Written Notice Requirements for those in direct contact with principal contractor.	N/A	Same as above.	N/A
Statute of Limitations for bringing suit.	Within one year from the date final payment was made to principal contractor.	Within one year after completion and acceptance of project.	Within one year after the day on which the last labor or material was furnished to the project by the claimant.

**I. JOINT CHECK AGREEMENTS**

In certain cases a materialman or supplier will request that it receive payment directly from a general contractor instead of relying on a subcontractor with whom it has contracted. However, in Michigan, the promise by a general contractor to pay the debt of its subcontractor is void unless the promise is reduced to writing and signed.<sup>15</sup> Therefore, if a general contractor wishes to pay a subcontractor's supplier or materialmen directly, the general contractor should enter into a joint check agreement to protect its obligations to both the supplier/materialman and the subcontractor. A sample joint check agreement is attached as Appendix 12.

**J. BUILDERS TRUST FUND**

The Michigan Building Contract Fund Act<sup>16</sup> also known as the Builders Trust Fund Act, is a Michigan law which provides that when a payment is made from an owner to a contractor or from a general contractor to a subcontractor, that money is considered a "trust fund" and the contractor/subcontractor who receives the payment is the trustee of the money paid. The beneficiaries of the trust fund are the subcontractors, laborers or materialmen who furnished labor or materials to the project.

Although the Act provides for both civil as well as criminal penalties, the Act applies only to private projects and not public projects. The Act, passed by the State Legislature in 1931 as a tool to aid subcontractors, laborers and materialmen, is designed to prevent contractors from juggling funds between construction projects. Under Michigan law, the contractor bears the burden of proving that he did not defalcate funds received pursuant to the Act.

In many cases, the Trust Fund Act benefits subcontractors, suppliers and contractors when the person with whom they have contracted files for bankruptcy. When a person files for bankruptcy, all of the contractor's assets, including accounts receivable, become part of the bankruptcy estate and are subject to the bankruptcy laws. However, the Builders Trust Fund Act, if it applies to the project, requires that the funds be subject to a trust. Trust funds are not part of the bankruptcy estate, and are to be used for the benefit of those supplying labor and materials.

The problem in using the Builders Trust Fund Act is that there are several exceptions carved out of the Act. For example, the Act does not apply to public construction projects. Also, you must be in direct contract to claim that your monies are trust funds. Thus, while the Act does provide some subcontractors, materialmen and owners with a more secure position, it is not always the solution.

## Conclusion

Payment disputes may arise between owners, general contractors, subcontractors, materialmen, laborers, and others who make improvements or have a proprietary interest on and in real property. For contractors to protect themselves, they should (1) choose the contractual language carefully and (2) avail themselves of the statutory measures enacted to protect them.

### Endnotes

1. The author wishes to recognize and thank Gerald J. Richter, of Facca, Richter & Pregler, P.C., author of this chapter in the original edition of this book, whose work was relied on heavily with this update.
2. See for example. Christman Company v Anthony S. Brown Development Company, Inc. Michigan Appeals Court, Docket No. 157736 (April 28,1995).
3. A condition is an act or event other than a lapse of time, which, unless excused, affects a duty to render a promised performance. A condition is distinguished from a promise because promises do not create a right or duty in and of themselves.
4. Many private projects may involve participation or other assistance that is provided by public agencies. Projects that include financing, subsidies, grants, and, in some cases, even partial ownership by governmental agencies are still considered private projects if any portion of the ownership is held by a private citizen or entity.
5. Under the Act, an "Owner" is defined as a person holding a fee interest in real property or an equitable interest arising out of a land contract. Therefore, one dealing with a land contract vendee is, for purposes of the lien act, dealing with the owner.
6. Although the lien claimant's contract need not be direct with the Owner, the sum of all the construction liens against the project may not exceed the amount which the Owner or lessee agreed to pay the person with whom he or she contracted, as modified by additions and deletions and less payments made by or on behalf of the Owner.
7. The statement in paragraph 6 of Exhibit 1 must be contained in the Notice of Commencement as written. Also, in paragraph 4 of Exhibit 1, the "Designee" is that person named by the owner or lessee to receive, on behalf of the owner or lessee, all notices or other documents required to be furnished under the Lien Act.
8. A written request to a contractor or subcontractor does not extend the time for the requesting party to serve a Notice of Furnishing.
9. Fringe benefits and withholdings are defined as compensation due an employee pursuant to a written contract or policy for holiday, time off for sickness, bonuses, and other contributions. The requirements with respect to laborers are especially difficult for an owner and general contractor, because of the difficulty in monitoring payment of laborers' wages, fringes and withholdings.
10. If a laborer fails to serve a Notice of Furnishing on a general contractor, the lien is not lost but the laborer is responsible for actual damages sustained by the general contractor as a result of the failure.
11. An agent, like a union, may file a Claim of Lien for a group of laborers; however, the Claim of Lien must contain separate information for each laborer.
12. Payments made directly to subcontractors, suppliers or laborers under this section are considered as paid directly to the contractor. Also, if the contractor or subcontractor has amounts withheld by the

owner, the contractor or subcontractor has the right to request, and the owner is required to give, an itemized statement of the amounts withheld.

13. Waivers should always specify the dollar value of lien rights waived and should specify the date through which the waiver is given; this is not necessarily the same date as the date the waiver is signed.

14. The bond may be either a cash or surety bond.

15. Refer to MCLA 566.132.

16. MCLA 570.151, *et seq.*

**NOTICE OF COMMENCEMENT**

1. Legal Description of location of Improvements  
(Use attachment if space provided is not adequate)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Name of Party Contracting for Improvements:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Capacity (Owner, Lessee, Part Owner, Land Contract Vendee, etc.): \_\_\_\_\_

3. Name and address of fee owner if different than Party contracting for improvements:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_

4. Name and address of designee:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_

5. Name and address of general contractor, if any:

Name: \_\_\_\_\_  
Address: \_\_\_\_\_

6. To lien claimants and subsequent purchasers:

TAKE NOTICE THAT WORK IS ABOUT TO COMMENCE ON AN IMPROVEMENT TO THE REAL PROPERTY DESCRIBED IN THIS INSTRUMENT. A PERSON HAVING A CONSTRUCTION LIEN MAY PRESERVE THE LIEN BY PROVIDING A NOTICE OF FURNISHING TO THE ABOVE NAMED DESIGNEE AND THE GENERAL CONTRACTOR, IF ANY AND BY TIMELY RECORDING A CLAIM OF LIEN, IN ACCORDNACE WITH LAW.

A PERSON HAVING A CONSTRUCTION LIEN ARISING BY VIRTUE OF WORK PERFORMED ON THIS IMPROVEMENT SHOULD REFER TO THE NAME OF THE OWNER OR LESSEE AND THE LEGAL DESCRIPTION APPEARING IN THIS NOTICE. A PERSON SUBSEQUENTLY ACQUIRING AN INTEREST IN THE LAND DESCRIBED IS NOT REQUIRED TO BE NAMED IN A CLAIM OF LIEN.

A COPY OF THIS NOTICE WITH AN ATTACHED FORM FOR NOTICE OF FURNISHING MAY BE OBTAINED UPON MAKING A WRITTEN REQUEST BY CERTIFIED MAIL TO THE ABOVE NAMED OWNER OR LESSEE, THE DESIGNEE, OR THE PERSON WITH WHOM YOU HAVE CONTRACTED.

7. Attached hereto is a blank Notice of Furnishing form.

BY: \_\_\_\_\_  
(insert name and address of Owner or Lessee)  
\_\_\_\_\_  
\_\_\_\_\_

STATE OF MICHIGAN) )S  
COUNTY OF )

This Notice of Commencement and the information contained herein was sworn and verified before me this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, by \_\_\_\_\_ in his capacity as \_\_\_\_\_ of \_\_\_\_\_.

This Notice was prepared by: \_\_\_\_\_  
County, Michigan

My commission expires: \_\_\_\_\_

\_\_\_\_\_  
(name)  
\_\_\_\_\_  
\_\_\_\_\_  
(address)

**NOTICE OF FURNISHING**

TO: \_\_\_\_\_

\_\_\_\_\_  
(Insert name and address of Designee from Notice of Commencement-  
only insert name of Owner or Lessee if Designee not named or died)

Please take notice that the undersigned is furnishing to \_\_\_\_\_

\_\_\_\_\_  
(Insert name and address of other contracting party)

certain labor/materials for \_\_\_\_\_

\_\_\_\_\_  
(describe type of work)

in connection with the improvement to the real property described in the Notice of Commencement, recorded in Liber

\_\_\_\_\_, on Page \_\_\_\_\_,

\_\_\_\_\_ County Records or \_\_\_\_\_

\_\_\_\_\_  
(a copy of which is attached hereto).

**WARNING TO OWNER: THIS NOTICE IS REQUIRED BY THE MICHIGAN CONSTRUCTION LIEN ACT. IF YOU HAVE QUESTIONS ABOUT YOUR RIGHTS AND DUTIES UNDER THIS ACT, YOU SHOULD CONTACT AN ATTORNEY TO PROTECT YOU FROM THE POSSIBILITY OF PAYING TWICE FOR THE IMPROVEMENTS TO YOUR PROPERTY.**

\_\_\_\_\_  
(Name and address of lien claimant)

BY:

\_\_\_\_\_  
(Name and capacity of party  
signing for lien claimant)

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Address of party signing)



**CLAIM OF LIEN FOR CONTRACTOR,  
SUBCONTRACTOR, OR SUPPLIER**

Notice is hereby given that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, \_\_\_\_\_  
(name and

\_\_\_\_\_, first provided labor or material for an improvement to: \_\_\_\_\_  
address of lien claimant)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(legal description of real property from Notice of Commencement)

The (Owner)(Lessee) of the above described real property is \_\_\_\_\_  
\_\_\_\_\_  
(name of Owner or Lessee from Notice of Commencement)

The last day of providing labor or material was the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

The lien claimant's contract amount, including extras, is \$ \_\_\_\_\_.

The lien claimant has received payment in the total amount of \$ \_\_\_\_\_, and therefore claims a construction  
lien upon the above described real property in the amount of \$ \_\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
(name and address of lien claimant)

BY: \_\_\_\_\_  
(signature of lien claimant, agent or attorney)

\_\_\_\_\_  
\_\_\_\_\_  
(address of party signing claim of lien)

Dated: \_\_\_\_\_

Prepared By: \_\_\_\_\_  
\_\_\_\_\_  
(name)

\_\_\_\_\_  
\_\_\_\_\_  
(address)

Subscribed and sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Notary Public  
\_\_\_\_\_ County, Michigan  
My commission expires: \_\_\_\_\_

**INSTRUCTIONS:**

- (1) CLAIM OF LIEN TO BE RECORDED WITH COUNTY REGISTER OF DEEDS WITHIN 90 DAYS OF LAST LABOR OR MATERIAL.
- (2) ATTACH PROOF OF SERVICE OF NOTICE OF FURNISHING TO CLAIM OF LIEN AT TIME OF RECORDING.
- (3) IF CLAIMANT IS A "CONTRACTOR", CONTRACTOR MUST DELIVER A SWORN STATEMENT TO THE OWNER/LESSEE BEFORE RECORDING THE CLAIM OF LIEN.

**CLAIM OF LIEN FOR LABORER ONLY**

Notice is hereby given that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, \_\_\_\_\_

(name of lien claimant)

whose address is \_\_\_\_\_ first provided labor or material for an improvement to: \_\_\_\_\_

(legal description of real property from Notice of Commencement)

The (Owner)(Lessee) of the above described real property is \_\_\_\_\_

(name of Owner or Lessee from Notice of Commencement)

The last day of providing labor or material was the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

The lien claimant's hourly rate, including fringe benefits and withholdings, is \$\_\_\_\_\_.

There is due and owing to or on behalf of the laborer the sum of \$\_\_\_\_\_ for which the laborer claims a construction lien upon the above-described real property.

BY: \_\_\_\_\_

(signature of lien claimant)

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Signed on: \_\_\_\_\_  
(date)

Prepared By: \_\_\_\_\_  
(name)

\_\_\_\_\_  
(address)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_ County, Michigan

My commission expires: \_\_\_\_\_





That the contractor has not procured material from, or subcontracted with, any person other than those set forth above and owes no money for the improvement other than the sums set forth above.

Deponent further says that he or she makes the foregoing statement as the (contractor) (subcontractor) or as \_\_\_\_\_ of \_\_\_\_\_ (contractor) (subcontractor) for the purpose of representing to the owner or lessee of the above-described premises and his or her agents that the above-described property is free from claims of construction liens, or the possibility of construction liens, except as specifically set forth above and except for claims of construction liens by laborers which may be provided pursuant to Section 109 of the Construction Lien Act, Act No. 497 of the Public Acts of 1980, as amended, being Section 570.1109 of the Michigan Compiled Laws.

**WARNING TO OWNER: AN OWNER OR LESSEE OF THE ABOVE-DESCRIBED PROPERTY MAY NOT RELY ON THIS SWORN STATEMENT TO AVOID THE CLAIM OF A SUBCONTRACTOR, SUPPLIER, OR LABORER WHO HAS PROVIDED A NOTICE OF FURNISHING OR A LABORER WHO MAY PROVIDE A NOTICE OF FURNISHING PURSUANT TO SECTION 109 OF THE CONSTRUCTION LIEN ACT TO THE DESIGNEE OR THE OWNER OR LESSEE IF THE DESIGNED IS NOT NAMED OR HAS DIED.**

\_\_\_\_\_  
Deponent

**WARNING TO DEPONENT: A PERSON, WHO WITH INTENT TO DEFRAUD, GIVES A FALSE SWORN STATEMENT IS SUBJECT TO CRIMINAL PENALTIES AS PROVIDED IN SECTION 110 OF THE CONSTRUCTION LIEN ACT, ACT NO. 497 OF THE PUBLIC ACTS OF 1980, AS AMENDED, BEING SECTION 570.1110 OF THE MICHIGAN COMPILED LAWS.**

Subscribed and sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Notary Public  
\_\_\_\_\_ County, Michigan  
My commission expires: \_\_\_\_\_

**PARTIAL UNCONDITIONAL WAIVER**

I/we have a contract with \_\_\_\_\_ to  
(other contracting party)

provide \_\_\_\_\_  
\_\_\_\_\_ for improvement to the property described

as: \_\_\_\_\_  
\_\_\_\_\_

and hereby waive my/our construction lien to the amount of \$ \_\_\_\_\_ for labor/materials provided through \_\_\_\_\_

\_\_\_\_\_  
(date)

This waiver, together with all previous waivers, if any (circle one) does/does not cover all amounts due to me/us for contract improvements provided through the date shown above.

\_\_\_\_\_  
BY: \_\_\_\_\_

(signature of lien claimant)

Address: \_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_

Signed on: \_\_\_\_\_  
(date)

**DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.**

**PARTIAL CONDITIONAL WAIVER**

I/we have a contract with \_\_\_\_\_  
(other contracting party)

to provide \_\_\_\_\_  
\_\_\_\_\_ for the improvement to the property described  
as \_\_\_\_\_  
\_\_\_\_\_

and hereby waive my/our construction lien to the amount of \$ \_\_\_\_\_ for labor/materials  
provided through \_\_\_\_\_  
(date)

This waiver, together with all previous waivers, if any (circle one) does/does not cover all amounts due to me/us for contract  
improvements provided through the date shown above.

This waiver is conditioned on actual payment of the amount shown above.

BY: \_\_\_\_\_  
\_\_\_\_\_  
(signature of lien claimant)

Address: \_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_

Signed on: \_\_\_\_\_  
(date)

**DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.**

**FULL UNCONDITIONAL WAIVER**

My/our contract with \_\_\_\_\_  
(other contracting party)

to provide \_\_\_\_\_  
\_\_\_\_\_ for the improvement of the property described

as: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

having been fully paid and satisfied, all my/our construction lien rights against such property are hereby waived and released.

BY: \_\_\_\_\_  
(signature of lien claimant)

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

dated on: \_\_\_\_\_  
(date)

**DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.**

**JOINT CHECK AGREEMENT**

WHEREAS, (GENERAL CONTRACTOR) is the General Contractor upon the (name of Construction Project), project; and

WHEREAS, (TROUBLED SUBCONTRACTOR) is a Subcontractor to General Contractor upon said Construction Project; and

WHEREAS, (SUPPLIER OR SUB-SUBCONTRACTOR) is supplying labor and/or materials to (Troubled Subcontractor) upon said project; and

WHEREAS, all parties hereto are desirous of assuring that appropriate payments are made and received by the parties hereto.

NOW, THEREFORE,

IT IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. That (GENERAL CONTRACTOR) has entered into a contract with (TROUBLED SUBCONTRACTOR) for services to be performed upon Construction Project in the amount of \$ \_\_\_\_\_.

2. That (TROUBLED SUBCONTRACTOR) has entered into a contract with (SUPPLIER OR SUB-SUBCONTRACTOR) to provide labor and/or materials to Construction Project in the amount of \$ \_\_\_\_\_.

3. That when and if monies become due to (TROUBLED SUBCONTRACTOR) from (GENERAL CONTRACTOR), pursuant to the terms and conditions of the contract between (TROUBLED CONTRACTOR) and (GENERAL CONTRACTOR) for the labor and/or materials supplied by (TROUBLED SUBCONTRACTOR), (GENERAL CONTRACTOR) agrees to issue joint checks in the amounts due from time to time to (TROUBLED SUBCONTRACTOR), which checks shall be payable to (TROUBLED SUBCONTRACTOR) and (SUPPLIER OR SUB-SUBCONTRACTOR).

4. Any payment by (GENERAL CONTRACTOR) in the form of a joint check to TROUBLED SUBCONTRACTOR and SUPPLIER OR SUB-SUBCONTRACTOR shall constitute payment in the amount of the joint check to TROUBLED SUBCONTRACTOR upon its contract with (GENERAL CONTRACTOR).

5. Any breach by TROUBLED SUBCONTRACTOR of its Contract with (GENERAL CONTRACTOR), shall terminate any obligations of this Agreement.

6. In no event shall joint check payments made hereunder by (GENERAL CONTRACTOR) exceed the amount of the Contract between TROUBLED SUBCONTRACTOR and SUPPLIER OR SUB-SUBCONTRACTOR.

7. That SUPPLIER OR SUB-SUBCONTRACTOR, by execution hereof, acknowledges that it is the obligation of TROUBLED SUBCONTRACTOR to pay other laborers, suppliers, subcontractors and materialmen upon this Construction Project and agrees to accept as payment of its Contract with (TROUBLED SUBCONTRACTOR) the sums paid by the Owner to (GENERAL CONTRACTOR) and then by (GENERAL CONTRACTOR) jointly to TROUBLED SUBCONTRACTOR and SUPPLIER OR SUB-SUBCONTRACTOR as payment of TROUBLED SUBCONTRACTOR'S obligations of its contract with SUPPLIER OR SUB-SUBCONTRACTOR.

8. All payments made pursuant to this Joint Check Agreement shall be applied by SUPPLIER OR SUB-SUBCONTRACTOR exclusively to the indebtedness of TROUBLED SUBCONTRACTOR upon this project and the above-referenced Contract.

9. Acceptance or endorsement of any joint check shall constitute receipt of the full amount of such check by both TROUBLED SUBCONTRACTOR and SUPPLIER OR SUB-SUBCONTRACTOR upon this project and shall further constitute a waiver in the amount of the

Joint Check of all rights of either TROUBLED SUBCONTRACTOR or SUPPLIER OR SUB-SUBCONTRACTOR of any lien upon the project or of any claim upon any labor or material payment bond issued relative to this project.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the \_\_\_\_\_ day of \_\_\_\_\_, 200\_.

(GENERAL CONTRACTOR)

\_\_\_\_\_  
Witness

By \_\_\_\_\_

\_\_\_\_\_  
Witness

Its \_\_\_\_\_

TROUBLED SUBCONTRACTOR

\_\_\_\_\_  
Witness

By \_\_\_\_\_

\_\_\_\_\_  
Witness

Its \_\_\_\_\_

SUPPLIER OR SUB-SUBCONTRACTOR

\_\_\_\_\_  
Witness

By \_\_\_\_\_

\_\_\_\_\_  
Witness

Its \_\_\_\_\_

**FULL CONDITIONAL WAIVER**

My/our contract with \_\_\_\_\_  
(other contracting party)

to provide \_\_\_\_\_  
\_\_\_\_\_ for the improvement of the property described  
as: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

having been fully paid and satisfied, all my/our construction lien rights against such property are hereby waived and released.

This waiver is conditioned on actual payment of \$ \_\_\_\_\_.

BY: \_\_\_\_\_  
(signature of lien claimant)

Address: \_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_

Signed on: \_\_\_\_\_  
(date)

**DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.**