



JUDGMENT LIENS PROVIDE NEW PAYMENT TOOL

Michigan's new Judgment Lien Act became effective on September 1, 2004. It permits a party who has obtained a money judgment to record a county name filing against the debtor's real estate using a new Notice of Judgment Lien form. Legal descriptions of land are not needed. The recorded notice automatically creates a lien against all real property owned by the debtor, as well as land acquired in the future, in that county. The lien filing lasts for five years, but can be extended for an additional five years. The Judgment Lien Act specifies the necessary information required in the notice and that it must be certified by the originating Court.

The judgment lien is not as powerful as a construction lien which permits a lien claimant to file a lawsuit to foreclose and cause the sale of real estate to pay lien claimants. With a judgment lien, a party has no foreclosure right. However, when the debtor eventually attempts to sell or refinance its interest in the real estate, it must pay to the lien holder all proceeds of the sale or refinancing up to the amount of the judgment debtor's "equity" in the property after all senior liens, property taxes, and costs and fees necessary to close the sale or refinancing are paid or extinguished.

The judgment lien is also subordinate to various kinds of liens in the debtor's land that are listed in the new Act, for example, purchase money mortgages and refinancings, construction liens, condominium assessment liens, and state or federal tax liens, even if the judgment lien was filed first.

Construction liens and bonds remain the best methods for getting paid for work on a construction project. However, the new Judgment Lien Act provides a relatively inexpensive method for collecting upon judgments where a party providing an improvement to real estate has not perfected its construction lien rights or for claims that cannot be secured by construction liens and are otherwise unsecured. *— Michael Stack*



AN OVERVIEW OF AIA FORMS – THE BASICS

In commercial construction, contracts are often based on model forms that have been developed by the American Institute of Architects ("AIA"). It is important for

owners, architects, contractors and lenders to be at least generally familiar with the AIA forms, what rights and obligations they establish and how they can be modified to accommodate individual project demands.

The AIA documents are organized according to a letter and family series that refer to the specific purpose of the document. The most commonly used AIA documents are in the "A" series (the owner-contractor documents) and the "B" series (the owner-architect documents).

Perhaps the most significant AIA document is A-201, entitled "General Conditions," which generally applies to both the A and B document series and is incorporated by reference into most but not all AIA contracts. A-201 outlines the responsibilities for claims, dispute resolution, performance and timing of work, warranty repair, insurance, call back issues and change orders.

The A series includes forms that vary based on the method of compensation, the size and scope of the project, and the project delivery method, e.g., design-bid-build, construction management, and design/build.

In addition to describing the Architect's compensation, the B-141 owner-architect agreement outlines the architect's obligations regarding design, approval of shop drawings, pricing, and limits as to services, such as site visits, shop drawing review, inspections and dispute resolution.

There are over 75 AIA contracts and administrative forms. Many of them are updated regularly though not all at the same time. While the forms are intended for nationwide use, they are not drafted to conform to the law of any one state. The forms are also perceived to incorporate various biases that favor certain parties.

— Sandra Jasinski



USING BONDS TO GET PAID ON PUBLIC PROJECTS

A construction lien cannot be recorded on public property. Therefore, to protect subcontractors and suppliers, Michigan law requires that a principal contractor (one contracting directly with a governmental unit) obtain a payment bond to ensure payment to these parties. Because some contractors do not obtain the required bond and bonds vary in their payment conditions depending upon the surety, it is a good idea for a subcontractor to obtain a copy of the payment

bond from either the principal contractor or the governmental unit as early in the project as possible.

A subcontractor contracting directly with the principal contractor can sue upon a payment bond after 90 days from its last day of work on the project. In all cases, however, a lawsuit must be initiated within one year of the last payment made to the principal contractor by the governmental unit. This date may be difficult for a subcontractor to ascertain, and therefore it is recommended that the lawsuit be filed no later than one year from the date of the subcontractor's last day of work.

If a bond claimant does not have a direct contractual relationship with the principal contractor, to protect its bond claim rights, the claimant must also provide to the principal contractor a notice of furnishing within the first 30 days of providing labor or material to the project. Additionally, the claimant must provide written notice to both the principal contractor and the governmental unit within 90 days of its last day of work performed on the project.

Courts have generally required strict compliance with the notice requirements of the bond statutes. Therefore, it is important for contractors working on bonded jobs to carefully mark their calendars for these important dates. Also, be aware that different rules apply on Michigan highway projects, on projects under \$50,000 which do not require a bond, and when the bond involves a private project. — *Joseph Shannon*



SECURING PAYMENT WHEN THE GENERAL CONTRACTOR IS IN BANKRUPTCY

Federal bankruptcy law provides trustees and certain others with the power to seek repayment of all funds received from the debtor within 90 days of the initial bankruptcy filing. This general rule can have a significant adverse impact on a party that has received payment for goods and services but would be required to return any payments received within this time period.

However, two Michigan laws interact with federal bankruptcy law and may give relief to a party, often a subcontractor, that would ordinarily be subject to a demand for return of funds. The Michigan Construction Lien Act ordinarily provides for a lien in favor of the party making an improvement to real property if the lien is properly perfected. If a contractor files bankruptcy prior to a lien claimant's perfection of its claim of lien but while there is still time to do so, the lien claimant may still do so and it is imperative that it do so. Service of a notice

of furnishing and recording of a claim lien are permitted even after the bankruptcy filing. However, the service and recording deadlines remain in effect.

The Michigan Building Contract Fund Act may also provide relief to the aggrieved subcontractor that finds itself in the position of dealing with a general contractor in bankruptcy. Under the law, the general contractor on a private project who receives money from the owner receives this money subject to a constructive trust for the benefit of subcontractors, laborers and suppliers. The law prohibits the contractor from keeping or using a designated construction payment until all of the subcontractors, laborers and suppliers who performed work under contract with the contractor are paid. Accordingly, under federal bankruptcy law, the funds received from the owner are not deemed to belong to the debtor's bankruptcy estate, and therefore are not subject to recapture by the bankruptcy trustee.

These two Michigan laws create arguments that subcontractors may use to obtain payment for goods and services rendered, despite the bankruptcy, as long as all legal requirements are met. — *Edward Frankfort*

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