

Act No. 572
Public Acts of 2006
Approved by the Governor
December 30, 2006
Filed with the Secretary of State
January 3, 2007
EFFECTIVE DATE: January 3, 2007

**STATE OF MICHIGAN
93RD LEGISLATURE
REGULAR SESSION OF 2006**

Introduced by Senators Garcia and Bernero

ENROLLED SENATE BILL No. 405

AN ACT to amend 1980 PA 497, entitled "An act to establish, protect, and enforce by lien the rights of persons performing labor or providing material or equipment for the improvement of real property; to provide for certain defenses with respect thereto; to establish a homeowner construction lien recovery fund within the department of licensing and regulation; to provide for the powers and duties of certain state officers; to provide for the assessments of certain occupations; to prescribe penalties; and to repeal certain acts and parts of acts," by amending sections 110, 115, 202, 203, 204, and 206 (MCL 570.1110, 570.1115, 570.1202, 570.1203, 570.1204, and 570.1206), section 110 as amended by 2001 PA 151, sections 115 and 203 as amended by 1982 PA 17, and sections 202 and 206 as amended by 1981 PA 191.

The People of the State of Michigan enact:

Sec. 110. (1) A contractor shall provide a sworn statement to the owner or lessee in each of the following circumstances:

(a) When payment is due to the contractor from the owner or lessee or when the contractor requests payment from the owner or lessee.

(b) When a demand for the sworn statement has been made by or on behalf of the owner or lessee.

(2) A subcontractor shall provide a sworn statement to the owner or lessee when a demand for the sworn statement has been made by or on behalf of the owner or lessee and the owner or lessee has complied with the requirements of subsection (6).

(3) A subcontractor shall provide a sworn statement to the contractor when payment is due to the subcontractor from the contractor or when the subcontractor requests payment from the contractor.

(4) A sworn statement shall list each subcontractor and supplier with whom the person issuing the sworn statement has contracted relative to the improvement to the real property. The sworn statement shall contain a list of laborers with whom the person issuing the sworn statement has contracted relative to the improvement to the real property and

SWORN STATEMENT

(5) The contractor or subcontractor is not required to list in the sworn statement material furnished by the contractor or subcontractor out of his or her own inventory that was not purchased specifically for performing the contract.

(6) On receipt of a sworn statement, the owner, lessee, or designee shall give notice of its receipt, either in writing, by telephone, or personally, to each subcontractor, supplier, and laborer who has provided a notice of furnishing under section 109 or, if a notice of furnishing is excused under section 108 or 108a, to each subcontractor, supplier, and laborer named in the sworn statement. If a subcontractor, supplier, or laborer who has provided a notice of furnishing or who is named in the sworn statement makes a request, the owner, lessee, or designee shall provide the requester a copy of the sworn statement within 10 business days after receiving the request.

(7) After the contractor or subcontractor provides the sworn statement, the owner or lessee may withhold or, upon written demand from the contractor, shall withhold from the amount due or to become due to the contractor or to the subcontractor for work already performed an amount sufficient to pay all sums due to subcontractors, suppliers, or laborers, as shown by the sworn statement, or due to lien claimants who have provided a notice of furnishing under section 109. From the amount withheld, the owner or lessee may directly pay subcontractors, suppliers, or laborers the amount they are due as shown by the sworn statement. If the contract provides for payments by the owner to the general contractor in the normal course of construction, but the owner elects to pay lien claimants directly under this section, the first time the owner elects to make payment directly to a lien claimant, he or she shall provide at least 5 business days' notice to the general contractor of the intention to make direct payment. Subsequent direct disbursements to lien claimants need not be preceded by the 5-day notice provided in this section unless the owner first returns to the practice of paying all sums to the general contractor. As between the owner or lessee and the contractor or subcontractor, all payments made under this subsection are considered the same as if paid directly to the contractor or subcontractor. If an amount is withheld under this subsection from the contractor or subcontractor, the owner or lessee, upon request, shall prepare and provide to the contractor or subcontractor an itemized statement of the sums withheld. If an amount is paid directly to a lien claimant under this section, the owner or lessee shall, if requested by the contractor or subcontractor, provide to the contractor or subcontractor an itemized statement of the sums paid.

(8) An owner, lessee, designee, mortgagee, or contractor may rely on a sworn statement prepared by a party other than himself or herself to avoid the claim of a subcontractor, supplier, or laborer unless the subcontractor, supplier, or laborer has provided a notice of furnishing as required under section 109 or unless the notice of furnishing is excused under section 108 or 108a.

(9) If a contractor fails to provide a sworn statement to the owner or lessee before recording the contractor's claim of lien, the contractor's construction lien is not invalid. However, the contractor is not entitled to any payment, and a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien, until the sworn statement has been provided.

(10) If a subcontractor fails to provide a sworn statement under subsection (2) to the owner or lessee before recording the subcontractor's claim of lien, the subcontractor's construction lien is valid. However, a complaint, cross-claim, or counterclaim may not be filed to enforce the construction lien until the sworn statement has been provided.

(11) A contractor or subcontractor who desires to draw money and gives or causes to be given to any owner or lessee a sworn statement required by this section that is false, with intent to defraud, is guilty of a crime as follows:

(a) If the statement involved is for less than \$200.00, the contractor or subcontractor is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00 or 3 times the statement amount, whichever is greater, or both imprisonment and a fine.

(b) If any of the following apply, the contractor or subcontractor is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$2,000.00 or 3 times the statement amount, whichever is greater, or both imprisonment and a fine:

(i) The statement involved is for \$200.00 or more but less than \$1,000.00.

(ii) The statement involved is for less than \$200.00 and the contractor or subcontractor has 1 or more prior convictions for committing or attempting to commit an offense under this act.

(c) If any of the following apply, the contractor or subcontractor is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$10,000.00 or 3 times the statement amount, whichever is greater, or both imprisonment and a fine:

(i) The statement involved is for \$1,000.00 or more but less than \$20,000.00.

(ii) The statement involved is for more than \$200.00 but less than \$1,000.00 and the contractor or subcontractor has 1 or more prior convictions for violating or attempting to violate this act. For purposes of this subparagraph, however, a prior conviction does not include a conviction for a violation or attempted violation described in subdivision (a) or (b)(ii).

(d) If any of the following apply, the contractor or subcontractor is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$15,000.00 or 3 times the statement amount, whichever is greater, or both imprisonment and a fine:

(i) The statement involved is for \$20,000.00 or more.

(ii) The statement involved is for \$1,000.00 or more but less than \$20,000.00 and the contractor or subcontractor has 2 or more prior convictions for committing or attempting to commit an offense under this act. For purposes of this subparagraph, however, a prior conviction does not include a conviction for a violation or attempted violation described in subdivision (a) or (b)(ii).

(12) For purposes of subsection (11), statements involved in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total amount involved in the statements.

(13) If the prosecuting attorney intends to seek an enhanced sentence for a violation under this section based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include in the complaint and information a statement listing the prior conviction or convictions. The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing. The existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, 1 or more of the following:

(a) A copy of the judgment of conviction.

(b) A transcript of a prior trial, plea-taking, or sentencing.

(c) Information contained in a presentence report.

(d) The defendant's statement.

(14) If the sentence for a conviction under this section is enhanced by 1 or more convictions, those prior convictions shall not be used to further enhance the sentence for the conviction pursuant to section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

Sec. 115. (1) A person shall not require, as part of any contract for an improvement, that the right to a construction lien be waived in advance of work performed. A waiver obtained as part of a contract for an improvement is contrary to public policy, and shall be invalid, except to the extent that payment for labor and material furnished was actually made to the person giving the waiver. Acceptance by a lien claimant of a promissory note or other evidence of indebtedness from an owner, lessee, or contractor shall not of itself serve to waive or discharge otherwise valid construction lien rights.

(2) A lien claimant who receives full payment for his or her contract shall provide to the owner, lessee, or designee a full unconditional waiver of lien.

(3) A lien claimant who receives partial payment for his or her contract shall provide to the owner, lessee, or designee a partial unconditional waiver of the lien for the amount which the lien claimant has received, if the owner, lessee, or designee requests the partial unconditional waiver.

(4) A partial conditional waiver of lien or a full conditional waiver of lien shall be effective upon payment of the amount indicated in the waiver.

(5) For purposes of this act, retainage that is not payable under a contract until the happening of a certain event in addition to the providing of an improvement is not due as of the date of the providing of the improvement.

(6) A waiver of a lien under this section shall be effective when a person makes payment relying on the waiver unless at the time payment was made the person making the payment has written notice that the consideration for the waiver has failed.

(7) Subject to subsection (8), an owner, lessee, or designee shall not rely on a full or partial unconditional or conditional waiver of lien provided by a person other than the lien claimant named in the waiver if the lien claimant has either filed a notice of furnishing under section 109 or is excused from filing a notice of furnishing under section 108 or 108a unless the owner, lessee, or designee has first verified the authenticity of the lien waiver with the lien claimant either in writing, by telephone, or personally.

(8) An agent who is authorized to prepare and serve a notice of furnishing or to prepare, record, and serve a claim of lien on behalf of a laborer or group of laborers is automatically authorized to provide and responsible for providing waivers of lien, unless or until the laborer or group of laborers notifies the designee in writing that someone other than the agent is authorized to provide appropriate waivers. An individual laborer may also provide waivers under this section instead of the agent.

(9) The following forms shall be used in substantially the following format to execute waivers of construction liens:

(a) **PARTIAL UNCONDITIONAL WAIVER**

I/we have a contract with to
(other contracting party)
provide for the improvement to the property
described as , and
by signing this waiver waive my/our construction lien to the amount of \$..... , for labor/materials provided
through
(date)

This waiver, together with all previous waivers, if any, (circle one) does does not cover all amounts due to me/us for contract improvement provided through the date shown above.

If the owner or lessee of the property or the owner's or lessee's designee has received a notice of furnishing from me/one of us or if I/we are not required to provide one, and the owner, lessee, or designee has not received this waiver directly from me/one of us, the owner, lessee, or designee may not rely upon it without contacting me/one of us, either in writing, by telephone, or personally, to verify that it is authentic.

.....
.....
(signature of lien claimant)

Signed on: Address:
(date)
Telephone:

DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.

(b) **PARTIAL CONDITIONAL WAIVER**

I/we have a contract with to
(other contracting party)
provide for the improvement to the property
described as: , and
by signing this waiver waive my/our construction lien to the amount of \$..... , for labor/materials provided
through
(date)

This waiver, together with all previous waivers, if any, (circle one) does does not cover all amounts due to me/us for contract improvement provided through the date shown above. This waiver is conditioned on actual payment of the amount shown above.

If the owner or lessee of the property or the owner's or lessee's designee has received a notice of furnishing from me/one of us or if I/we are not required to provide one, and the owner, lessee, or designee has not received this waiver directly from me/one of us, the owner, lessee, or designee may not rely upon it without contacting me/one of us, either in writing, by telephone, or personally, to verify that it is authentic.

.....
.....
(signature of lien claimant)

Signed on: Address:
(date)
Telephone:

DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.

(c)

FULL UNCONDITIONAL WAIVER

My/our contract with to
(other contracting party)

provide for the improvement of the property
described as: has been
fully paid and satisfied. By signing this waiver, all my/our construction lien rights against the described property are
waived and released.

If the owner or lessee of the property or the owner's or lessee's designee has received a notice of furnishing from me/one
of us or if I/we are not required to provide one, and the owner, lessee, or designee has not received this waiver directly
from me/one of us, the owner, lessee, or designee may not rely upon it without contacting me/one of us, either in writing,
by telephone, or personally, to verify that it is authentic.

.....
.....
(signature of lien claimant)

Signed on: Address:
(date)
Telephone:

DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.

(d)

FULL CONDITIONAL WAIVER

My/our contract with to
(other contracting party)

provide for the improvement of the property
described as: has been
fully paid and satisfied. By signing this waiver, all my/our construction lien rights against the described property are
waived and released.

This waiver is conditioned on actual payment of

If the owner or lessee of the property or the owner's or lessee's designee has received a notice of furnishing from me/one
of us or if I/we are not required to provide one, and the owner, lessee, or designee has not received this waiver directly
from me/one of us, the owner, lessee, or designee may not rely upon it without contacting me/one of us, either in writing,
by telephone, or personally, to verify that it is authentic.

.....
.....
(signature of lien claimant)

Signed on: Address:
(date)
Telephone:

DO NOT SIGN BLANK OR INCOMPLETE FORMS. RETAIN A COPY.

Sec. 202. (1) The director of the department shall manage the fund according to this act. A detailed financial
statement of the condition of the fund shall be published by the director annually. The fund shall be subject to an audit
by the auditor general. The state treasurer shall deposit or invest money from the fund, in the same manner as and
subject to all provisions of law that apply to the deposit or investment of state funds by the state treasurer, and interest
earned shall be credited to the fund. The unexpended fund balance shall carry forward to the new fiscal year at the end
of each fiscal year.

(2) The department may employ office clerical and professional help and claims investigators as necessary to carry
out this act. The attorney general shall assign members of his or her staff and may supplement that staff by contracting
with private attorneys as necessary to adequately defend actions against the fund. All wages, professional fees, and
other administrative expenditures necessary for operation and defense of the fund, including legal counsel, shall be
charged to and payable from the fund. Except for legal counsel fees, the amount paid in a fiscal year for wages,
professional fees, and other administrative expenditures shall not exceed 20% of the average of the ending balances in
the fund for the previous 2 fiscal years.

Sec. 203. (1) A claim of construction lien does not attach to a residential structure, to the extent payments have been made, if the owner or lessee files an affidavit with the court indicating that the owner or lessee has done all of the following:

(a) Paid the contractor for the improvement to the residential structure according to the contract, indicating in the affidavit the amount of the payment. The owner or lessee shall attach to the affidavit copies of the contract, any change orders, and any evidence of the payment that the owner or lessee has, including, but not limited to, a canceled check or a credit card or other receipt.

(b) Not colluded with any person to obtain a payment from the fund.

(c) Cooperated and will continue to cooperate with the department in the defense of the fund.

(2) If there is no written contract as required by section 114, the filing of an affidavit under this section creates a rebuttable presumption that the owner or lessee has paid the contractor for the improvement. The presumption may be overcome only by a showing of clear and convincing evidence to the contrary.

(3) Subject to section 204, a person who has recorded a claim of lien and who is precluded from having a construction lien under subsection (1) may recover from the fund the amount he or she would have been entitled to recover but for subsection (1). A person who seeks recovery from the fund shall establish all of the following:

(a) That he or she would be entitled to a construction lien on a residential structure except for the defense provided in subsection (1).

(b) That payment was made by the owner or lessee to the contractor or subcontractor.

(c) That the contractor or subcontractor has retained or used the proceeds or any part of the proceeds paid to the contractor or subcontractor without having paid the person claiming the construction lien.

(d) That he or she has complied with section 201.

(e) That he or she has not colluded with another person to obtain a payment from the fund.

(f) That he or she has complied with any applicable licensing acts.

(g) That he or she has made a reasonable effort to obtain payment from the contractor or subcontractor.

(h) That the contractor or subcontractor with whom the person claiming the construction lien contracted is licensed if required by law to be licensed.

(i) That the contractor or subcontractor with whom the person claiming the construction lien contracted is the same individual or legal entity with whom the owner or lessee contracted.

(j) If the person claiming the construction lien is a supplier, that he or she has documentary proof that, unless the supplier had provided material or equipment to the contractor or subcontractor within the preceding year, before he or she provided the material or equipment that is the subject of the lien without obtaining advance payment in full, he or she did both of the following:

(i) Required the contractor or subcontractor to whom he or she provided the material or equipment to complete and submit a credit application.

(ii) Before beginning to supply material or equipment to the contractor or subcontractor without obtaining advance payment in full, did either of the following, as applicable:

(A) If the contractor or subcontractor is a corporation whose shares are publicly traded, obtained a report on the contractor or subcontractor from a nationally or regionally recognized organization that provides credit ratings of businesses to determine the financial stability of the contractor or subcontractor.

(B) If sub-subparagraph (A) does not apply, did both of the following:

(I) Obtained a credit report on the owner or qualifying officer or the principal partners, officers, shareholders, or members of the contractor or subcontractor to determine the financial stability of the contractor or subcontractor.

(II) If the contractor or subcontractor is less than 4 years old, obtained a personal guaranty from the owner or 1 or more of the partners, officers, directors, managing members, trustees, or shareholders of the contractor or subcontractor.

(k) If the person claiming the construction lien is a supplier seeking to recover for material or equipment supplied to a contractor or subcontractor without obtaining advance payment in full, that a credit report obtained by the supplier on the contractor or subcontractor did not disclose any of the following:

(i) That the contractor or subcontractor was, at the time of the application, or had been, within 2 years before the application, insolvent.

(ii) That the contractor or subcontractor was, at the time of the application, subject to a receivership.

(iii) Total delinquent judgments of more than \$1,000.00.

(4) A subcontractor, supplier, or laborer who seeks enforcement of a construction lien on a residential structure through foreclosure shall join the fund as a defendant in the foreclosure action within the period provided in section 117(1). The subcontractor, supplier, or laborer shall serve a summons and complaint on the office of the fund administrator within the department by certified or registered mail or by leaving a copy at the office. The failure to serve a summons and complaint under this subsection bars recovery from the fund. After a defendant is served with a

summons and complaint in an action to foreclose a construction lien, the department may intervene in the action as a party defendant with respect to other construction liens.

(5) The attorney general shall make every reasonable effort to defend the fund and may assert any defense to a claim of lien that would have been available to the owner or lessee.

(6) A payment from the fund shall not include interest on the unpaid principal amount due, including, but not limited to, a time-price differential or a finance charge, that accrued after 90 days after the claim of lien was recorded.

(7) A payment from the fund to a supplier shall not include money due for material or equipment supplied to a contractor or subcontractor without obtaining advance payment in full if either of the following applies:

(a) The contractor or subcontractor was delinquent in paying the supplier for material or equipment for more than the following number of days after the first business day of the month following the shipment of the material or equipment:

(i) In 2007, 180 days.

(ii) In 2008, 150 days.

(iii) In 2009, 120 days.

(iv) In 2010 and each year after 2010, 90 days.

(b) The contractor or subcontractor was indebted to the supplier in an amount equal to or more than the credit limit established by the supplier for the contractor or subcontractor at the time the material or equipment was supplied.

(8) Payment from the fund shall be made only if the court finds that a subcontractor, supplier, or laborer is entitled to payment from the fund. Subject to section 204, after the judgment has become final the department shall pay the amount of the judgment out of the fund.

Sec. 204. The department shall not pay out of the fund to subcontractors, suppliers, and laborers more than \$100,000.00 per residential structure. When it appears that the amount claimed from the fund with respect to a residential structure will exceed \$100,000.00, the department may delay payment until the total amount to be paid can be ascertained. If the total amount payable to subcontractors, suppliers, and laborers exceeds \$100,000.00, they shall be paid their proportional shares of that amount.

Sec. 206. (1) The department shall maintain a website. If the department makes a payment from the fund as the result of a contractor's failure to pay a subcontractor or supplier, the department shall post on the website the name and license number of the contractor and the name and license number of any qualifying officer of the contractor. The website shall be designed to allow a visitor to search the posted names and license numbers of contractors and qualifying officers.

(2) If the department makes a payment from the fund as the result of a licensee's failure to pay a lien claimant, the department shall enter a complaint against the licensee with the appropriate licensing agency to be addressed by the disciplinary proceedings under the appropriate licensing law.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No. 459 of the 93rd Legislature is enacted into law.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Ray E. Randall

Clerk of the House of Representatives

Approved _____

Governor