THE MECHANIC'S LIEN IN MARYLAND

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THE MECHANIC'S LIEN IN MARYLAND
I. THE MECHANIC'S LIEN LAW.

A. **General Purpose.**

1. The first mechanic's lien law was enacted in Maryland in 1791 at the urging of Thomas Jefferson and James Madison who sought the law as a means to encourage the rapid building of Washington, D.C. See historical account in Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d. 222 (Md. 1976).

2. The mechanic's lien is meant to protect contractors, subcontractors and material men who are not in a position to protect themselves if the owner defaults on payment or pays the contractor without first ascertaining that other parties have been paid. Dickerson Lumber Co., Inc. v. Herson, 230 Md. 487, 187 A.2d 689 (Md. 1963). For example, if the contract between the general contractor and the subcontractor includes a clause making payment to the general contractor by the owner a condition precedent to the general contractor's obligation to pay the subcontractor, the subcontractor, who is prevented by the contract clause from seeking recovery from the general contractor, may instead file a mechanic's lien against the owner's property. Architectural Systems, Inc. v. Gilbane Building Co., 760 F. Supp. 79 (D. Md. 1991); Gilbane Building Co. v. Brisk Waterproofing Co., Inc., 86 Md. App. 21, 585 A.2d 248 (1991). By statute, condition precedent payment clauses do not bar mechanic's liens or payment bond claims. See § 9-113(b) of the Maryland Real Property Code.

3. A major revision of Maryland's lien law occurred in 1976 with the Barry Properties case, which transformed the proceeding to enforce a lien into a proceeding to establish a lien.

In 1977, the Maryland Court of Special Appeals referred to the impact of Barry Properties upon the Maryland mechanic's lien law. In Mervin L. Blades & Son, Inc. v. Lighthouse Sound Marina and Country Club, 37 Md. App. 265, 377 A.2d 523 (Md. Ct. Spec. App. 1977), the court noted "it will be seen also that the lien concept in the law is otherwise virtually swept away. The claimant has no lien until he has gone to court and has prevailed in what would be, in essence, a debt suit at law, without a jury. Even then, he achieves no priority over any existing mortgage, judgment, lien, or other encumbrance." Id. at 269, 377 A.2d at 526.

1. Occasional amendments since then have included (a) an amendment to § 9-113 of the Maryland Real Property Code signed into law May 19, 1981 prohibiting a prior waiver of liens; (b) an amendment to § 9-104 effective July 1, 1982 which limited a subcontractor's lien against a single family dwelling erected on the owner's land intended for his own residence, to the amount by which the owner is indebted under the contract at the time notice of the lien is given; (c) an amendment effective July 1, 1982 adding § 9-114 which provided that at the time of settlement or payment in full between a contractor and an owner, the contractor shall give the owner a signed lien release from each material supplier and subcontractor and, further, provides that the owner is not subject to a lien for any of the work or materials included in such a release; and (d) an amendment to § 9-101 of the Code, effective July 1, 1983, which defined the term "building" to include any unit of a nonresidential building that is leased or separately sold as a unit.

Major Distinctions With Virginia's Lien Law.

3. Virginia's lien law creates subsisting or inchoate liens. This means that the effective date of the lien reaches (or relates) back to when the work was performed or materials furnished, even though a lien is not filed, perfected or made enforceable until sometime after. Hence, a mechanic's lienor has priority over judgment creditors or mortgage liens if the work began before the competing claims were reduced to judgment or before the mortgages attached.

4. In order to overcome due process problems, the Maryland law since the Barry Properties decision provides that a lien does not attach at the commencement of work, but only upon a judicial order to establish a lien. See, Md. Real Prop. Code Ann. § 9-102 (Repl. Vol. 1988). See also, Reisterstown Lumber Company v. Royer, 91 Md.App. 746, 605 A.2d 980 (1991). Compare under old Maryland law, Clark Certified Concrete Co., Inc. v. Lindberg, 216 Md. 576, 141 A.2d 685 (Md. 1958).

3. Maryland law also is at variance with the Virginia code provision on limitation of owner liability. Virginia follows a "subrogation" lien theory, while Maryland follows a "direct" theory of lien, both of which are explained in greater detail below.

Unlike the District of Columbia or Virginia, in Maryland, the subcontractor's or materialmen's right to lien is not affected by whether the owner is holding money due the principal contractor.

There is one exception to the "direct" theory of lien followed in Maryland, which is a result of the 1982 amendment to § 9-104 of the Code. That section deals with the notice of intention to claim a lien which must be filed by a subcontractor. Subparagraph (f)(3) added in 1982 states the following:

> Notwithstanding any other provision of this section to the contrary, the lien of the subcontractor against a single family dwelling being erected on the land of the owner for his own residence shall not exceed the amount by which the owner is indebted under the contract at the time the notice is given. Md. Real Prop. Code Ann. § 9-104(f) (3) (Repl. Vol. 1990).

Thus, subcontractors in Maryland, with respect to single family dwellings have been placed in essentially the same position as subcontractors in Virginia with respect to any type of construction work. The extent of their lien cannot exceed the amount owed to the general contractor at the time notice is given.

Even with this exception, owners in Maryland must generally protect themselves against an impecunious contractor and are liable to have to pay twice for materials because a subcontractor or materialman may press a claim regardless of past payments to the principal contractor. Bounds v. Nuttle, 181 Md. 400, 30 A.2d 263 (Md. 1943); T. Dan Kolker, Inc. v. Shure, 209 Md. 290, 121 A.2d 223 (Md. 1956) Reisterstown Lumber v. Reeder, 224 Md. 499, 168 A.2d 385 (Md. 1961).

A. **Purpose** .

1. The mechanic's lien statute is an endeavor to provide for the public welfare and to encourage construction by ensuring that those who contribute to a construction project are compensated for their work.
2. The mechanic's lien is not an exclusive remedy. Personal actions against owners or payment bond sureties may be concurrent with lien proceedings. Md. Real Prop. Code Ann. §9-111 (Repl. Vol. 1988). The lien is a proceeding in rem, meaning that debts are collectible only to the extent of the property described in the lien claim. Concurrent personal

judgments (as opposed to in rem judgments) will subject all assets of the debtor to a claim. Scott & Wimbrow, Inc. v. Wisterco Invs., Inc., 36 Md. App. 274, 373 A.2d, 965 (Md. 1977).

A. **Definition - The Parties** .

1. "Owner"

The term "owner" according to the Maryland statute means the owner of the land, except that when the contractor executes the contract with a tenant for life or for years, "owner" means the tenant. Md. Real Prop. Code Ann. § 9-101(f) (Repl. Vol. 1988).

The statute provides that if tenants and lessees of the owner erect or repair lienable property to the extent of 25 percent of its value, those liens established in accordance with the statute will be good to the extent of the tenant's interest in the property. Md. Real Prop. Code Ann. § 9-103(c) (2) (Repl. Vol. 1988).

In York Roofing, Inc. v. Adcock, 333 Md. 158, 634 A.2d 39 (1993), the court found that a purchaser of a building under construction was not an "owner" for the purposes of Section 9-101(f), even where the purchaser acquired equitable ownership of property while a portion of labor and materials giving rise to disputed lien claims were furnished because the purchaser did not have a contract with subcontractors asserting lien interests. Instead, the court held that an active subsisting contract must exist between the builder and the owner before the mechanic's lien statute applies to make the owner responsible for materials furnished.

In a 1982 decision, the Maryland Court of Appeals considered the definition of the term "owner" as defined in § 9-101(f), and held that the mere fact that the owner of a project was also a contractor for construction

of the project did not deprive the owner of the right to withhold funds owed to the general contractor upon notice of a subcontractor's lien.

In Hill v. Parkway Indus. Ctr., 49 Md. App. 676, 435 A.2d 472 (Md. Ct. Spec. App. 1981), the contractor, Mills & Sons, Inc., contracted with Parkway Industrial Center to build a bank and office building on Parkway's property. Mills subcontracted with Barber-Coleman to furnish and install temperature controls for the project. Due to a payment dispute between Mills and the temperature controls subcontractor, the subcontractor notified the owner of its intent to claim a mechanic's lien against the property. The subcontractor petitioned the Circuit Court for Anne Arundel County to establish its mechanic's lien, and the owner paid the subcontractor's claim in order to remove the lien.

Thereafter, the general contractor filed suit to recover payment from the owner for the balance due under the contract. The trial court ruled that the owner had the right, pursuant to § 9-104(f) of the lien law to withhold funds owed to the general contractor in order to satisfy the subcontractor's claim. The court further held that it was proper to set-off the owner's earlier payment to Barber-Coleman to affect the release of its lien against the owner's debt to the general contractor. Therefore, the general contractor was entitled to recover only a nominal sum as a result of the set-off. Id.

The general contractor contended that since the owner was not exclusively an owner, but also a contractor, it could not avail itself of the right to set-off provided by § 9-104(f).

The court disposed of this "fine distinction" noting that the mechanic's lien law was designed, among other things, to provide an owner with a second source of payment to release subcontractor claims.

The "fine distinction" raised by the general contractor was not sufficient to deprive the owner of this right. Id.

2. "Contractor"

A "contractor" is anyone who has a contract with the owner. Md. Real Prop. Code Ann. § 9-101(d) (Repl. Vol. 1988).

3. "Subcontractor"

A person who has a contract with anyone except the owner or his agent. Md. Real Prop. Code Ann. § 9-101(g) (Repl. Vol. 1988).

4. "Contract"

"Contract" means an agreement, express or implied, for doing work or furnishing materials for or about a building. Md. Real Prop. Code Ann. §9-101(c) (Repl. Vol. 1988). There is no need for a formal binding contract between the contractor and the lien claimant. Humphrey v. Harrison Bros., Inc., 196 F.2d 630 (4th Cir. 1952). The burden is not on the claimant to show a contract, but only to show what work was done so as to afford a proper ground for presumption that an implied contract existed. T. Dan Kolker, Inc. v. Shure, 209 Md. 290, 121 A.2d 223 (Md. 1956).

The subcontractor or supplier of the materials must be able to show an express or implied contract between the principal contractor (to whom the labor or materials were furnished) and the owner without benefit of presumption. Greenway v. Turner, 4 Md. 296 (Md. 1853).

While the contract need not be in writing, it must be an enforceable contract which does not violate public policy. In Gannon & Son, Inc. v. Emerson, 291 Md. 443, 435 A.2d 449 (Md. 1981), a homeowner sought to avoid a mechanic's lien on the grounds that the oral home improvement

contract which gave rise to the lien was unenforceable under Maryland's Home-Improvement Law.

The homeowner and contractor had entered into an oral agreement for the construction of an addition to the homeowner's residence. When the contractor filed a mechanic's lien action, the homeowner asserted that the oral agreement was illegal and unenforceable under the Maryland Home-Improvement Law which requires, among other things, that every home improvement contract subject to the provisions of the law must be evidenced by a written agreement signed by the parties thereto. The applicable section of the law also includes a "savings" clause which states "Contracts which fail to comply with the requirements of this section shall not be deemed to be invalid solely because of non-compliance".

At trial, the contractor was denied the right to a lien on the grounds that since the contract was not in writing, it was unenforceable and the contractor had failed to establish his right to a lien as a matter of law. However, the Court of Appeals reversed this decision largely on the basis of the "saving" clause noting that the contractor could be liable for civil penalties for failure to comply with the Maryland Home-Improvement Law. Nonetheless, the contractor did not lose his lien rights by virtue of his failure to enter into a written agreement with the owner. As the court noted, "As the Act [Home-Improvement Law] stands today, a plumber who comes to the home in order to repair a leaking faucet which requires only a replacement washer should prepare, sign and deliver to the owner a written contract which contains all of the elements required by [the Act]... but clearly the General Assembly did not intend... that all oral contracts be unenforceable on the grounds of illegality. We hold that the saving clause applies even if the home improvement contract is wholly oral. Thus, the

absence of any writing at all in the matter at bar was not in and of itself a ground for the dismissal of Gannon's mechanic's lien claim." Id. at 454.

A. **Who has Lien Rights?**

1. Laborers and Materialmen

All persons providing labor and materials for buildings erected or for repairs and improvements to existing buildings have lien rights. However, in the latter case, only if such improvements and repairs equal 25% of the value of the improved building does one acquire lien rights. Md. Real Prop. Code Ann. § 9-102(a). Shacks v. Ford, 128 Md. 287, 97 A. 511 (Md. 1916).

In Hurst v. V & M of Virginia, Inc., 293 Md. 575, 446 A.2d 55 (Md. 1982), the Maryland Court of Appeals dealt with Md. Real Prop. Code Ann. § 9-102(a) (Repl. Vol. 1988) and the limitation contained therein upon the lien rights afforded to a contractor performing work upon existing buildings. The contractor had contracted with the tenants of a portion of Bethesda Square Shopping Mall for the construction of improvements in their restaurant and disco. After a dispute arose over payment, the contractor filed a lien. The defendants challenged the lien on the basis that the plaintiff had not alleged that he had improved the tenant's property in an amount which was greater than 25% of its value as required by the statute. The issue before the court was whether the word "building" in the statute was to be construed broadly to include leased space, or whether the construction to be placed on the term "building" was such as to require the contractor to demonstrate that the improvements he had undertaken increased the value of the entire shopping mall by 25%.

The contractor argued that the word "building" was capable of being construed broadly so as to refer to the restaurant and disco and that

the General Assembly could not possibly have meant that the term "building" should refer to an entire shopping mall in determining a mechanic's eligibility for a lien.

The Court of Appeals noted that Maryland's law was unique with respect to the 25% requirement. The court reviewed many definitions of the term "building" as set forth in cases from other states and concluded that for there to be a lien for improvements, the whole shopping mall structure must have been improved to 25% of its value. Id. at 587, 446 A.2d at 61. This requirement amounted to a rejection of the contractor's contention that upon improving the value of the leasehold by more than 25%, he was entitled to a mechanic's lien. According to the court, the leasehold interest was not a "building" as that term was used in the applicable statute.

The court did recognize that a different set of facts might establish that a landlord and tenant regarded specific space in a mall as a "building" so as to limit the contractor's burden of proof that improvements to the tenant's space to the extent of 25% of its value would be sufficient for a mechanic's lien. Notwithstanding this recognition of a possible different outcome in another case, the Chief Judge filed a strong dissent noting that the contractor should have been able to obtain a lien against the leasehold interest.

In response to the decision in Hurst, the Maryland General Assembly enacted Maryland House Bill 187 signed into law on April 12, 1983, and effective July 1, 1983. This Bill amended § 9-101 of the code by adding language which defines the term "building" to include any unit of a nonresidential building that is leased or separately sold as a unit, for example, leased space in a shopping center.

1. Architects

Maryland courts have held that an architect who prepares the plans and supervises the erection is entitled to a mechanic's lien. Caton Ridge, Inc. v. Bonnett, 245 Md. 268, 225 A.2d 853 (Md. 1967). In Caton Ridge, the court ruled that where the contract between an architect and an owner provides for the preparation of plans and supervision of construction of the building for which the plans have been prepared, the architect, having performed his contract, is entitled to a mechanic's lien under the provision of the mechanic's lien law. Id. Maryland also appears to follow the rule that the mere preparation of plans used in the erection of the building can give rise to a lien regardless of whether or not the architect or engineer who prepares the plans also supervises the construction.

1. Union Trustees

In a significant case decided by the Maryland Court of Appeals on August 15, 1983, the court extended the right to claim a mechanic's lien to trustees representing various trust funds established pursuant to collective bargaining agreements between a union and the employers' national bargaining agent. In National Electrical Industry Fund v. Bethlehem Steel Corporation, 296 Md. 541, 463 A.2d 858 (Md. 1983), petitions for mechanic's liens were instituted in the Circuit Court for Baltimore County by local union No. 24 of the International Brotherhood of Electrical Workers and by various funds to which employer remittances were required under a collective bargaining agreement between the union and the National Electrical Contractors Association, Inc. The electrical workers had been employed by Mid-States Electric, Inc. on a project at Sparrows Point involving a coke oven battery and other facilities owned by Bethlehem. Mid-States was

obligated to contribute various amounts to the National Employees Benefit Board, the Maryland Electrical Industry Health & Welfare Fund, the Maryland Electrical Industry Pension Fund, the Maryland Electrical Industry Severance & Annuity Fund, the NECA Local and Union Joint Apprenticeship and Training Trust Fund, the Union Vacation and Holiday Fund, and also to deduct working dues from the pay of each IBEW member. All such contributions and/or deductions were to be paid to the various funds. However, no payments were ever made and the trustees, on behalf of the individual workers, filed petitions to establish mechanic's liens on the Bethlehem property. At the trial court level, Bethlehem successfully demurred to the petitions on the basis of plaintiffs' lack of standing to maintain the actions.

The Court of Appeals reversed the trial court decision and allowed the mechanic's lien actions to proceed. The court considered the case to revolve around the definition of "subcontractor" under § 9-101(g) of the lien law. This section of the law defines a subcontractor to mean "a person who has a contract with anyone except the owner or his agent." Further, pursuant to §9-102(a), the contract must be "for work done for or about the building". Therefore, the question before the court was whether the individual employees represented by the trustees were "subcontractors" under Maryland's lien law.

The court first noted that the collective bargaining agreement itself was not a contract "for doing work" that would give rise to a mechanic's lien. In comparing the collective bargaining agreement to a lease agreement whereby the lessor of construction equipment merely furnishes equipment to the project, but does not operate the equipment, the court noted that Maryland law did not recognize a mechanic's lien as arising out

of such a contract. See, for example, Giles and Ransome, Inc. v. First National Realty Corp., 238 Md. 203, 208 A.2d 582 (Md. 1965).

However, the court did conclude that the individual contracts for hire (employment contracts) between Mid-States and its workers were contracts "for work done for or about the building" which would give rise to a mechanic's lien. Therefore, "each electrical worker employed by Mid-States at Bethlehem was a subcontractor as defined in the Act, because each had a contract with someone, other than the owner, for doing work for or about the "building". 296 Md. at 548. As the court noted, individuals who furnish labor only have long enjoyed mechanic's lien rights in Maryland.

The only remaining question was whether the trustees of the various funds could assert, on behalf of the individual workers, the workers' mechanic's lien claims. Noting that the Trusts operated on behalf of the electrical workers and for their benefit, and comparing the situation to cases decided under the Federal Miller Act, the court found that the mechanic's lien claims could be asserted by the trustees. National Electrical Industry Fund v. Bethlehem Steel Corporation, 296 Md. 451, 463 A.2d 858 (Md. 1983).

The court also addressed arguments asserted by Bethlehem at the trial court level which had not been considered by that court. Specifically, Bethlehem contended that the notices of intent to claim a lien and the lien petitions were defective for failure to specify (1) the names of the employees providing labor to the project; (2) the dates upon which the employees provided labor; and (3) the amount being claimed on behalf of each employee who provided labor. The court noted that the lien notices claimed a specific dollar amount as due and unpaid to the trustees,

although the notices did not segregate the amount being claimed by each individual worker. The notices also stated that the workers performed on the project from January 21, 1981 through October 20, 1981, but did not indicate the actual dates each individual worker performed. Referring to well-established Maryland law, Bethlehem had argued that a notice of intent to claim a lien must definitely state the intention of the claimant to claim the lien, and also fully and specifically state the particulars of the claim and the nature and kind of work done or materials furnished, the time when done or furnished, and the amount of the claim. Md. Real Prop. Code Ann. § 9-104 (Repl. Vol. 1988).

The court distinguished the situation before it from earlier cases relied upon by Bethlehem in which the elements of the mechanic's lien notice were strictly construed. In the instant case, the court noted that the labor was furnished by the employees, but the debts generated by that labor were payable to the trust funds. "Under these circumstances we believe the notices filed were sufficient." Noting that the total payable to each employee "is calculable", the court found that there was no purpose to be served in requiring the calculation per individual to be made in the notice itself. National Electrical Industry Fund v. Bethlehem Steel Corporation, 296 Md. 451, 463 A.2d 858 (Md. 1983).

As to Bethlehem's argument of deficiency with respect to time, the court did state that in those cases where the trustees were suing on behalf of the individuals, it may later be determined at the trial court level that certain claims were too late. Id.

The Court of Appeals' decision raises interesting questions under Maryland's mechanic's lien law. For example, in light of the decision, will the employee of a bankrupt subcontractor who is owed wages now have

the right to file a lien on the project on the theory that he is a "subcontractor" under the lien law? Or, will non-union employees who, nonetheless, receive fringe benefits from their employer, be entitled to file mechanic's liens for the employer's failure to fund such benefits? Further, to avoid the ninety-day notice requirement, could several subcontractors file a petition representing "a joinder of claims for mechanic's liens" thereby relying upon the timely provision of notice by one of the claimants? These possibilities exist as a result of the National Electrical Industry Fund decision.

A. **Property Subject to Lien** .

1. Exempt property

Lands and buildings belonging to the federal, state or local governments are not subject to a mechanic's lien. In re Fowble, 213 F. 676 (D. Md. 1914). Additionally, to the extent that improvements to existing property represent less than 25% of its value, § 9-103(c)(2) provides a statutory exemption from mechanic's liens. Also, § 9-102(c)(2) provides that if a building is erected, repaired, rebuilt or improved to the extent of 25 percent of its value by a tenant for life or years or by a person employed by the tenant, any lien established in accordance with this subtitle applies only to the extent of the tenant's interest. Md. Real Prop. Code Ann. §§ 9-102(a), 9-103(c)(2) (Repl. Vol. 1988).

In R.L. Gardner, Inc. v. Bowie Joint Venture, 64 Md. App. 302, 494 A.2d 988 (1985), the parties disputed the pre-existing value of the property. The court considered what was the proper method to calculate the value of the owner's property to determine whether the improvement to the property was at least 25% of its value and held that a permissible formula for determining the value of the property under § 9-102(a) would

be the appraised value of the property less the price of the new construction.

1. Tenancy by the Entireties

Where land is held by husband and wife as tenants by the entirety, a mechanic's lien may attach for a debt contracted by both of them, but a mechanic's lien will not attach for a debt contracted by one of them alone without proof that in making the contract, one spouse was the agent for the other spouse, or a notice of intent to claim a lien was given to the non-contracting spouse. In William Penn Supply Corp. v. Watterson, 218 Md. 291, 146 A.2d 420 (Md. 1958) a materialman was unable to prove agency and was not entitled to enforce a mechanic's lien.

But in Wohlmuther v. Mt. Airy Plumbing & Heating, Inc., 244 Md. 321, 223 A.2d 562 (Md. 1966), a builder's wife had knowledge of her husband's intent to mortgage property held by them as tenants by the entireties and even entered into a deed of trust securing a construction loan. The husband was deemed to be the agent of the wife in dealings with a plumbing contractor who filed a mechanic's lien, and the lien was good despite the wife's lack of contractual privity with plumber. In Wolhmuther, the court decided that the wife's conduct was too closely connected to the husband's to shield the property from liens for the protection of her interest in the land.

Remember the general rule, a tenant by the entirety has no separate interest that can be sold on execution of a judgment by the courts on a judgment lien against one spouse alone. See Blenard v. Blenard, 185 Md. 548, 45 A.2d 335 (Md. 1946). Similarly, on a mechanic's lien, there is ordinarily no separable interest for a lien to attach to on a debt contracted by the husband or wife alone. Id.

If a spouse does not become a party to a construction contract where a tenancy by the entireties is involved, then a special circumstance, such as entering into a construction finance arrangement, before the construction contract, will have to be shown before a lien will be enforceable. One other way of enforcing a mechanic's lien against a tenancy of entireties, where the claimant has failed to prove agency of husband and wife, is for the claimant to show that the statutory requirement of notice of his intention has been substantially complied with. William Penn Supply Corp., 218 Md. at 297.

1. Lessors and Lessees

A contract between the lien claimant and a lessee will not give rise to lien on the reversionary interest of the lessor. Hoffman v. McColgan, 81 Md. 390, 32 A.179 (Md. 1895); Noone Electric Co., Inc. v. Frederick Mall Assoc., 278 Md. 54, 359 A.2d 91 (Md. 1976); Cabana Inc. v. Eastern Air Control, Inc., 61 Md. App. 609, 487 A.2d 1209 (Md. Ct. Spec. App. 1985).

1. Vendors and Vendees

Generally, no lien affecting the interest of the seller of land can arise because work or materials had been furnished on account of a contract with the buyer. However, a vendor, by his conduct or the conduct of his agent, may be estopped to deny that he is responsible for buildings or improvements done pursuant to the contract with the vendee. In Maryland, the decision in Moreland v. Meade, 162 Md. 95, 159 A. 101 (Md. 1932) has a similar effect as to § 43-20 of the Code of Virginia. In Moreland, circumstances disclosed that the seller's agent gave the vendee in possession on an installment contract, permission to erect a building on the property. The seller never objected to the continuation of construction

even though the seller knew that the vendee was going into default. A lien was held good against the seller when the seller was precluded under the doctrine of estoppel from denying its authorization of the improvements. Id.

1. Condominium Units

Mechanic's liens can be filed on condominium units and the "common elements" of such units pursuant to § 11-118 (formerly § 11-115) of the Md. Real Prop. Code Ann., set forth below:

> (a) Any mechanics' lien or materialmen's lien arising as a result of repairs to or improvements of a unit by a unit owner shall be a lien only against the unit.
>
> (b) Any mechanics' or materialmen's lien arising as a result of repairs to or improvements of the common elements, if authorized in writing by the council of unit owners, shall be paid by the council as a common expense and until paid shall be a lien against each unit in proportion to its percentage interest in the common elements. On payment of the proportionate amount by any unit owner to the lienor or on the filing of a written undertaking in the manner specified by Rule BG75 of the Maryland Rules, the unit owner shall be entitled to a recordable release of his unit from the lien and the council of unit owner is not entitled to assess his unit for payment of the remaining amount due for the repairs or improvements.
>
> (c) Except in proportion to his percentage interest in the common elements, a unit owner personally is not liable (1) for damages as a result of injuries arising in connection with the common elements solely by virtue of his ownership of a percentage interest in the common elements; or (2) for liabilities incurred by the council of unit owners. On payment by any unit owner of his proportionate amount of any judgment resulting form that liability, the unit owner shall be entitled to a recordable release of his unit from the lien of the judgment and the council of unit owners is not entitled

to assess his unit for payment of the remaining amount due. Md. Real Prop. Code Ann. §11-118 (Repl. Vol. 1988).

1. Bona Fide Purchaser for Value

Until 1959, it was no defense to a claim for a mechanic's lien in Maryland that the owner of the property was a bona fide purchaser for value prior to establishment of the lien without notice of the claim. In 1959, the Maryland mechanic's lien law was amended to provide that if the owner was a bona fide purchaser for value without notice of the claim, the lien could not be applied to the owner's property. The current exemption set forth in the Code provides as follows:

> However, a building or the land on which the building is erected may not be subjected to a lien under this subtitle, if, prior to the establishment of a lien in accordance with this subtitle, legal title has been granted to a bona fide purchaser for value. Md. Real Prop. Code Ann. §9-102(d) (Repl. Vol. 1988)

Under Section 9-102(d), the burden of establishing the right to a lien is on the mechanic's lien claimant. The claimant's general burden includes proving that an intervening owner is not a bona fide purchaser for value, and the property owner need do no more than contravene a claimant's allegation in order to challenge the validity of the claim. He or she need offer no evidence of his or her status except in response to evidence first offered by the claimant tending to show that the property owner is not a bona fide purchaser for value. Sterling Mirror of Maryland, Inc. v. Rahbar, 90 Md.App. 193, 600 A.2d 899 (1991). Similarly, once equitable title has been transferred to a bona fide purchaser for value, the property is no longer subject to a lien. York Roofing, Inc. v. Adcock, 333 Md. 158, 634 A.2d 39 (1993).

In Talbott Lumber Co. v. Tymann, 48 Md. App. 647, 428 A.2d 1229 (Md. 1981), the Maryland Court of Special Appeals reviewed the exemption from liens afforded bona fide purchasers for value by § 9-102(d). The court in Talbott Lumber addressed the questions of which party in the lien enforcement process -- the lien claimant or the owner -- had the burden of establishing whether the exemption applied. Must the owner prove that he was a bona fide purchaser for value or must the lien claimant prove that the owner was not? Talbott Lumber Co. had filed a lien in the amount of $4,219 against property owned by the Tymanns. The property was a newly constructed residence. Talbott Lumber had delivered supplies to the site from June to December, 1979 at the request of the contractor, and the supplies were used in construction of the residence. On October 15, 1979, the property was conveyed by the contractor to the Tymanns prior to the filing of the lien. In the papers filed by the lien claimant to establish the lien, there was no allegation that the Tymanns were not bona fide purchasers for value. Id.

The Tymanns responded to the lien suit with a demurrer raising the defense afforded them by § 9-102(d). However, in their pleading they did not claim that they were bona fide purchasers for value. The trial court concluded that the lien claimant had the burden of showing that the owner was not a bona fide purchaser for value, and since it had failed to satisfy that burden, the lien was invalid. The Special Court of Appeals of Maryland affirmed the lower court ruling. Id. Reviewing the history of the bona fide purchaser exemption and other cases establishing that in an equity proceeding to enforce a mechanic's lien, the claimant has the burden of proving his cause of action, the court concluded that the general burden of proving entitlement to the lien rested on the claimant. This

burden included proving that an intervening owner was not a bona fide purchaser for value, and therefore was not entitled to the exemption afforded by § 9-102(d). Id. Hence, in Maryland, the owner, defending against the lien, need do no more than deny the validity of the claim. He does not need to offer any evidence of his status except in response to evidence first offered by the lien claimant tending to show that the owner is not a bona fide purchaser for value.

The effect of the decision in Talbott Lumber Co. is to increase the burden of proof which the lien claimant bears in any action brought to enforce his lien. This decision is harsh in that it would seem more equitable to put the burden of proof on the homeowner inasmuch as the homeowner benefits from the exemption of his property from the lien. Moreover, the homeowner is in a better position to prove that he is a bona fide purchaser for value. He was, after all intimately involved in the transaction by which the property was acquired. The lien claimant, on the other hand, may be a subcontractor, supplier, or other remote party to the construction and would have a very difficult time establishing that the homeowner was not a bona fide purchaser for value.

The rule is even harsher when the purchaser's equitable title in the land arises prior to the filing of the subcontractor's petition for a mechanic's lien. In this situation, the subcontractor's mechanic's lien cannot reach the purchaser's equitable interest. Himmighoefer v. Medallion Industries, Inc., 302 Md. 270, 487 A.2d 282 (1985). In Himmighoefer, the purchaser, by virtue of the contract of sale, obtained equitable interest in the land prior to the subcontractor's filing the petition for a mechanic's lien, and the court held that because a mechanic's lien does not arise until a court order establishes a lien, the subcontractor could

not maintain a mechanic's lien against the purchaser. Here, the court also found that question of whether the purchaser is bona fide or not is irrelevant where equitable title passed prior to the docketing of the suit to establish the mechanic's lien. Id.

Contractors prosecuting lien claims should determine from the land records if there has been a conveyance of the property subsequent to performing their work. If so, they should make sure that their pleadings establishing the lien include allegations to the effect that the subsequent purchaser is not a bona fide purchaser for value so as to require the subsequent purchaser to prove this defense.

1. Miscellaneous Property

The Md. Real Prop. Code Ann. at § 9-102 (Repl. Vol. 1988) describes the kind of construction work subject to a lien. Included is work done for or about the building, and materials furnished for or about the building, including the drilling and installation of wells, swimming pools, sodding, seeding, or planting, landscaping or paving. In 1953, suppliers were permitted a lien "for materials furnished for or about the building." Thus, the key phrase in determining the work which gives rise to a lien is "for or about the building."

Also, water lines, sewers and drains in a development or improvements thereon when they service several lots in a development are subject to a lien on a pro-rata basis according to the number of lots that are affected. (Virginia has a similar provision relating to subdivision site work; however, the District of Columbia's lien law makes no such distinction.) Machines that are erected, constructed or repaired are subject to lien as are bridges and wharves. Md. Real Prop. Code Ann. §§9-102(b), 9-102(c) (Repl. Vol. 1988). While the off-site liens in Maryland refer to

all lots in a development, would they by extension refer to condominiums as well as to the specifically mentioned types of construction? Virginia has amended its lien statute to expressly include condominiums. In Maryland, the question is generally settled. See, Md. Real Prop. Code Ann. § 11-118 (formerly § 11-115) (Repl. Vol. 1988) which provides for mechanic's liens filed on condominium projects.

Unlike the case in Virginia, recovery for rentals cannot be made under the mechanic's lien law of Maryland. Williams Construction Co., Inc. v. Construction Equipment, Inc. 253 Md. 60, 251 A.2d 864 (Md. 1969). The rental of equipment, without a mechanic or laborer to operate it, is not lienable. Giles & Ransom, Inc. v. First National Realty Corp., 238 Md. 203, 208 A.2d 582 (Md. 1965). In Giles & Ransom, a lien was filed by a lessor of earth-moving equipment who leased equipment to the grading subcontractor for construction of a department store in Prince George's County. The equipment was sent when needed, was kept in running order and was removed when the grading was completed, but the equipment was operated by the subcontractor's mechanics. The question presented was whether the leasing of earth-moving equipment to a grading subcontractor constituted either "work done for or about" the premises or a debt contracted for "work done for or about" the erection of a building within the meaning of the mechanic's lien law. The court noted that though the mechanic's lien law was to be construed in a most liberal and comprehensive manner in favor of mechanics and materialmen, a party seeking a lien must nevertheless come within the plain meaning and obvious purpose of the statute. Id.

The court decided that the question turned on whether or not the mechanics who operated the leased equipment were employed by the

lessor-lien claimant or lessee-subcontractor. Since the operators were employed by the subcontractor rather than the lessor, the Maryland Court of Appeals determined that the lessor was not entitled to a lien either on the theory that supplying the equipment on a rental basis constituted "work done", or on the theory that the charges for the use of the equipment constituted a debt "contracted for work done". Put simply, the court determined that the lessor had done no work for or about the premises. "In order for it to come within the plain meaning and obvious purpose of the statute it was necessary for the lessor to have actually participated in the performance of the work done, and this necessitated something more than taking the equipment to the site of the job, keeping it in running order while it was there, and removing it when the grading was completed." 208 A.2d at 584. Ironically, the Maryland statute specifies that grading and filling are lienable, though it would appear that equipment leased to perform this work does not give rise to a lien. Suppliers who lease construction equipment will have to convince the Maryland legislature to amend the lien law in order to obtain coverage. In the meantime, equipment suppliers would be well-advised to send an operator with their equipment in order to establish entitlement to a lien.

Coal, oil or gas used to power or fuel machinery is not lienable, nor is the depreciation on equipment. These items are not materials under § 9-102, and therefore not lienable. Gill v. Mullan, 140 Md. 1, 116 A. 563 (Md. 1922). Oil and gas are costs that may be included in a lien as debts for work done about the building. House v. Fissell, 188 Md. 160, 51 A.2d 669 (Md. 1947).

II. NOTICE REQUIRED TO PRESERVE THE LIEN.

A. Generally.

Careful compliance with the notice provisions of the mechanic's lien statute is essential. Improper notice will void a lien. Hill v. Kaufman, 98 Md. 247, 56 A. 783 (Md. 1904); Tyson v. Masten Lumber & Supply, Inc., 44 Md. App. 293, 408 A.2d 1051 (Md. Ct. Spec. App. 1979). In Tyson, it was argued that the notice of lien was defective because the notice was not "verified". The court, however, concluded that the law "does not require mathematical precision. By its very terms, what is needed is substantial compliance. While the verification is missing, the [owners] were not in any way misled or deceived. The fact is that they noted an answer on the same day they were served with a petition, thus indicating that they knew full well what the notice contained and were primed to mount their defense...actual knowledge may supplant formal statutory notification." Id. at 1056. 44 Md. App. at 408, A.2d at 1056.

In addition to notice, a lien is not enforceable without proper and timely filing of a lien claim in a circuit court of the state. A distinction must be made in Maryland between the notice to the owner of an intention to file a lien, required of subcontractor claimants, and the subsequent act of filing a lien claim. Filing the claim is not constructive notice of intent unless such effect has been given to it by some statutory provision. William Penn Supply Corp., 218 Md. at 298. Two separate legal acts are involved, each with a special purpose in the statutory scheme.

B. Notice from the General Contractor .

One who has a contract with the owner (or his agent), for example, the general contractor, is not required to provide the notice set forth in § 9-104 of the Code. Kaufman v. Miller, 75 Md. App. 545, 542 A.2d 391 (Md. Ct. Spec. App. 1988). Those who normally function as subcontractors and suppliers may, on

occasion, contract directly with the owner and, when so doing, are not obligated to give notice of intention to claim a lien in these limited situations.

C. **Notice from a Subcontractor.**

A subcontractor loses his right to a lien unless within 90 days after doing work or furnishing materials, the owner is given written notice of his intention to claim a lien. The notice must be similar to the form specified in the statute. Md. Real Prop. Code Ann. § 9-104 (Repl. Vol. 1988). The purpose of this provision is to protect the owner so that he may retain amounts claimed out of funds due the principal contractor. National Glass, Inc. v. J.C. Penny Properties, Inc., 329 Md. 300, 619 A.2d 528 (Md. 1992).

In 1980, the Maryland court of Appeals considered a case dealing with § 9-104 requiring a subcontractor to give notice to the owner. Riley v. Abrams, 287 Md. 348, 412 A.2d 996 (Md. 1980). The sole issue was the timeliness of the subcontractor's notice to the owner of an intention to claim a mechanic's lien. The subcontractor, on the 85th day after doing the work or furnishing the materials, mailed notice to the owner in New Jersey by certified mail, return receipt requested. The notice was, in fact, received, but not until the 92nd day. The owner contended that for notice to be effective, receipt had to occur within the ninety-day period. The subcontractor contended, on the other hand, that mailing notice within the 90-day period was sufficient compliance with the requirements of the mechanic's lien law whether or not notice was actually received.

Referring to cases decided under Maryland's "Little Miller Act," the court concluded that registered mail notice under § 9-104 of the Code sent within 90 days and received thereafter was effective. In particular, the court pointed to the inclusion in the mechanic's lien law of registered mail as an expressly authorized manner of giving notice which the court believed was strongly indicative of a legislative intent that a notice sent by such mail within the statutory period

complied with the Code even though receipt occurred beyond the statutory period. Id.

However, the court declined to address the argument raised by the subcontractor that as long as notice is mailed within the ninety-day period, it is not necessary that the notice actually be received by the owner. Id.

Lien claimants who are required to give notice should beware of the risks entailed in failing to strictly comply with the notice requirement. For example, the notice required to be given the owner may be waived, but such a waiver must be clearly and unequivocally expressed. In Welch v. Humphrey, 200 Md. 410, 90 A.2d 686 (Md. 1952), it was contended by the lien claimant that a discussion of the amount of the claim at a conference between the contractor, materialman and owner amounted to a waiver of the notice requirement by the owner. The court disagreed and found that the obligation to provide notice had not been waived merely by a conference at which the claim was discussed. Id. Therefore, lien claimants should not rely upon such things as oral discussions regarding the claim, letters regarding joint check arrangements, or other discussions at which a claim is discussed in general as a substitute for the statutory requirement that notice of the intention to claim a lien be given.

D. Form of Notice.

The Maryland legislature has included a model form of notice in the statute at § 9-104(b) which includes: identification of the subcontractor; description of work or materials; amount earned under contract with principal contractor; amount still due and owing; dates when work was performed; and the party who contracted for the work. NOTE: It is of course, necessary for subcontractors to identify the contractor to the owner. Frequently an owner may be doing business directly with more than one principal contractor.

It is essential that the notice state that it has been given within the 90-day period prescribed by §9-104(a).

The form of the statutory notice is set forth on the following page.

Failure to state the nature of materials furnished will defeat the lien; Thomas v. Barber, 10 Md. 380 (Md. 1857); failure to state when work was done also will defeat the lien; Himelfarb v. B&M Welding & Iron Works, Inc., 254 Md. 37, 253 A.2d 842 (Md. 1969); National Electrical Industry Fund v. Bethlehem Steel Corp., 296 Md. 541, 463 A.2d 858 (Md. 1983). In Himelfarb, the notice of lien was attacked on the grounds that it failed to specify when the work was done or the materials furnished. The lien claimant argued that its notice substantially complied with the notice requirement which was all that was necessary. However, the court stated that the notice did not indicate that the last performance of work or delivery of materials occurred sometime within the previous ninety (90) days; the time when the work was done or materials furnished must be stated.

The statute requires that notice be given in a form substantially similar to the sample set forth at § 9-104(b) of the Code. Included in the form is a short verification or sworn declaration that the averments (statements) of the notice are true to the best of the claimant's knowledge.

(Subcontractor Address)

Date

Owner/Owner's Agent's Address

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, and 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)

Frequently, a party against whom a lien is filed will attempt to have the lien declared invalid due to a technical defect in the notice of intention to claim a lien. For example, in Palmer Park, 255 Md. 121, it was argued that the lien filed by a supplier of paints was invalid in that it referred to "G and H Painting Co., Inc." rather than the correct name, "G and H Paint Co." This argument left the court unimpressed. In the same case, the party defending against the lien argued that the description of the property, which gave the name of an apartment

complex, the streets it was bounded by and information identifying the deed book containing a legal description of the property was insufficient for failure to state the number and size of stories in the apartment building. The court stated that it would be an unreasonable burden to require the supplier to know upon which of the thirty-five (35) buildings within the complex his paint had been used. Id.

However, in other cases, defects in the form of notice have resulted in the lien being stricken. For example, in Scott & Wimbrow, Inc. v. Wisterco Invs., Inc., 36 Md. App. 274, 373 A.2d, 965 (Md. Ct. Spec. App. 1977), the court found that the notice of lien provided an inadequate description of the property and was invalid. There, the lien claimant had supplied fill dirt and services consisting of moving earth by dozer, crane and elevator pan. The notice of lien described the property as "the structures at Lighthouse Sound, St. Martins Neck, Maryland". While the court concluded that the term "structure" perhaps included a building, it did not describe one. Moreover, the locality of the structure or building was insufficiently described by the mere reference to "Lighthouse Sound, St. Martins Neck, Maryland". The description contained in the notice did refer to a deed as "Exhibit A"; however, the deed described three (3) tracts of land by metes and bounds, one of which, designated "Lighthouse Sound", consisted of 713 acres, on one acre of which presumably, was the "structure" referred to in the notice. In view of the fact that the claimant had provided fill dirt and earth moving services somewhere on a 713-acre site for an undefined and unlocated structure, the court could not conclude that the notice was sufficient. Therefore, the lien was deemed invalid.

E. To Whom is Notice Given.

1. Corporate Owner

Notice to the highest officer or agent of the owner in the county has been held valid notice. Brunt v. Farinholt - Meredith Co., 121 Md.

126, 88 A.42 (Md. 1913); also, notice to the corporation's registered agent is valid. Jakenjo v. Blizzard, 221 Md. 46, 155 A.2d 661 (Md. 1959).

2. Multiple Owners

Contrary to the former notice provision in Maryland the statute now provides at Md. Real Prop. Code Ann. § 9-104(d) (Repl. Vol. 1988)

> "If there is more than one owner, the subcontractor may comply...by giving notice to any of the owners."

3. Husband and Wife

Where property is held jointly by husband and wife or as tenants by the entireties, delivery of notice to one is sufficient. Blenard v. Blenard, 185 Md. 548, 45 A.2d 335 (Md. 1946). Formerly, the person giving notice had to ascertain that the couple was not divorced or separated. Apparently, this is no longer required under a 1977 amendment. However, while the 1977 notice provision simplifies the "notice" responsibility, there is still a requirement in a later proceeding to show that the debt contracted by one spouse purportedly was contracted for both and to make both parties debtors. William Penn Supply Corp. v. Watterson, 218 Md. 291, 146 A.2d 420 (Md. 1958); Wohlmuther v. Mt. Airy Plumbing & Heating Inc., 244 Md. 321, 223 A.2d 562 (Md. 1966).

Questions of agency and apparent authority may create problems in this area. Where a joint tenancy or tenancy by the entireties is involved, contractors are advised to get both husband and wife to sign the contract. A wife's entrustment of management of property to a husband may not be sufficient to show an agency relationship to subject the wife's interest to a lien. Id.

Similarly, a wife's awareness that improvements may be taking place does not necessarily make a contracting husband the wife's agent.

Blenard v. Blenard, 185 Md. 548, 45 A.2d 335 (Md. 1946). Lien enforcement may be impossible where the court believes that one spouse may have acted against the interests of the other even if there is no clear proof that a spouse's interests were harmed.

A subcontractor may have no enforceable lien rights where a spouse was not clearly made a debtor in the principal contract. A subcontractor's "notice" responsibility may be fulfilled, however, by notice to either spouse regardless of the terms of the principal contract. Md. Real Prop. Code Ann. §9-104(d) (Repl. Vol. 1988).

F. Delivery of Notice .

To be effective, notice must be given by registered or certified mail, return receipt requested, or personally delivered to the owner by the claimant or his agent. Md. Real Prop. Code Ann. § 9-104(c) (Repl. Vol. 1988).

If notice cannot be given on account of absence or other causes, the subcontractor or his agent, in the presence of a competent witness and within 90 days, may place the notice on the door or other front part of the building. Notice by posting is also sufficient in any case where the owner of the property has died and his successors in title do not appear on the public records of the county. Md. Real Prop. Code Ann. § 9-104(e) (Repl. Vol. 1988).

Note, also, the opinion of the Maryland Court of Appeals in Riley v. Abrams, 287 Md. 348, 412 A.2d 996 (Md. 1980) which held, among other things, that as long as notice is mailed within the 90-day period, the notice requirement is satisfied. The court specifically declined to address the question of whether notice must actually be delivered.

In Mardirossian Family Enterprises v. Clearail, Inc., 324 Md. 191, 596 A.2d 1018 (1991), the court clarified Riley in considering whether written notice of intention to claim a mechanic's lien, sent within the statutory period by

certified mail, return receipt requested, but not received by the owner until served by personal service after the statutory period, satisfied the requirements of Md. Real Prop. Code Ann. § 9-104. Here, Clearail mailed the notices by certified mail, but the notices were returned as unclaimed. Clearail then had the owner personally served, but the owner received notice 50 days after expiration of the statutory period and that upon the return of the notice as unclaimed, Clearail did not make actual service until 44 days had elapsed.

The court held that Section 9-104 of the Real Property Article was not satisfied by the sending of certified mail notice within the prescribed 90-day period and personal delivery of the notice after the 90-day period had expired, because such a construction of Sec. 9-104 ignores the plain meaning of the language employed by the General Assembly in prescribing three alternative methods of accomplishing the required notice. Instead, the court ruled that if the method chosen is certified or registered mail, that mail must be received by the property owner. If personal service is elected, that service must be made within 90-days of the last day on which the labor and materials were provided. If posting of the notice is authorized under the circumstances, posting must be made within the 90-day period. Since none of these alternatives was accomplished by Clearail, there was no compliance with Section 9-104 of the Real Property Article. The statute could not be altered by judicial construction to excuse Clearail's failure to comply. Id. at 202, 596 A.2d at 1024.

A. **Occasional Exceptions To Notice Requirements.**

Exact compliance with the statute may not always be essential. Where the exact terms of the statutory notification procedures were not complied with, actual knowledge of intent to file has excused formal notice requirements to some extent in rare situations.

In the case of Tyson v. Masten Lumber & Supply, Inc., 44 Md. App. 293, 408 A.2d 1051 (Md. Ct. Spec. App. 1979), an owner attempted to defeat a subcontractor's lien by arguing that a required verification had not appeared on the notice and that no return receipt evidencing registered or certified mail had been put into the record. The subcontractor's attorney had sent a letter by registered mail to the owner which, in its content, otherwise closely matched the notification form set out in §9-104.

The court rejected the owner's argument saying that the absence of a verification would not defeat notice. The notice provisions did "not require mathematical precision". The opinion went on to say "actual knowledge may supplant formal statutory notification". Id.

However, prospective lienors should not hesitate to use the exact form that appears in the Code, if for no other reason than to avoid having to meet objections as to the adequacy of notice.

A. **Payment After Notice .**

On receipt of notice, the owner may withhold from the principal contractor sums due, up to the amount ascertained to be due the subcontractor giving the notice. The contractor shall receive only the difference between the amount due him and that due the subcontractor giving notice. Md. Real Prop. Code Ann. § 9-104(f) (Repl. Vol. 1988).

A. **Time for Subcontractor to Give Notice** - 90 days means 90 days.

Ninety days is not three (3) months. Extensions are not granted. Nevertheless, it has been held that where materials are furnished under different contracts for different purposes, even if used by the same contractor on the job, the right to lien dated from the delivery to each parcel individually and not from the last delivery of the item for the entire series of deliveries. Unless there is a continuing contract, notice must be given within 90 days of furnishing material under each separate order. U.S. ex rel. Noland Co., Inc. v. Allied Contractors, Inc., 171 F.Supp. 569 (D. Md.), rev'd on other grounds, 273 F.2d 917 (4th Cir. 1959); Palmer Park Ltd. Partnership v. Marvelite, Inc., 255 Md. 121, 257 A.2d 169 (Md. 1969). In Clark Certified Concrete Company v. Lindberg, 216 Md. 576, 141 A.2d 685 (Md. 1958), the court had occasion to review a lien filed in connection with the periodic supplying of ready-mixed concrete. The court noted "Where there are continuous deliveries...pursuant to an undertaking to supply materials as needed, a lien may be filed within six months [the period then in effect] from the delivery of the last item, provided such delivery is made in good faith and not as a subterfuge to toll the statute." Id. at 686.

A. **Punch List and Warranty Work** .

Occasionally, a subcontractor delivers small quantities of materials which are trivial or furnishes some extra labor, and then files a lien with the idea of fixing a new time from which the statutory notice period could run, thus circumventing the 90-day deadline. The courts have been clear that the work which triggers the notice period must be for the completion of the contract and not to merely keep a lien opportunity in force. T. Dan Kolker Inc. v. Shure, 209 Md. 290, 121 A.2d 223 (Md. 1956); Reisterstown Lumber Co. v. Reeder, 224 Md. 499, 168 A.2d 385 (Md. 1961).

Contractors who delay filing liens in the hope that punch list or warranty work will extend the period for filing a lien run a great risk. Certain contractors, such as mechanical contractors, frequently (perhaps intentionally) will fail to install an air filter or other trivial item for the express purpose of keeping their options open with respect to a mechanic's lien. If an owner objects to a lien as not timely filed on the basis of such manipulation of the work, the contractor runs the risk of losing his lien. All that is required on the contractor's part to avoid this situation is to carefully monitor the progress of the work and file the lien within 90 days after the contractor's work is substantially complete, without relying on small punch list items and certainly without relying on warranty work.

III. FILING OF THE LIEN CLAIM - THE PETITION.

A. When to File .

After giving notice (when required), an individual interested in establishing a lien under the statute must file a petition in equity in the circuit court for the county where the land or any part of the land is located within 180 days after the work has been completed or the materials furnished. Failure to comply is fatal to the claim. Md. Real Prop. Code Ann. § 9-105(a) (Repl. Vol. 1988); Aviles v. Eshelman Electric Corp., 281 Md. 529, 379 A.2d 1227 (Md. 1977).

When is the work finished? In Goodman v. Winskowski, 249 Md. 546, 241 A.2d 407 (Md. 1968) the court said, "If after a contract has been substantially completed, a builder furnishes additional work or materials necessary to the performance of the contract [and] this is done in good faith at the request of the owner and not merely as a friendly gesture, a gratuity, or to circumvent the statute, then the period for filing the lien runs from the date the additional work is done, regardless of the value of the work."

The courts are sensitive to the time limits established by separate contracts and will generally regard liens to be attachable to each of the distinct contracts where those contracts are entire and separate. Johnson v. Metcalfe, 209 Md. 537, 121 A.2d 825 (Md. 1956).

Where, however, there is a continuing delivery of materials at a fluctuating market rate pursuant to a requirements contract, a single lien may be filed for all deliveries within the statutorily-required time after the last delivery. Clark Certified Concrete Co. v. Lindberg, 216 Md. 576, 141 A.2d 685 (Md. 1958).

B. Contents of the Petition .

There are five essentials for a lien claimant to allege in the petition to establish a lien:

a. The name and address of the lienor or claimant;

b. The name and address of the owner;

c. The nature or kind of work done or the kind and amount of materials furnished; the time when the work was done or the materials furnished; the name of the person for whom the work was done or to whom the materials were furnished, and the amount or sum claimed to be due, less any credit recognized by the petitioner;

d. A description of the land, including a statement whether part of the land is located in another county, and a description adequate to identify the building; and

e. If the petitioner is a subcontractor, facts showing that the notice required under §9-104 of the statute was properly mailed or served upon the owner, or, if so authorized, posted on

the building. Md. Real Prop. Code Ann. § 9-105(a) (1) (Repl. Vol. 1988).

To support the data set forth above, there must be a verified account of affidavit setting forth the facts on which the petitioner claims he is entitled to the lien in the amount claimed and certified copies or photocopies of all material papers, if any, which constitute the basis of the claim. Md. Real Prop. Code Ann. § 9-105(2), (3) (Repl. Vol. 1988). Invoices are material papers where they are the primary documents directly indicating the nature and quantity of the goods sold, the date of sale, and the unit or total price charged. AMI Operating Partners Limited Partnership v. OAD Enterprises, Inc., 77 Md. App. 654, 551, A.2d 888 (1989). In AMI, the subcontractor failed to attach 9 of 55 invoices to its petition, and the court found that failure to include all of the invoices was a partial failure to comply with § 9-105 (a)(3). As a result of this partial failure, the subcontractor was able to maintain its mechanic's lien but the court reduced the amount of the lien by the amount of the invoices which were not included in the petition and of which the owner therefore had no notice.

Claimants should take care to state all matters with particularity. Liens have been lost when no date was given as to the time when materials were furnished, Dugan v. Howard, 130 Md. 114, 99 A. 966 (Md. 1917), or when the property was inadequately described. In Dugan, the notice of lien referred to a claim for work on a heating system in the amount of $331. This was the amount of the subcontractor's original bid, though the contract for the heating work which the subcontract signed was in the amount of $311. The lien was declared invalid due to the fact that it referred to the bid figure, rather than the contract figure. In addition, the lien was defective for failure to state the time when any of the materials were furnished or labor performed.

In Mervin L. Blades & Sons v. Lighthouse Sound Marine & Country Club, 37 Md. App. 265, 377 A.2d 523 (Md. Ct Spec. App. 1977), a building's location was designated to be a certain 770 acre tract of land which the court noted was "more than double the entire area of the Principality of Monaco." Id. at 275, 377 A.2d at 529. While the contractor attempted to amend the inadequate description at trial in order to avoid losing his lien, the court decided that an amendment coming a year later would not be permitted. Therefore, the Blades case well-illustrates the need to achieve strict compliance with the requirements of the law and the penalty that will result where such compliance is not obtained.

It is possible to amend some defects in a mechanic's lien petition even after the expiration of the 180-day deadline, but other defects are incurable after the deadline. Maryland Rule of Procedure BG72 states with regard to mechanic's liens:

> "... no amendment shall be permitted which will 1) increase the amount of the claim or 2) materially alter the description of the land." Md. Rules of Proc. BG72.

Besides these two "incurable" items, the Maryland rules are quite liberal for amendments. Baltimore Contractors, Inc. v. Valley Mall Associates, 27 Md. App. 695, 341 A.2d 845 (Md. Ct. Spec. App. 1975). The court noted in Baltimore Contractors, "it is difficult to imagine any more extensive power of amendment than that allowed in proceedings concerning mechanics' liens." Id. at 701, 341 A.2d at 849.

Nevertheless, it is better to make the first petition an accurate one. One can never be certain when an inaccurate description of the building or land will be fatal. Moreover, courts are not always predictable about amendments.

Although broad amendment privileges are conferred, a court may decide that an amendment, even though not related to an increase in the lien amount or

description of property is, in reality, a totally new claim which will only be allowed if the time for filing has not expired.

In Kitchen v. Himelfarb, 254 Md. 372, 254 A.2d 694 (Md. 1969), a Virginia corporation not registered to do business in Maryland, filed a lien. When objections were raised that the filing party did not have capacity to sue in the state, the court granted the Virginia firm 30 days to qualify to do business. The claimant took no action to amend the petition or qualify to do business, however, until after the expiration had passed. The court ultimately decided that the earlier filing by a legal non-entity (an unregistered corporation) could not be corrected by amendment.

One lesson, of course, is for traveling contractors to register or qualify to do business in foreign jurisdictions. Another is to remember that although leave to amend is possible - it is by no means unlimited. Lack of capacity of the claimant may bar amendment after the expiration of the time for filing. There is also a degree of judgment exercised by the judge on what constitutes an adequate or amendable description of land. There is always a chance that a judge may regard an amendment as a disallowed new claim. Therefore, claimants should file their initial petitions with particularity and care.

C. Multiple Parcel Problem .

1. Apportioning Materials

Contractors and subcontractors face a peculiar situation when they seek to establish a lien against two or more buildings on separate parcels owned by the same owner. If a petition to establish a lien fails to allocate amounts of the debt alleged to be owed to each building, the lien will be postponed to other apportioned mechanic's liens, with the possible result that proceeds of a judicial sale on the property will leave a lienor with a

totally unsatisfied claim. Md. Real Prop. Code Ann. § 9-105 (a)(v) (Repl. Vol. 1988).

Obviously, in many situations, when a materialman delivers supplies to a site he has only a limited ability to determine how much of his material is going into a given unit among the multiple lots. At the same time since liens run with the land, it would appear to be fair that claimants who can precisely (or fairly precisely) apportion their supplies should be given first call on the proceeds of sale.

Hence, the long-standing rule, now codified, from Fulton v. Parlett & Parlett, 104 Md. 62, 64 A.58 (Md. 1906), has stated a kind of compromise:

> A failure to apportion a claim, when an apportionment ought to be made, does not defeat the claim, but postpones it "to other lien creditors".

The possible harsh effect of this rule is mitigated by the likelihood that if there are competing mechanic's lienors, several of them may have the same difficulty with regard to their inability to apportion their claim to each unit. Most of the liens may be subordinated to the few that are apportioned, leaving greater possibilities that the pool of proceeds from sale will be divisible to subordinate lienors.

The basic reason for not entirely invalidating the unapportioned blanket lien is that the facts of how materials are used are within the control and knowledge of the owner. Maryland Brick Co. of Baltimore v. Spilman, 76 Md. 337, 25 A.297 (Md. 1892). In Maryland Brick Co., the brick supplier furnished bricks to a project consisting of forty-seven houses. Echoing an opinion of the Supreme Court of Texas, the court stated "When materials have been furnished under a single contract for

buildings erected in two or more contiguous lots owned by the person to whom the materials are furnished, we see no reason why the lien should not attach to all the lots, and it would be exceedingly unreasonable to require the persons who furnished material, in such a case, to ascertain how much of the material is placed in each house. This is a matter under the control of the owner of the property improved, and, if he does not see proper to make separate contracts for material to be used in each lot, he cannot be heard to say that a lien does not attach upon all of the lots upon which the material is used. ....so long as [the owner] treat such lots as one property, by making one contract for material to be used on all of them,.... so long may the materialman treat the lots as one piece of property in fixing his lien upon it." Id. at 339, 25 A. at 298. It has generally been held that the fact that there is delivery of material to the site of building operations is enough to establish a lien. See, Clark Certified Concrete Co. v. Lindberg, 216 Md. 576, 141 A.2d 685 (Md. 1958). Virginia courts have taken a much more conservative approach by requiring apportionment on a multi-unit project.

1. Use of Materials at Site

In Maryland, it has been ruled that when materials are furnished to a multiplicity of houses comprising a single project, it is not essential to the validity of the lien claim that the supplier either show in what houses specific materials were used, or that the materials were actually used upon the site at all, if they were purchased for and delivered to the site of the work. Humphrey v. Harrison Bros, Inc., 196 F.2d 630 (4th Cir. 1952).

This rule's import is in creating the standard that delivery of the material may be conclusive that the materials were incorporated into the building so as to make the property lienable.

Since the purpose of the multiple lot rule is to protect the materialman's rights when it is the owner who has superior knowledge and access to evidence regarding the ultimate use of the materials, is it not sensible to allow an owner to prove that the materials were not used on the site?

What if we are dealing with a subsequent owner, who has acquired the property from the individual who contracted for construction? Could it occur that a subsequent owner of a unit could be held responsible to a claimant who delivered material to the site even though the new owner could prove the materials were not incorporated into his unit?

An owner was responsible for claims on exactly those facts in Clark Certified Concrete Co. v. Lindberg, 216 Md. 576, 141 A.2d 685 (Md. 1958). There, a concrete supplier had sold and delivered on open account, more than 1800 cubic yards of concrete to a development site over a two-year period, about half of which was not paid for. The court said that there was no dispute that the concrete used on the liened house was part of the deliveries that had been paid for and not those unpaid. Further:

"The liens were valid even though it was shown that none of the materials for which the liens were claimed went into the particular houses against which the liens were filed...at time when the houses were owned by the developer".

The court also observed that the lien in this case was filed after the conveyance of the property to the new owner. Without such filing the new owners had no land or court records to check to determine whether the property was encumbered. Nevertheless, the court in Clark Concrete said, "It would seem [that] the purchaser is charged with constructive notice of

the lien ... [the] Code calls for construction of the law as remedial in nature and we have frequently stated that it should be construed liberally in favor of the claimant... If the law ought to be changed so as to protect purchasers from claims for deliveries to other houses in a development prior to conveyance, it should be done by the legislature, not by judicial fiat." Clark Concrete, 216 Md. at 582, 141 A.2d at 688.

As discussed elsewhere, the legislature has acted to alter the time of effective attachment of liens. Nevertheless, it has not totally relieved a purchaser of the particular peril that was faced by the owners in the Clark Concrete case. It is still possible in Maryland for a subsequent owner to be responsible for a previous owner's debts despite the fact that no lien was attached at the time of conveyance and the work or materials were used on a remote unit in a subdivision, provided however, the subsequent owner is not a bona fide purchaser for value order § 9-102 of the Maryland Real Property Code.

1. Multiple Lot Problems and the Bona Fide Purchaser

In Celta Corporation v. A. G. Parrott Company, 94 Md.App. 312, 617 A.2d 632 (1993), the court held that where a number of the lots in a subdivision have been sold to bona fide purchasers for value and no third-persons would be damaged by shifting the burden of a mechanic's lien for work done for the benefit of the entire subdivision onto the remaining lots held by the owner, the lien claimant may properly shift the burden to the remaining lots. The court further held, however, that a lienor's ability to shift the burden of the mechanic's lien to the remaining lots held by the owner is limited to the pro-rata amount by which each lot benefitted from the overall contract. Applying the pro-rata apportionment formula set forth in Section 9-102(b), each of the 141 lots in Brampton Hills received

$15,215.88 in improvements under the contract between Celta and Parrott. Since this number represents the extent to which each lot was improved by work done by Parrott, and the lien sought by Parrott was for only $5,006.47 per lot, the court found that the total amount of the lien may be secured by shifting the entire amount of the lien onto the remaining 15 lots owned by Celta.

1. Lien Release and the Multiple Lot Case

While the Maryland courts protect the reach of the claimant's multiple or blanket lien, a lienor can weaken a claim by releasing units from the lien.

At one time in Maryland, courts held that where materials were furnished for two houses and a materialman released the lien as to one of them, he could not claim a lien against the other. Wilson v. Wilson, 51 Md. 159 (Md. 1878). By this older standard, a partial release destroyed the blanket lien.

Wilson was overruled to afford better protection to subcontractors. Today, instead, a partial release does not destroy the blanket lien. Instead, the lien remains in effect except to the extent that an owner or other party attacking the lien may show that materials supplied and claimed upon went into the houses released. Maryland Brick Co. of Baltimore v. Dunkerly, 85 Md. 199, 36 A.761 (Md. 1897). The more recent rule is consistent with the theory that a supplier's potentially limited knowledge of the on-site use of materials should not be penalized. Moreover, it can be argued that this newer rule mitigating the penalty for partial release encourages installment settlements of controverted claims. The opposite prevails in Virginia, however, where a partial release can be fatal to the entire lien.

D. Amount of Lien Claim By Contractor .

1. Maryland adheres to the general rule on the extent of a contractor's lien:

> The extent of a lien of a contractor or builder with respect to the amount secured by it is determined by the contract between the parties and the state of their accounts. 57 CJS Mechanic's Liens §174 (1948).

Hence, look to the contract to see the claimable amount first.

Where there is a contract which specifies a price, upon completion of the contract, the contractor, as against the owner, is entitled to the contract price and appropriate extras to the extent that the contract remains unpaid. In Schneider v. Menaquale, 187 Md. 202, 49 A.2d 330 (Md. 1946), the court ruled that a contractor had no mechanic's lien for a percentage of the purchase price as a hauling charge where the owner did not agree to pay any hauling charge. By contrast, the case of House v. Fissell, 188 Md. 160, 51 A.2d 669 (Md. 1947) held that a contractor was entitled to a mechanic's lien that computed profit on a cost-plus percentage of cost basis because the contract so provided.

E. Amount of Lien Claim by Subcontractor.

1. Commercial Buildings

In many jurisdictions (by way of contrast to Maryland), the amount for which a subcontractor can perfect a lien cannot exceed the amount to which an owner is indebted to the general contractor at the time notice of the lien cliam is given. These jurisdictions (which include Virginia and the District of Columbia), in effect, provide for a form of subrogation for the subcontractor, who as against the owner, is entitled to stand in the shoes of the principal contractor and collect up to the limit of the owner's debt to the principal contractor. Virginia conforms

to this lien theory which some have called the "New York" system. See Va. Code § 43-7.

Not so in Maryland. The direct lien theory, or "Pennsylvania" system, prevails in Maryland under which payment to the original contractor is no defense to the claim of a subcontractor. The owner's payments do not limit a subcontractor's claims. The historical justification of the direct system has been to prevent collusion and fraud by contractors and owners against subcontractors. The contractor is held theoretically to be the owner's agent. 57 CJS Mechanic's Liens § 105 (1948).

Hence, in Maryland, the following rule for the extent of a subcontractor's lien has been established:

> Owners not party to a contract binding a claimant subcontractor are not bound by contract price, but are liable for the reasonable value of the work performed. 57 CJS Mechanics Lien §105(b), 173 (1948).

This means that previous payment to the contractor does not offset potential liability to subcontractors and that the contract price between the subcontractor and the principal contractor does not firmly fix the extent of the subcontractor's lien.

The key Maryland case discussing subcontractor and sub-subcontractor liens, Diener v. Cubbage, 259 Md. 555, 270 A.2d 471 (Md. 1970), takes contract price into account as a non-binding indicator:

> Reasonable value, then, is the measure of damages, but the contract price can be used in determining what those damages are. We are in agreement with those authorities which hold that while the contract is not binding, the contract price is nonetheless prima facie proof of the reasonable value and the owner has the burden of introducing evidence to show unreasonableness. Diener at 259 Md. at 561. (Emphasis added).

Under Virginia's system, if a general contractor underbids a job and if costs arise unexpectedly with claims exceeding the amounts due, such excess amounts are an unrecoverable loss for a subcontractor. If a Virginia owner reimburses a principal contractor without careful inspection of progress or the documentation of amounts of paid to its subcontractors, the subcontractors may stand a chance to lose. In Maryland, the owner's liability to subcontractors is not so limited. The owner may be forced to satisfy liens which exceed his contract price, and then have to use other forms of security or file personal actions against the principal contractor to be reimbursed.

Of course, the notice provisions previously cited do provide a measure of protection for the owner. Section 9-104(f)(1) of the Maryland Real Property Code allows the owner, on receipt of notice from a lien claimant, to withhold from sums due the principal contractor, the amount the owner ascertains to be due the subcontractor who gave notice of an intention to file a lien. Therefore, the prudent owner is not without some protection from the risk of having to pay twice.

2. Single-family Dwellings

Maryland has carved out an exception to the direct lien theory in the case of owner-built single-family homes. Md. Real Prop. Code Ann. §9-104 (a)(2) (Repl. Vol. 1988), provides that:

> A subcontractor doing work or furnishing materials or both for or about 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 90 days after doing work or furnishing materials for or about that single family dwelling, the subcontractor gives written notice of an intention to claim a lien in accordance with subsection (a)(1) of this section and the

owner has not made full payment to the contractor prior to receiving the notice.

Md. Real Prop. Code Ann. § 9-104(f) (Repl. Vol. 1988) provides that:

> Payments by owner to contractor after notice; limitation on lien against certain family dwellings. - (1) On receipt of notice given under this section, the owner may withhold, from sums due the contractor, the amount the owner ascertains to be due the subcontractor giving the notice.
>
> (2) If the subcontractor giving notice establishes a lien in accordance with this subtitle, the contractor shall receive only the difference between the amount due to him and that due the subcontractor giving the notice.
>
> (3) Notwithstanding any other provision of this section to the contrary, the lien of the subcontractor against a single family dwelling being erected on the land of the owner for his own residence shall not exceed the amount by which the owner is indebted under the contract at the time the notice is given.

In enacting these sections, Maryland has prevented the single family homeowner from having to pay twice. However, these sections contain pitfalls for the unsuspecting subcontractor.

In Reisterstown Lumber Co. v. Tsao, 319 Md. 623, 574 A.2d 307 (1990), the court considered the question of the applicability of the single-family dwelling exception of § 9-104 (a)(2) when the building in question changes character during construction so that it either no longer qualifies or did not initially qualify but now does. In other words, if the owner, as in Reisterstown, initiates the project intending to occupy the house, but during construction decides to sell the house before ultimately retracting the listing and occupying the house, is the owner who pays the contractor protected under § 9-104 (a)(2) from any or all of the subcontractor's liens? The court held that the determination as to whether a subcontractor is doing work or furnishing materials for a single-family dwelling, is made as of the time when the subcontractor commences work or provides materials to the contractor. Because at the time Reisterstown provided materials,

the owners intended to occupy the house and because they paid the general contractor in full, Reisterstown was not able to maintain its mechanic's lien.

Md. Real Prop. Code Ann. § 9-104(f) serves to limit the amount of the subcontractor's mechanic's lien and consequently the amount that the subcontractor may recover from the owner/occupier of a single-family dwelling. In Ridge Sheet Metal Co., Inc. v. Morrell, 69 Md. App. 342, 517 A.2d 1133 (1986), the court applying §9-104(f) held that a subcontractor's lien on a single-family dwelling erected on the land of the owner for his residence may not exceed the amount of the contract with the prime contractor and may be further reduced to the amount that the owner owes to the prime contractor.

In Grubb Contractors v. Abbott, 84 Md. App. 384, 579 A.2d 1185 (1990), the court considered the definition of "single family dwelling" for the purposes of § 9-104. In Grubb, the owner hired a designer/builder to construct an addition to the owner's home. The addition was to include a garage and several rooms in which the owner's mother was to live. The owner paid the designer/builder who hired Grubb. The designer/builder never paid Grubb, and Grubb demanded payment from the owner, who upon the demand, fired Grubb. The owner contended that he was protected from Grubb's mechanic's lien under § 9-104(f)(3) while Grubb contended that the addition was not within the purview of the single-family dwelling exception because the addition was a separate residence. The court defined "single-family dwelling" as:

> The joint occupancy and use of the dwelling by all of those who live there. The word 'single' precludes the segregation of certain portions or rooms for rental. It forecloses multiple occupancy of certain portions of the unit for rental as a segregated part, or parts, of the unit. 'Dwelling' means the whole of the premises used for living purposes. It must include the use of the common rooms, such as the kitchen, dining room, living room, if any, by all occupants. It refers to, and cannot be fragmentized into broken bits of housing for rental return. 'Family' signifies living as a family; it inhibits the breaking up of the premises into segregated units. It does not necessarily compel the use of the unit by more than one person....

> The word must then, instead, refer to the use of the premises as a family, or in the manner of a family. Such family use, again, would, and must be, a single and common use of the premises.

Id. at 396, 579 A.2d at 1191. (citing Brady v. Superior Court, 200 Cal. App.2d 69, 19 Cal. Rptr. 242 (Dist. Ct. App. 1962).) Applying this definition, the court found that the owner's addition fell within the single-family dwelling exception.

F. On Building Not Finished.

As provided at Md. Real Prop. Code Ann. § 9-103(c)(1) (Repl Vol. 1988), if a building is commenced and not finished, a lien established in accordance with this subtitle shall attach to the extent of the work done or materials furnished. By contrast to Virginia's provision for an owner's credit for completion, Maryland does not discount the owner's liabilities to subcontractors based on costs an owner might incur from the general contractor's incompetence or abandonment of the project.

The distinction is grounded in the differing lien theories of the two states. Virginia's credit for completion will potentially defeat all subcontractor claims if the general contractor has left substantial work undone. Maryland law expressly avoids that result.

However, in connection with the construction of a single family dwelling being erected on the land of the owner for its own residence, subcontractors and materialmen should take note of § 9-104(f)(3) of the Code. This provision states that the lien of the subcontractor against such a dwelling shall not exceed the amount by which the owner is indebted under the contract at the time the notice is given. If under the owner-contractor agreement, the owner is entitled to a credit

and/or backcharge for the cost of completion, there may be little, if anything, due the contractor. This would serve to reduce the amount of the subcontractor's lien.

IV. ESTABLISHMENT AND ENFORCEMENT OF THE MECHANIC'S LIEN.

A. Commencing the Action.

1. The petition is filed within 180 days after the work is completed in the court where the land or any part of it is located. Maryland Rules of Proc. BG71.
2. Note that subcontractors must show that notice was properly served on the owner. Md. Real Prop Code Ann. § 105 (a)(1)(v) (Repl Vol. 1988).

B. Proceedings.

1. Court Review

   When a petition to establish a lien is filed, the court shall review the pleadings and documents on file and may require the petitioner to supplement or explain any of the matters set forth therein. Md. Real Prop. Code Ann. § 9-106 (a) (Repl Vol. 1988).

2. Show Cause Order

   If the court concludes that the petition (initially or upon supplementation as the court may require) gives reasonable grounds for the lien to attach, it shall order the owner to show cause, within 15 days of service of the order and the other pleadings and documents in the matter, as to why a lien as described in the petition should not attach. Id. Service of the order may often be the first notice that an owner receives of a claim in cases in which a petition is filed by a general contract. Md. Real Prop. Code Ann. § 9-102(e) (Repl Vol. 1988).

3. Answer

   An owner must file a counter-affidavit or verified answer within the time set forth by the court. Failure to respond will result in the court

deeming the petitioner's claim as admitted, and the lien will attach without a further hearing. Md. Real Prop. Code Ann. § 9-106 (Repl Vol. 1988).

4. Timing

Under Maryland Rules of Proc. at BG73(a), the show cause order will also set a date for a hearing within 45 days to present evidence in addition to that already submitted by the lien claimant to the court.

5. Court Determination

If the court believes, based on evidence gathered in the above steps, that there are no general disputes about material facts and that a lien should attach, it may issue a final order to establish the lien. It may also deny the lien by final order as well. A petitioner so denied may, within 30 days, file a request that his petition for a lien be assigned for trial. Md Rules of Proc. 136-73(d).

As provided in Md. Rules of Proc. BG73, and Real Code § 106 (Repl Vol. 1988), the court may also decide that questions of material fact do exist, but there is probable cause to believe that the petitioner may be entitled to a lien. In this situation, the court may issue an interlocutory order that will; (1) establish a lien, (2) describe the boundaries of the property to which the lien is attached, (3) state the amount of the claim, (4) specify the amount of the bond needed to release the lien, and (5) assign a date for trial to adjudicate the final establishment of the lien within six months. The owner or other person interested in the land may at any time move the court to have a lien established by an interlocutory order modified or dissolved. Id.

6. Joinder of Other Claims

During the trial to adjudicate the final establishment of the lien, the court may consider, as well, other claims between the parties, for example,

those relating to defective work. This was the case in RPS Development Corp. v. College Park, etc., 437 A.2d 706 (Md. 1982). There, the owner of a condominium project was allowed to defend against a mechanic's lien on the basis of defective workmanship which had not been raised earlier as a counterclaim in the lien action. College Park, the general contractor, entered into an agreement with RPS to build an office complex consisting of seven buildings, each divided into condominiums, on property known as Bowie Office Park Condominium in Prince George's County, Maryland. A payment dispute developed and the contractor instituted suit to establish a mechanic's lien in the amount of $303,614.13. The owner filed an answer alleging that the contractor had made substantial deletions and had downgraded materials without the owner's authorization and that the defective work would have to be corrected.

At trial, the court refused to allow the owner to prove, by way of recoupment, the cost to correct certain defective workmanship. The trial court agreed with the contractor that the owner had failed to assert any counterclaims within the time permitted by the Maryland Rules and, therefore, had waived any claims for defective work. The owner, however, contended that what it was asserting was not a counterclaim, but rather a claim for "recoupment" and that there was a difference between recoupment and counterclaim at common law such that recoupment did not have to be specially pleaded, but could be brought up at trial.

The Maryland Court of Specials Appeals accepted this argument and reversed the judgment for the contractor, ordering a new trial on the defective work. Id.

While RPS Development Corp. may be viewed as a procedure case rather than a mechanic's lien case, it does suggest that mechanic's lien

claimants should use discovery to determine any and all claims which the other party may have as setoffs, whether such claims are styled "counterclaims" or "recoupment". If such information is sought in discovery, the other side will be required to identify its claims for defective work before trial.

7. Trial Bond

Upon interlocutory order the court may require the petitioner to file a bond in an amount sufficient to cover damages and attorney's fees if the lien is ultimately deemed to be inappropriate. Md. Real Prop. Code Ann. § 9-106 (b)(3)(v) (Repl. Vol. 1988).

8. Final Order to Establish the Lien

The court must establish a lien by final order before it can be enforced by judicial sale or foreclosure or before execution on a bond will be accepted to obtain release of the lien. Md. Real Prop. Code Ann. §§ 9-106, 9-107, 9-108 (Repl. Vol. 1988).

If a final order is issued establishing a mechanic's lien, the land against which it rests shall be sold under foreclosure or judicial court order. "All liens and encumbrances on such property shall be satisfied in accordance with their priority, subject to the limitation that the proceeds of the sale are insufficient to satisfy all liens established pursuant to this subtitle, then all proceeds available to satisfy each such lien shall be stated by the court auditor as one fund, and the amount to be disbursed to satisfy each lien established pursuant to this subtitle shall bear the same proportion to that fund as the amount of such lien bears to the total amount secured by all such liens, without regard to priority among such liens." Md. Real Prop. Code Ann § 9-108 (Repl. Vol. 1988).

9. Bonding-off and Release

Any time after a petition to establish a lien is filed, the owner or other person interested in the property may petition to have the lien released from any interlocutory or final order establishing the lien, or any order that may thereafter establish the lien upon the filing of a bond sufficient to protect the petitioner as determined by the court. Md. Rules of Proc. GH76(a). The court shall thereupon issue an order releasing the property from the lien.

10. Entry of Satisfaction.

Upon satisfaction of a lien it is the responsibility of the petitioner or its successor in interest to file an order of satisfaction of lien in every court where the lien is a matter of record.

If the petitioner or successor fails to do this the owner may petition to a court to enter an order after proof of satisfaction to discharge the lien and to award the owner reasonable counsel's fees and costs.

11. Statute of Limitations Upon Right to Enforce a Lien.

A petition to enforce a lien must be filed after the final order and within one year of the date on which a petition to establish a lien was first filed. If the petition to enforce is made within the one-year period, the right to the lien will have full force and effect until the conclusion of the enforcement proceedings, and in accordance with any decree issued at the end of those proceedings. Md. Real Prop. Code Ann. § 9-109. (Repl. Vol. 1988).

12. Establishing Boundaries to Liened Property

As an adjunct to the procedure for enforcement of liens, the Md. Rules of Proc. at BG77 establish a means to designate precisely the property against which a lien might lie.

To establish boundaries before commencement of construction, the owner shall file a notice to establish boundaries in an ex parte proceeding in the circuit court of the county in which the property is located. The notice shall contain:

(a) a reference to the conveyance or other means by which the owner acquired title to the land;

(b) a description of the newly established boundaries sufficient to identify the land with reasonable certainty; and

(c) a brief description of the construction for which the boundaries are established.

The notice shall be captioned, filed and indexed as any other civil action under the name of the owner of the land. Md. Rules of Proc. BG77.

After the commencement of construction of any improvement upon land which might be subject to a claim for a mechanic's lien, the owner of the land or any other person interested therein, including anyone who has or might assert a mechanic's lien against the land by reason of the construction, may petition a court of the county where the land is located to designate the boundaries thereof pursuant to this Rule. If the person filing the petition is a party to a proceeding to establish or enforce the lien, the petition shall be filed in the first proceeding to which he became a party. Id.

A petition filed under this section shall be served on the owner of the land, each person who has petitioned for or established a mechanic's lien against the land, and any other person designated by the court. Id.

The court shall appoint a surveyor who shall make a report to the court in which he shall determine and describe the boundaries of such land in a manner as to include within the boundaries so designated so much of

the land as is necessary to the use of the improvement thereon for the purpose for which it is designated or reasonably adaptable. Id.

A copy of the surveyor's report shall be furnished to the petitioner and to each person required to be served under the Rule. Within fifteen days thereafter any person to whom the surveyor's report is required to be furnished may file a motion requesting the court to determine the boundaries other than in the surveyor's report. After a hearing on the motion or if no motion is filed within fifteen days, the court shall determine the boundaries or approve the surveyor's report, as the case may be, for filing in the proceedings. Id.

After a judicial sale pursuant to enforcement, the court shall refer the proceedings to an auditor for an accounting to determine payment of liens. Md. Rules of Proc. BG75.

V. PRIORITIES.

A. Generally.

Priority questions raise the problem of which claims will receive early payment from the debtor's proceeds and which will be postponed to claims of other creditors. It is in this area that contractors and others have severely criticized the revised Maryland mechanic's lien statute for failing to accord contractors and subcontractors all of the protection provided under similar laws in other states. The priority disability of lienors in Maryland is a particular reason why prompt action on the filing and enforcement of liens in Maryland is advisable. Under the current law in Maryland, there are simply greater risks than exist under the lien statutes in other states that contractors will lose out to other creditors. Under the Maryland lien law before 1976, a lien was created and "attached" to property as soon as work began on a project. To retain the lien, a contractor had to file a

petition within 180 days of completion of the work. For the purpose of priority, such liens were regarded as having been effective from the commencement of the building regardless of when the work was actually performed.

Following the controversial 1976 decision by the Maryland Court of Appeals in Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (Md. 1976), the new law said that a building would be "subject to the establishment of a lien." Md. Real Prop. Code Ann. § 9-102. (Repl. Vol. 1988).

This means that under the new law passed in 1976, a mechanic's lien is no longer attached when work is being performed, but only upon a judicial determination to establish a lien. Hence, a lien's effect usually is from the date of judicial decree. Where the owner is in bankruptcy, the contractor is in additional peril. In In Re Fitness Connection, Inc. v. Jenkins, 76 Bankr. 534 (D. Md. 1987), the bankruptcy court applying Barry Properties found that because the contractor's lien no longer relates back to the commencement of construction, the owner's bankruptcy "relegates [the contractor] to the position of an unsecured creditor without any priority over the other unsecured creditors." Id at 538.

The lien does not "relate back" to the time of commencement of the work, as is the case in Virginia. A lien no longer exists in inchoate form ready to assume full force and effect later if the contractor or subcontractor enforces it. There is one situation, however, in which a lien (not judicially established) will have effect before the judicial decree. Note, for example, the statute at Md. Real Prop Code Ann. §9-102(d) (Repl. Vol. 1988):

> (d) Exemptions - However, a building or the land on which the building is erected may not be subjected to a lien under this subtitle, if prior to the establishment of a lien in accordance with this subtitle, legal title has been granted to a bona fide purchaser for value.

The law defines a bona fide purchaser as one who takes upon payment of valuable consideration absent actual or constructive notice of outstanding rights of others, Black's Law Dictionary, 161 (5th ed., 1979).

Under Md. Real Prop. Code Ann. at § 9-102(e) (Repl. Vol. 1988) it is stated:

> The filing of a petition under § 9-105 shall constitute notice to a purchaser of the possibility of a lien being perfected under this subtitle.

Under Maryland's rules, the mere filing of a petition will generally not establish a priority for a mechanic's lien. But the subsequent purchaser with notice (actual or constructive) by virtue of the filing of a petition against the owner is potentially liable to subsequently established liens despite the fact the no lien actually exists at the time of a conveyance under § 9-102.

The sections of the Code at 9-102(d) and 9-102(e) appear to be contradictory. Section 9-102(d) was passed in 1976 when the statute as a whole was revised and § 9-102(e) was an amendment passed one year later. The courts have not clarified these sections, but one legal commentary reasonably suggests that the lawmakers generally sought to make the practical and legal effects of a mechanic's lien with regard to the ordering of priorities among lienors felt upon the judicial establishment of the lien. The legislature wanted, at least in one instance, to have a legal effect of the lien felt upon petition, instead of judicial establishment. At the time of the petition, the owner has not necessarily received notice of the lien to contest it. Whether the constitutional requirements of notice before judgement that concerned the court in Barry Properties are fulfilled is therefore questionable. Nevertheless, subsequent purchasers from the potentially unnotified prior owner should secure from their vendors adequate assurances against undisclosed lien liability of which they may be deemed to have

constructive notice. A last minute check of the local court's equity index before settlement may afford actual notice to a vendee. If this occurs, however, there may be the kind of encumbrance against the owner-vendor which the Maryland courts found objectionable in Barry Properties.

Recall the Clark Concrete case cited earlier. The court said that the legislature may protect subsequent purchasers from claims derived from transactions prior to the conveyance. The legislature has apparently chosen to create only limited protection.

B. The Priorities Rule.

There are two questions as to priorities. First, what is the priority of a mechanic's lien relative to other types of liens (e.g., mortgages and judgments)? Second, what is a mechanic's lien priority vis a vis other mechanics' liens? (Remember, the unapportioned lien on multiple lots has already been sent to the back of the line).

Md. Real Prop. Code Ann. § 9-108 (Repl. Vol. 1988) currently provides:

> If all of any part of the land or buildings against which a mechanic's lien has been established pursuant to this subtitle shall be sold under foreclosure or a judgment, execution or any other court order, all liens and encumbrances on such property shall be satisfied in accordance with their priority...

How does this operate in practice? In Residential Industrial Loan Co., Inc. v. Weinberg, 279 Md. 483, 369 A.2d 563 (Md.), cert. denied, 434 U.S. 876 (1977), one of the first cases decided under the new law, a decree to establish a lien was entered in February, 1976. If the lien had "related back" under the old law, it would have had priority over two deeds of trust recorded subsequent to the commencement of construction. Because the lien's legal existence dated from

judicial establishment under the new scheme, the claimant's lien was inferior to both deeds of trust.

C. Why Maryland Eliminated Relation Back.

The Barry Properties case struck down the old "relation back" provision because the Court of Appeals determined that the old statute was an unconstitutional taking of property without due process of law.

While property was not actually taken from an owner in the old scheme, the use and enjoyment of property was interfered with so as to be the equivalent of a taking. If a subsisting or inchoate lien existed, owners could be prevented from full use of their property. Also, under the old law, lien encumbrances could attach without notice.

The U.S. Supreme Court frowns on prejudgment attachments where notice or some other safeguard is lacking or which prevent a property owner's quick intervention into creditor actions. Still, the U.S. Supreme Court has upheld a mechanic's lien law similar to Maryland's old law in Speilman-Fond, Inc.. v. Hanson's Inc., 379 F. Supp. 997 (D. Ariz. 1973), aff'd, 417 U.S. 901 (1974: construing Arizona's statute as acceptable). Maryland's highest court, however, determined that the Arizona law had certain mitigating safeguards and chose to apply a stricter standard, as a state's highest court may do in construing the U.S. Constitution.

In the course of revising the law, all of Maryland's relation-back provisions were eliminated. However, there are, as some commentators have pointed out, no necessary constitutional reasons why a law cannot provide adequate prejudgment safeguards for the owner as well as relation-back advantages for contractors and subcontractors.

D. Priority When Lien is Straddled by Future Advance.

Construction financing arrangements can create priorities controversies. Suppose a construction deed of trust is entered into by an owner-developer prior to commencement of construction that provides for future periodic advances. Suppose further that various contractors or subcontractors give requisite notice and properly establish liens. Finally, suppose that the construction lender, after the establishment of mechanics' liens, provides further advances pursuant to the construction deed of trust. What are the priorities among the lender and the lienors?

In the case of Frank M. Ewing Co., Inc. v. Krafft Co., 222 Md. 21, 158 A.2d 654 (Md. 1960), the court had to determine if the Ewing Co. could have the benefit of a senior lien based on a construction deed of trust as to $8,300 advanced with actual knowledge of other liens that had attached after that deed of trust. The court carefully examined the construction financing arrangement to determine to what extent payment was either compelled or optional. Based on numerous authorities on mortgage law the court recited the following rule:

> ...where the lender with actual knowledge of intervening liens voluntarily makes an advance he could not have been compelled to make... the claim of the lender is inferior to intervening liens. Ewing, 222 Md. at 27, 158 A.2d at 658.

In assessing the financial responsibility of an owner, a contractor or subcontractor may wish to know the extent of a construction lender's necessary obligation in determining the adequacies of the owner's guarantees and the possible existence of lender's priorities. Mortgages securing future advances may need to be inspected in the county land records.

E. Ordinarily, All Mechanic's Lienors Take Equally.

With regard to priorities of one mechanic's lien holder over another, the statute at § 9-108 now provides:

> If the proceeds of the sale are insufficient to satisfy all liens established pursuant to this subtitle, then all proceeds available to satisfy each such lien shall be stated by the court auditor as one fund, and the amount to be disbursed to satisfy each lien established pursuant to this subtitle shall bear the same proportion to that fund as the amount of such lien bears to the total amount secured by all such liens, without regard to priority among such liens. Md. Real Prop. Code Ann. §9-108 (Repl. Vol. 1988).

Hence, upon a sale or foreclosure, all mechanic's lienors will bear the burden of a deficiency on an equal, pro-rata basis measured by the size of their claims. The date of decree or establishment of the lien is not critical. Note, however, that where apportionment has been appropriate (as in a blanket lien situation) the unapportioned lienors are treated as a subordinate category of creditors.

F. Infirmities of Maryland's Current System.

In Maryland, property may be sold before the filing of a petition, or before an interlocutory or final decree of lien, and mortgaged to the detriment of a potential lienor's priority vis a vis other creditors. A claimant could ultimately win a judicial decree only to find its priority is so inferior to other creditors as to be of negligible value. Even without the complication of subsequent sales by the owner, priorities of the contractor are impaired.

Basically, a contractor is taking a risk by engaging in settlement discussions with the reluctant owner. Each delay in filing may reduce priority beyond any utility to the contractor or result in loss of the lien after a conveyance prior to petition, to a bona fide purchaser who necessarily would have no notice of the claim. Hence, the contractor's remedies under the lien law must be pursued with dispatch.

Also, owners, lenders and title companies are relieved of some of their burdens to secure loans, at the expense of contractors. They do not have to police and inspect sites as to when construction commenced so as to ascertain their vulnerability to unfiled contractors' liens.

G. <u>Impact of Prohibition of Waiver and Final Payment</u>.

In May, 1981, Maryland enacted a provision to its mechanic's lien statute which may, to a degree, mitigate some of the negative impact of disfavored priority status of mechanic's lienors.

<u>§ 9-113 of the Code now states:</u>

> (a) An executory contract between a contractor and any subcontractor that is related to construction, alteration,or repair of a building, structure,or improvement may not waive or require the subcontractor to waive the right to:
>
> (1) Claim a mechanics' lien; or
>
> (2) Sue on a contractor's bond.
>
> * * *
>
> (c) Any provision of a contract made in violation of this section is void as against the public policy of this State. Md. Real Pro. Code Ann. § 9-113 (Repl. Vol. 1988).

Now while the priority may be limited, the subcontractor will not be pressured into being deprived of his lien remedy. Note, however, that a principal contractor may still validly waive its rights to lien the owner's property. Further, where the contract containing the waiver provision is governed by the laws of a state which enforces waivers in executory contracts, the waiver provision will be upheld. <u>See</u> <u>National Glass, Inc. v. J.C. Penny Properties, Inc.</u>, 329 Md. 300, 619 A.2d 528 (1993). The statute addresses executory contracts (i.e., contracts to be performed.) Two questions, yet unanswered by the courts, remain regarding these provisions:

1. May a subcontractor be required or allowed to subordinate, as opposed to waive, lien rights?

2. May a subcontractor be required to waive liens upon substantial completion as a condition of final payment? The answer to this question is probably in the affirmative as a result of the enactment in 1982 (effective July 1, 1982) of § 9-114 of the Code which deals with releases from material suppliers and subcontractors. This section reads as follows:

> (a) At the time of settlement or payment in full between a contractor and an owner, the contractor shall give to the owner a signed release of lien from each material supplier and subcontractor who provided work or materials under the contract.
>
> (b) An owner is not subject to a lien and is not otherwise liable for any work or materials included in the release under subsection (a) of this section. Md. Real Prop. Code Ann. §9-114 (Repl. Vol. 1988)

Under § 9-114(a), the contractor shall give to the owner a signed release of lien from each material supplier and subcontractor at the time of settlement or payment in full. Obviously, such a release cannot be obtained from subcontractors if they are under no obligation to provide it according to § 9-113 of the Code. Construing the two provisions together, one can only conclude that the prohibition upon a waiver of liens contained in § 9-113 was not intended to apply to the requirement to submit a waiver of liens in conjunction with final payment.

H. No Waiver of Lien by Taking Security.

Section 9-110 provides "No person having the right to establish a mechanic's lien waives the right by granting a credit, or receiving a note or other security, unless it is received as payment or the lien right is expressly waived". Occasionally, a lien claimant may be asked to waive his lien after it has been established in order to remove the lien from the property. The claimant may be offered a note or some other security, or a mere promise to pay the debt, as

consideration for removal of the lien. Unless it is clear from the transaction that the security was received as payment of the lien, or the lien is expressly waived, no such waiver will be found. To be effective, a waiver must be clear and unambiguous. The mere taking of security, with nothing more, will not amount to a waiver. The lien claimant who has taken security, however, should ensure that the statute of limitations for giving notice of the intention to claim the lien, petitioning to establish the lien or petitioning to enforce the lien, does not expire before the matter is resolved.

VI. WRONGFULLY-FILED LIENS.

A. Generally.

Maryland has reported no cases in which an owner has filed suit against a mechanic's lienor for slander of title, but several other states have held that wrongfully-filed liens may be the basis for an owner's cause of action for damages. 50 Am. Jur. 542.

B. Elements.

Maryland decisions on slander or disparagement of title based on other kinds of wrongfully-filed instruments set forth three elements which an owner must establish to collect for a wrongfully-filed lien. These are discussed in the case of Horning v. Hardy, 36 Md. App. 419, 373 A.2d 1273 (Md. Ct. Spec. App. 1977) which involved an alleged wrongfully-filed suit that thwarted a real estate settlement. The court said first, that slander of title was actionable only if damage was proved.

Second, the disparaging statement or claim must be false. An owner must prove the derogatory statement was false; it is the owner's burden of proof to show the falsity.

Third, the owner must show a motivation of ill-will or spite. A defendant's disparaging act, if made in good faith, will not be actionable even if

there is some negligence in failing to ascertain the facts. But the Maryland court did say that reckless disregard of the facts could permit the conclusion that the defendant had serious doubts as to the truth of the charge and was therefore acting in bad faith. Id.

VII. CONSTRUCTION TRUST FUND STATUTE.

Maryland has enacted a construction trust fund statute, Md. Real Prop. Code Ann. §§ 9-201 thru 9-204 (Repl. Vol. 1988), which provides that:

§ 9-201:

(a) Moneys to be held in trust. - Any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, shall be held in trust by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.
(b) Commingling. - (1) Nothing contained in this subtitle shall be construed as requiring moneys held in trust by a contractor or subcontractor under subsection (a) of this section to be placed in a separate account. (2) If a contractor or subcontractor commingles moneys held in trust under this section with other moneys, the mere commingling of the moneys does not constitute a violation of this subtitle.

§ 9-202:

Any officer, director, or employee of any contractor or subcontractor, who, with intent to defraud, retains or uses the moneys held in trust under § 9-201 of this subtitle, or any part thereof, for any purpose other than to pay those subcontractors for whom the moneys are held in trust, shall be personally liable to any person damaged by the action.

§ 9-203:

The use by contractor or subcontractor or any officer, director, or employee of a contractor or subcontractor of any moneys held in trust under § 9-201 of this subtitle, for any other purpose than to pay those subcontractors who did work or furnished materials, or both, for or about the building, shall be prima facie evidence of intent to defraud in a civil action.

§ 9-204:

(a) In general. - This subtitle applies to contracts subject to Title 17, Subtitle 1 of the State Finance and Procurement Article, known as the "Maryland Little Miller Act", as well as property subject to § 9-102 of this title.
(b) Exceptions contracts. - This subtitle does not apply to:
(1) A contract for the construction and sale of a single family residential dwelling; or
(2) A home improvement contract by a contractor licensed under Article 56 of the Code.
(c) Definitions. - In this subtitle, "owner", "contractor", and "subcontractor" have the same meanings as in § 9-101 of this title.

This statute requires that a general contractor who receives payment from the owner, or in the case of a subcontractor who receives payment from the general contractor, holds that money for the benefit of the subcontractor or sub-subcontractor with whom he contracted. It also provides that the use of funds held in trust under § 9-201 for any purpose other than payment of the lower tier is prima facie evidence of intent to defraud. Finally, this statute imposes personal liability upon the directors, officers and employees of the contractor who use the funds held in trust for any purpose other than paying the subcontractor. However, it is important to remember that this statute only applies to state-financed buildings and to those projects subject to Maryland's mechanic's lien statute.

In Ferguson Trenching Company, Inc. v. Kiehne, 329 Md. 169, 618 A.2d 735 (1992), the Maryland Court of Apeals construed for the first time Maryland's construction trust statute, Maryland Code (1974, 1988 Repl.Vol., 1992 Cum.Supp.), Real Property Article, Secs. 9-201 to 9-204. The issue in Ferguson was what was the extent of personal liability of a corporate general contractor's president for funds that the corporation held in trust for a subcontractor, but used for other purposes? The construction trust statute provides that a corporate officer of a contractor may be held personally liable when, with intent to defraud, the officer retains or uses the funds for a purpose other than the payment of those subcontractors for whom the funds were being held in trust.

This case arose from a contract between Ferguson Trenching Co., Inc. (Ferguson), and Advanced Excavation Company, Inc. (Advanced), of which C. Stuart

Kiehne (Kiehne), is the president. On August 16, 1989, Advanced entered into a $279,380 contract with Triple Brook Partnership to perform excavation work for Mount Oak Estates, a Triple Brook real estate development in Anne Arundel County. On September 15, 1989, Advanced executed a $44,549 contract with Ferguson which called for Ferguson to install a water line on the Mount Oak job. Ferguson completed its work and billed Advanced on February 5, 1990 for the contract price. Advanced received only $251,000 in payments from Triple Brook towards its $279,380 Mount Oak contract. It paid out approximately $78,000 to subcontractors other than Ferguson and $82,000 in equipment costs for the project, and incurred approximately $46,000 in labor costs for its hourly employees on the project. According to Advanced, the balance of about $45,000 was devoted to "the payment of debts incurred in connection with other construction projects and to Advanced's operating expenses." Three subcontractors or suppliers, including Ferguson, did not receive payment from Advanced for their work on the Mount Oak project.

Ruling that the construction trust statute was enacted to protect subcontractors from dishonest practices by general contractors and other subcontractors for whom they might work, the court noted that the statute creates a trust relationship between the contractor and subcontractor such that where the contractor has been paid by the owner for the subcontractor's work, the statute establishes personal liability for the officers, directors, or employees of contractors or subcontractors who fraudulently retain or use those trust monies. Nonetheless, the court held that proof that funds subject to the construction trust statute were diverted for a purpose other than paying subcontractors on the job is not conclusive proof of intent to defraud, so as to permit imposition of liability on an officer of the corporate contractor. While the construction trust statute does not create an irrebuttable presumption of intent to defraud when monies received by the contractor are used for a purpose other than paying the subcontractor, it does provide the subcontractor with an important evidentiary boost towards establishing intent to defraud,

so as to permit imposition of liability on an officer, and it significantly alters the pre-statute personal liability of corporate officers. Thus, the court held that in order to establish "intent to defraud" required for imposition of personal liability on an officer of the corporate contractor under the construction trust statute, the subcontractor must prove some form of bad faith by the officer and, in order to have an intent to defraud, the officer must have acted dishonestly or, at least, with reckless indifference. Finding that the president of the contractor did not act with intent to defraud when funds received from the owner were used to pay debts other than those owed to the subcontractor, the court declined to impose personal liability under the construction trust statute because the contractor had not been paid in full, the president had extended loans to the contractor in order to help it pay debts, and that all funds were devoted to legitimate business debts and expenses of the contractor.

MARYLAND REAL PROPERTY CODE ANN. §9-101, et seq.

§ 9-101. Definitions

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Building. -- "Building" includes any unit of a nonresidential building that is leased or separately sold as a unit.

(c) Contract. -- "Contract" means an agreement of any kind or nature, express or implied, for doing work or furnishing material, or both, for or about a building as may give rise to a lien under this subtitle.

(d) Contractor. -- "Contractor" means a person who has a contract with an owner.

(e) Land. -- "Land" means the land to which a lien extends under this subtitle or the land within the boundaries established by proceedings in accordance with the Maryland Rules. "Land" includes the improvements to the land.

(f) Owner. -- "Owner" means the owner of the land except that, when the contractor executes the contract with a tenant for life or for years, "owner" means the tenant.

(g) Subcontractor. -- "Subcontractor" means a person who has a contract with anyone except the owner or his agent.

§ 9-102. Property subject to lien

(a) Buildings. -- Every building erected and every building repaired, rebuilt, or improved to the extent of 25 percent of its value is subject to establishment of a lien in accordance with this subtitle for the payment of all debts, without regard to the amount, contracted for work done for or about the building and for materials furnished for or about the building, including the 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.

(b) Waterlines, sewers, drains and streets in development. -- If the owner of land or the owner's agent contracts for the installation of waterlines, sanitary sewers, storm drains, or streets to service all lots in a development of the owner's land, each lot and its improvements, if any, are subject, on a basis pro rata to the number of lots being developed, to the establishment of a lien as provided in subsection (a) of this section for all debts for work and materialin connection with the installation.

(c) Machines, wharves, and bridges. -- Any machine, wharf, or bridge erected, constructed, or repaired within the State may be subjected to a lien in the same manner as a building is subjected to a lien in accordance with this subtitle.

(d) Exemptions. -- However, a building or the land on which the building is erected may not be subjected to a lien under this subtitle if, prior to the establishment of a lien in accordance with this subtitle, legal title has been granted to a bona fide purchaser for value.

(e) Filing of petition constitutes notice to purchaser. -- The filing of a petition under § 9-105 shall constitute notice to a purchaser of the possibility of a lien being perfected under this subtitle.

§ 9-103. Extent of lien

(a) A lien established in accordance with this subtitle shall extend to the land covered by the building and to as much other land, immediately adjacent and belonging in like manner to the owner of the building, as may be necessary for the ordinary and useful purposes of the building. The quantity and boundaries of the land may be designated as provided in this section.

(b) An owner of any land who desires to erect any building or to contract with any person for its erection may define, in writing, the boundaries of the land appurtenant to the building before the commencement of construction, and then file the boundaries for record with the clerk of the circuit court for the county. The designation of boundaries shall be binding on all persons. If the boundaries are not designated before the commencement of a building, the owner of the land or any person having a lien or encumbrance on the land by mortgage, judgment, or otherwise entitled to establish a lien in accordance with this subtitle may apply, by written petition, to the circuit court for the county to designate the boundaries.

(c) (1) If a building is commenced and not finished, a lien established in accordance with this subtitle shall attach to the extent of the work done or material furnished.

(2) If a building is erected, or repaired, rebuilt or improved to the extent of 25 percent of its value, by a tenant for life or years or by a person employed by the tenant, any lien established in accordance with this subtitle applies only to the extent of the tenant's interest.

§ 9-104. Notice to owner by subcontractor

(a) Notice required to entitle subcontractor to lien. --

(1) 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 90 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.

(2) A subcontractor doing work or furnishing materials or both for or about 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 90 days after doing work or furnishing materials for or about that single family dwelling, the subcontractor gives written notice of an intention to claim a lien in accordance with subsection (a) (1) of this section and the owner has not made full payment to the contractor prior to receiving the notice.

(b) Form of notice. -- The form of notice is sufficient for the purposes of this subtitle if it contains the information required and is substantially in the following form:

"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______________________
(insert if subcontractor is not an individual)

(c) Notice by mail or personal delivery. -- The notice is effective if given by registered or certified mail, return receipt requested, or personally delivered to the owner by the claimant or his agent.

(d) More than one owner. -- If there is more than one owner, the subcontractor may comply with this section by giving the notice to any of the owners.

(e) Notice by posting. -- If notice cannot be given on account of absence or other causes, the subcontractor, or his agent, in the presence of a competent witness and within 90 days, may place the notice on the door or other front part of the building. Notice by posting according to this subsection is sufficient in all cases where the owner of the property has died and his successors in title do not appear on the public records of the county.

(f) Payments by owner to contractor after notice; limitation on lien against certain single family dwellings. --

(1) On receipt of notice given under this section, the owner may withhold, from sums due the contractor, the amount the owner ascertains to be due the subcontractor giving the notice.

(2) If the subcontractor giving notice establishes a lien in accordance with this subtitle, the contractor shall receive only the difference between the amount due him and that due the subcontractor giving the notice.

(3) Notwithstanding any other provision of this section to the contrary, the lien of the subcontractor against a single family dwelling being erected on the land of the owner for his own residence shall not exceed the amount by which the owner is indebted under the contract at the time the notice is given.

§ 9-105. Filing of claims

(a) In general. -- In order to establish a lien under this subtitle, a person entitled to a lien shall file proceedings in the circuit court for the county where the land or any part of the land is located within 180 days after the work has been finished or the materials furnished. The proceedings shall be commenced by filing with the clerk, the following:

(1) A petition to establish the mechanic's lien, which shall set forth at least the following:

(i) The name and address of the petitioner;

(ii) The name and address of the owner;

(iii) The nature or kind of work done or the kind and amount of materials furnished, the time when the work was done or the materials furnished, the name of the person for whom the work was done or to whom the materials were furnished and the amount or sum claimed to be due, less any credit recognized by the petitioner;

(iv) A description of the land, including a statement whether part of the land is located in another county, and a description adequate to identify the building; and

(v) If the petitioner is a subcontractor, facts showing that the noticerequired under § 9-104 of this subtitle was properly mailed or served upon the owner, or, if so authorized, posted on the building. If the lien is sought to be established against two or more buildings on separate lots or parcels of land owned by the same person, the lien will be postponed to other mechanics' liens unless the petitioner designates the amount he claims is due him on each building.

(2) An affidavit by the petitioner or some person on his behalf, setting forth facts upon which the petitioner claims he is entitled to the lien in the amount specified; and

(3) Either original or sworn, certified or photostatic copies of material papers or parts thereof, if any, which constitute the basis of the lien claim, unless the absence thereof is explained in the affidavit.

(b) Docketing; process; pleadings. -- The clerk shall docket the proceedings as an action in equity, and all process shall issue out of and all pleadings shall be filed in the one action.

§ 9-106. Procedure following filing of claim

(a) Review of pleadings and documents filed; order to show cause; opposing affidavit; answer showing cause.

(1) When a petition to establish a mechanic's lien is filed, the court shall review the pleadings and documents on file and may require the petitioner to supplement or explain any of the matters therein set forth. If the court determines that the lien should attach, it shall pass an order that directs the owner to show cause within 15 days from the date of service on the owner of a copy of the order, together with copies of the pleadings and documents on file, why a lien upon the land or building and for the amount described in the petition should not attach. Additionally, the order shall inform the owner that:

(i) He may appear at the time stated in the order and present evidence in his behalf or may file a counteraffidavit at or before that time; and

(ii) If he fails to appear and present evidence or file a counteraffidavit, the facts in the affidavit supporting the petitioner's claim shall be deemed admitted and a lien may attach to the land or buildings described in the petition.

(2) If the owner desires to controvert any statement of fact contained in the affidavit supporting the petitioner's claim, he must file an affidavit in support of his answer showing cause. The failure to file such opposing affidavit shall constitute an admission for the purposes of the proceedings of all statements of fact in the affidavit supporting the petitioner's claim, but shall not constitute an admission that such petition or affidavit in support thereof is legally sufficient.

(3) An answer showing cause why a lien should not be established in the amount claimed shall be set down for hearing at the earliest possible time.

(b) Final order; interlocutory order.

(1) If the pleadings, affidavits and admissions on file, and the evidence, if any, show that there is no genuine dispute as to any material fact and that the lien should attach as a matter of law, then a final order shall be entered establishing the lien for want of any cause shown to the contrary. Further, if it appears that there is no genuine dispute as to any portion of the lien claim, then the validity of that portion shall be established and the action shall proceed only on the disputed amount of the lien claim.

(2) If the pleadings, affidavits and admissions on file and the evidence, if any, show that there is no genuine dispute as to any material fact and that the petitioner failed to establish his right to a lien as a matter of law, then a final order shall be entered denying the lien for cause shown.

(3) If the court determines from the pleadings, affidavits and admissions on file, and the evidence, if any, that the lien should not attach, or should not attach in the amount

claimed, as a matter of law, by any final order, but that there is probable cause to believe the petitioner is entitled to a lien, the court shall enter an interlocutory order which:

(i) Establishes the lien;

(ii) Describes the boundaries of the land and the buildings to which the lien attaches;

(iii) States the amount of the claim for which probable cause is found;

(iv) Specifies the amount of a bond that the owner may file to have the land and building released from the lien;

(v) May require the claimant to file a bond in an amount that the court believes sufficient for damages, including reasonable attorney's fees;

(vi) Assigns a date for the trial of all the matters at issue in the action, which shall be within a period of six months. The owner or any other person interested in the property, however, may, at any time, move to have the lien established by the interlocutory order modified or dissolved.

(c) Bond. -- The amount of and the surety on any bond shall be determined and approved pursuant to the Maryland Rules except as set forth in this subtitle. The petitioner, or any other person interested in the property, however, if notsatisfied with the sufficiency of a surety or with the amount of any bond given, may, at any time before entry of a final decree, apply to the court for an order requiring an additional bond, and upon notice to the other parties involved, the court may order the giving of such additional bond as it may deem proper. In lieu of filing bond, any party may deposit money in an amount equal to the amount of the bond which would otherwise be required, pursuant to the Maryland Rules.

(d) Trial on matters at issue. -- Until a final order is entered either establishing or denying the lien, the action shall proceed to trial on all matters at issue, as in the case of any other proceedings in equity.

§ 9-107. Attachment of lien to land in another county

(a) If any part of the land is located within another county and the petitioner desires that the lien attach to the land in that county, the petitioner shall file a certified copy of the docket entries, of the court order, and of any required bond with the clerk of the circuit court for that county.

(b) A lien attaches to the land or building in a county as of the time the documents required to be filed under subsection (a) are filed with the clerk of the circuit court of that county.

§ 9-108. Sale under foreclosure or execution of land against which lien established

If all or any part of the land or buildings against which a mechanic's lien has been established pursuant to this subtitle shall be sold under foreclosure or a judgment, execution or any other court order, all liens and encumbrances on such property shall be satisfied in accordance with their priority, subject to the limitation in the next sentence of this section. If the proceeds of the sale are insufficient to satisfy all liens established pursuant to this subtitle, then all proceeds available to satisfy each such lien shall be stated by the court auditor as one fund, and the amount to be disbursed to satisfy each lien established pursuant to this subtitle shall bear the same proportion to that fund as the amount of such lien bears to the total amount secured by all such liens, without regard to priority among such liens.

§ 9-109. Expiration of right to enforce lien

The right to enforce any lien established under this subtitle expires at the end of one year from the day on which the petition to establish the lien was first filed. During this time the claimant may file a petition in the lien proceedings to enforce the lien or execute on any bond given to obtain a release of the land and building from the lien. If such petition is filed within the one-year period, the right to a lien or the lien, or any bond given to obtain a release of lien, shall remain in full force and effect until the conclusion of the enforcement proceedings and thereafter only in accordance with the decree entered in the case.

§ 9-110. No waiver by giving credit or taking security

No person having the right to establish a mechanics' lien waives the right by granting a credit, or receiving a note or other security, unless it is received as payment or the lien right is expressly waived.

§ 9-111. Right to institute personal action

Nothing in this subtitle affects the right of any person, to whom any debt is due for work done or material furnished, to maintain any personal action against the owner of the building or any other person liable for the debt.

§ 9-112. Subtitle a remedial law; amendment to proceedings

This law is remedial and shall be so construed to give effect to its purpose. Any amendment shall be made in the proceedings, commencing with the claim or lien to be filed and extending to all subsequent proceedings, as may be necessary and proper. However, the amount of the claim or lien filed may not be enlarged by amendment.

§ 9-113. Prohibited provisions in executory contracts

(a) In general. -- An executory contract between a contractor and any subcontractor that is related to construction, alteration, or repair of a building, structure, or improvement may not waive or require the subcontractor to waive the right to:

(1) Claim a mechanics' lien; or
(2) Sue on a contractor's bond.

(b) Provisions conditioning payment to subcontractor on payment of contractor. -- A provision in an executory contract between a contractor and a subcontractor that is related to construction, alteration, or repair of a building, structure, or improvement and that conditions payment to the subcontractor on receipt by the contractor of payment from the owner or any other third party may not abrogate or waive the right of the subcontractor to:

(1) Claim a mechanic's lien; or

(2) Sue on a contractor's bond.

(c) Void provisions. -- Any provision of a contract made in violation of this section is void as against the public policy of this State.

§ 9-114. Releases from material suppliers and subcontractors

(a) At the time of settlement or payment in full between a contractor and an owner, the contractor shall give to the owner a signed release of lien from each material supplier and subcontractor who provided work or materials under the contract.

(b) An owner is not subject to a lien and is not otherwise liable for any work or materials included in the release under subsection (a) of this section.

§ 9-201. Moneys to be held in trust; commingling

(a) Moneys to be held in trust. -- Any moneys paid under a contract by an owner to a contractor, or by the owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, shall be held in trust by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.

(b) Commingling. --

(1) Nothing contained in this subtitle shall be construed as requiring moneys held in trust by a contractor or subcontractor under subsection (a) of this section to be placed in a separate account.

(2) If a contractor or subcontractor commingles moneys held in trust under this section with other moneys, the mere commingling of the moneys does not constitute a violation of this subtitle.

§ 9-202. Liability for fraudulent retention or use of moneys held in trust under § 9-201 of this subtitle

Any officer, director, or employee of any contractor or subcontractor, who, with intent to defraud, retains or uses the moneys held in trust under § 9-201 of this subtitle, or any part thereof, for any purpose other than to pay those subcontractors for whom the moneys are held in trust, shall be personally liable to any person damaged by the action.

§ 9-203. Misuse of funds prima facie evidence of intent to defraud

The use by a contractor or subcontractor or any officer, director, or employee of a contractor or subcontractor of any moneys held in trust under § 9-201 of this subtitle, for any other purpose than to pay those subcontractors who did work or furnished materials, or both, for or about the building, shall be prima facie evidence of intent to defraud in a civil action.

§ 9-204. Applicability of subtitle; definitions

(a) In general. -- This subtitle applies to contracts subject to Title 17, Subtitle 1 of the State Finance and Procurement Article, known as the "Maryland Little Miller Act", as well as property subject to § 9-102 of this title.

(b) Exceptions contracts. -- This subtitle does not apply to:

(1) A contract for the construction and sale of a single family residential dwelling; or

(2) A home improvement contract by a contractor licensed under the Maryland Home Improvement Law.

(c) Definitions. -- In this subtitle, "owner", "contractor", and "subcontractor" have the same meanings as in § 9-101 of this title.

§ 9-301. Definitions

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Contract. --

(1) "Contract" means an agreement of any kind or nature, express or implied, for doing work or furnishing materials, or both, for or about a building.

(2) "Contract" includes an agreement for:

(i) The erection, repair, rebuilding, or improvement of a building;

(ii) The drilling and installation of wells to supply water;

(iii) The construction or installation of any swimming pool or fencing;

(iv) The grading, filling, landscaping, and paving of the premises;

(v) The installation of waterlines, sanitary sewers, storm drains, or streets; or

(vi) The erection, repair, rebuilding, or improvement of a wharf.

(c) Contractor. -- "Contractor" means a person who has a contract with an owner.

(d) Owner. -- "Owner" means:

(1) The owner of the land; or
(2) An owner's tenant for life or for years, provided the tenant enters into the contract with the contractor.

(e) Subcontractor. --

(1) "Subcontractor" means a person who has a contract with anyone except the owner or the owner's agent.

(2) "Subcontractor" includes a supplier.

(f) Undisputed amount. -- "Undisputed amount" means an amount owed on a contract for which there is no good faith dispute, including any retainage withheld.

§ 9-302. Prompt payment

(a) In general; exception. -- Except for work done or materials furnished under a contract enumerated in § 9-304 of this subtitle, a contractor or subcontractor who does work or furnishes material under a contract shall be entitled to prompt payment under subsection (b) of this section.

(b) Time for payments. --

(1) If the contract is with an owner, the owner shall:

(i) If the contract does not provide for specific dates or times of payment, pay to the contractor undisputed amounts owed under the terms of the written contract, within the earlier of:

30 days after the day on which the occupancy permit is granted; or

30 days after the day on which the owner or the owner's agent takes possession; or

(ii) If the contract provides for specific dates or times of payment, pay to the contractor undisputed amounts owed within 7 days after the date or time specified in the contract.

(2) Paragraph (1) of this subsection does not apply to any contract between the contractor and:

(i) The State;

(ii) A county;

(iii) A municipal corporation;

(iv) A board of education; or

(v) A public authority or instrumentality.

(3) If the contract is not with an owner, the contractor or subcontractor shall pay undisputed amounts owed to its subcontractors within 7 days after receipt by the contractor or subcontractor of each payment received for its subcontractors' work or materials.

§ 9-303. Remedies

(a) In general. -- In addition to any other remedy provided under any other provision of law, a court of competent jurisdiction, for good cause shown may:

(1) Award any equitable relief for prompt payment of undisputed amounts that it considers necessary, including the enjoining of further violations; and

(2) In any action, award to the prevailing party:

(i) Interest from the date the court determines that the amount owed was due; and

(ii) Any reasonable costs incurred.

(b) Attorneys' fees. -- If a court determines that an owner, contractor or subcontractor has acted in bad faith by failing to pay any undisputed amounts owed as required under § 9-302 of this subtitle, the court may award to the prevailing party reasonable attorney's fees.

§ 9-304. Exceptions

This subtitle does not:

(1) Affect the rights of contracting parties under Title 9, Subtitle 1 of this article;

(2) Apply to a contract for the construction and sale of a single family residential dwelling;

(3) Apply to any transaction under the Custom Home Protection Act, Title 10, Subtitle 5 of this article; and

(4) Apply to a home improvement contract by a contractor licensed under the Maryland Home Improvement Law.

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