

Public Policy Position
HB 4668

The Real Property Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,545 members. The Real Property Law Section is not the State Bar of Michigan and the position expressed herein is that of the Real Property Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Real Property Law Section has a public policy decision-making body with 17 members. On May 12, 2021, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 1 member did not vote.

Oppose

Explanation:

Background: The Construction Lien Act, MCL 570.1114 and MCL 570.1115 provides that a contractor does not have a right to a lien for an improvement to a residential structure unless the contractor has a written contract (with all amendments and additions in writing) including a statement that the builder or maintenance and alteration contractor must be licensed, an affirmative statement of licensing, and license number. If the contractor was not licensed, the owner of property may bring an action to discharge the lien and recover all damages from recording and any attempts to enforce the lien, including actual costs and attorney fees. A contractor who attempts to recover has the burden of proving that he or she was properly licensed.

Expanded enforcement: HB 4668 would amend the act to require the contractor recording a lien claim to

display the contractor's license and, if the contractor is an individual, the contractor's personal identification when recording a claim of lien ... If the claim of lien is not presented in person, the contractor shall attach to the claim of lien copies of the contractor's license and personal identification.

The register of deeds is instructed not to accept a claim of lien without these. A contractor who violates this section would be guilty of a misdemeanor.

In short, the bill attempts to avoid improper liens by (1) having the register of deeds act as a gatekeeper, (2) allowing recovery of actual costs and fees, and (3) making violation a misdemeanor. Our objection is to the new role for the register of deeds. That is not and should not be the role of

the register of deeds in accepting documents for record, puts the register in an untenable position, and creates a host of problems, even if the contractor and register follow all of these procedures.

First, registers of deeds ensure that instruments are in proper form for recording with signatures, acknowledgments, and addresses. If the instrument meets those requirements, it is recorded. The contents and the effect of the contents are not the business of the register of deeds.

Registers of deeds are not equipped to know or determine whether property for which a lien is claimed is residential property. They would not know whether there is a contract for the improvements meeting the terms of the statute or, to state the obvious, whether the money claimed is actually owed. With recent amendments taking account of mixed-use projects, the task only becomes more complicated. There is no system for the register to track the identification required, to know whether the license is or was current at the time of the contract or construction, and, if the lien claim is signed by someone other than the licensee, whether it is properly authorized.

For a licensed contractor, standard practice (as in many real estate transactions) is to record at the deadline. If the register holds up the recording to check documentation, review the property description to determine if the property is residential, or address other questions, there is a good chance that in a number of cases, the filing will miss the deadline. Moreover, acceptance of the claim if it meets these requirements may be taken to give some presumptive validity to the claim which it may not deserve.

It is unfortunate that unscrupulous or misguided contractors may record liens when they were not or are not properly licensed, but there is no magic fix to having an entity equipped to determine facts determine that the requirements for a lien are not met. That is true as to any number of recorded instruments. The provision for recovery of actual costs and fees is obviously intended to alleviate that if the matter goes to court. The addition of a criminal penalty may not only give unlicensed contractors pause before filing an improper lien, but also give a prosecutor's office leverage to have the lien removed without the owner having to file suit.

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