

## CHAPTER 11

# MECHANIC'S LIENS IN MARYLAND

## EXECUTIVE SUMMARY

### Distinctive Features of the Law in Maryland

There is no “defense of payment” in Maryland. Consequently, the burden is on the owner to make sure all subcontractors are paid. If an owner pays a general contractor in full, but that general contractor fails to pay the subcontractors, then those subcontractors will still be able to enforce a lien against the property.

In Maryland, a contractor does not have a lien until the court says it has a lien.<sup>1</sup> A Maryland contractor must file a Petition to Establish a Lien and then go to a Show Cause hearing so that the court can establish an “Interlocutory Lien.” A contractor has no lien until this happens. Compare this to Virginia or other states with an “inchoate lien,” where a contractor has a lien from the moment the contractor begins supplying labor and materials to the property, even though the lien is not filed until months later.<sup>2</sup>

This difference in timing means that a mechanic’s lien in Maryland has a much lower “priority” than in states with an inchoate lien. In Maryland, the mechanic’s lien will be inferior to the construction loan deed of trust, judgment lien or anything else that is recorded in the land records before the court establishes the lien.<sup>3</sup>

In Maryland, a “bona fide” purchaser buys property free of the lien. If a contractor supplies labor and materials, but the property is sold before the contractor can establish a lien in court, then that buyer and the property are not affected by the lien.<sup>4</sup> This is most often a problem with residential properties, which sometimes are pre-sold even before construction begins.

Contractors working on residential properties in Maryland, therefore, will have a difficult time ever establishing lien rights. Once a property is sold, or even “under contract,” all lien rights are cut off.

Sub-subcontractors and remote suppliers will have lien rights in Maryland, as long as they can prove that their materials were used on the property.

This scenario in Maryland benefits contractors working on commercial projects, especially subcontractors and remote suppliers. Commercial properties are rarely sold during the construction period, so contractors rarely lose lien rights because of a sale. Even though the Maryland mechanic’s lien will have a relatively low priority, the lienholder will still be able to establish a lien and foreclose upon the property. If the owner is solvent and the project is profitable, then the owner will not allow this to happen. The commercial subcontractor in Maryland will be able to force payment even if the owner has already paid the general contractor.

### Deadline Summary

**Prefiling Before Construction.** No prefiling requirement.

**Lien Filing and/or Service after Labor or Materials Supplied.** Subcontractors must serve notice on owner within 120 days of last work.

**Enforcement.** All contractors must enforce lien, by filing a lawsuit, within 180 days of last work.

### Defense of Payment: Owner’s Responsibility for Payment to Subcontractors

The burden is on the owner to make sure that all subcontractors are paid. The owner has the right and the duty to withhold the amount claimed by a subcontractor. There is no “defense of payment” for the Maryland project owner in most cases. The owner can be required to pay for the project twice. Even if the owner has paid the general

<sup>1</sup> See section below, Petition to Establish a Mechanic’s Lien.

<sup>2</sup> See chapter, Mechanic’s Lien Rights and General Principles; section, Priority. See also chapter, Mechanic’s Liens in Virginia; section, Priority.

<sup>3</sup> See section below, Priority.

<sup>4</sup> See section below, Priority; subsection, Sale or Foreclosure of Property.

contractor in full, a subcontractor will be able to establish a lien and eventually foreclose on the property, with only one exception.<sup>5</sup>

The only time a Maryland property owner has a defense of payment is in the case of an individual building his own residence on his own land. Such a homeowner is protected if the homeowner pays all contractors with whom the owner had a direct contract.<sup>6</sup>

### Remote Subcontractor and Supplier Liens

There is no known limit to a lien claim by remote subcontractors and suppliers.<sup>7</sup> Sub-subcontractors and suppliers are certainly allowed a lien claim. Apparently, anyone has lien rights, no matter how far removed they are from the owner, as long as they can prove their labor or materials were used in improvements on the property.

### Priority

The timing of various liens on a property usually determine their priority. For example, the first mortgage filed in the land records will be the “first mortgage” with the first priority to any proceeds from a foreclosure or sale of the property. If another mortgage is filed in the land records later in time, it will be a “second mortgage.” If the property is foreclosed, this second mortgage will not receive any proceeds until after the first mortgage has been paid in full.

There are very few exceptions to this “first in time, first in right” general rule. One exception is county real estate tax liens, which will always have priority over other liens no matter when they are filed. Another exception is mechanic’s liens that are “inchoate.” If a mechanic’s lien is inchoate, this means that the lien relates back to the time when work began on the property, even if the lien is not filed in the land records until a later time. The lien exists from the moment labor and material are supplied to the property, as long as the claimant eventually perfects the lien by filing and enforcing the mechanic’s lien.

It is very important to understand that the mechanic’s lien is *not* inchoate in Maryland. The claimant has no mechanic’s lien unless and until the court establishes a lien after a court hearing. The mechanic’s lien will be inferior to the construction loan deed of trust, judgment lien or anything else that is recorded in the land records before the court establishes the lien. This also means the lien is vulnerable to bankruptcy or a sale of the property.

### Sale or Foreclosure of Property

In Maryland, a sale or foreclosure of the property usually will cut off all lien rights. Until the lien has been established by a court, any “bona fide purchaser” buys the property free and clear of any mechanic’s lien claim.<sup>8</sup> Claimants who perform work prior to the sale will no longer be able to enforce mechanic’s lien rights and will have to collect from the contract debtor. It is possible that a purchaser is not “bona fide.” In order to qualify as bona fide, the purchaser must pay the market value for the property without knowledge of the mechanic’s lien claim. An “inside” deal may not qualify.

A foreclosure purchaser can be a bona fide purchaser. A purchaser at a foreclosure auction will take the property free of any mechanic’s lien claims, partly because the mortgage resulting in the foreclosure was recorded long before the work by the mechanic’s lien claimant.<sup>9</sup> One of the lawful consequences of a mortgage foreclosure is that junior (inferior) liens are extinguished.<sup>10</sup>

Maryland courts have also determined that the property is free of lien claims once “equitable title” has passed.<sup>11</sup> This means that it will be impossible to file a mechanic’s lien once the property is “under contract.” As a practical matter, this means it will be very difficult to ever establish a mechanic’s lien on residential property in Maryland. Many builders do not begin work on a house unless it is presold. This means that the property is under contract and equitable title has passed before work even begins on the property. Even many “spec” buildings are sold soon after construction. Remember that it can be months before a claimant can get to court to establish a mechanic’s lien.

<sup>5</sup> *Palmer Park Partnership v. Marvelite, Inc.*, 255 Md. 121, 257 A.2d 169 (1968).

<sup>6</sup> Maryland Real Property Code Section 9-104(a)(2).

<sup>7</sup> Maryland Real Property Code Section 9-101(g); *Judd Fire Protection, Inc. v. Davidson*, 138 Md. App. 654, 773 A.2d 573 (2001); *Diener v. Cabbage*, 259 Md. 555, 270 A.2d 471(1970).

<sup>8</sup> *York Roofing, Inc. v. Adcock*, 333 Md. 158, 634 A.2d 39 (1993).

<sup>9</sup> *IA Construction Corp. v. Carney*, 341 Md. 703, 672 A.2d 650 (1996).

<sup>10</sup> *Bennett Heating & Air Conditioning, Inc. v. Nationsbank*, 342 Md. 169, 674 A.2d 534 (1996).

<sup>11</sup> *York Roofing, Inc. v. Adcock*, 333 Md. 158, 634 A.2d 39 (1993).

## Bankruptcy

In Maryland, the claimant is an unsecured creditor until the court establishes a lien. The bankruptcy stay prevents the Maryland lien claimant from moving forward to establish the lien. The claimant will not have security in the property and will have to share with other general unsecured creditors in whatever assets the debtor has left in bankruptcy after all secured creditors have been paid. As a practical matter, this usually means the Maryland lien claimant will receive nothing in bankruptcy, unless the court had established the claimant's mechanic's lien at least 90 days before bankruptcy was filed.

Even if a property owner files bankruptcy within 90 days after a lien is established by a court, then the lien may be a preference that can be avoided (set aside) by the bankruptcy court.<sup>12</sup> This is a radical difference between a Maryland mechanic's lien and a lien that is "inchoate." An inchoate mechanic's lien claimant is a secured creditor from the moment labor and materials are supplied to the property. The inchoate mechanic's lien claimant will retain secured status even though lien enforcement proceedings are filed long after bankruptcy.

## Subdivision and Utility Improvements—Off-Site Work

Subdivision improvements such as installation of utilities and streets are very important to the value of a development and are also very costly. None of these improvements, however, are actually placed on each individual lot. They are often in a public right of way or common area that will eventually be owned by a homeowners' association.

This problem was at least partially resolved by the Maryland Code. All of the lots in a development are subject to a lien on a pro rata basis for the value of waterlines, sanitary sewers, storm drains or streets installed to serve all the lots in a development.<sup>13</sup> There is little Maryland case law to provide guidance on the application of this statute.<sup>14</sup> It is, however, similar to statutes in other states.

## Renovation or Repair Work

A building must be "repaired, rebuilt, or improved to the extent of 15% of its value" before it is subject to a mechanic's lien in Maryland.<sup>15</sup> This limitation will not affect construction of new buildings, only renovations, additions or tenant improvements. If the entire renovation increases the value of the property by 15%, then each subcontractor and material supplier will have lien rights.<sup>16</sup> If the property is subject to a lien, the amount of an individual claim is irrelevant.<sup>17</sup> If the claimant is a subcontractor or supplier, this rule applies to the value of the general contract, not the value of the claimant's contract.<sup>18</sup>

There is a similar rule for tenant work. However, different rules apply depending on whether the owner or the tenant orders the work. If it is a tenant ordering work, then the project must increase the value of that "building" by at least 25%. If the owner orders the work, however, the value of the building must increase only 15% for mechanic's lien rights to exist.

## Tenant Work

If a contractor does tenant improvements, the contractor can obtain a lien on the lease.<sup>19</sup> If a tenant improves a building to the extent of 25% of the building's value, the contractor gets a lien on the tenant's interest in the property.<sup>20</sup> The end result will be a foreclosure on the leasehold.

<sup>12</sup> *Johnson Hydro Seeding Corp. v. Ian Homes, Inc.*, 126 Bankr. 933 (Bankr. D. Md. 1991).

<sup>13</sup> Maryland Real Property Code Section 9-102(b).

<sup>14</sup> *Celta Corp. V. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>15</sup> Maryland Real Property Code Section 9-102(a).

<sup>16</sup> *Hurst v. V. & M of Va., Inc.* 293 Md. 575, 446 A.2d 55 (1982).

<sup>17</sup> *O-porto Construction Co., v. Devon/Lanham, L.L.C.*, 129 Md. App. 301, 741 A.2d 546 (1999); Maryland Real Property Code Section 9-102(a). The statute goes on to say that the building will be subject to a lien for the "payment of all debts, without regard to the amount," if the building is repaired or improved to the extent of 15% of its value.

<sup>18</sup> Maryland Real Property Code Section 9-102(a). The statute goes on to say that the building will be subject to a lien for the "payment of all debts, without regard to the amount," if the building is repaired or improved to the extent of 15% of its value.

<sup>19</sup> Maryland Real Property Code Section 9-103(c)(2).

<sup>20</sup> Maryland Real Property Code Section 9-103(c)(2).

### Special Problems—Show Cause Hearing

Within 90 days of the Petition filing, the claimant will have a summary court proceeding called a Show Cause hearing. The mechanic's lien may rise or fall at that hearing based on the documents attached to and the facts described in the Petition to Establish Lien. Hence, it is important to include all of the necessary evidence at the time of filing the Petition, especially documents that will be needed to prove the lien.<sup>21</sup>

### Special Problems—Arbitration Clauses

Maryland courts have ruled that the court must “stay” (stop) the mechanic's lien proceedings if arbitration is requested by one of the parties and the construction contract has an enforceable arbitration clause.<sup>22</sup> Arbitration clauses, therefore, can create problems for a mechanic's lien claimant. As discussed above, a claimant has no lien at all until the court hearing establishes a lien. Until the lien is established, other judgment liens or mortgage liens can be filed that will then be superior to the mechanic's lien. The property could also be sold or foreclosed during the arbitration, defeating the lien.

### Lien Waivers—No Waivers in Executory Contracts

The Maryland Code does not allow mechanic's lien waivers in a construction subcontract.<sup>23</sup> Some general contractors use contract forms stating that subcontractors “hereby waive all rights to lien.” This type of contract clause is effective in many states, but it is “void as against public policy” in Maryland.<sup>24</sup> This prohibition, however, applies only to an executory contract between a contractor and any subcontractor. A general contractor can waive its lien rights in the general contract with the owner.

It is still possible for general and subcontractors to waive mechanic's lien or bond rights in a document separate from the construction contract. Subcontractors can be required to provide releases in exchange for partial payment. Such releases may include a waiver of future rights to lien.<sup>25</sup>

## TIME LIMITS FOR NOTICE OF INTENT AND PETITION TO ESTABLISH MECHANIC'S LIEN

The Notice of Intent to Lien must be served on the owner within 120 days after the subcontractor has completed the work or furnished the materials.<sup>26</sup> The Petition to Establish a Lien must be filed within 180 days after the work has been completed or materials furnished.<sup>27</sup> This means within 180 days of the completion of work by the claimant, not within 180 days of the completion of the whole building.<sup>28</sup> Both time limits work from the same starting point: the “day that work is finished or materials furnished” by the particular claimant.<sup>29</sup>

The length of time is not in question. It is 120 days (not four months) for the Notice of Intent to Lien and 180 days (not six months) for the Petition to Establish Lien. The date the time period begins is often in question.

<sup>21</sup> *AMI Operating Partners Ltd. Partnership v. JAD Enters., Inc.*, 77 Md. App. 654, 551 A.2d 888, cert. Denied, 315 Md. 307, 554 A.2d 393 (1989).

<sup>22</sup> *McCormick Constr. Co. v. 9690 Deerco Rd. Ltd. Partnership*, 79 Md. App. 177, 556 A.2d 292 (1989).

<sup>23</sup> Maryland Real Property Code Section 9-113.

<sup>24</sup> Maryland Real Property Code Section 9-113(c).

<sup>25</sup> See chapter, Contract Terms and Preserving Rights; section, Contract Administration; subsection, Waiver Forms.

<sup>26</sup> Maryland Real Property Code Section 9-104(a)(1); See also section below, Notice of Intent to Lien: Remote Subcontractor and Supplier Liens.

<sup>27</sup> Maryland Real Property Code Section 9-105(a); See also section below, Petition to Establish Mechanic's Lien.

<sup>28</sup> *Okisko Co. v. Matthews*, 3 Md. 168 (1852).

<sup>29</sup> Compare this to the DC Mechanic's Lien Code where the lien must be filed within 90 days of completion of the entire building.

### Claimant's Last Work

The time limit begins from the completion of the work by the claimant.<sup>30</sup> For materials, the time begins to run from the time they are delivered.<sup>31</sup> For labor, the time begins to run from the last labor performed that is necessary to complete the project.<sup>32</sup> Where materials are furnished or work done under more than one distinct contract, a separate deadline runs from the time the work is finished or the materials furnished under each contract.<sup>33</sup> Most of the case law on this subject is fairly old. It would seem prudent, however, to count deadlines from the last substantial, new work.<sup>34</sup> Trivial items, warranty or repair work may not extend filing deadlines. Large gaps of time between deliveries can also be a problem.

Where the last delivery is made in good faith at the request of the owner for the purpose of completing the contract, the period for filing the lien and giving Notice of Intent to Lien runs from the furnishing of that material no matter how small that last delivery.<sup>35</sup> By requesting more work, the owner is claiming that the supplier has not fully performed his contract. If specific items need to be replaced and the supplier fails to deliver, the supplier would be legally liable for damages.<sup>36</sup> The owner cannot reverse position later and claim that the supplier's contract had been completed before the last delivery.

For example, where completion of the work was delayed for one year and certain work could not be completed until the electricity was turned on, and the last work was necessary for the completion of the contract, that last work extended the deadline for filing a notice.<sup>37</sup> When a contractor had pulled off a project and removed all equipment, but the contractor had to remove a quantity of stone under the contract, this work would also extend the time for filing a notice.<sup>38</sup>

### Supplying Additional Labor or Materials to Extend Time

After a contract is completed, if goods are delivered or work is performed for the *purpose* of extending the time within which notice may be served on the owner, the lien is invalid.<sup>39</sup> The time for filing will not be extended where small additional items are furnished only to circumvent the statutory requirement.<sup>40</sup>

Additional work that is done in good faith at the request of the owner or for the purpose of fully completing the contract, and not merely as a gratuity or act of friendly accommodation, extends the period for filing from that last work.<sup>41</sup>

### Payments to Defeat Lien Rights

An owner or general contractor cannot make a small, partial payment and insist that the payment be applied to the most recent delivery, thereby defeating a lien right.<sup>42</sup>

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<sup>30</sup> *Okisko Co. v. Matthews*, 3 Md. 168 (1852); *Trustees of German Lutheran Evangelical St. Matthew's Congregation v. Heise*, 44 Md. 453 (1876); *Watts v. Whittington*, 48 Md. 353 (1878); *John W. Wilson & Son v. Wilson*, 51 Md. 159 (1879); *Maryland Brick Co. v. Dunkerly*, 85 Md. 199, 36 A. 761 (1897); *Clark v. Boarman*, 89 Md. 428, 43 A. 926 (1899); *Hensel v. Johnson*, 94 Md. 729, 51 A. 575 (1902); *Wix v. Bowling*, 120 Md. 265, 87 A. 759 (1913).

<sup>31</sup> *Heath v. Tyler*, 44 Md. 312 (1876).

<sup>32</sup> *Heath v. Tyler*, 44 Md. 312 (1876).

<sup>33</sup> *Johnson v. Metcalfe*, 209 Md. 537, 121 A.2d 825 (1956).

<sup>34</sup> *T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223 (1956).

<sup>35</sup> *T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223 (1956).

<sup>36</sup> *Reisterstown Lumber Co. v. Reeder*, 224 Md. 499, 168 A.2d 385 (1961).

<sup>37</sup> *Mount Airy Plumbing & Heating, Inc. v. Grey Dawn Dev. Co.*, 237 Md. 38, 205 A.2d 299 (1964).

<sup>38</sup> *Gill v. Mullan*, 140 Md. 1, 116 A. 563 (1922).

<sup>39</sup> *Greenway v. Turner*, 4 Md. 296 (1853).

<sup>40</sup> *Mount Airy Plumbing & Heating, Inc. v. Grey Dawn Dev. Co.*, 237 Md. 38, 205 A.2d 299 (1964).

<sup>41</sup> *Goodman v. Winskowski*, 249 Md. 546, 241 A.2d 407 (1968).

<sup>42</sup> *Bounds v. Nuttle*, 181 Md. 400, 30 A.2d 263 (1943).

## Deadlines for Open Account Suppliers

When materials are furnished under separate contracts, the right to lien dates from the time different materials are furnished under each contract and not from the last item delivered to the project as a whole.<sup>43</sup> The same rule applies for labor performed.<sup>44</sup> Unless there is a “continuing contract” to furnish materials on a project, the time limits for the notice or Petition count from each separate order.<sup>45</sup>

If there is a written or verbal contract for the entire project, then the deadline will always count from the last day any labor or material is furnished.<sup>46</sup> Many open account sales, however, are in a gray area. Even without an explicit contract for the whole project, the material supplier will be entitled to count the deadline from the last delivery if there was a “continuing” agreement to furnish materials and the parties “contemplated” that this supplier would furnish through the end of the project.<sup>47</sup>

A binding contract between the contractor and supplier for the entire project may not be necessary, if the parties in their dealings with each other treat the project as a single enterprise and the goods are delivered continuously, as needed, during the building operation.<sup>48</sup> Where there are continuous deliveries of materials at a “going price,” pursuant to an agreement to supply materials as needed, the lien filing deadline counts from the delivery of the last item, provided such delivery is made in good faith and is not only an effort to extend lien rights.<sup>49</sup>

## Effect of Bankruptcy

The bankruptcy stay prevents the Maryland lien claimant from ever moving forward to establish the lien by sending a Notice of Intent to Lien or by filing a Petition to Establish a Lien. There is also no known opportunity to get relief from the stay or permission to establish lien rights. This would prefer the lien claimant to other unsecured creditors. The claimant will never have security in the property and will have to share with other general unsecured creditors whatever assets the Debtor has left in bankruptcy after all secured creditors have been paid.<sup>50</sup>

## NOTICE OF INTENT TO LIEN: REMOTE SUBCONTRACTOR AND SUPPLIER LIENS

Subcontractors must serve a Notice of Intent to Lien to the owner of the property to be liened.<sup>51</sup> This will notify the owner that the subcontractor has not been paid and enables the owner to protect itself by withholding future payments to the general contractor.<sup>52</sup>

A general contractor is not required to give such a notice. The owner knows whether the general contractor has been paid.<sup>53</sup> As discussed below, a general contractor begins the Maryland mechanic’s lien process by filing a Petition to Establish Mechanic’s Lien in the circuit court. A subcontractor, however, starts the process with Notice of Intent to the owner.

The Maryland Real Property Code Section 9-104 states this requirement as follows:

A subcontractor doing work or furnishing materials or both for or about a building other than a single family dwelling being erected on the owner’s land for his own residence is not entitled to a lien under this subtitle unless, within 120 days after doing the work or furnishing the materials, the subcontractor gives written notice of an intention to claim a lien substantially in the form specified in subsection (b) of this section.

<sup>43</sup> *Gill v. Mullan*, 140 Md. 1, 116 A. 563 (1922).

<sup>44</sup> *Gill v. Mullan*, 140 Md. 1, 116 A. 563 (1922).

<sup>45</sup> *United States ex rel. Noland Co. v. Allied Contractors*, 171 F. Supp. 569 (D.Md.), *rev’d on other grounds sub nom; Noland Co. v. Allied Contractors*, 273 F.2d 917 (4th Cir. 1959).

<sup>46</sup> *Trustees of German Lutheran Evangelical St. Matthew’s Congregation v. Heise*, 44 Md. 453 (1876).

<sup>47</sup> *G. Edgar Harr Sons v. Newton*, 220 Md. 618, 155 A.2d 480 (1959); *Noland Co. v. Allied Contractors*, 273 F.2d 917 (4th Cir. 1959); *Palmer Park Partnership v. Marvelite, Inc.*, 255 Md. 121, 257 A.2d 169 (1968).

<sup>48</sup> *T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223 (1956).

<sup>49</sup> *Clark Certified Concrete Co. v. Lindberg*, 216 Md. 576, 141 A.2d 685 (1958).

<sup>50</sup> See section below, Priority; subsection, Bankruptcy.

<sup>51</sup> *Parker V. Tilghman v. Morgan, Inc.*, 170 Md. 7, 183 A.224 (1936).

<sup>52</sup> Maryland Real Property Code Section 9-104(f)(1).

<sup>53</sup> Maryland Real Property Code Section 9-104(a).

**Form of Notice**

Maryland Real Property Code Section 9-104 provides a helpful form that can be used for the Notice of Intent to Lien. The form or notice is sufficient if it contains the information required and is substantially in the following form:<sup>54</sup>

**Notice to Owner or Owner's Agent of Intention to Claim a Lien**

..... Subcontractor did work or furnished material for or about the building generally designated or briefly described as ..... The total amount earned under the subcontractor's undertaking to the date hereof is \$...... of which \$...... is due and unpaid as of the date hereof. The work done or materials provided under the subcontract were as follows:

*(insert brief description of the work done and materials furnished, the time when the work was done or the materials furnished, and the name of the person for whom the work was done or to whom the materials were furnished).*

I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing notice are true to the best of the affiant's knowledge, information and belief.

..... (Individual)

on behalf of ..... (Subcontractor)  
(insert if subcontractor is not an individual)

Another copy of this form appears in the Appendices as a Maryland Notice of Intention to Claim a Lien that can be copied and sent by subcontractors to owners.

The claimant will have the burden in court of proving that this written notice was given to the owner.<sup>55</sup> The claimant must "substantially comply" with this notice requirement.<sup>56</sup> This means that a claimant may have some "wiggle room" but not much.

The form above, provided by the Maryland Code, provides the claimant a "safe harbor." The code states that the notice is "sufficient" if it "contains the information required and is substantially in" this form. It is certainly the best practice for any claimant to make sure that all the information described in the form is provided and that the notice in this form is actually delivered to the owner of the property.

One Maryland case has stated, for example, that the notice must assert that the work was done within the last 90 days (now 120 days).<sup>57</sup> The Notice of Intent to Lien must state the time when the work was done or materials furnished or at least that each was provided within the 120 days prior to the notice.<sup>58</sup> Otherwise, the owner would have no way of determining whether the claim could be a valid lien.<sup>59</sup> The exact time of performance need not be specified, however, so long as the notice makes it clear that the work was performed at some time within 90 days (now 120 days).<sup>60</sup> Another Maryland court stated that a notice was insufficient when it failed to state the "nature and kind of materials furnished or amount claimed."<sup>61</sup> It should also describe the work done or materials furnished, the building for which the work or materials were furnished and the name of the person for whom the work was done or materials furnished.<sup>62</sup> The notice must also state the amount that is due and unpaid.<sup>63</sup>

<sup>54</sup> Maryland Real Property Code Section 9-104(b); *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 545, 856 A.2d 626,638 (2004).

<sup>55</sup> *Prima Paint Corp. v. Ammerman*, 264 Md. 392, 287 A.2d 27 (1972).

<sup>56</sup> *Bukowitz v. Maryland Lumber Co.*, 210 Md. 148, 122 A.2d 486 (1956); *Himelfarb v. B&M Welding & Iron Works, Inc.*, 254 Md. 37, 253 A.2d 842 (1969).

<sup>57</sup> *Himelfarb v. B&M Welding & Iron Works, Inc.*, 254 Md. 37, 253 A.2d 842 (1969).

<sup>58</sup> Maryland Real Property Code Section 9-104(b).

<sup>59</sup> *Himelfarb v. B&M Welding & Iron Works, Inc.*, 254 Md. 37, 253 A.2d 842 (1969).

<sup>60</sup> *G. Edgar Harr Sons v. Newton*, 220 Md. 618, 155 A.2d 480 (1959); *Himelfarb v. B&M Welding & Iron Works, Inc.*, 254 Md. 37, 253 A.2d 842 (1969).

<sup>61</sup> *Thomas v. Barber*, 10 Md. 380 (1857).

<sup>62</sup> Maryland Real Property Code Section 9-104(b).

<sup>63</sup> Maryland Real Property Code Section 9-104(b).

If necessary, there may be some flexibility regarding the contents of the notice.<sup>64</sup> This Notice of Intent to Lien statute does not require mathematical precision, only “substantial compliance.”<sup>65</sup> A claimant’s notice may be sufficient even if some of the information described in the code is missing or unavailable.

The fact that the property owner is one of the partners in the contracting firm does not dispense with the requirement of actual notice.<sup>66</sup> It does appear to be settled that *written* notice is required. Oral notice is not sufficient.<sup>67</sup>

If the owner has actual knowledge of the subcontractor’s claim through written communication, it may not be necessary for the subcontractor to send the formal notice shown above.<sup>68</sup> It is possible that copies of invoices, letters or other informal notices sent to the owner will satisfy the notice requirement. This is a significant difference from Virginia law where written notice must be sent in the form required and delivered in the manner required by the statute.<sup>69</sup> In Maryland, it is still the best practice to send a notice complying with Section 9-104. If a subcontractor has failed to provide this formal notice, however, it is possible that other correspondence will satisfy the requirement.

## Deadline for Notice

In order for a mechanic’s lien to be valid, the statute requires that a subcontractor do two things. First, the Notice of Intent to Lien must be served on the owner within 120 days of the claimant’s last work.<sup>70</sup> It is sufficient if the notice is sent by certified mail within the deadline, although it may be received by the owner after the deadline.<sup>71</sup> Second, the subcontractor must file its Petition to Establish a Lien within 180 days of the claimant’s last work.<sup>72</sup>

Note that both deadlines work from the same time: the date work was last performed or materials last furnished. This is different from, and should not be confused with, the Virginia statute. In Virginia, the lawsuit to enforce the lien must be filed within six months after the mechanic’s lien is filed in the land records. In Maryland, it does not matter when the Notice of Intent to Lien was sent; the Petition to Establish a Lien must be filed within 180 days of last work.

The 120-day time limit was established by the Maryland legislature in 1996. Prior to that, the subcontractor was required to provide notice within 90 days of last work. All Maryland court cases prior to 1996, therefore, refer to the older 90-day deadline. All of the law established in these cases should be valid except for the change from 90 to 120 days.

## Owner

A property owner, a partial owner, a tenant or anyone who has a property under contract can order labor and materials, create lien rights and be an “owner” for mechanic’s lien purposes. Generally, if a mechanic’s lien claimant performs work for someone with a limited interest in the real estate, the mechanic’s lien is limited to that interest. A mechanic’s lien ordinarily attaches to the interest of the person requesting the improvements.<sup>73</sup> The fact that a lien is filed against a lesser interest than it might have been does not destroy it.<sup>74</sup>

## Tenants and Leaseholds

If a contractor does tenant improvements, the contractor can obtain a lien on the lease, if a building is improved by a tenant to the extent of 25% of the building’s value.<sup>75</sup> The contractor obtains a lien on the tenant’s leasehold, and the end result will be a foreclosure on the leasehold.

Where a tenant owns the building, but leases the land on which the building sits (a ground lease), a mechanic’s lien filed by the tenant’s contractor attaches to the building and the tenant’s leasehold interest in the land upon

<sup>64</sup> *G. Edgar Harr Sons v. Newton*, 220 Md. 618, 155 A.2d 480 (1959); *Himelfarb v. B&M Welding & Iron Works, Inc.*, 254 Md. 37, 253 A.2d 842 (1969).

<sup>65</sup> *Tyson v. Masten Lumber & Supply, Inc.*, 44 Md. App. 293, 408 A.2d 1051 (1979), cert. denied, 287 Md. 758 (1980).

<sup>66</sup> *Reindollar v. Flickinger*, 59 Md. 469 (1883).

<sup>67</sup> *William Penn Supply Corp. v. Watterson*, 218 Md. 291, 146 A.2d 420 (1958).

<sup>68</sup> *Tyson v. Masten Lumber & Supply, Inc.*, 44 Md. App. 293, 408 A.2d 1051 (1979), cert. denied, 287 Md. 758 (1980).

<sup>69</sup> See chapter, Mechanic’s Liens in Virginia; section, Prefiling Before Construction: Notice to the Mechanic’s Lien Agent.

<sup>70</sup> Maryland Real Property Code Section 9-104(a)(1).

<sup>71</sup> *Riley v. Abrams*, 287 Md. 348, 412 A.2d 996 (1980).

<sup>72</sup> *Accrocco v. Fort Washington Lumber Co.*, 255 Md. 682, 259 A.2d 60 (1969); See section below, Petition to Establish Mechanic’s Lien.

<sup>73</sup> *United States Tile & Marble Co. v. B&M Welding & Iron Works, Inc.*, 254 Md. 81, 253 A.2d 838 (1969).

<sup>74</sup> *Goldheim v. Clark*, 68 Md. 498, 13 A. 363 (1888); *Grinnell Co. v. City of Crisfield*, 264 Md. 552 (1972).

<sup>75</sup> Maryland Real Property Code Section 9-103(c)(2).



termination of the lease.<sup>76</sup> If the building is also owned by the landowner, then the mechanic's lien would attach only to the tenant's interest (i.e., the lease of the land and building).<sup>77</sup> "A lien only can attach to whatever interest is held by the person liable for the improvement."<sup>78</sup>

### Multiple Owners

If a property has multiple owners and only one orders work, the contractor's mechanic's lien rights will depend on how legal title to the property is held. A mechanic's lien may be asserted against only one tenant in common or joint tenant that ordered work.<sup>79</sup> A tenant by the entirety has no separate interest that can be subjected to a mechanic's lien, if only one owner contracted for the work.<sup>80</sup> This will occur only with a husband and wife, where a contractor should be certain to get both spouses' signatures.

In order to be able to assert a mechanic's lien against each of the units for work in the common area of a condominium, the lien claimant must have written authorization for the work from the unit owner's association.<sup>81</sup> The mechanic's lien claimant must also send their Notice of Intent to Lien to all unit owners in the condominium and name all unit owners in the condominium as parties in the Petition to Establish Lien, in order to be able to assert a mechanic's lien against each of the units for work in the common area of a condominium.<sup>82</sup>

### Contract Purchaser

A lien will attach although the person ordering work has only an equitable interest in the property.<sup>83</sup> This means that if a contract purchaser enters into a contract to have improvements constructed on the property, then a lien can attach to the contract purchaser's interest in the property. If the contract purchaser did not order the work, however, the lien will not attach to the contract purchaser's equitable interest.<sup>84</sup>

### Description of Building and Property

The form provided by the Maryland Code, as shown above, requests a description for "the building generally designated or briefly described as [follows]."<sup>85</sup> It is important to accurately describe the building.<sup>86</sup> The lien is against the building itself and the land is only incidentally involved.<sup>87</sup> This procedure is somewhat different from the "land record" based mechanic's liens of Virginia and the District of Columbia. In those jurisdictions, it is essential to provide the correct legal description of the real estate as it then appears in the land records.

A description of an entire 770-acre tract as the locale of the building or buildings covered by a Maryland mechanic's lien was not a sufficient description of the property.<sup>88</sup> The phrase "a building or buildings" is not an identifying description.<sup>89</sup> Identifying the building by its mailing address (with both a street number and nine-digit zip code), is sufficient.<sup>90</sup> The form for Notice of Intent to Lien seems to request information only about the building, while both the building and property must be correctly identified in the later Petition to Establish Lien.

In Maryland, a mechanic's lien action is an "in rem" proceeding.<sup>91</sup> This means that the lawsuit is focused on the building and property rather than the people involved. The building and property must be correctly identified in the

<sup>76</sup> *Cabana, Inc. v. Eastern Air Control, Inc.*, 61 Md. App. 609, 487 A.2d 1209, cert. denied, 302 Md. 680, 490 A.2d 718 (1985).

<sup>77</sup> *Cabana, Inc. v. Eastern Air Control, Inc.*, 61 Md. App. 609, 487 A.2d 1209, cert. denied, 302 Md. 680, 490 A.2d 718 (1985).

<sup>78</sup> *Cabana, Inc. v. Eastern Air Control, Inc.*, 61 Md. App. 609, 487 A.2d 1209, cert. denied, 302 Md. 680, 490 A.2d 718 (1985), citing *Noone Electric Co. v. Frederick Mall*, 278 Md. 54, 359 A.2d 91 (1976).

<sup>79</sup> *United States Tile & Marble Co. v. B&M Welding & Iron Works, Inc.*, 254 Md. 81, 253 A.2d 838 (1969).

<sup>80</sup> *Blenard v. Blenard*, 185 Md. 548, 45 A.2d 335 (1946); *In re Slacum*, 272 B.R. 335 (Bkcy.Md. 2001); *Akinyoyenu v. Keswick Homes, LLC*, Nos. 1126, 770, 2017 Md. App. LEXIS 234 (Spec. App. 2017).

<sup>81</sup> Maryland Real Property Code Section 11-118(b); *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 548-52, 856 A.2d 626, 641-42 (2004).

<sup>82</sup> *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 531, 856 A.2d 626, 630 (2004).

<sup>83</sup> *Goldheim v. Clark*, 68 Md. 498, 13 A. 363 (1888).

<sup>84</sup> *Wolf Organization, Inc. v. Oles*, 705 A.2d 40, 119 Md. App. 357 (1997).

<sup>85</sup> Maryland Real Property Code Section 9-104(b).

<sup>86</sup> *Scott & Wimbrow, Inc. v. Wisterco Invs., Inc.*, 36 Md. App. 274, 373 A.2d 965 (1977).

<sup>87</sup> *Scott & Wimbrow, Inc. v. Wisterco Invs., Inc.*, 36 Md. App. 274, 373 A.2d 965 (1977).

<sup>88</sup> *Mervin L. Blades & Son v. Lighthouse Sound Marina & Country Club*, 37 Md. App. 265, 377 A.2d 523 (1977).

<sup>89</sup> *Mervin L. Blades & Son v. Lighthouse Sound Marina & Country Club*, 37 Md. App. 265, 377 A.2d 523 (1977).

<sup>90</sup> *Arfaa v. Martino*, 404 Md. 364, 379 (Md. 2008).

<sup>91</sup> *Shryock v. Hensel*, 95 Md. 614, 53 A. 412 (1902).

later Petition to Establish Lien within the time limits. A mechanic's lien claimant will not have an opportunity to change the description of the lien property after the time has passed to file the Petition.<sup>92</sup> Presumably, either a Notice of Intent or a Petition could be amended if the time limit for filing has not passed. It is not clear whether the property description in a subcontractor's Notice of Intent could be amended more than 120 days after last work but before the Petition is due. Other information in the Petition to Establish, such as the name of the owner, can be changed after the time limit, however.<sup>93</sup>

### **Extent of the Lien**

The lien established under the mechanic's lien statute is essentially against the building itself and the land is only incidentally involved.<sup>94</sup> The lien extends to the building, the land it covers and to as much of the adjacent land "as may be necessary for the ordinary and useful purposes of the building."<sup>95</sup>

There can be disputes about how much land gets liened along with the building. If there are two adjoining parcels of land, and the improvement is on only one, the lien will probably extend only to the parcel containing the building.<sup>96</sup> If a contractor builds one shed in the corner of a 770-acre farm, however, the lien would not extend to the entire farm. The court would determine how much of the land is necessary for the "ordinary and useful purposes of the building" and only this amount of the land would be subject to the mechanic's lien and foreclosure.

An owner who is concerned with this problem can file a "designation" in the land records before beginning construction.<sup>97</sup> This designation will define the boundaries of the land that will be subject to lien for the improvements to be constructed.<sup>98</sup> Such a designation of boundaries will be binding on all persons.<sup>99</sup> If an owner fails to make use of this designation process, the owner cannot later complain that the court ordered the sale of more land than was necessary for the necessary and useful purposes of the building.<sup>100</sup>

### **Unfinished or Incomplete Building**

If a building is commenced and not finished, an established lien will still attach to the extent of the work done or the materials furnished.<sup>101</sup> The claimant would still have a lien in the incomplete building and presumably also in the adjoining land to the extent necessary for the ordinary and useful purposes of the building.<sup>102</sup> The sale of a house and lot while the building is in the process of erection cannot affect the mechanic's lien rights of a claimant who worked for the previous owner and continues to be employed by the new owner.<sup>103</sup>

### **Title Search**

There is no question that the best practice is to perform a title search before serving a Notice of Intent to Lien and especially before filing a Petition to Establish a Mechanic's Lien. The title search requires the greatest lead time in preparing a mechanic's lien, reveals the greatest complexities in preparing a mechanic's lien and has the greatest impact on the costs of preparing a mechanic's lien.

It is especially important to accurately describe the building.<sup>104</sup> An amendment to alter the building description is not allowed to a Petition to Establish a Mechanic's Lien after its filing deadline.<sup>105</sup>

In a clearly defined subdivision, a title search will be relatively simple, fast and inexpensive. You can consider simply using tax assessment records or even a street address in a clearly defined and well-established subdivision.

<sup>92</sup> *Gault v. Wittman*, 34 Md. 35 (1871); *Real Estate & Imp. Co. v. William Phillips & Sons*, 90 Md. 515, 45 A. 174 (1900); *Bruncz v. DiLeo*, 263 Md. 481, 283 A.2d 606 (1971).

<sup>93</sup> See section below, Petition to Establish Mechanic's Lien; subsection, Particularity Required in the Claim.

<sup>94</sup> *Scott & Wimbrow, Inc. v. Wisterco Invs., Inc.*, 36 Md. App. 274, 373 A.2d 965 (1977).

<sup>95</sup> Maryland Real Property Code Section 9-103(a).

<sup>96</sup> *Fulton v. Parlett & Parlett*, 104 Md. 62, 64 A. 58 (1906); *Filston Farm Co. v. Henderson & Co.*, 106 Md. 335, 67 A. 228 (1907).

<sup>97</sup> Maryland Real Property Code Section 9-103(b).

<sup>98</sup> Maryland Real Property Code Section 9-103(b).

<sup>99</sup> Maryland Real Property Code Section 9-103(b).

<sup>100</sup> Maryland Real Property Code Section 9-103(b).

<sup>101</sup> Maryland Real Property Code Section 9-103(c).

<sup>102</sup> Maryland Real Property Code Section 9-103(a).

<sup>103</sup> *Miller v. Barroll*, 14 Md. 173 (1859).

<sup>104</sup> *Scott & Wimbrow, Inc. v. Wisterco Invs., Inc.*, 36 Md. App. 274, 373 A.2d 965 (1977).

<sup>105</sup> *Bruncz v. DiLeo*, 263 Md. 481, 283 A.2d 606 (1971); *Real Estate & Imp. Co. v. William Phillips & Son*, 90 Md. 515, 45 A. 174 (1900).

When there is no doubt that labor and materials went on Lot 2, a title search will show that Lot 2 is owned by John and Jane Smith. New, complex and large developments, however, are much more difficult. The development property has often been assembled by joining several parcels of land. The developer may re-subdivide one or more times after that, as the developer becomes aware of the needs of new tenants or purchasers. These changes are very hard to follow through the land records. A lawyer has to be part surveyor to figure out exactly which parcel of land now contains the labor and materials supplied. A title search may take one hour or it could take 15 hours. This is the greatest variable in determining the costs of a mechanic's lien.

The lien claim must identify the owner.<sup>106</sup> However, the Petition to Establish a Mechanic's Lien can be amended for the purpose of changing the name of the owner if a mistake has been made.<sup>107</sup> A claimant is justified in relying on the public records to identify the owner. If the designation of owner or reputed owner is made in good faith, the lien will not be lost because it subsequently appears that some other person is owner.<sup>108</sup>

### Claimant

Apparently, anyone who provides labor or material to improvements on real estate has lien rights, as long as they can prove their labor or materials were used in improvements on the property.

### Remote Suppliers and Subcontractors

There is no known limit to a lien claim by remote subcontractors and suppliers.<sup>109</sup> Sub-subcontractors and suppliers are certainly allowed a lien claim. Apparently, anyone has lien rights, no matter how far removed they are from the owner.

### Architects and Engineers

An earlier case stated that where an architect's contract provides for the preparation of plans and the supervision of construction, an architect is entitled to a mechanic's lien.<sup>110</sup> A fairly recent amendment to the code states that building or landscape architectural services, engineering services or land surveying services for use for or about the building or premises provide lien rights.<sup>111</sup> This amendment makes it clear that landscape architects, engineers and land surveyors also have lien rights. It does still appear necessary that a building actually be constructed, but it may no longer be necessary that an architect actually supervise the construction to have lien rights.

### Assignment of Mechanic's Lien Rights

The most obvious observation is that an assignment of mechanic's lien rights is not effective if the claimant is not owed any money on the project. If the claimant was paid or the claimant defaulted on its contract, then the claimant also has no mechanic's lien rights. Anyone with an assignment of lien rights from the claimant has no enforceable rights on the project.

Mechanic's lien rights are assignable in Maryland, at least once a memorandum of lien has been recorded.<sup>112</sup> The assignability of mechanic's lien rights may depend on whether the labor or material has already been supplied, so that the mechanic's lien rights already exist at the time of assignment. The assignability of mechanic's lien rights may also depend on whether the mechanic's lien has already been perfected (filed) at the time of assignment.<sup>113</sup>

<sup>106</sup> *Wehr v. Shryock*, 55 Md. 334 (1881); *Reindollar v. Flickinger*, 59 Md. 469 (1883).

<sup>107</sup> *Wilhelm v. Roe*, 158 Md. 615, 149 A. 438 (1930); *Bruncz v. DiLeo*, 263 Md. 481, 283 A.2d 606 (1971); *Real Estate & Imp. Co. v. William Phillips & Sons*, 90 Md. 515, 45 A. 174 (1900).

<sup>108</sup> *Shryock v. Hensel*, 95 Md. 614, 53 A. 412 (1902).

<sup>109</sup> Maryland Real Property Code Section 9-101(g); *Diener v. Cabbage*, 259 Md. 555, 270 A.2d 471 (1970).

<sup>110</sup> *Caton Ridge, Inc. v. Bonnett*, 245 Md. 268, 225 A.2d 853 (1967).

<sup>111</sup> Maryland Real Property Code Section 9-102(a).

<sup>112</sup> Maryland Real Property Code Section 7-204 [An assignment or release of a vendor's lien may be made by the holder of the lien in the same manner prescribed for the short assignment or release of a mortgage. The holder of the lien also may write a release on the record in the office where the deed is recorded or the release may be endorsed on the original deed].

<sup>113</sup> *Talco Capital Corp. v. State Underground Parking Comm'n*, 324 N.E.2d 762, 767 (Ohio Ct. App. 1974); *Gould, Inc. v. Dynalectric Company*, 435 A.2d 730 (Sup.Ct. Del 1981).

Legal rights are generally assignable and this does allow a general prediction that mechanic's lien rights are also assignable.<sup>114</sup>

### Description of Labor or Materials

To file a mechanic's lien, the contractor must specify the amount and kind of labor and materials furnished so that a court can determine if that labor and materials were used in the building.<sup>115</sup> A notice that fails to state the nature and kind of materials furnished or the amount claimed, and makes no reference to the claim filed, is not sufficient.<sup>116</sup>

It is often difficult to determine what types of labor and materials are for the erection or repair of a building and give rise to lien rights. Courts have provided some answers on a case-by-case basis over time. For example, modular buildings are subject to liens.<sup>117</sup> Installation of machinery that is movable in its operation will not give rise to lien rights.<sup>118</sup> Manufacturing machinery is not lienable.<sup>119</sup> Heating equipment, however, does give lien rights provided it is installed before the building is completed.<sup>120</sup> Apparently, demolition and asbestos abatement for a building renovation provides lien rights.<sup>121</sup>

### Site Improvements and Landscaping

The Maryland Legislature has expressly provided lien rights for “drilling and installation of wells to supply water, the construction or installation of any swimming pool or fencing, the sodding, seeding or planting in or about the premises of any shrubs, trees, plants, flowers or nursery products, and the grading, filling, landscaping, and paving of the premises”<sup>122</sup> furnished for or about the *building*. In other words, such labor and materials give rise to lien rights if supplied in connection with the construction of a building. These types of labor or material may not give lien rights, however, if a building is not constructed.

### Architects and Engineers

Building or landscape architectural services, engineering services, or land surveying services for use for or about the building or premises provides lien rights.<sup>123</sup> This amendment makes it clear that not only architects, but also landscape architects, engineers and land surveyors have lien rights. It does still appear necessary that a building actually be constructed.

### Rental Equipment

Formerly, a mechanic's lien was not available to equipment owners who leased their equipment without an operator.<sup>124</sup> However, a revision of the Maryland Code endowed equipment lessors with mechanic's lien rights where

<sup>114</sup> *Nat'l Elec. Indus. Fund v. Bethlehem Steel Corp.*, 296 Md. 541, 552 (1983) [A Union could enforce the mechanic's lien rights of subcontractor-employees for the purposes of collecting Union fees]; *See also District Heights Apartments v. Noland Co.*, 202 Md. 43, 46 (1952) [The subcontractor, having encountered financial difficulties, had assigned all its right, title and interest in the money which the general contractor owed it. However, the dispute in this case addressed only delivery and notice issues. Apparently, the assignment was not directly addressed or contested]; *Davis v. Bilsland*, 85 U.S. 659 (1873) [Based on Montana mechanic's lien statute, U.S. Supreme Court ruled that mechanic's liens are assignable. Claimant had “completed his claim by filing his lien before assigning it to the plaintiff. It was perfectly lawful for him to assign his claim. It was not against any principle of public policy to do so.” This case also at least allows assignment of a recorded mechanic's lien].

<sup>115</sup> *Scott & Wimbrow, Inc. v. Wisterco Invs., Inc.*, 36 Md. App. 274, 373 A.2d 965, cert. denied, 281 Md. 743 (1977).

<sup>116</sup> *Thomas v. Barber*, 10 Md. 380 (1857).

<sup>117</sup> *5500 Coastal Hwy. Ltd. Partnership v. Electrical Equip. Co.*, 305 Md. 532, 505 A.2d 533 (1986).

<sup>118</sup> *New England Car Spring Co. v. B & O R.R.*, 11 Md. 81 (1857).

<sup>119</sup> *Basshor v. B & O R.R.*, 65 Md. 99, 3A. 285 (1886); *Kent Sand & Gravel, LLC v. Jacksonville Mach. & Repair, Inc.*, 403 Md. 173, 183-184, 941 A.2d 468, 474 (2008) [When such a machine becomes a fixture, like a heating system incorporated into a building, mechanic's lien rights must be asserted against the building itself. But when the mechanic erects, constructs or repairs machinery that is not incorporated into a building as a fixture, there is no mechanic's lien on the real property].

<sup>120</sup> *Stebbins v. Culbreth*, 86 Md. 656, 39 A. 321 (1898); *Shacks v. Ford*, 128 Md. 287, 97 A. 511 (1916); *Kent Sand & Gravel, LLC v. Jacksonville Mach. & Repair, Inc.*, 403 Md. 173, 183-184, 941 A.2d 468, 474 (2008).

<sup>121</sup> *Southern Management Corp. v. Kevin Willes Construction Co., Inc.* 382 Md. 524, 856 A.2d 626 (2004).

<sup>122</sup> Maryland Real Property Code Section 9-102(a).

<sup>123</sup> Maryland Real Property Code Section 9-102(a).

<sup>124</sup> *Williams Constr. Co. v. Construction Equip., Inc.*, 253 Md. 60, 251 A.2d 864 (1969).

the equipment is leased for use for or about the building or premises, regardless of whether the equipment is leased with an operator.<sup>125</sup>

### Structure

Even if a claimant provides labor or material that can give rise to lien rights, the labor or materials must be used in a “building” on which a lien can attach. The word “building does not include every type of structure on land.” Claimants do not have lien rights unless the labor or material went into a building described by the Maryland Code.<sup>126</sup> A “building” only can mean “an erection intended for use and occupancy as a habitation or for some purpose of trade, manufacture, or ornamental use, such as a house, store or church.”<sup>127</sup> The legislature has provided some clarification on the types of structures that give lien rights.<sup>128</sup>

### Site Development Improvements, Roads and Utilities

A problem used to exist with subdivision improvements such as the installation of utilities and streets. Such improvements are very important to the value of a residential building and are also very costly. None of these improvements, however, are actually placed on each individual lot. They are often in a public right of way or common area that will eventually be owned by a homeowners’ association.

This problem was at least partially resolved by the Maryland Code, which states that waterlines, sanitary sewers, storm drains or streets installed to serve all the lots in a development are structures to which a lien can attach and that all of the lots in a development are subject to a lien on a pro rata basis.<sup>129</sup> Although there is no Maryland case law to provide guidance on the application of this statute, it is similar to statutes in other states.<sup>130</sup>

### Machines, Wharves and Bridges

The Maryland legislature has provided that any machine, wharf or bridge erected, constructed or repaired in the state may be subjected to a lien in the same manner as a building.<sup>131</sup> This means that the machine, wharf or bridge is a “building” for the purposes of the lien statute.

## AMOUNT OF CLAIM AND ALLOCATION

The amount of the claim cannot be increased after lien proceedings have begun.<sup>132</sup> It is possible that the amount of the claim cannot be increased even if the time limit for filing the Petition has not yet expired.

A claimant may recover his profit on both labor and material under a cost-plus contract by means of a mechanic’s lien.<sup>133</sup> The claimant is also entitled to interest from the time his claim is filed.<sup>134</sup> An owner is entitled to a set-off for the amount paid to properly complete work after default.<sup>135</sup>

### Interest

Maryland courts have reaffirmed that a mechanic’s lien by a supplier can carry both prejudgment and post-judgment interest.<sup>136</sup> This can be very important and can involve a lot of money, since mechanic’s lien litigation

<sup>125</sup> Maryland Real Property Code Section 9-102(a).

<sup>126</sup> *Jaguar Technologies, Inc. v. Cable-LA, Inc.*, 229 F.Supp.2d 453 (2002); *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 228 Md. 297, 301, 179 A.2d 683, 685 (1962); *See also L.W. Wolfe Enterprises, Inc., Maryland National Golf, L.P.*, 165 Md. App. 339, 885 A.2d 826 (2005).

<sup>127</sup> *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 228 Md. 297, 301, 179 A.2d 683, 685 (1962).

<sup>128</sup> Maryland Real Property Code Section 9-102(a).

<sup>129</sup> Maryland Real Property Code Section 9-102(b).

<sup>130</sup> *See* chapter, Mechanic’s Liens in Virginia; subsection, Site Development Improvements, Roads and Utilities—Section 43-3(B).

<sup>131</sup> Maryland Real Property Code Section 9-102(c).

<sup>132</sup> Maryland Real Property Code Section 9-112.

<sup>133</sup> *House v. Fissell*, 188 Md. 160, 51 A.2d 669 (1947).

<sup>134</sup> *Trustees of German Lutheran Evangelical St. Matthew’s Congregation v. Heise*, 44 Md. 453 (1876); *Eastover Stores, Inc. v. Minnix*, 219 Md. 658, 150 A.2d 884 (1959).

<sup>135</sup> *Johnson v. Metcalfe*, 209 Md. 537, 121 A.2d 825 (1956).

<sup>136</sup> *AMI Operating Partners Ltd. Partnership v. JAD Enters., Inc.*, 77 Md. App. 654, 551 A.2d 888, cert. denied, 315 Md. 307, 554 A.2d 393 (1989).

can end long after work is completed. The mechanic's lien carries interest at the legal rate, unless there is a contract agreement for a different rate.

A mechanic's lien by a supplier can carry interest at 1½% per month (18% per annum), where each of the invoices and delivery tickets stated that "[a] finance charge of 1½% per month will be added to all past due accounts."<sup>137</sup> Apparently, this statement on invoices and delivery tickets is enough for a supplier lien claimant to get interest, even without a signed contract term. The large amount of interest recovered went a long way toward compensating the supplier for losses. For this reason, all contractors want a contract term calling for a high rate of interest, or at least this term on all invoices and delivery tickets. It is advisable to give notice of the claim for interest, by stating the rate at which interest is claimed in any Notice of Intent to Lien and in the Petition.

## 15% Rule

A building must be "repaired, rebuilt, or improved to the extent of 15% of its value" before it is subject to a mechanic's lien in Maryland.<sup>138</sup> This limitation does not affect construction of new buildings, only renovations, additions or tenant improvements.<sup>139</sup> If the entire renovation increases the value of the property by 15%, then each subcontractor and material supplier will have lien rights.<sup>140</sup> If the property is subject to a lien, the amount of an individual claim is irrelevant.<sup>141</sup> In other words, if the claimant is a subcontractor or supplier, this rule applies to the value of the general contract, not the value of the claimant's contract.

Consider the case of the modern shopping center or office building. A contract for improvements in a grocery store or restaurant can exceed \$1 million. If the entire shopping center is worth \$60 million, however, do the contractors have lien rights? The Maryland code defines the word "building" as including "any unit of a non-residential building that is leased or separately sold as a unit."<sup>142</sup> In other words, as long as that particular store or office is repaired or improved to the extent of 15% of its value, all contractors will have lien rights.

The 15% Rule described in Maryland Real Property Code Section 9-102(a) formerly required repairs or improvements to the extent of 25% of the value of the building before mechanic's lien rights existed.<sup>143</sup> Accordingly, the case on this subject, decided in 1982, speaks in terms of 25% of the value of the building.<sup>144</sup>

There is a similar rule for tenant work. The Maryland Code states that "if a building is ... improved to the extent of 25 percent of its value, by a tenant ... the lien established ... applies only to the extent of the tenant's interest."<sup>145</sup> Formerly, both rules required an increase of 25% of the value of the building. It appears now, however, that different rules apply depending on whether the owner or the tenant orders the work. If it is a tenant ordering work, then the project must increase the value of that "building" by at least 25%. If the work is ordered by the owner, however, the value of the building must increase only 15% for mechanic's lien rights to exist.

The 15% and 25% rules are an affirmative part of the claimant's case.<sup>146</sup> In other words, the claimant must allege in their petition and then prove to the court that the property was improved sufficiently in value.

## Allocation

A contractor can supply labor and materials to more than one parcel of land in a single project. In some states, there are very strict rules for "allocating" the labor and materials supplied to each parcel.<sup>147</sup> The lien can be lost in its entirety if materials are misallocated and one parcel is "overliened."

<sup>137</sup> *AMI Operating Partners Ltd. Partnership v. JAD Enters., Inc.*, 77 Md. App. 654, 551 A.2d 888, cert. denied, 315 Md. 307, 554 A.2d 393 (1989).

<sup>138</sup> Maryland Real Property Code Section 9-102(a).

<sup>139</sup> *L.W. Wolfe Enterprises, Inc., Maryland National Golf, L.P.*, 165 Md. App. 339, 885 A.2d 826 (2005).

<sup>140</sup> *O-Porto Construction Co., Inc. v. Devon/Lanham, LLC*, 129 Md. App. 301, 741 A.2d 576 (1998); *Hurst v. V. & M of Va., Inc.*, 293 Md. 575, 446 A.2d 55 (1982).

<sup>141</sup> Maryland Real Property Code Section 9-102(a). The statute goes on to say that the building will be subject to a lien for the "payment of all debts, without regard to the amount," if the building is repaired or improved to the extent of 15% of its value.

<sup>142</sup> Maryland Real Property Code Section 9-101(b). Apparently, an amendment to Section 9-101(b) would change the result in *Hurst v. V. & M of Va., Inc.*, 293 Md. 575, 446 A.2d 55 (1982).

<sup>143</sup> The change to 15% became effective October 1, 1996, Maryland Real Property Code Section 9-102(a).

<sup>144</sup> *Hurst v. V. & M of Va., Inc.*, 293 Md. 575, 446 A.2d 55 (1982).

<sup>145</sup> Maryland Real Property Code Section 9-103(c)(2); See sub-subsection above, Tenants and Leaseholds.

<sup>146</sup> *Westpointe Plaza II LP v. Kalkreuth Roofing & Sheet Metal, Inc.*, 109 Md. App. 569, 675 A.2d 571 (1996).

<sup>147</sup> See chapter, Mechanic's Liens in Virginia; section, Amount of Claim and Allocation.

The safest practice in all states is to accurately allocate to the greatest extent possible. A claimant must specify the buildings on which the liens are claimed and the amount claimed on each.<sup>148</sup> Where a claimant furnishes material in the construction of 45 houses, a notice is insufficient which fails to specify the houses on which liens are claimed or the amount claimed.<sup>149</sup> A final order establishing a lien on condominium units for work done on the common areas must allocate the lien in accordance with each unit owner's percentage interest in the common elements.<sup>150</sup>

There is case law in Maryland indicating that contractors have less of an allocation burden than in other states. When a number of buildings were constructed in a single project, a Maryland court ruled that the material supplier did not have to prove in which buildings the specific materials were used or even prove that the materials were actually used on the project.<sup>151</sup> The claimant will need to show that the materials were delivered to the site of the work, but the claimant does not have to show in which buildings the specific materials were used.<sup>152</sup> If the supplier has proof that materials were shipped to the site, it will be presumed that they were delivered unless there is evidence to the contrary.<sup>153</sup>

In one case, a contractor was allowed to establish a mechanic's lien on a project even though some of the materials furnished went into parcels not included in the lien.<sup>154</sup> A concrete supplier could establish a lien even though it was shown that none of the concrete for which the liens were claimed went into the particular houses against which the liens were filed, but was used in the construction of other houses in the development at a time when all of the houses were owned by the developer.<sup>155</sup>

However, when multiple parcels are involved in a single construction contract, and a release has been given as to one of the parcels, a lien cannot be claimed against the unreleased parcels for materials furnished to the released parcel.<sup>156</sup> The determining factor in this case is the release.<sup>157</sup> The claimant signed a release indicating that he had received payment for all labor or materials supplied to that one house, and the court would not allow him to thereafter attempt to collect money for work done on the same house.<sup>158</sup> It is important, therefore, that a contractor not sign a release for any parcel of a multiple parcel job if all labor and materials have not been carefully traced and allocated.

The courts seem to be generally unconcerned if one parcel is overliened by a blanket lien. However, as in other states, it does seem important whether the rights of third persons would be damaged.<sup>159</sup> If no one is hurt by the overburdening lien except the contractor who did not pay his bills, the lien will stand.<sup>160</sup>

Where a lien is claimed on a contract involving more than one building, the failure to apportion the amount claimed among the buildings does not defeat the lien but postpones it "to other lien creditors."<sup>161</sup> These other lien creditors are third parties that would be adversely affected by an overburdening.

The contract is also important in determining the extent to which allocation is necessary. A lien claim that includes work or materials under two or more contracts places the claimant under a greater burden to describe each contract and the materials provided under each.<sup>162</sup>

## Site Development Improvements, Roads and Utilities

For contractors supplying labor or materials for the construction of waterlines, sanitary sewers, storm drains or streets to service a development, the Maryland Code provides an allocation for the lien pro rata on each lot in the development.<sup>163</sup> Such improvements are very important to the value of a residential building and are also very costly.

<sup>148</sup> *Welch v. Humphrey*, 200 Md. 410, 90 A.2d 686 (1952).

<sup>149</sup> *Welch v. Humphrey*, 200 Md. 410, 90 A.2d 686 (1952).

<sup>150</sup> Maryland Real Property Code Section 11-118(b); *Southern Management Corp. v. Kevin Willes Construction Co., Inc.* 382 Md. 524, 856 A.2d 626 (2004).

<sup>151</sup> *Palmer Partnership v. Marvelite, Inc.*, 255 Md. 121, 257 A.2d 169 (1968).

<sup>152</sup> *District Heights Apts., Section D-E, Inc. v. Noland Co.*, 202 Md. 43, 95 A.2d 90 (1953).

<sup>153</sup> *District Heights Apts., Section D-E, Inc. v. Noland Co.*, 202 Md. 43, 95 A.2d 90 (1953).

<sup>154</sup> *Humphrey v. Harrison Bros.*, 196 F.2d 630 (4th Cir. 1952).

<sup>155</sup> *Clark Certified Concrete Co. v. Lindberg*, 216 Md. 576, 141 A.2d 685 (1958).

<sup>156</sup> *John W. Wilson & Son v. Wilson*, 51 Md. 159 (1879).

<sup>157</sup> See *Humphrey v. Harrison Bros., Inc.*, 196 F.2d 630 (1952).

<sup>158</sup> *John W. Wilson & Son v. Wilson*, 51 Md. 159 (1879).

<sup>159</sup> *Celta Corp. v. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>160</sup> *Celta Corp. v. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>161</sup> *Humphrey v. Harrison Bros.*, 196 F.2d 630 (4th Cir. 1952).

<sup>162</sup> *Clark v. Boarman*, 89 Md. 428, 43 A. 926 (1899).

<sup>163</sup> Maryland Real Property Code Section 9-102(b); See sub-subsection above, Extent of Lien.

None of these improvements, however, are actually placed on each individual lot. They are often in a public right of way or common area that will eventually be owned by a homeowners' association.

The Maryland Code states that all of the lots in a development are subject to a lien on a pro rata basis for the value of waterlines, sanitary sewers, storm drains or streets installed to serve all the lots in a development.<sup>164</sup> This would help allocation problems for these types of improvements. Although there is little Maryland case law to provide guidance on the application of this statute,<sup>165</sup> it is similar to statutes in other states.<sup>166</sup>

If some of the lots have been sold to bona fide purchasers, the lien cannot be enforced against the sold lots. The lien claimant may be able to collect from the remaining lots held by the owner, however—at least when no third persons would be damaged.<sup>167</sup> A claimant's ability to lien the remaining lots held by the owner is limited to the pro rata amount by which each lot benefited from the overall contract. In other words, the amount of lien allowed against each of the unsold lots cannot exceed the total value of labor and material (paid and unpaid) supplied to each lot.<sup>168</sup>

## Condominiums

If an owner of a single unit in a condominium orders improvements to that unit, the claimant is entitled to a lien on that one unit.<sup>169</sup>

In order to be able to assert a mechanic's lien against each of the units for work in the common area of a condominium, the lien claimant must have written authorization for the work from the unit owner's association.<sup>170</sup> If the repair or improvement was authorized *in writing* by the council of unit owners, a lien will attach to each unit in the condominium in proportion to its percentage interest in the common elements established in the declaration of the condominium. The mechanic's lien claimant must also send their Notice of Intent to Lien to all unit owners in the condominium and name all unit owners in the condominium as parties in the Petition to Establish Lien, in order to be able to assert a mechanic's lien against each of the units for work in the common area of a condominium.<sup>171</sup>

## SERVICE OF LIEN NOTICE: REMOTE SUBCONTRACTOR AND SUPPLIER LIENS

### Identity of Owner to Receive Notice

The Maryland Code requires that notice be received by the "owner or owner's agent." It is not a problem if the notice is addressed to additional people other than the owner, as long as the owner or owner's agent receives actual notice.<sup>172</sup> The notice should be addressed to the person for whom it is intended.<sup>173</sup> The recipient must be an agent of the owner and the builder is not necessarily an agent of the owner.<sup>174</sup>

If there is more than one owner of a single piece of property, the subcontractor can give notice to any of the owners.<sup>175</sup> If there is more than one piece of property, however, the claimant must serve at least one owner of each property.<sup>176</sup>

<sup>164</sup> Maryland Real Property Code Section 9-102(b).

<sup>165</sup> *Celta Corp. v. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>166</sup> See chapter, Mechanic's Liens in Virginia; subsection, Amount of Claim and Allocation; subsection, Site Development Improvements, Roads and Utilities—Section 43-3(B).

<sup>167</sup> *Celta Corp. v. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>168</sup> *Celta Corp. v. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>169</sup> Maryland Real Property Code Section 11-118(a).

<sup>170</sup> Maryland Real Property Code Section 11-118(b); *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 548-52, 856 A.2d 626, 641-42 (2004).

<sup>171</sup> *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 531, 856 A.2d 626, 630 (2004).

<sup>172</sup> *Hensel v. Johnson*, 94 Md. 729, 51 A. 575 (1902).

<sup>173</sup> *Kenly v. Sisters of Charity*, 63 Md. 306 (1855).

<sup>174</sup> *Richardson v. Saltz*, 127 Md. 388 (1916).

<sup>175</sup> Maryland Real Property Code Section 9-104(d).

<sup>176</sup> *Southern Management Corp. v. Kevin Willes Construction Co., Inc.* 382 Md. 524, 856 A.2d 626 (2004).



## Delivery of Notice

The statute states that the notice *is* effective if sent by certified or registered mail or personally delivered to the owner.<sup>177</sup> The intention of this section is that notice shall be served personally on the owner whenever possible.<sup>178</sup> The best practice is to send multiple notices to multiple addresses and in multiple methods to be sure that the owner receives actual written notice. Notices can be sent by certified mail, by personal delivery and by posting on the construction property. Notices can also be sent to the principal place of business or to the resident agent, employees or other agents of the owner. The code tells us how we can be certain to get effective service, but other methods such as regular mail may be sufficient.<sup>179</sup>

Using certified mail or personal delivery is probably the best single method. The advantage of registered or certified mail is that the U.S. Post Office will provide evidence of the date on which the notice is actually sent and received. It is sufficient if the notice is sent by certified mail within the deadline, although it may be received by the owner after the deadline.<sup>180</sup> The claimant still has to show that the owner eventually actually received the notice.

If certified mail is used, the original green cards should be kept securely in the file. One disadvantage of this method of service is that a receptionist, secretary or some unidentified person may sign the green card.<sup>181</sup> The subcontractor will then have the burden of showing that the property owner received the notice.<sup>182</sup> If the registered or certified mailing is unclaimed, the claimant is on notice that the owner has not received actual notice of the lien.<sup>183</sup>

Personal delivery will solve some of the problems of certified mail. However, the owner can still dispute actual receipt. If an employee of the claimant claims to have delivered the notice, the owner may still claim the notice was never received. For this reason, it is preferable to use an independent process server for service. The process server should supply an affidavit of service kept in the file. Use of private process will obviously be more expensive than certified mail.

If the property owner is a corporation, the notice can be served on the resident agent of the corporation listed in the State Department of Assessments and Taxation.<sup>184</sup> In this instance, certified mail should be sufficient.

If it is not possible to personally serve the owner, it may be sufficient to post the notice on the property.<sup>185</sup> Posting should be used as a method of last resort. The claimant will need to show that the notice could not be served personally before the claimant can rely upon the notice attached to the building.<sup>186</sup> Notice by posting is authorized, however, when owners are not residents of the county in which the construction site is located.<sup>187</sup>

Notice may be waived, but the waiver must be clearly and unequivocally expressed.<sup>188</sup> Notice is not waived, for example, by a conference among the contractor, materialman and owner, where the amount of the materialman's claim is discussed.<sup>189</sup>

## PETITION TO ESTABLISH MECHANIC'S LIEN

The Petition to Establish a Mechanic's Lien is a lawsuit. The earlier Notice of Intent to Lien is not "filed" anywhere. It is really just a letter sent by the claimant to the owner. The claimant keeps a copy of this notice and proof that this notice was sent to the owner within time and received.

<sup>177</sup> Maryland Real Property Code Section 9-104(c).

<sup>178</sup> *Hill v. Kaufman*, 98 Md. 247, 56 A. 783 (1904).

<sup>179</sup> *Clearail, Inc. v. Mardirossian Family Enters.*, 84 Md. App. 497, 581 A.2d 36 (1990).

<sup>180</sup> *Riley v. Abrams*, 287 Md. 348, 412 A.2d 996 (1980).

<sup>181</sup> Maryland Rule 1-321.

<sup>182</sup> *Clearail, Inc. v. Mardirossian Family Enters.*, 84 Md. App. 497, 581 A.2d 36 (1990); *Prima Paint Corp. v. Ammerman*, 264 Md. 392, 287 A.2d 27 (1972).

<sup>183</sup> *Clearail, Inc. v. Mardirossian Family Enters.*, 84 Md. App. 497, 581 A.2d 36 (1990).

<sup>184</sup> *Jakenjo, Inc. v. Blizzard*, 221 Md. 46, 155 A.2d 661 (1959).

<sup>185</sup> Maryland Real Property Code Section 9-104(e).

<sup>186</sup> *Kenly v. Sisters of Charity*, 63 Md. 306 (1855); *Bounds v. Nuttle*, 181 Md. 400, 30 A.2d 263 (1943).

<sup>187</sup> *Diener v. Cabbage*, 259 Md. 555, 270 A.2d 471 (1970).

<sup>188</sup> *Welch v. Humphrey*, 200 Md. 410, 90 A.2d 686 (1952).

<sup>189</sup> *Welch v. Humphrey*, 200 Md. 410, 90 A.2d 686 (1952); *See also William Penn Supply Corp. v. Watterson*, 218 Md. 291, 146 A.2d 420 (1958).

## Deadline for Petition

Within 180 days after the work has been finished or the last materials furnished, the claimant must file a lawsuit with the court called the Petition to Establish Mechanic's Lien.<sup>190</sup> This means within 180 days of the completion of work by the claimant, not within 180 days of the completion of the entire building.<sup>191</sup> If the Petition to Establish Lien is not filed in a timely manner, all mechanic's lien rights are lost.<sup>192</sup>

The time limits for the subcontractor notice and for the lien enforcement operate from the same starting point: the "day that work is finished or materials furnished" by the particular claimant.<sup>193</sup> This is the first deadline for a general contractor who dealt directly with the owner of the property. Refer back to the section on Time Limits to determine when the 180-day time limit begins.

The claimant must finish its work before it can file the Petition. The lawsuit is premature if the claimant is continuing to work on the project.<sup>194</sup> It may be that only the claimant's work must be finished, not the entire project.<sup>195</sup>

## Effect of Bankruptcy

The bankruptcy stay prevents the Maryland lien claimant from ever moving forward to establish the lien by filing a Petition to Establish a Lien. There is also no known opportunity to get relief from the stay or permission to establish lien rights. This would prefer the lien claimant to other unsecured creditors.

In Maryland, the claimant is an unsecured creditor until the court establishes a lien pursuant to a Petition to Establish Lien. Even if a property owner files bankruptcy within 90 days after a lien is established by a court, then the lien may be a preference that can be avoided (set aside) by the bankruptcy court.<sup>196</sup> As a practical matter, this usually means the Maryland lien claimant will receive nothing in bankruptcy, unless the court had established the claimant's mechanic's lien at least 90 days before bankruptcy was filed. Accordingly, in bankruptcy most mechanic's lien claimants will never have security in the property and will have to share with other general unsecured creditors whatever assets the debtor has left in bankruptcy after all secured creditors have been paid.<sup>197</sup>

## Necessary Parties

The Court of Appeals of Maryland has held that all unit owners in a condominium are "necessary parties" in a Petition to Establish Lien in order to be able to assert a mechanic's lien against each of the units for work in the common area of a condominium.<sup>198</sup> A party is "necessary" if the sale of the property pursuant to the Petition to Establish Lien would "impair or impede the person's ability to protect a claimed interest," such as an ownership interest in the property.<sup>199</sup>

It is not clear how far this idea goes in Maryland or whether necessary parties would include a tenant in possession of the premises, an easement owner, the county with a claim for past due real estate taxes, judgment lien holders, the general contractor or other mechanic's lien holders.

## Petition to Establish and Enforce Lien

A Petition to Establish Lien must be filed in order to preserve mechanic's lien security rights. If the Petition to Establish Lien is not filed in a timely manner, all mechanic's lien rights are lost.<sup>200</sup>

<sup>190</sup> Maryland Real Property Code Section 9-105(a).

<sup>191</sup> *Okisko Co. v. Matthews*, 3 Md. 168 (1852).

<sup>192</sup> *Aviles v. Eshelman Electric Corp.*, 281 Md. 529, 537, 379 A.2d 1227,1231 (1977).

<sup>193</sup> Compare this to the DC Mechanic's Lien Code where the lien must be filed within three months of completion of the entire building.

<sup>194</sup> *ARCO/Murray Nat'l Constr. Co. v. Equitable Dev., LLC*, No. JKB-16-591, 2016 U.S. Dist. LEXIS 103848, at \*8 (D. Md. 2016).

<sup>195</sup> *ARCO/Murray Nat'l Constr. Co. v. Equitable Dev., LLC*, No. JKB-16-591, 2016 U.S. Dist. LEXIS 103848, at \*8 (D. Md. 2016); citing *Harrison v. Stouffer*, 193 Md. 46, 65 A.2d 895,897 (1949) [interpreting same language in prior version of statute in order to determine the latest that the Petition can be filed].

<sup>196</sup> *Johnson Hydro Seeding Corp. v. Ian Homes, Inc.*, 126 Bankr. 933 (Bankr. D. Md. 1991).

<sup>197</sup> See section below, Priority; subsection, Bankruptcy.

<sup>198</sup> *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 531, 856 A.2d 626, 630 (2004).

<sup>199</sup> Maryland Rule 2-211(a); *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 548-52, 856 A.2d 626, 640-43 (2004) [Failure to join a necessary party constitutes a defect in the proceedings that cannot be waived by the parties, and may be raised at any time, including for the first time on appeal].

<sup>200</sup> *Aviles v. Eshelman Electric Corp.*, 281 Md. 529, 537, 379 A.2d 1227,1231 (1977).

A lien claimant must also petition the court to “enforce” the lien within one year after the Petition to Establish Lien is filed.<sup>201</sup> As a practical matter, the best practice is to file a Petition to Establish and Enforce Mechanic's Lien within 180 days of last work. This may make it unnecessary to complete the case within one year or remember to later enforce the lien.<sup>202</sup>

The end result of the enforcement action is foreclosure upon the real estate. The proceeds of sale are used to pay off the mechanic's lien claim and other liens on the property. This is why all other persons or entities with an interest in the property are “necessary parties,” so that they can participate in the lawsuit to protect their interest. As a practical matter, mechanic's lien litigation very rarely results in foreclosure on the property. Usually, the mechanic's lien is a relatively small dollar amount compared to the value of the property. Once it becomes clear that the mechanic's lien is valid and that the contractor has the right to foreclose on the property, some other interested party (like the owner or lender) will step in to pay off the mechanic's lien claim.

It is possible to include other “lawsuits” in the Petition to Establish and Enforce Mechanic's Lien. Most commonly, a contractor will add a separate “count” for breach of contract, requesting a money judgment against the party with which they contracted.

### Information Required in a Petition

According to Maryland Real Property Code section 9-105(a)(1), the Petition to Establish Mechanic's Lien should include the following:

1. Name and address of petitioner
2. Name and address of owner<sup>203</sup>
3. A description of the nature or kind of work done or the kind and amount of materials furnished<sup>204</sup>
4. A description of the “time” when the work was done or materials furnished<sup>205</sup>
5. Name of person for whom work done or materials furnished<sup>206</sup>
6. The amount or sum claimed to be due less any credit recognized by the petitioner<sup>207</sup>
7. A description of the land and a description adequate to identify the building<sup>208</sup>
8. An allocation of claim amount if there are multiple parcels of land<sup>209</sup>
9. Affidavit setting forth sufficient facts to establish a lien
10. Originals or copies of all documents that establish a lien.

It is very important to correctly identify and include all of these items in the Petition the first time, since only certain parts of the Petition can be amended or changed later.<sup>210</sup>

Within 90 days of the Petition filing, the claimant will have a summary court proceeding called a “Show Cause Hearing.”<sup>211</sup> The mechanic's lien may rise or fall at that hearing, which is based on the documents attached to and the facts described in the Petition to Establish Lien.<sup>212</sup> Hence, it is important to include in the Petition all of the evidence that will be needed to prove the lien.<sup>213</sup>

<sup>201</sup> Maryland Real Property Code Section 9-109.

<sup>202</sup> See *Southern Management Corp. v. Kevin Willes Construction Co., Inc.*, 382 Md. 524, 856 A.2d 626 (2004).

<sup>203</sup> See section above, Notice of Intent to Lien; subsection, Owner. See also subsection below, Amendment to the Petition.

<sup>204</sup> See section above, Notice of Intent to Lien; subsection, Description of Labor or Materials.

<sup>205</sup> See section below, Accounting.

<sup>206</sup> See section above, Notice of Intent to Lien; subsection, Owner.

<sup>207</sup> See section above, Amount of Claim and Allocation. See also section below, Accounting.

<sup>208</sup> See section above, Notice of Intent to Lien; subsection, Description of Building and Property.

<sup>209</sup> See section above, Amount of Claim and Allocation. Maryland Real Property Code Section 9-105(a)(1)(v) does not require the petitioner to allocate but if the petitioner does not then the lien will be postponed to other mechanic's liens.

<sup>210</sup> See subsection below, Amendment to the Petition.

<sup>211</sup> See sub-subsection below, Show Cause Hearing.

<sup>212</sup> *Westpointe Plaza II LP v. Kalkreuth Roofing & Sheet Metal, Inc.*, 109 Md. App. 569, 675 A.2d 571 (1996); *Winkler Construction Co. v. Jerome*, 355 Md. 231, 734 A.2d 212 (1999); *F. Scott Jay & Co. v. Vargo*, 112 Md. App. 354, 685 A.2d 799 (1996).

<sup>213</sup> *AMI Operating Partners Ltd. Partnership v. JAD Enters., Inc.*, 77 Md. App. 654, 551 A.2d 888, cert. Denied, 315 Md. 307, 554 A.2d 393 (1989).

## Particularity Required in the Claim

It is clear that information and allegations in the Petition are critical. Maryland courts seem increasingly likely to rule the entire lien invalid if comprehensive allegations are not included in the Petition. A comprehensive Petition will be particularly important if the owner fails to properly respond to the lawsuit.<sup>214</sup>

The Maryland Code explicitly states that some information can be amended or changed later.<sup>215</sup> Claimants should be very reluctant to omit anything from the Petition, however, and should err in favor of being as comprehensive as possible in allegations and attachment of documents to support the claim.

Court case law has always stated that some information must be accurate at the time of Petition filing. In order to have a valid lien, for example, the claimant must describe the nature and kind of work done, itemize the kind and amount of materials furnished, and state the time when the materials were furnished or the work done.<sup>216</sup>

Several items required in the Petition are a repeat of information required in a subcontractor's Notice of Intent to Lien. The previous section in this chapter on Notice of Intent to Lien should be reviewed for this reason. However, a few critical items in the Petition need special consideration.

## Accounting

The Petition to Establish Lien must include an accounting showing the amount claimed to be due.<sup>217</sup> A petitioner will not be able to amend or later change the Petition to increase the amount of the claim.<sup>218</sup> It will probably not be a fatal error, however, to overstate a claim in good faith. The court will be able to correct some errors.<sup>219</sup>

If more than one parcel of land is involved, it is important to do the accounting necessary to allocate the labor and materials supplied to each parcel.<sup>220</sup> A failure to apportion a claim between parcels does not defeat the claim but does "postpone it to other lien creditors."<sup>221</sup> This means that lien creditors protected by an apportioned lien will have priority over lien creditors protected by an unapportioned mechanic's lien claim.<sup>222</sup> This difference in priority can determine whether the claimant collects at all.

If labor and materials are furnished on a "lump sum" basis, then the accounting can also show a lump sum for all labor and materials.<sup>223</sup> The accounting still should itemize the different labor and material supplied for that lump sum.<sup>224</sup>

The claimant must also specifically allege in the petition that the property was improved to the extent of 15% or 25% of its value.<sup>225</sup>

## Time Work Was Performed

The Petition must describe "the time when the work was done or materials furnished."<sup>226</sup> The lien claim can be lost entirely if timeliness is not apparent in the Petition itself.<sup>227</sup> Where materials are furnished or work done under separate and distinct contracts, the claimant should provide separate accountings for each contract, showing the work done or materials furnished and the time the materials were furnished under each contract.<sup>228</sup>

<sup>214</sup> *Westpointe Plaza II LP v. Kalkreuth Roofing & Sheet Metal, Inc.*, 109 Md. App. 569, 675 A.2d 571 (1996); *Winkler Construction Co. v. Jerome*, 355 Md. 231, 734 A.2d 212 (1999); *F. Scott Jay & Co. v. Vargo*, 112 Md. App. 354, 685 A.2d 799 (1996).

<sup>215</sup> See section below, Amendment to the Petition.

<sup>216</sup> *Mervin L. Blades & Son v. Lighthouse Sound Marina & Country Club*, 37 Md. App. 265, 377 A.2d 523 (1977); *Scott v. Wimbrow, Inc. v. Wisterco Invs., Inc.*, 36 Md. App. 274, 373 A.2d 965, cert. denied, 281 Md. 743 (1977).

<sup>217</sup> Maryland Real Property Code Section 9-105(a)(1)(iii).

<sup>218</sup> Maryland Real Property Code Section 9-112.

<sup>219</sup> *Maryland Brick Co. v. Spilman*, 76 Md. 337, 25 A. 297 (1892); *Whicher Dev. Corp. v. Ross*, 142 Md. 522, 121 A. 372 (1923).

<sup>220</sup> Maryland Real Property Code Section 9-105(a)(1)(v); *Humphrey v. Harrison Bros.*, 196 F.2d 630 (4th Cir. 1952).

<sup>221</sup> Maryland Real Property Code Section 9-105(a)(1)(v); *Fulton v. Parlett & Parlett*, 104 Md. 62, 64 A. 58 (1906); *Whicher Dev. Corp. v. Ross*, 142 Md. 522, 121 A. 372 (1923); *Caltrider v. Isberg*, 148 Md. 657, 130 A. 53 (1925).

<sup>222</sup> See section below, Priority.

<sup>223</sup> *Continental Steel Corp. v. Sugarman*, 266 Md. 541, 295 A.2d 493 (1972).

<sup>224</sup> *Continental Steel Corp. v. Sugarman*, 266 Md. 541, 295 A.2d 493 (1972).

<sup>225</sup> *Westpointe Plaza II LP v. Kalkreuth Roofing & Sheet Metal, Inc.*, 109 Md. App. 569, 675 A.2d 571 (1996).

<sup>226</sup> Maryland Real Property Code Section 9-105(a)(1)(iii).

<sup>227</sup> *Rust v. Chisolm*, 57 Md. 376 (1882).

<sup>228</sup> *Johnson v. Metcalfe*, 209 Md. 537, 121 A.2d 825 (1956); *Okisko Co. v. Matthews*, 3 Md. 168 (1852); *Wix v. Bowling*, 120 Md. 265, 87 A. 759 (1913).

### Description of Building and Property

In Maryland, a mechanic's lien action is an "in rem" proceeding.<sup>229</sup> This means that the lawsuit is focused on the building and property rather than the people involved. If the real property is located in Maryland, then the law of Maryland governs the creation of a mechanic's lien.<sup>230</sup>

The building and property must be correctly identified in the Petition to Establish Lien within the time limits.<sup>231</sup> The lien established by the court will extend to the land covered by the building and to as much other land as "may be necessary for the ordinary and useful purposes of the building."<sup>232</sup> The owner has an opportunity to designate the portion of land that will be subject to a mechanic's lien prior to construction.<sup>233</sup> The lien claimant has no obligation to define the portion of the land subject to the mechanic's lien, however. A petition for mechanic's lien was sufficient that was not limited and sought a lien against the entire 73 acres of land on which a residence was located.<sup>234</sup>

A mechanic's lien claimant will not have an opportunity to change the description of the lien property after the time has passed to file the Petition.<sup>235</sup> This is because the enforcement of a mechanic's lien is an "in rem" proceeding.<sup>236</sup> Thus, changing the description of the "rem" (building and property) would effectively create a new mechanic's lien on a different building and property.<sup>237</sup> Presumably, a Petition could be amended if the time limit for filing has not passed.

### Name of Owner

In Maryland, it is not fatal to the establishment of the lien if the legal owner of the property is not correctly identified in the Petition.<sup>238</sup> In Virginia and the District of Columbia, where the Memorandum of Mechanic's Lien is recorded in the land records, the mechanic's lien will fail if the legal owner is not correctly identified. A title searcher would not be able to find the lien if it was not properly indexed under the correct owner's name.

Under Maryland case law, it is essential that the lien claim state the owner.<sup>239</sup> The Petition can be amended for the purpose of changing the name of the owner if a mistake has been made.<sup>240</sup> However, the owner is a necessary party to the proceedings and must eventually be added to the lawsuit.<sup>241</sup> In Maryland, a mechanic's lien action is an "in rem" proceeding.<sup>242</sup> This means that the lawsuit is more focused on the property than the people involved.<sup>243</sup> Maryland case law makes it clear, for example, that the property must be correctly identified within the time limits.<sup>244</sup> It is possible, however, that the owner's name can be changed after time limits have expired.

A claimant is justified in naming as owner a person appearing as such on public records. If the designation of owner or reputed owner is made in good faith, the lien will not be lost because it subsequently appears that some other person is owner.<sup>245</sup>

<sup>229</sup> *Shryock v. Hensel*, 95 Md. 614, 53 A. 412 (1902).

<sup>230</sup> *National Glass v. J.C. Penney Properties*, 336 Md. 606, 612, 650 A.2d 246 (1994).

<sup>231</sup> *Martino v. Arfaa*, 169 Md.App. 692, 906 A.2d 945 (2006).

<sup>232</sup> Md. Real Property Code Ann. §9-103.

<sup>233</sup> Md. Rule 12-304.

<sup>234</sup> *Arfaa v. Martino*, 404 Md. 364, 385-86(2008).

<sup>235</sup> *Gault v. Wittman*, 34 Md. 35 (1871); *Real Estate & Imp. Co. v. William Phillips & Sons*, 90 Md. 515, 45 A. 174 (1900); *Bruncz v. DiLeo*, 263 Md. 481, 283 A.2d 606 (1971).

<sup>236</sup> *Real Estate & Imp. Co. v. William Phillips & Son*, 90 Md. 515, 45 A. 174 (1900).

<sup>237</sup> *Real Estate & Imp. Co. v. William Phillips & Son*, 90 Md. 515, 45 A. 174 (1900).

<sup>238</sup> *Wilhelm v. Roe*, 158 Md. 615, 149 A. 438 (1930); *Real Estate & Imp. Co. v. William Phillips & Son*, 90 Md. 515, 45 A. 174 (1900).

<sup>239</sup> *Wehr v. Shryock*, 55 Md. 334 (1881); *Reindollar v. Flickinger*, 59 Md. 469 (1883).

<sup>240</sup> *Wilhelm v. Roe*, 158 Md. 615, 149 A. 438 (1930); *Bruncz v. DiLeo*, 263 Md. 481, 283 A.2d 606 (1971); *Real Estate & Imp. Co. v. William Phillips & Sons*, 90 Md. 515, 45 A. 174 (1900).

<sup>241</sup> *Southern Management Corp. v. Kevin Willes Construction Co., Inc.* 382 Md. 524, 856 A.2d 626 (2004), citing *Mahan v. Mahan*, 320 Md. 262, 577 A.2d 70 (1990) for the proposition that failure to name the owner as a necessary party is a defect in the proceedings that cannot be waived by the parties and can be raised for the first time on appeal.

<sup>242</sup> *Shryock v. Hensel*, 95 Md. 614, 53 A. 412 (1902).

<sup>243</sup> *Shryock v. Hensel*, 95 Md. 614, 53 A. 412 (1902).

<sup>244</sup> See subsection above, Description of Property.

<sup>245</sup> *Shryock v. Hensel*, 95 Md. 614, 53 A. 412 (1902).

## Amendment to the Petition

Generally, mistakes in the Petition can be corrected by amendment. It is, of course, always safer and more efficient to avoid the need for any amendment. Two categories are not subject to amendment: the increase of the amount claimed<sup>246</sup> and the property description.<sup>247</sup> Otherwise, the Petition may be amended “as may be necessary and proper.”<sup>248</sup> The court can also require a claimant to supplement or explain any of the matters described in the petition.<sup>249</sup>

## Procedure after the Petition

After the Petition to Establish is filed, the court will review the Petition, the affidavits and all documents attached.<sup>250</sup> If the Petition is defective or missing some critical element, the court can deny the Petition outright or require the claimant to supplement and explain any part of the Petition.<sup>251</sup> If the Petition appears to be in order, the court will sign a “show cause” order scheduling a hearing.<sup>252</sup>

## Show Cause Hearing

The court issues a show cause order directed at the owner of the property.<sup>253</sup> The claimant must serve a copy of the order on the owner, together with a complete copy of the Petition to Establish Lien. The court’s order sets a time and place for a Show Cause hearing, directs the owner to file a counter affidavit or verified answer if any fact is in dispute, and advises the owner that a mechanic’s lien may attach to the land if the owner does not defend.<sup>254</sup>

The show cause hearing is sometimes called a “probable cause” hearing. The court hears the case on a summary basis. This means the court does not hear the entire case. Neither side will be able to set forth *all* evidence, nor it is likely that either side will have discovery before the show cause hearing, such as depositions or interrogatories. The claimant has an opportunity to put forth “highlights” of the case with limited opposition from the owner. For the case to proceed, the court must determine that the claimant is “more or less likely” to prevail at the final trial.<sup>255</sup>

Remember, the petitioner may be limited at the show cause hearing to evidence described in the Petition and documents that were attached to the Petition.<sup>256</sup> For this reason, it is very important to carefully draft the Petition and be certain to attach all documents that are necessary to establish the lien.

After the show cause hearing, the court again has three options. First, the court could deny the lien entirely.<sup>257</sup> Second, it could enter a final order establishing the lien, although this is unlikely unless the owner does not defend at all.<sup>258</sup> Finally, so long as the claimant has a good case, the most likely outcome of a show cause hearing is that the court will enter an interlocutory order establishing a temporary lien and assigning a trial date for final resolution.<sup>259</sup>

## Interlocutory Order

If at the show cause hearing the judge is unable to determine definitively that a lien should attach in a certain amount, but is satisfied that the claimant is likely entitled to a lien, the court will enter an interlocutory order.<sup>260</sup>

<sup>246</sup> Maryland Real Property Code Section 9-112.

<sup>247</sup> *Gault v. Wittman*, 34 Md. 35 (1871); *Real Estate & Imp. Co. v. William Phillips & Sons*, 90 Md. 515, 45 A. 174 (1900); *Brunecz v. DiLeo*, 263 Md. 481, 283 A.2d 606 (1971); *Wilhelm v. Roe*, 158 Md. 615, 149 A. 438 (1930).

<sup>248</sup> Maryland Real Property Code Section 9-112.

<sup>249</sup> Maryland Real Property Code Section 9-106(a).

<sup>250</sup> Maryland Real Property Code Section 9-106(a)(1).

<sup>251</sup> Maryland Real Property Code Section 9-106(a)(1); *Westpointe Plaza II LP v. Kalkreuth Roofing & Sheet Metal, Inc.*, 109 Md. App. 569, 675 A.2d 571 (1996).

<sup>252</sup> Maryland Real Property Code Section 9-102(a).

<sup>253</sup> Maryland Real Property Code Section 9-106(a)(1).

<sup>254</sup> Maryland Real Property Code Section 9-106(a)(1).

<sup>255</sup> *Reisterstown Lumber Co. v. Royer*, 91 Md. App. 746, 605 A.2d 980 (1992).

<sup>256</sup> Maryland Real Property Code Section 9-106(a)(1).

<sup>257</sup> Maryland Real Property Code Section 9-106(b)(2); *Westpointe Plaza II LP v. Kalkreuth Roofing & Sheet Metal, Inc.*, 109 Md. App. 569, 675 A.2d 571 (1996).

<sup>258</sup> Maryland Real Property Code Section 9-106(b)(1).

<sup>259</sup> Maryland Real Property Code Section 9-106(b)(3).

<sup>260</sup> Maryland Real Property Code Section 9-106(b)(3).

The interlocutory order establishes a “temporary” lien until a court can hold a complete and final trial.<sup>261</sup> To enter the interlocutory order, the court must determine that probable cause for the mechanic’s lien exists. The facts and circumstances, taken as a whole, would lead a reasonably cautious person to believe that the claimant is entitled to the interlocutory mechanic’s lien.<sup>262</sup>

The lien established at the final hearing will “relate back” to the time of the interlocutory order. Any other liens on the property filed in the land records after the interlocutory order will be inferior to the mechanic’s lien.<sup>263</sup>

The interlocutory order will (1) establish the lien, (2) describe the boundaries of the land and the buildings covered by the lien, (3) state the amount of the probable claim, (4) specify the amount of any bond that the owner can file to release the lien, (5) perhaps require the claimant to file a bond to cover any possible damages as a result of the interlocutory lien and (6) assign a trial date for the final hearing, which must be within six months.<sup>264</sup>

### Final Hearing

The final hearing must occur within six months of the interlocutory order.<sup>265</sup> The lien rights will also expire unless the lien is established by final order within one year of the filing of the Petition.<sup>266</sup>

The final hearing is a complete trial. The owner, claimant and other parties will have an opportunity to take depositions, require the production of documents, propound interrogatories and engage in other discovery. The burden of establishing the lien is on the claimant.<sup>267</sup> No final order establishing the lien will be entered unless the petitioner prevails.<sup>268</sup> No lien exists until that final order is entered.<sup>269</sup>

### Arbitration Clauses

Maryland courts must stay the mechanic’s lien proceedings if arbitration is requested by one of the parties and the construction contract has an enforceable arbitration clause.<sup>270</sup> In order to establish a lien, the court would have to hold a hearing to determine the status of accounts between the parties. To do this, the court would review all of the evidence, which would violate the arbitration agreement.<sup>271</sup>

Arbitration clauses, therefore, can create problems for a claimant. A claimant has no lien at all until the court hearing establishes a lien. Until the lien is established, other judgment liens or mortgage liens filed will then be superior to the mechanic’s lien.<sup>272</sup> The property could also be sold, defeating the lien entirely.<sup>273</sup>

A claimant could lose lien rights entirely if arbitration proceedings are not resolved in time to enforce lien rights within the required deadline. The right to enforce any lien expires one year after the filing of the Petition.<sup>274</sup> There is no case law indicating that a stay in an arbitration case extends this deadline.

It may be possible to establish an interlocutory lien despite an arbitration clause in a contract and this may establish security until completion of the arbitration.<sup>275</sup> When the contractor makes clear that it is merely seeking an interlocutory lien and desires to have any dispute as to the merits of the claim reserved for resolution through arbitration, it does not waive its right to arbitration. In that situation, the court is not being asked to resolve the merits

<sup>261</sup> Maryland Real Property Code Section 9-106(b)(3); *Brendsel v. Winchester Construction Co., Inc.*, 392 Md. 601, 616, 898 A.2d 472, 480-81 (2006).

<sup>262</sup> *Reisterstown Lumber Co. v. Royer*, 91 Md. App. 746, 605 A.2d 980 (1992).

<sup>263</sup> See section below, Priority.

<sup>264</sup> Maryland Real Property Code Section 9-106(b)(3).

<sup>265</sup> Maryland Real Property Code Section 9-106(b)(3)(vi).

<sup>266</sup> Maryland Real Property Code Section 9-109.

<sup>267</sup> *Talbott Lumber Co. v. Tymann*, 48 Md. App. 647, 428 A.2d 1229, cert. denied, 290 Md. 723 (1981).

<sup>268</sup> *Tyson v. Masten Lumber & Supply, Inc.*, 44 Md. App. 293, 408 A.2d 1051 (1979), cert. denied, 290 Md. 723 (1981).

<sup>269</sup> *Taylor Elec. Co. v. First Mariner Bank*, 191 Md. App. 482, 493, 992 A.2d 490, 497-98 (Md. Ct. Spec. App. 2010); *Himmighoefler v. Medallion Indus., Inc.*, 302 Md. 270, 487 A.2d 282 (1985).

<sup>270</sup> *McCormick Constr. Co. v. 9690 Deerco Rd. Ltd. Partnership*, 79 Md. App. 177, 556 A.2d 292 (1989).

<sup>271</sup> *McCormick Constr. Co. v. 9690 Deerco Rd. Ltd. Partnership*, 79 Md. App. 177, 556 A.2d 292 (1989).

<sup>272</sup> *Residential Industrial Loan Co. v. Weinberg*, 279 Md. 483, 369 A.2d 563 (1977).

<sup>273</sup> *Carretti, Inc. v. The Colonnade Limited Partnership*, 104 Md. App. 131, 655 A.2d 64 (1995) writ of cert. denied 339 Md. 641, 664 A.2d 885 (1995).

<sup>274</sup> Maryland Real Property Code Section 9-109.

<sup>275</sup> *Brendsel v. Winchester Construction Co., Inc.*, 392 Md. 601, 616, 898 A.2d 472, 480-81 (2006) citing *Carretti, Inc. v. The Colonnade Limited Partnership*, 104 Md. App. 131, 655 A.2d 64 (1995) writ of cert. denied 339 Md. 641, 664 A.2d 885 (1995).

of the claim. An interlocutory lien is imposed only when there *are* issues of fact in dispute that cannot and *are* not resolved at that stage of the proceeding.<sup>276</sup>

All contractors would prefer to either strike out any arbitration clause completely or add language to the agreement stating that the arbitration clause does not apply to any proceedings for the establishment of a mechanic's lien and that any procedural or substantive issue can be decided by a court of law for the purposes of establishing a mechanic's lien. The contract can permit request for a show cause hearing and an interlocutory order before the remaining disputes are submitted to arbitration.<sup>277</sup>

## DEFENSE OF PAYMENT: OWNER'S RESPONSIBILITY FOR PAYMENT TO SUBCONTRACTORS

### No Defense of Payment to Most Owners

The owner has the duty to withhold the amount claimed by a subcontractor in addition to the right to do so. There is no defense of payment for the Maryland project owner in most cases. The owner can be required to pay for the project twice. Even if the owner has paid the general contractor in full, a subcontractor will be able to establish a lien and eventually foreclose on the property.<sup>278</sup> The burden is on the owner to make sure that all subcontractors are paid. If owners fail to protect themselves and have to pay twice for materials, it is their own fault.<sup>279</sup>

The mechanic's lien law was designed to make property owners a source of payment for subcontractors in addition to the general contractor.<sup>280</sup> The owner receives the ultimate benefit of services and materials and, as a practical matter, controls the cash.<sup>281</sup> The contractor's right to a lien is not affected by whether the owner is holding money due the builder.<sup>282</sup>

Accordingly, the receipt of a Notice of Intent to Lien helps an owner more than it hurts. The notice does not create any additional burden or threat to the owner. Upon receipt, the owner has the statutory right to withhold monies from the general contractor.<sup>283</sup> The notice is required from the subcontractor to protect the property owner.<sup>284</sup> Otherwise, the owner is in danger of losing the property.<sup>285</sup>

### Owner's Rights on Receipt of Notice

The Notice of Intent is required for the protection of the property owner.<sup>286</sup> The purpose is to allow the owner an opportunity to retain the amount claimed by the subcontractor out of the money payable to the general contractor.<sup>287</sup>

When the owner of a project receives a claimant's Notice of Intent to Lien, the owner has the right to retain from the general contractor the amount claimed in the notice.<sup>288</sup> If a court eventually finds a valid lien, then the owner may pay the subcontractor the established lien amount, and the general contractor will receive any additional money retained by the owner.<sup>289</sup>

<sup>276</sup> *Brendsel v. Winchester Constr. Co.*, 392 Md. 601, 898 A.2d 472, 480-82 (2006).

<sup>277</sup> *McCormick Constr. Co. v. 9690 Deercro Rd. Ltd. Partnership*, 79 Md. App. 177, 185, 556 A.2d 292 (1989).

<sup>278</sup> *Diener v. Cabbage*, 259 Md. 555, 563-564, 270 A.2d 471 (1970); *Palmer Park Partnership v. Marvelite, Inc.*, 255 Md. 121, 257 A.2d 169 (1968); *Treusch v. Shryock*, 51 Md. 162, 173 (1879) [the right of the material man to his lien, does not depend on, nor is it in any manner affected by the question whether the owner has or has not money in his hands due the builder, nor whether the former has performed his part of the contract with the latter]; see also *Richardson v. Saltz*, 127 Md. 388 (1916).

<sup>279</sup> *Bounds v. Nuttle*, 181 Md. 400, 30 A.2d 263 (1943).

<sup>280</sup> *Hill v. Parkway Indus. Ctr.*, 49 Md. App. 676, 435 A.2d 472 (1981), cert. denied, 292 Md. 376 (1982).

<sup>281</sup> *Hill v. Parkway Indus. Ctr.*, 49 Md. App. 676, 435 A.2d 472 (1981), cert. denied, 292 Md. 376 (1982).

<sup>282</sup> *Treusch v. Shryock*, 51 Md. 162 (1879); *Richardson v. Saltz*, 127 Md. 388, 96 A. 524 (1916).

<sup>283</sup> Maryland Real Property Code Section 9-104(f)(1); *G. Edgar Harr Sons v. Newton*, 220 Md. 618, 155 A.2d 480 (1959).

<sup>284</sup> *William Penn Supply Corp. v. Watterson*, 218 Md. 291, 146 A.2d 420 (1958).

<sup>285</sup> *Clearail, Inc. v. Mardirossian Family Enters.*, 84 Md. App. 497, 581 A.2d 36 (1990), *rev'd on other grounds*, 324 Md. 191, 596 A.2d 1018 (1991).

<sup>286</sup> *Clearail, Inc. v. Mardirossian Family Enters.*, 84 Md. App. 497, 581 A.2d 36 (1990), *rev'd on other grounds*, 324 Md. 191, 596 A.2d 1018 (1991).

<sup>287</sup> *Clearail, Inc. v. Mardirossian Family Enters.*, 84 Md. App. 497, 581 A.2d 36 (1990), *rev'd on other grounds*, 324 Md. 191, 596 A.2d 1018 (1991).

<sup>288</sup> Maryland Real Property Code Section 9-104(f)(2); *Palmer Park Partnership v. Marvelite, Inc.*, 255 Md. 121, 257 A.2d 169 (1968).

<sup>289</sup> Maryland Real Property Code Section 9-104(f)(2); See also *G. Edgar Harr Sons v. Newton*, 220 Md. 618, 155 A.2d 480 (1959); *Clearail, Inc. v. Mardirossian Family Enters.*, 84 Md. App. 497, 581 A.2d 36 (1990), *rev'd on other grounds*, 324 Md. 191, 596 A.2d 1018 (1991).



## Defense of Payment for Some Homeowners

The only time a Maryland property owner has a defense of payment is a person building his own residence on his own land. Such a homeowner is protected if the homeowner pays all contractors with whom the owner had a direct contract. A homeowner has a defense of payment if the subcontractor failed to provide a Notice of Intent to Lien before the owner made full payment to the contractor.<sup>290</sup>

A subcontractor may establish a lien only up to the amount of an enforceable obligation from the owner to the prime contractor.<sup>291</sup> It is not necessary to allege that status of accounts in the Petition.<sup>292</sup> If a subcontractor supplied labor or material to a single family dwelling, it may be presumed that the owner was indebted in an amount at least equivalent to the subcontractor's claim at the time the subcontractor's notice was sent. If the owner fails to raise the issue and present evidence on it, the court may determine that the subcontractor has met the burden of establishing its entitlement to a lien. If the owner does raise the issue and presents evidence sufficient to establish that the owner either had paid the prime contractor in full or was indebted for an amount less than the subcontractor's claim at the time the subcontractor's notice was sent, a question of fact exists on which the subcontractor has the ultimate burden of persuasion.<sup>293</sup>

Professional builders would seem to be excluded from this defense unless they own property in their individual name and intend to use the property for their own residence.

A Maryland case tells us that a "single family dwelling" means the joint occupancy and use of the dwelling by all of those who live there.<sup>294</sup> It does not include the multiple occupancy of certain portions of the unit for rental.<sup>295</sup> The addition of a homeowner's mother as a resident, however, does not disqualify the home as a single family dwelling.<sup>296</sup> The term residence also includes a single family dwelling that is the owner's secondary vacation home.<sup>297</sup>

The defense of payment to homeowners does extend to additions or improvements to existing homes, in addition to new homes.<sup>298</sup> Whether a new home is intended as the owner's "own residence" is determined as of the time when the subcontractor commences work. The lien claimant does not have the burden of proving that throughout the entire course of construction the owner of the home intended to make it his "own residence."<sup>299</sup>

## Cost of Completion

If a general contractor abandons a project and an owner has to employ another contractor to complete the work, the owner is entitled to a set-off for the amount the owner pays the other contractor to properly complete the work.<sup>300</sup> A subcontractor may only establish a lien up to the amount of an enforceable obligation of the owner to the prime contractor.<sup>301</sup>

## PRIORITY

The timing of various liens on a property usually determine their priority. For example, the first mortgage filed in the land records will be the "first mortgage" with the first priority to any proceeds from the sale of the property. If another mortgage is filed in the land records later in time, it will be a "second mortgage." If the property is foreclosed, this second mortgage will not receive any proceeds until after the first mortgage has been paid in full.

<sup>290</sup> Maryland Real Property Code Section 9-104(a)(2).

<sup>291</sup> *Winkler Construction Co. v. Jerome*, 355 Md. 231, 734 A.2d 212 (1999); *Ridge Sheet Metal Co. v. Morrell*, 69 Md. App. 364, 517 A.2d 1133 (1986).

<sup>292</sup> *Ridge Heating, Air Conditioning and Plumbing, Inc. v. Brennen*, 783 A.2d 691, 366 Md. 336 (2001); *Winkler Construction Co. v. Jerome*, 355 Md. 231, 734 A.2d 212 (1999).

<sup>293</sup> *Winkler Construction Co. v. Jerome*, 355 Md. 231, 255, 734 A.2d 212 (1999).

<sup>294</sup> *Grubb Contractors v. Abbott*, 84 Md. App. 384, 579 A.2d 1185 (1990).

<sup>295</sup> *Grubb Contractors v. Abbott*, 84 Md. App. 384, 579 A.2d 1185 (1990).

<sup>296</sup> *Grubb Contractors v. Abbott*, 84 Md. App. 384, 579 A.2d 1185 (1990).

<sup>297</sup> *Best Drywall, Inc. v. Berry*, 108 Md. App. 381, 672 A.2d 116 (1996).

<sup>298</sup> *Ridge Heating, Air Conditioning and Plumbing, Inc. v. Brennen*, 783 A.2d 691, 366 Md. 336 (2001).

<sup>299</sup> *Ridge Heating, Air Conditioning and Plumbing, Inc. v. Brennen*, 783 A.2d 691, 366 Md. 336, 344 (2001).

<sup>300</sup> *F. Scott Jay & Co. v. Vargo*, 112 Md. App. 354, 685 A.2d 799 (1996), discussed at *Winkler Constr. Co. v. Jerome*, 355 Md. 231, 250-51, 734 A.2d 212 (1999); *Johnson v. Metcalfe*, 209 Md. 537, 121 A.2d 825 (1956).

<sup>301</sup> *Ridge Sheet Metal Co. v. Morrell*, 69 Md. App. 364, 372-73, 517 A.2d 1133, 1137 (1986), discussed at *Winkler Constr. Co. v. Jerome*, 355 Md. 231, 249, 734 A.2d 212 (1999).

There are very few exceptions to this “first in time, first in right” general rule. One exception is county real estate tax liens, which will always have priority over other liens no matter when they are filed. Another exception is an inchoate mechanic’s lien such as those in Virginia, Pennsylvania and D.C.<sup>302</sup> If a mechanic’s lien is inchoate, this means that the lien relates back to the time when work began on the property even if the lien is not filed in the land records until a later time. The lien exists from the moment labor and material are supplied to the property, as long as the claimant eventually perfects the lien by filing and enforcing the mechanic’s lien.

It is very important to understand that the mechanic’s lien is *not* inchoate in Maryland. The claimant has no mechanic’s lien unless and until the court establishes a lien in an interlocutory order. This interlocutory lien is “temporary” and will be lost if the claimant does not eventually prevail at a final hearing. The timing of this interlocutory order will determine the priorities between the mechanic’s lien claimant and various other claims to the property.

### Priority between Mechanic’s Liens and Other Liens

A Maryland mechanic’s lien has essentially the same priority as a judgment lien.<sup>303</sup> Most types of liens filed before the issuance of an interlocutory order establishing a mechanic’s lien will have priority over the mechanic’s lien, including federal tax liens,<sup>304</sup> judgment liens against the owner of the property that are docketed in the land records and other mortgage liens filed in the land records.

Construction loans recorded prior to a mechanic’s lien court proceeding will usually have priority over the mechanic’s lien. This interlocutory lien court proceeding can occur long after construction has ceased. This difference in priority granted is a radical contrast between the Virginia and Maryland mechanic’s liens.<sup>305</sup>

In Maryland, a construction lender may lose its priority only if it advances additional money with knowledge that a mechanic’s lien claim is in progress.<sup>306</sup> A construction loan lienor, absent fraud or bad faith, however, may make advances permitted by his loan instruments without losing his priority when liens have not yet been established and all claimants are only “potential claimants.”<sup>307</sup>

As discussed above, a mechanic’s lien claimant’s priority may be lowered even further, if the claimant failed to apportion the amount claimed among multiple parcels of land involved in a construction contract.<sup>308</sup> Failure to apportion the claim does not defeat the claim but postpones it to other lien creditors.<sup>309</sup>

### Priority between Different Mechanic’s Liens

If there are multiple mechanic’s liens on one property, they will have equal priority.<sup>310</sup> In other words, it does not matter which mechanic’s lien petition is filed first. Each mechanic’s lien will share pro rata in any funds left after other types of priority liens have been paid.<sup>311</sup> Failure to apportion the claim, however, may give other mechanic’s liens a higher priority.

### Sale or Foreclosure of Property

A sale of the property will usually cut off all lien rights. Until the lien has been established by a court, any “bona fide purchaser” buys the property free and clear of any mechanic’s lien claim.<sup>312</sup> Claimants will no longer have mechanic’s lien rights and will have to collect from the contract debtor.

If the lien claimant has worked on multiple parcels of land for the same owner and only some of those parcels have been sold, the lien claimant may be able to collect from the remaining parcels of land held by the owner—at

<sup>302</sup> See chapter, Mechanic’s Liens in Virginia; section, Priority.

<sup>303</sup> *Wolf Organization, Inc. v. Oles*, 705 A.2d 40, 119 Md. App. 357 (1997).

<sup>304</sup> *United States v. Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 A.2d 81 (1953).

<sup>305</sup> See chapter, Mechanic’s Liens in Virginia, Priority.

<sup>306</sup> *Riggs Nat’l Bank v. Welsh*, 254 Md. 207, 254 A.2d 172, rehearing denied, 254 Md. 217, 255 A.2d 289 (1969).

<sup>307</sup> *Riggs Nat’l Bank v. Welsh*, 254 Md. 207, 254 A.2d 172, rehearing denied, 254 Md. 217, 255 A.2d 289 (1969).

<sup>308</sup> *Humphrey v. Harrison Bros.*, 196 F.2d 630 (4th Cir. 1952); See section above, Amount of Claim and Allocation.

<sup>309</sup> *Fulton v. Parlett & Parlett*, 104 Md. 62, 64 A. 58 (1906).

<sup>310</sup> Maryland Real Property Code Section 9-108.

<sup>311</sup> Maryland Real Property Code Section 9-108.

<sup>312</sup> Maryland Real Property Code Section 9-102 (d); *Celta Corp. V. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993); *York Roofing, Inc. v. Adcock*, 333 Md. 158, 634 A.2d 39 (1993).

least when no third persons would be injured.<sup>313</sup> A claimant's ability to lien the remaining parcels held by the owner is limited to the pro rata amount by which each parcel benefited from the overall contract. In other words, the amount of lien allowed against each of the unsold parcels cannot exceed the total value of labor and material (paid and unpaid) supplied to each parcel.<sup>314</sup>

It is also possible that a purchaser will not be "bona fide." In order to qualify as bona fide, the purchaser must pay the market value for the property without knowledge of the mechanic's lien claim. An "inside" deal may not qualify. If an insolvent debtor sells valuable property to his mother for \$1, she would not be a bona fide purchaser. If the purchaser is a related entity or was sufficiently involved in the construction transactions to have knowledge of the debt to the mechanic's lien claimant, they may not be bona fide. Even if there is "value" paid for the property, it is possible that the purchaser is not bona fide because of knowledge of a lien claim before the purchase. The claimant's burden of establishing the right to a lien includes proving that a new owner is not a bona fide purchaser for value.<sup>315</sup>

A foreclosure purchaser can be a bona fide purchaser. A purchaser at a foreclosure auction will take the property free of any mechanic's lien claims, partly because the foreclosed mortgage existed long before the work by the mechanic's lien claimant.<sup>316</sup> One of the lawful consequences of a mortgage foreclosure is that junior (inferior) liens are extinguished.<sup>317</sup>

Maryland courts have also decided that property is free of lien claims once "equitable title" has passed.<sup>318</sup> This means that it will be impossible to file a mechanic's lien once the property is "under contract."<sup>319</sup> As a practical matter, this means it is very difficult to ever establish a mechanic's lien on residential property in Maryland. Many builders do not begin work on a house unless it is presold. This means that the property is under contract and equitable title has passed before work even begins on the property. Even many "spec" buildings are sold soon after construction. Remember that it can be months before a claimant can get to court to establish a mechanic's lien. The bottom line is that contractors supplying labor and material to residential property will have effective lien rights only on model homes constructed or on spec homes that are not sold for a long period of time.

## Bankruptcy

In Maryland, the claimant is an unsecured creditor until the court establishes a lien. If the owner of the property has filed bankruptcy, the bankruptcy stay prevents the Maryland lien claimant from moving forward to establish the lien. There is no known opportunity to get relief from the stay or permission to establish lien rights.<sup>320</sup> This would prefer the lien claimant to other unsecured creditors. The claimant will not have security in the property and will have to share with other general unsecured creditors in whatever assets the debtor has left in bankruptcy after all secured creditors have been paid. As a practical matter, this usually means the Maryland lien claimant will receive nothing in bankruptcy if it is the owner of the property that has filed bankruptcy, unless the court had established the claimant's mechanic's lien at least 90 days before bankruptcy was filed.

Even if a property owner files bankruptcy within 90 days after a lien is established by a court, then the lien may be a preference that can be avoided (set aside) by the bankruptcy court.<sup>321</sup> This is a radical difference between a Maryland mechanic's lien and a lien that is "inchoate," such as in Virginia, Pennsylvania or D.C. An inchoate mechanic's lien claimant is a secured creditor from the moment labor and materials are supplied to the property and will retain secured status even though lien enforcement proceedings are filed long after bankruptcy.

If the contract debtor was not the owner of the real estate (the bankruptcy debtor was a contractor or subcontractor), the status of mechanic's lien rights are not so certain. The mechanic's lien is not a security interest in the real property of the bankruptcy debtor. However, the mechanic's lien rights in an owner's property does give the claimant priority over the receivable owed by the owner to the debtor. This receivable was property of the debtor, at least until creation

<sup>313</sup> *Celta Corp. v. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>314</sup> *Celta Corp. v. A.G. Parrott Co.*, 94 Md. App. 312, 617 A.2d 632 (1993).

<sup>315</sup> *Sterling Mirror of Md., Inc. v. Rahbar*, 90 Md. App. 193, 600 A.2d 899 (1992).

<sup>316</sup> *Taylor Elec. Co. v. First Mariner Bank*, 191 Md. App. 482, 493, 992 A.2d 490, 497-98 (Md. Ct. Spec. App. 2010); *IA Construction Corp. v. Carney*, 341 Md. 703, 672 A.2d 650 (1996).

<sup>317</sup> *Bennett Heating & Air Conditioning, Inc. v. Nationsbank*, 342 Md. 169, 674 A.2d 534 (1996).

<sup>318</sup> *York Roofing, Inc. v. Adcock*, 333 Md. 158, 634 A.2d 39 (1993); *Goldheim v. Clark*, 68 Md. 498, 13 A. 363 (1888); *Himmighoefer v. Medallion Indus., Inc.*, 302 Md. 270, 487 A.2d 282 (1985).

<sup>319</sup> *Wolf Organization, Inc. v. Oles*, 705 A.2d 40, 119 Md. App. 357 (1997).

<sup>320</sup> *In re Slacum*, 272 B.R. 335 (Bkcy. Md. 2001).

<sup>321</sup> *Johnson Hydro Seeding Corp. v. Ian Homes, Inc.*, 126 Bankr. 933 (Bankr. D. Md. 1991).

of the Maryland Trust Fund Statute in 1987.<sup>322</sup> Accordingly, the mechanic's lien action was stayed by the bankruptcy of an intermediate contractor. Since there is no lien in Maryland until established by the court, it would seem that bankruptcy of an intermediate contractor ended mechanic's lien rights for any subcontractor claiming through the bankruptcy debtor prior to creation of the Maryland Trust Fund Statute.

Trust Fund rights in the receivable would survive the bankruptcy of an intermediate contractor, however, and a claimant could collect their receivable directly from those trust fund rights in bankruptcy.<sup>323</sup> The Maryland Trust Fund Statute may also impact the mechanic's lien rights on the bankruptcy of an intermediate contractor. If the Maryland Trust Fund Statute applies,<sup>324</sup> the receivable held by the owner of the property is no longer "property of the estate."<sup>325</sup> Based on the reasoning in the earlier bankruptcy court cases, a subcontractor mechanic's lien claimant may no longer be stayed from enforcing their lien on the bankruptcy of an intermediate contractor. This does seem to be the belief and practice of most construction lawyers today in Maryland, although we do not have direct case law on this yet.

## MECHANIC'S LIEN WAIVERS

All types of waivers must be "clearly and unambiguously expressed." This rule is meant to protect legal rights. Persons should not be able to accidentally waive legal rights.

This general rule on waivers also applies to waiver of lien rights in the state of Maryland. A waiver of lien rights must be clear and unambiguous.<sup>326</sup> If there is doubt as to whether a waiver was given, then the claimant will likely retain lien rights. In addition to this general rule, the Maryland Legislature has created a number of statutes that protect mechanic's lien and payment bond rights even further.

### No Waiver in Subcontract

The Maryland Code does not allow mechanic's lien waivers in construction subcontracts. Some general contractors use contract forms stating that subcontractors "hereby waive all rights to lien." This type of contract clause is effective in many states. Such a provision in a subcontract waiving mechanic's lien or payment bond rights is "void as against public policy" in Maryland.<sup>327</sup> A general contractor, however, can waive its lien rights in the general contract with the owner.

It is still possible to waive mechanic's lien or bond rights in a document separate from the construction contract. Subcontractors can also be required to provide releases in exchange for payment. A general contractor will later be required to give such releases to the owner of the project.<sup>328</sup> A waiver signed by a contractor, however, will not release the lien rights of subcontractors that did not themselves sign a release.<sup>329</sup>

### Special Protection against Waiver

Maryland Real Property Code Section 9-110 states that no mechanic's lien rights are waived by granting credit or receiving a note or other security.<sup>330</sup> In other states, a claimant must be careful when accepting a promissory note from their debtor. The debtor or property owner could later argue that the claimant no longer has mechanic's lien rights because the claimant has been "paid" by means of the promissory note. They could argue that the claimant obviously intended to waive lien rights and accept the promissory note instead. In another state, a contract debtor or property owner could also make the same type of argument if the claimant accepted alternate security for the debt. Sometimes an ordinary credit agreement providing time to pay an account can create this problem.

<sup>322</sup> *In re R.E. Tull & Sons, Inc.*, 25 B.R.709 (Bankr. Md. 1982); *See also In re Shore Air Conditioning & Refrigeration, Inc.*, 18 B.R. 643 (Bankr.D. NJ 1982); *In re Richardson Builders*, 123 B.R. 736 (W.D.Va. 1990).

<sup>323</sup> *See* chapter, Trust Fund Laws and Agreements; section, Trust Fund Theory; subsection, Insolvency Protections and Bankruptcy.

<sup>324</sup> The Maryland Trust Fund Statute applies to any contract subject to the Maryland Little Miller Act as well as property subject to the mechanic's lien code. Maryland Real Property Code §9-204(a).

<sup>325</sup> *See* chapter, Trust Fund Laws and Agreements; section, Trust Fund Theory; subsection, Insolvency Protections and Bankruptcy.

<sup>326</sup> *Port City Constr. Co. v. Adams & Douglass, Inc.*, 260 Md. 585, 273 A.2d 121 (1971).

<sup>327</sup> Maryland Real Property Code Section 9-113(c).

<sup>328</sup> Maryland Real Property Code Section 9-114(a).

<sup>329</sup> *Judd Fire Protection, Inc. v. Davidson*, 138 Md. App. 654, 773 A.2d 573 (2001).

<sup>330</sup> *Humphrey v. Harrison Bros.*, 196 F.2d 630 (4th Cir. 1952).

In all states, such promissory notes, security agreements and credit agreements should state explicitly that they are provided as evidence and additional security but not in payment of the debt. In Maryland, however, the legislature has given this protection to all mechanic's lien claimants who grant credit or receive a note or other security, "unless it is received as payment or the lien right is expressly waived."<sup>331</sup> Maryland claimants should be careful, however, because it is still possible to unintentionally accept a note in payment of a debt.<sup>332</sup>

Similarly, utilizing mechanic's lien rights is not a waiver of a claimant's other rights, such as the right to sue the contract debtor, guarantors or any other person.<sup>333</sup> Even if a claimant has waived his lien rights, he has not waived the right to sue.<sup>334</sup> A claimant has the option of waiving or enforcing each of these different rights or enforcing lien rights, guaranty rights and contract rights simultaneously.<sup>335</sup> If a claimant does establish lien rights, it may not be necessary to prove all parts of the case again in a later contract action.<sup>336</sup>

A "pay when paid" clause will not defeat lien rights.<sup>337</sup> A subcontractor may (and is probably still required to) enforce lien rights within the deadline, even though the subcontract states that payment is not due until the owner has paid the general contractor.

Generally, such "pay when paid" clauses are effective.<sup>338</sup> The subcontractor may not be able to sue the general contractor "on the contract" if that contract contains a properly worded "pay when paid" clause. This does not mean, however, that the subcontractor cannot enforce its lien rights.

### Release on Final Payment

A general contractor is required to give the owner a signed release of lien from each material supplier and subcontractor at the time of settlement or payment in full.<sup>339</sup> The owner will have a defense against any lien filed by a subcontractor providing such a release.<sup>340</sup> The statute does not say that subcontractors are required to provide such a release in exchange for payment. General contractors should be careful, therefore, to have this requirement in each subcontract. Otherwise, a general contractor may be unable to comply with the requirement of releases to the owner.

## ALTERNATIVES TO MECHANIC'S LIEN

### Contract Rights

A contractor can always enforce contract rights.<sup>341</sup> Contract rights can be enforced before, during or after an action to enforce mechanic's lien rights.

In some cases, enforcing contract rights can be more effective than enforcing mechanic's lien rights. It can be less complicated and less expensive to enforce contract rights. There may also be fewer parties to the lawsuit and fewer issues involved.

A contractor can sometimes obtain relief faster with a contract action, especially in the case of a default judgment. In a mechanic's lien action, a claimant can obtain security in only one piece of property. A judgment lien obtained in a contract action, however, can entitle a claimant to garnishments, attachments on equipment or liens on any real estate owned by the judgment debtor.<sup>342</sup>

<sup>331</sup> Maryland Real Property Code Section 9-110.

<sup>332</sup> *Wix v. Bowling*, 120 Md. 265, 87 A. 759 (1913).

<sup>333</sup> Maryland Real Property Code Section 9-111.

<sup>334</sup> *Port City Constr. Co. v. Adams & Douglass, Inc.*, 260 Md. 585, 273 A.2d 121 (1971).

<sup>335</sup> *Port City Constr. Co. v. Adams & Douglass, Inc.*, 260 Md. 585, 273 A.2d 121 (1971); *Mervin L. Blades & Son v. Lighthouse Sound Marina & Country Club*, 37 Md. App. 265, 377 A.2d 523 (1977).

<sup>336</sup> *Brunecz v. DiLeo*, 263 Md. 481, 283 A.2d 606 (1971).

<sup>337</sup> Maryland Real Property Code Section 9-113(b).

<sup>338</sup> *Gilbane Building Co. v. Bisk Waterproofing Co., Inc.*, 86 Md. App. 21, 585 A.2d 248 (Md. Spec. App. 1991).

<sup>339</sup> Maryland Real Property Code Section 9-114(a).

<sup>340</sup> Maryland Real Property Code Section 9-114(b).

<sup>341</sup> *Port City Constr. Co. v. Adams & Douglass, Inc.*, 260 Md. 585, 273 A.2d 121 (1971).

<sup>342</sup> *Mervin L. Blades & Son v. Lighthouse Sound Marina & Country Club*, 37 Md. App. 265, 377 A.2d 523 (1977); *Scott & Wimbrow, Inc. v. Wisterco Invs., Inc.*, 36 Md. App. 274, 373 A.2d 965, cert. denied, 281 Md. 743 (1977).

## Enforcing Payment Bond Rights

A subcontractor or lower tier contractor also has the option of enforcing its rights on any payment bond provided by the general contractor or other intermediate contractors. This can be done instead of, before, after or simultaneously while enforcing mechanic's lien rights or contract rights.

Enforcing bond rights is usually cheaper and faster than mechanic's lien litigation. It is not necessary to perform a title search or file a mechanic's lien. It is not necessary to involve the owner, the deed of trust beneficiaries and the trustees. The claimant has the right to sue either or both of the surety and the contract debtor. This means that enforcing bond rights is usually a better option than mechanic's lien litigation. Of course, on a larger case, it is important to preserve all rights.

## Trust Fund Statute

The Maryland Trust Fund Statute is discussed in greater detail in the Trust Fund Laws and Agreements chapter later in this book. In short, however, the Trust Fund Statute was enacted to protect subcontractors and suppliers from dishonest practices by general contractors and other subcontractors for whom they might work.<sup>343</sup> This statute can be very helpful to subcontractors and suppliers, but it only applies to projects subject to the Maryland mechanic's lien statute or the Maryland Little Miller Act.<sup>344</sup> Therefore, federal construction projects are not subject to the Trust Fund Statute. Also exempt from this statute are contracts for the construction and sale of a single family residential dwelling or a home improvement contract by a Maryland-licensed home improvement contractor.<sup>345</sup>

When a general contractor receives money from the owner, these funds are "held in trust" for the benefit of subcontractors and suppliers who supplied labor and materials to the property.<sup>346</sup> Money received by a subcontractor is also held in trust for the benefit of sub-subcontractors or material suppliers who contracted with that subcontractor. If the contractor has been paid and does not pass these monies on to the subcontractors and suppliers with whom he contracted, there may be personal liability on the part of any officer, director or managing agent of the general contractor who had direction or control of the money held in trust.<sup>347</sup>

This statute is very helpful but does have its shortcomings. For example, contractors are allowed to "commingle" funds.<sup>348</sup> In other words, it is not necessary to keep the trust funds in separate accounts. Most general contractors are working on several projects. Funds are entering and leaving the general contractor's bank account for many purposes. If a general contractor can show that all funds leaving the account were used to pay subcontractors and suppliers on some construction project, then it is unlikely that a court will hold any individual officer or director personally liable.

As a practical matter, a general contractor will usually be "robbing Peter to pay Paul" for a long time prior to insolvency. A subcontractor may not be able to establish personal liability, unless there is a blatant case where an individual officer used funds for personal reasons. In order to hold an officer, director or managing agent liable, there must exist some form of bad faith by the defendant.<sup>349</sup> This means that the defendant must have acted dishonestly or at least with reckless indifference.<sup>350</sup>

The Maryland Trust Fund Statute is very important in the event of bankruptcy, particularly in defense of preference claims.<sup>351</sup> It has limited effectiveness as a collection tool, however, in the absence of bankruptcy.

## Prompt Pay Statute

The Maryland legislature has also written a "prompt pay" provision into every construction contract in the state of Maryland. A contractor or subcontractor who does work or furnishes material under a contract shall be entitled to prompt payment.<sup>352</sup>

<sup>343</sup> Maryland Real Property Code Section 9-201; *Ferguson Trenching Co. v. Kiehne*, 329 Md. 169, 618 A.2d 735 (1993).

<sup>344</sup> *Jaguar Technologies, Inc. v. Cable-LA, Inc.*, 229 F.Supp.2d 453 (2002).

<sup>345</sup> Maryland Real Property Code Section 9-204(b).

<sup>346</sup> Maryland Real Property Code Section 9-201(b)(1).

<sup>347</sup> Maryland Real Property Code Section 9-201(b)(2).

<sup>348</sup> Maryland Real Property Code Section 9-201(c)(1).

<sup>349</sup> *Ferguson Trenching Co. v. Kiehne*, 329 Md. 169, 618 A.2d 735 (1993).

<sup>350</sup> *Ferguson Trenching Co. v. Kiehne*, 329 Md. 169, 618 A.2d 735 (1993).

<sup>351</sup> See chapter, Bankruptcy Primer for Creditors; section, Preferences; subsection, The Trustee's Burden of Proof; sub-subsection, Trust Fund Statutes and Agreements.

<sup>352</sup> Maryland Real Property Code Section 9-302(a).

If a general contract does not provide specific dates or times for payment, the owner must pay the contractor “undisputed amounts” within 30 days after an occupancy permit is granted or the owner takes possession of the property.<sup>353</sup> If the contract does provide specific dates for payment, the owner must pay “undisputed amounts” within seven days after the time specified in the contract.<sup>354</sup>

There are similar rules for subcontracts. Any contractor on a project must pay all “undisputed amounts” to its subcontractors or suppliers within seven days after receipt of funds.<sup>355</sup>

If a court finds that an owner or contractor has violated a prompt pay statute, the court can order payment and award interests and costs.<sup>356</sup> If the court also finds that the owner or contractor “acted in bad faith by failing to pay any undisputed amounts,” the court may award reasonable attorney’s fees.<sup>357</sup> Without a statute like this, a claimant would not be able to recover attorney’s fees unless the claimant had a contract that allowed such fees.

The Prompt Pay Statute is very helpful to claimants enforcing mechanic’s lien, payment bond or contract rights. The interest and attorney’s fees provision provide a “hammer.” The contract debtor knows that there will be a penalty for “using the contractor as a bank.” If a debtor holds a contractor’s money for a long period of time, the debtor will have to pay all principal and its own attorney’s fees, plus interest and claimant’s attorney’s fees. This Prompt Pay Statute also allows a claimant to be made whole. Otherwise, a claimant will never be able to recoup all the costs and profit for which he bargained.

This Prompt Pay statute does not apply to the construction and sale of a single family dwelling, any transaction under the Custom Home Protection Act or a home improvement contract by a contractor licensed under the Maryland Home Improvement Law.<sup>358</sup>

## Retention Statute

The Maryland legislature has also restricted retention withheld in most construction contracts in the state of Maryland.<sup>359</sup> If a general contractor has furnished 100% performance and payment bonds on a project, retention under the terms of a contract and the retention proceeds of any payment due may not exceed 5%. Regardless whether performance and payment bonds are provided by any subcontractor, the retention held on any payment from a general contractor to a subcontractor may not exceed the percentage retention withheld by the owner. Similarly, the retention held on any payment from a lower tier subcontractor to another lower tier subcontractor may not exceed the percentage of retention withheld upstream. These lower tier retention restrictions apply no matter how far removed the lower tier subcontractors are from the owner.

However, these retention restrictions do not prohibit additional withholding if the contractor’s or subcontractor’s performance under the contract provides “reasonable grounds” for withholding additional amounts. This retention statute does not apply to a contract in an amount less than \$250,000,<sup>360</sup> a contract or subcontract for a project funded by the Department of Housing and Community Development,<sup>361</sup> the construction and sale of a single family dwelling, any transaction under the Custom Home Protection Act or a home improvement contract by a contractor licensed under the Maryland Home Improvement Law.<sup>362</sup>

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<sup>353</sup> Maryland Real Property Code Section 9-302(b)(1)(i).

<sup>354</sup> Maryland Real Property Code Section 9-302(b)(1)(i).

<sup>355</sup> Maryland Real Property Code Section 9-302(b)(3); *Capitol Indem. Corp. v. Mountbatten Sur. Co.*, 2001 U.S. Dist. LEXIS 207 (D. Md. 2001).

<sup>356</sup> Maryland Real Property Code Section 9-303(a) *Capitol Indem. Corp. v. Mountbatten Sur. Co.*, 2001 U.S. Dist. LEXIS 207 (D. Md. 2001) [Awarding of interest and costs depends on whether the amount owed is undisputed. Where the parties disagreed on the amount owed, the court denied interest and costs].

<sup>357</sup> Maryland Real Property Code Section 9-303(b); *Capitol Indem. Corp. v. Mountbatten Sur. Co.*, 2001 U.S. Dist. LEXIS 207 (D. Md. 2001).

<sup>358</sup> Maryland Real Property Code Section 9-305.

<sup>359</sup> Maryland Real Property Code Section 9-304.

<sup>360</sup> Maryland Real Property Code Section 9-304(b). This restriction seems to apply only to a general contract less than \$250,000 and not to a subcontract less than \$250,000.

<sup>361</sup> Maryland Real Property Code Section 9-304(b).

<sup>362</sup> Maryland Real Property Code Section 9-305.

