

Understanding Michigan's Construction Lien Law

*Get paid faster. Reduce
stress. Protect your assets.*

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Why This Topic?

Many contractors in Northern Michigan face
cash flow and possible legal risks based on
Michigan's Construction Lien Law.

Worse, many business owners do not
understand the law or follow procedures to
protect their business.

Introductions

Greg Luyt, Partner/Shareholder

Bowerman, Bowden, Ford, Clulo and Luyt, P.C.,
luyt@traverselaw.com 231.941.8048

Brent Vizina, Credit & Collections

Preston Feather, bcv@prestonfeather.com
231.439.5828



UNDERSTANDING MICHIGAN CONSTRUCTION LAW

Why Is This So Important?

- Downside risks are gravely serious
 - Jail time
 - Judgments/restitution orders that are non-dischargeable in bankruptcy
 - Potential inability to collect amounts due; harm to company's bottom line
- Upside opportunities
 - Compliance with law necessarily involves better accounting, cash flow, and profitability.
 - Better communication with owners and subcontractors/suppliers
 - Distinguish yourself from your competition

Michigan Construction Law

- Two Different, but Related Laws
 - Builders Trust Fund Act, MCL 570.151, *et seq.*
 - Construction Lien Act, MCL 570.1101, *et seq.*
- Both BTFA and CLA serve similar goals
 - Help ensure that providers of labor and materials on construction projects get paid
 - Protect those making payment from having to pay twice for the same labor/materials



BUILDER TRUST FUND ACT (BTFA)

Builders Trust Fund Act (BTFA)

The STREAM OF COMMERCE in Construction Projects



Purpose of the BTFA is to protect both upstream (person making payment) and downstream (subcontractors/suppliers/laborers whose work was included in billing)

Contractors Are Really “Trustees”

- BTFA classifies any payment on a construction project to be a “trust fund”
- Consequences of this designation
 - Recipient of funds is a “trustee” with fiduciary obligations
 - Amount of the “trust fund” is not the recipient’s money
 - Creates potential criminal liability
 - Creates obligations that are non-dischargeable in bankruptcy

BTFA and Fraud

“Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and [suppliers], engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid . . .”

BTFA Key Points

- Any retention of funds by the contractor while amounts remain unpaid to subcontractors and suppliers would be a violation, including payment of employees and overhead expenses.
- “Intent to defraud” element is generally satisfied from the mere fact that funds were appropriated and not paid downstream.
- Express provision for criminal liability, including fines and jail time. Prosecutor’s offices in the region are well aware of this statute and have pursued violations aggressively

BTFA Key Take-Aways

- Keep separate accounting (and ideally separate accounts) for each project
- Never “rob Peter to pay Paul”
- Always make sure that all subs and suppliers are paid for all work performed through the last paid draw before using any payments for employees, overhead, construction management fees, contractor markups, etc.



MICHIGAN CONSTRUCTION LIEN ACT (MCLA)

CLA Key Terms

- **Owner** – holds fee title or land contract owner's interest in property being improved
- **Contractor** – contracts directly with owner for improvement to property (includes general contractors)
- **Subcontractor** – contracts with a contractor or subcontractor (but not the owner) to perform a portion of the improvement to the property
- **Supplier** – provides materials and/or equipment to contractor or subcontractor

CLA Project Timeline

1. Contract for scope of work
2. Notice of commencement
3. Notices of furnishing
4. Sworn Statements
5. Payments/Lien Waivers
6. Claim of Lien
7. Lawsuit to foreclose Lien

(See Forms/Handouts)

CLA Contract (1)

- Contracts on residential projects with the owner must be in writing
 - Includes all amendments (i.e., change orders)
- Contract must contain the contractor's license number

CLA Contract (2)

- Contract must also contain the following language:
 - A residential builder or a residential maintenance and alteration contractor is required to be licensed under article 24 of the occupational code, 1980 PA 299, MCL 339.2401 to 339.2412. An electrician is required to be licensed under the electrical administrative act, 1956 PA 217, MCL 338.881 to 338.892. A plumbing contractor is required to be licensed under the state plumbing act, 2002 PA 733, MCL 338.3511 to 338.3569. A mechanical contractor is required to be licensed under the Forbes mechanical contractors act, 1984 PA 192, MCL 338.971 to 338.988.

CLA Notice of Commencement

- (Form in handout)
 - Have the owner complete and return the form as soon as possible after the contract is signed
 - Gives critical information for lien process, including
 - Precise ownership status of property
 - Legal description of property
 - Contact information for all relevant owner parties
 - Contractor must provide copies to subcontractors and suppliers if requested (along with notice of furnishing form)

CLA Notice of Furnishing

- (Form in handout)
 - Not required for general contractor with direct contract with Owner
 - Provides notice to Owner that subcontractor/supplier is providing labor/materials.
 - Deadline for providing – 20 days after first supplying labor/materials

CLA Sworn Statements (1)

- (Form in handout)
 - Critically important for general contractors
 - Routinely filled out inaccurately or incompletely
 - CLA requires that a sworn statement be provided
 - Any time a request for payment is made
 - Any time an owner requests
 - By a subcontractor when the contractor requests
 - “Sworn Statement” means an oath under penalty of perjury
 - Criminal penalties for false sworn statements
 - Fines and jail time

CLA Sworn Statements (2)

- (Form in handout)
 - Required Contents:
 - Must list all subcontractors/suppliers/laborers
 - Total contract price/change orders (for entire project and each line item)
 - Amount already paid
 - Amount currently owing
 - Balance to complete
 - Does not need to include inventory items not purchased specifically for the project

CLA Lien Waivers

- (Form in handout)
 - Four kinds
 - Partial Conditional, Partial Unconditional
 - Full Conditional, Full Unconditional
 - Partial vs. Full
 - Will the waiving party's contract be paid in full by this payment?
 - If yes, then full waiver
 - If no, then partial waiver.
 - Conditional vs. Unconditional
 - Has the waiving party actually received payment?
 - If yes, then unconditional
 - If no, then conditional

CLA Claim of Lien

- (Form in handout)
 - Must be recorded at the register of deeds within 90 days after the last day of providing labor and materials
 - No exceptions / a delay of one day means loss of lien rights
 - “Last day” means substantial work/involvement; picking up tools not enough
 - Many technical requirements related to filing and service

CLA Lawsuit to Foreclose

- Must be filed within 1 year after the filing of the claim of lien
- All construction liens have the same priority – dating back to the first “actual physical improvement” on the property
 - If value of the property is less than value of all construction liens, then construction liens paid pro rata.

INTERMISSION FOR LUNCH



LIEN WAIVERS, PAYMENT PROCESS, AND CASH FLOW TIPS

Brent Vizina: Role

- Credit and Collections Analyst
- From credit to liens
 - Trade Credit
 - Billing
 - Payments
 - Lien Waiver Requests
 - Lien Claims
- Customer training and consulting

Lien Waiver Requests (1)

- How PF processes requests
 - Waiver Request (amount, cutoffs) match PF job account records: **NO RESEARCH, EASY, FAST**
 - Waiver Request (amount, cutoffs) do not match PF job account records: **RESEARCH, SLOWER**
- Customer Statement Example
 - Waiver Request Amount
 - Cutoff Period (Paid Through Date)

Lien Waiver Requests (2)

Waiver Request does not match PF records,
then:

- Waiver Request must be changed
 - From FULL to PARTIAL; or
 - From UNCONDITIONAL to CONDITIONAL
- MAY NOT BE WHAT YOU NEED FOR THE TITLE COMPANY, BANK OR THE CUSTOMER!

Common Lien Waiver Mistakes

- Requesting FULL lien waiver with an unpaid, outstanding balance.
- Flip – Flop the contracting parties' names.
 - Contracting Party vs. Lien Claimant
- Over simplified (wrong) form. Missing key language for legal waiver of lien.
- Incorrect Paid Through (statement cutoff) date.

Best Practices (1)

- Job accounting
 - Authorized purchase agent by job (w/pictures)
 - Emailed invoice copies in lieu of paper receipt.
 - POS messages for PF Staff
- Send lien waiver with payment
 - Completed filled in, ready to be signed (not blank)
 - Use statement date as paid through date
 - Use a broad category of material provided:
Building Materials

Best Practices (2)

- Prolink Web/App for online access
 - Invoices, Returns, Orders, and quotes
 - Easily share PF documents
 - Real time data
- E-statements.
 - Receive statements days earlier
 - Maintain a digital record.
- QuickBooks Web Connector
 - Eliminate manual invoice entry.

Z-Lien Notice of Furnishing

- Notice of Commencement copy (20 days)
- Protects lien rights on material supplied
 - Helps contractor get paid, so supplier gets paid, too
- Keeps all parties in communication
- Automated process

Assessing Your Process

- Lien waiver requests get revised?
- Recurring difficulties reconciling project billing, payments and lien waivers?
- Cash flow issues?
- Not sure how well you are complying BTFA and CLA?
- Not sure where to start?

Help Is Available

- Start with Preston Feather - best practice examples, training, referrals to other professionals in our network
- Project accounting/bookkeeping assistance
- Legal advisory services: construction law, contracts and lien rights

Questions?

Thank You For
Attending