



MICHIGAN CONSIDERS “PROMPT PAY” LEGISLATION

The Michigan Legislature is considering a “prompt pay” amendment to the statute requiring payment and performance bonds on certain public projects. The amendment will require an owner, contractor, or principal contractor (as defined in the amendment) on any project, public or private, to pay amounts owed to suppliers and subcontractors, on or before the date the payment is due pursuant to written contract. Among other conditions, the claim must arise out of a written contract and be for \$10,000 or more. The proposed amendment does not apply to residences. Untimely payment is deemed a material breach of the contract and permits the supplier or subcontractor to lawfully suspend its performance. This law would apply regardless of whether it is referenced in the contract. Patterned on prompt pay legislation from other jurisdictions, this law is currently pending in committees of the House and Senate. Ohio and Illinois have already enacted prompt pay legislation. *Gary Reeves*



KNOW THY OWNER PRIOR TO START OF WORK

When anyone but the owner contracts for an improvement to real property, Michigan's lien law provides that in most cases a lien will only attach to the interest of the person contracting for the improvement. For example, in the case of a lessee (which is broadly defined so that it would include a tenant or land contract purchaser), the lien claimant's interest only attaches to the interest of the tenant or the land contract purchaser. This creates many problems for the lien claimant especially when the time comes to foreclose on its lien. The lien law does not make clear how a lien claimant forecloses on less than the entire interest in the real estate since the improvement is usually "attached" to the land and cannot be separated.

There are two exceptions to the above limitation in the lien law relating to lessees that would also likely apply to land contract vendees. The first exception is where an owner-landlord requires the lessee to make the improvement to the real estate. The second is where the owner *encourages* the lessee to make the improvement, which may result in the lessee becoming the implied agent of the owner. While lien claimants will frequently attempt to expand the scope of their lien by

arguing for the application of one of the exceptions, facts justifying these exceptions may be difficult to prove.

Therefore, it is best to know who the owner of the real property is before executing a construction contract. If the contracting party is a tenant or a land contract vendee, at a minimum, seek to obtain the owner's written approval of the improvement as part of the contract negotiations, which may subsequently provide leverage for better lien rights. *Edward Frankfort*



CONSUMER PROTECTION ACT APPLIES TO BUILDERS

Michigan courts have been see-sawing as to whether the Michigan Consumer Protection Act (“MCPA”) applies to builders and other firms in regulated industries. Reversing prior law, the latest court decision which is binding on all lower courts provides that the MCPA does in fact apply to builders. This court case has wide-reaching and detrimental effects on builders.

The MCPA makes all unfair, unconscionable, or deceptive methods, acts, or practices unlawful in the conduct of trade or commerce. The actions covered by this law are widespread and include over thirty separate types of prohibited conduct including:

- Representing that goods are new if they are deteriorated, altered, reconditioned, used, or secondhand.
- Representing that a part, replacement, or repair service is needed when it is not.
- Misrepresenting that because of a defect in a consumer's home the health, safety, or lives of the consumer or his or her family are in danger if the product or services are not purchased, when in fact the defect does not exist or the product or services would not remove the danger.
- Representing or implying that the subject of a consumer transaction will be provided promptly, at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.

The MCPA provides that in the event of a violation, a consumer is entitled to actual damages or \$250, whichever is greater, as well as attorney's fees

regardless of whether the builder's contract contains such a provision.

Though the court decision questions whether the MCPA should be applied to residential builders, it is clear that under current Michigan law residential builders can be held liable for violating the act. Therefore, in dealing with consumers and advertising, builders and other members of a regulated industry should continue to be careful not to take any action that could be construed to violate the MCPA. *Alicia Blumenfeld*



AIA REVISES DESIGN-BUILD FORMS

The American Institute of Architects (AIA) typically revises its major contract forms every ten years and the next major revision is scheduled for 2007. However, in December of 2004, the AIA broke from tradition and released a new set of design-build forms that many view as a major improvement that are now just beginning to appear on the industry's radar screen. In doing so, the AIA retired standard forms A191 DB-1996 (contract between owner and design-builder), A491 DB-1996 (contract between design/builder and contractor), and B901 DB-1996 (contract between design-builder and architect).

The new design-build forms consist of five documents including two new forms:

- A 141 - contract between owner and design-builder (replacing A191)
- A 142 - contract between design-builder and contractor (replacing A491)
- B 142 – contract between owner and consultant (new)
- B 143 - contract between design-builder and architect (replacing B901)
- G 704/DB – acknowledgment of substantial completion by owner and design-builder (new)

Examples of key changes to a few of the new forms include:

- Forms apply equally well to all design-build projects, whether led by the contractor, architect, or developer.
- Form A 141 is no longer two parts and does not lock the owner in from day one. If the owner decides not to engage the design-builder after completion of design but before construction, the owner's decision is considered a termination for convenience, thus requiring the owner to pay for design services performed, costs due to termination, and overhead and profit on design services not completed.

Termination after construction begins increases the amounts due to the design-builder.

- Mediation and arbitration are no longer the sole methods of dispute resolution. Parties may now elect to litigate disputes if mediation fails.
- In disputes, the architect no longer makes the initial decision. Parties may designate a neutral to make the initial decision during construction, although the owner makes the initial decision in the absence of a designated neutral.
- Copyright provisions provide the owner with greater rights of ownership and use of the instruments of service provided that the owner has paid the design professional for its services. In the event of nonpayment, the owner must indemnify the design professional against any claims or liability including payment of attorney fees arising from the owner's use or modification of the instruments of service.

This synopsis is greatly simplified. The actual forms should be carefully reviewed and adapted to the unique aspects of each project. Most users of these forms will find them easier to use and mold to their needs. For a more detailed summary, see http://www.aia.org/db_a_contracts (which is part of the AIA's web site).

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