

# Mechanic's Liens and Payment Bonds

Power Tools For Getting Paid

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# Getting Paid

- What we will cover
  - Mechanic's liens
  - Payment bond claims
  - Trust Fund Statute
  - Prompt Pay Act
  - Court actions

# Mechanic's Liens

# Mechanic's Liens Overview

- Payment tools created by statute
- Enacted in 1971 to encourage construction
- Found in Real Prop. Art. of the Maryland Code, § 9-101 and Title 12 of the Maryland Rules of Civil Procedure

# Mechanic's Liens Overview

- Statute creates a mechanism to pursue owner for payment – against the property
- Creates a lien – like a mortgage (“establish”)
- Creates mechanism to foreclose on the property (“enforce”)
- Not dependent on contract

# Mechanic's Liens Overview

- Remedy not exclusive
- Based on the theory that contractor improved the value of the property

# Goal of Mechanic's Liens

- Legal goal: foreclose
- Practical goal: get owner's attention
  - Threat of foreclosure
  - Pressure on payment chain
  - Stops up financing (good and bad)



# Who Can Claim a Lien?

- Those who furnish labor or materials to:
  - Erect buildings
  - Repair, rebuild or improve buildings to the extent of 15% of their value

# What Is Includable In a Lien?

- Labor and materials furnished “**for or about**” the building
- Includes:
  - Well installation
  - Swimming pools
  - Sodding, seeding or planting of shrubs, trees, plants, flowers or nursery products
  - Grading, filling, landscaping and paving
  - Equipment rentals

# What Is Includable In a Lien?

- Architectural / engineering services
- Land surveying
- Interior design services related to construction and performed by licensed interior designer

# Scope of the Lien

- Lien extends to the **building** and “so much of the land as is necessary for the ordinary and useful purposes of the building.”
- If work and materials are furnished for a **tenant**, lien applies to tenant’s interest in the lease.

# How to Lien

- Depends on your status in the chain
  - General contractor
  - Subcontractor

# Notice Requirement - Subcontractors

- Notice of Intent to Lien
  - To owner
  - Only subcontractors are required to send
  - Must give within 120 days of last day labor/materials furnished
  - Authorizes owner to withhold payments to GC

# Petition to Enforce

- File a Petition to Establish and Enforce
  - Contractors, subcontractors, materialmen
  - Circuit Court where property located
  - Within 180 days of last day labor and materials furnished
- Show cause hearing
- Trial within 6 months
- Lien must be established by the Court.

# Court Must Establish

- No lien until the Court establishes
- Creates priority issues



# Bona Fide Purchasers

- Property sales present a problem, considering no lien until Court awards
- Bona fide purchasers for value are protected
  - However, if Petition filed, purchasers have notice and cannot be bona fide purchasers

# Owner Pays Twice

- Generally, owner can be forced to pay twice
- “Harry Homeowner” Defense:
  - Where building being erected is a single-family home on the owner’s property
  - Lien only up to amount owner owed the general contractor on date Notice of Intent to Lien given
  - Don’t wait 120 days

# Pay When Paid Clauses

- PWPs = conditions precedent to payment
- Generally enforceable in Maryland
- Do not preclude mechanic's lien claims
- Result: you may be barred from recovery against GC, but may still move forward with mechanic's lien

# Waivers

- Statute does not permit contract provisions that waive mechanic's lien rights
- PWPs are not effective to prevent lien suits

# Failure to Be Licensed

- Make sure you are licensed if required (i.e. home improvement contractors)
- Non-licensure is a bar to enforcing contract and filing a lien (*Harry Berenter, Inc. v. Berman*, 258 Md. 290 (1970))

# Practical Considerations

- Give plenty of time for Notice of Intent
- Know who the owner is from the beginning
- Consider having all owners sign contracts
- GC – send notice of intent even though not required

# Bond Claims

# What Is A Payment Bond?

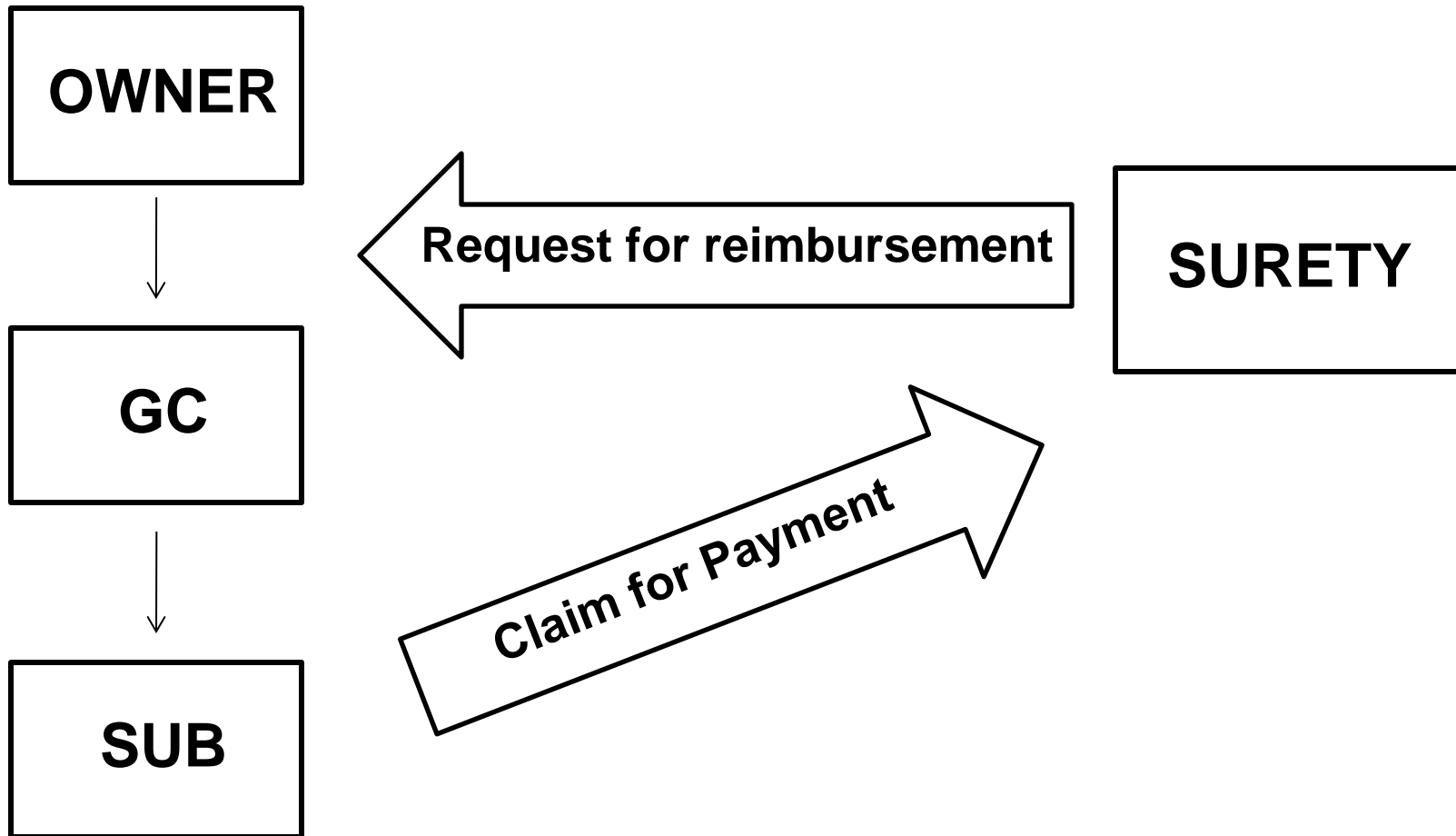
- Guaranty that subcontractors and materialmen will get paid
- Required on many government projects
- Mechanic's lien substitutes



# Parties

- Principal = Contractor
- Surety = Bonding company
- Obligor = Project owner

# How It Works



# Miller/Little Miller Act

- Statutory schemes for filing claims on state and federal projects
- Important deadlines and procedures
- Failure to follow invalidates claims
- Obligations depend on your relationship with contractor who posted the bond

# No Contract With Bond Poster

- If you did not contract with the contractor who posted the bond
  - Required to furnish notice to contractor who posted the bond within 90 days after work complete
    - Amount of the claim
    - To whom you furnished labor and materials
  - File suit within 1 year of last date of claimant's work if not paid within 90 days

# Contract With Bond Poster

- If you do have a contract with the poster of the bond:
  - 90-day notice not required
  - File suit within 1 year of last date of claimant's work if not paid within 90 days.

# Practical Considerations

- Send notice to all parties
- Send notice to all addresses
- Send notice with enough time to be sure it is received
- Be sure to review bond carefully for additional requirements
- Private Bonds – additional requirements / not statutory

# MD Trust Fund Law

# What Is It?

- Applies to contractors and subs
- Requires that payments received for certain work reach the subs/materialmen who did the work
- Officer, director or managing agent who has control over the money must keep in trust



# Personal Liability

- Officer, director or managing agent who knowingly uses trust monies other than to pay subs may be personally liable
- However,
  - mere insufficiency of funds to pay subs/materialmen is not enough for personal liability.
  - Funds must be specifically “earmarked” for specific work, or no personal liability

# Commingling

- No requirement for funds to be held in separate account
- Money can be commingled with other funds

# Who Can Assert?

- Unpaid contractors
- Owner (i.e. versus GC who fails to pay sub)
- General contractor (i.e. versus sub who fails to pay for materials).

# Which Contracts?

- Applies to:
  - Contracts subject to the Little Miller Act (i.e. state projects)
  - Property subject to mechanic's liens.
- Do not apply to:
  - Contracts for construction of single family homes
  - Home improvement contracts

# MD Prompt Pay Act

# Prompt Payment

- Requires payments to contractors and subcontractors to be made promptly
- Depends on your status
  - Contract with owner?
  - Contract with sub?

# Contracts With Owner

- If contract is with the owner
  - and does not specify when payment due, then payment required the *earlier* of:
    - 30 days after occupancy permit granted
    - 30 days after day owner takes possession
  - and does specify when payment due, then payment required within 7 days after date specified

# Contract Not With Owner

- If contract is not with the owner, payment must be made to subs/materialmen within 7 days of receipt of payment received



# Contracts Covered

- Those for furnishing labor/materials “for or about a building” including:
  - Erection, repair, rebuilding or improvement
  - Drilling and installation of wells
  - Installation of swimming pools
  - Grading, filling, landscaping and paving
  - Installation of waterlines, sewers/drains, streets

# “Undisputed Amount”

- Prompt Pay Act only applies to “undisputed” amounts.
- “Undisputed amount” means and amount owed for which there is no good faith dispute
- The exception can swallow the rule

# Remedies

- If a violation is found, a court may:
  - Order payment of undisputed amounts
  - Enjoin further violations
  - Award interest to the winning party
  - Award costs in cases where there is bad faith

# Exclusions

- Does not apply
  - where the contract is for the construction and sale of a single family home
  - a transaction under the Custom Home Protection Act (which governs sales of homes build on land owned by the purchaser)
  - Home improvement contracts

# Court Action

# Court Action

- Try to avoid if possible:
  - Send demand letter for payment
  - Send warning letters notifying of
    - Intent to File Mechanic's Lien
    - Potential bond claims
    - Trust fund violations
    - Prompt pay violations
    - Potential litigation

# Court Action

- Court Jurisdictional Limits

- District Court

- matters under \$5,000

- District Court / Circuit Court

- matters over \$5,000 to \$30,000

- Circuit Court

- matters over \$30,000

# The Suit

- Include multiple claims
- Sue multiple parties (i.e. owner and contractor in a lien suit)
  - Create leverage
  - Conserve resources by resolving all disputes at once and bringing all parties under the same roof
  - Avoid inconsistent rulings



# One Size Does Not Fit All

- Many factors play into getting paid
- Multiple tools for collection
- Timing is everything
- Important to have a strategy, to conserve funds and achieve checkmate

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# WORKPLACE HARASSMENT/DISCRIMINATION

by:

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riders, willing to risk death daily.

**Orphans preferred.**  
**Wages \$25 per week.**

**APPLY, PONY EXPRESS STABLES**  
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# What to ask during an interview

- Always ask questions that are clearly related to the job.
- Do not ask questions about an applicant's sex, race, religion, sexual orientation, genetic history, national origin, age, disability, marital status, familial status, ethnicity or any other area that is protected by federal, state or local statutes.

# What to ask during an interview

- To comply with the American with Disabilities Act, ask all applicants a question similar to the following. “Having been told or shown the job description highlighting the essential functions, can you perform this job with or without reasonable accommodation?”
- Most importantly, make sure that each question you ask relates directly to a job responsibility or qualification.

# What NOT to ask during an interview

- Do not ask questions about whether an applicant has filed a complaint with the Equal Employment Opportunity Commission, applied for workers' compensation, or filed a wage claim with the state department of labor. Employees and applicants have rights to file these claims without fear of retaliation.

# What NOT to ask during an interview

- Do not ask if an applicant has ever been arrested.
- If an applicant discloses it verbally or the application, you have the right to ask additional information about the arrest.
- Asking about convictions are okay.

# Advertising for positions

- Be sure that when advertising for a position in your company to stay away from certain descriptions that can welcome a claim of discrimination, such as:
  - “Recent college graduate”
  - “Young”
  - “1-2 Years out of college”
  - “No retirees”
- Always make sure to have an EOE disclaimer in your advertisements.



# DISCRIMINATION, HARASSMENT AND RETALIATION

# What is Discrimination?

## Discrimination is:

- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, ethnicity, disability or sexual orientation; and
- Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability, etc.

# What is Workplace Harassment?

Harassment consists of unwelcome conduct, whether verbal, physical, or visual, that is based on a person's status, such as sex, sexual orientation, color, race, ancestry, national origin, age, disability or other prohibited basis.

# Prohibited Conduct Includes:

- A. Epithets, slurs, negative stereotyping, or intimidating acts that are based on a person's protected status
- B. Written or graphic material circulated within or posted within the workplace that show hostility toward a person or persons because of their protected status

# What is a Hostile Work Environment?

A hostile work environment is one that a reasonable person would find hostile or abusive. A hostile environment is determined by looking at all of the circumstances, including the frequency of the alleged conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

# TIPS FOR CONSISTENT TREATMENT

- Train your managers on policies and procedures.
- Have updated job descriptions.
- Have a conscientious Human Resources department.
- Engage in fair treatment of employees.

# EEOC TARGETS

# 8 EEOC Targets (Slide 1 of 2)

1. Systemic discrimination (*e.g.*, recruitment, hiring practices, promotions).
2. Immigrant, migrant and vulnerable workers (*e.g.*, disabled).
3. Claims that implicate emerging legal trends (*e.g.*, ADAAA, discrimination against lesbian, gay, bisexual and transgender community).
4. “Fixed Leave” policies as being unlawful under the ADAAA.



# 8 EEOC Targets (Slide 2 of 2)

5. “100% Healed” policies.
6. A written one-size-fits-all form to request an ADA accommodation.
7. GINA Cases
8. Use of criminal records in hiring (*e.g.*, which may overwhelmingly target certain races or national origin groups).

# Questions?

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