ANTICIPATED TESTIMONY OF STANLEY B. EDELSTEIN ON BEHALF OF MECHANICAL CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, INC.
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My name is Stanley Edelstein. I am a principal of the law firm Jacoby Donner, P.C. in Philadelphia, and speak today on behalf of the Mechanical Contractors Association of Eastern Pennsylvania, an organization of contractors that perform plumbing, heating, ventilation and air-conditioning work primarily on commercial, industrial and institutional projects, including some of the largest projects in the Commonwealth. I speak with more than 30 years experience representing contractors, subcontractors, owners, developers, suppliers and design professionals. Since 1998 the Pennsylvania Bar Institute—the continuing legal education arm of the Pennsylvania Bar Association—has given me both the task and honor of updating course materials and teaching the "Recent Developments" section of the Mechanics Lien Seminar it presents every two years in Pittsburgh, Mechanicsburg and Philadelphia, and by video link to other counties located throughout the Commonwealth. I believe my experience with mechanics liens on a day-to-day basis is as extensive as any that of any practitioner in Pennsylvania.

Although I am here today specifically on behalf of the MCA, I believe the sentiments I express today are shared by all subcontractors throughout the Commonwealth, and that at least some of them are shared by contractors as well.

At the outset, we share the goal of preventing "surprise" liens after an owner or contractor has made final payment—and are prepared to work to find a workable and fair solution to that concern. As presently written, HB1602 doesn't accomplish that.

Before commenting on the specific provisions of that bill, it is important to place that bill—and the lien law as currently written—in the context of commercial realities as they exist in 2011, and that affect your neighbors and constituents.

Mechanics liens are not some sort of evil conjured up to hurt people; to the contrary, they date back to the earliest days of our nation to induce builders—back then they were generally individual craftsmen, and they *were* called mechanics—to provide their skills and material on credit to someone who wanted something built. The lien was a statutory security for payment of the debt created by the work furnished by the mechanic.

Today, things are not as uncomplicated as they once were: construction is almost always done by companies, with specialized skills never dreamed of in the 1800s performed by a broad array of specialty contractors. But one thing is unchanged: at least for non-residential construction, the contractor or subcontractor furnishing the material, equipment and labor is doing so solely in the expectation that it will be paid, somewhere down the line: 30,50,90 or more days after providing that work. And 30,50 or 90 or more days after laying out payment to its workers (who are paid weekly or at most, bi-weekly) and its suppliers. This is not like residential work, where the owner pays a deposit in advance.

Instead, the owner and higher-tier contractors hold money back, 10% (sometimes reduced to 5%) as retainage until the last payment. This puts every contractor at risk of non-payment.

And the impact of non-payment generates more than mere ripples. According to the Bureau of Labor Statistics figures for 2008—the last year prior to the terrible recession impact on construction—as an industry, construction was one of the largest employers in the nation. One generally doesn't think of construction as "big business", but that's because the industry is so dispersed. The vast majority of contractors are closely held family businesses; they employ carpenters, electricians, plumbers, tile setters, HVAC installers, glaziers and others. They are your constituents. And when they don't get paid, they can go out of business, and their employees can be out of a job.

The Mechanics Lien Law, and the fact that a contractor can file a lien, is a powerful incentive to making sure those who furnish work get paid, and to getting contractors to take the risk of furnishing work without a deposit in the first place.

As I turn to the provisions of the bill, its important to make one thing clear: to the extent the motivation for some of these changes is to help homeowners—and I see that a representative of the Board of Realtors will speak later this morning—there is no reason for the proposed changes. The 2006 Amendments to the lien law continued the practice of allowing up-front waivers for work involving a "residential building", and the 2009 amendments—changing that to residential property expanded the universe of projects where an owner could seek an upfront waiver. Some of the difficulties experienced after the 2006 amendments became effective in 2007 were a result of a transition from the older version of the law to the new one. Today, waivers seem to be almost universal on work involving the now more-broadly defined definition of residential property, and to the extent that an owner or higher tier-contractor obtains a waiver, none of the changes sought by the proposal before the Committee are necessary: if the right to lien is waived, then it doesn't matter how long a party has to file a lien, or whether the owner knew the identity of a second-tier subcontractor. And it appears that problems that arose in residential construction after 2007 are driving these changes.

But as proposed, HB 1602 hits contractors, subcontractors and suppliers on non-residential work especially harshly.

I'll start with the one proposed change that I believe contractors and subcontractors can agree upon, which is the proposal that Section 502(a)(1) be changed to reduce the time for filing a lien from six to four months. The harm to those furnishing the actual work of the project far outweighs any benefit to the owner or anyone related to the owner. Whatever payment cycles may have existed before late 2008, the notion of a 30-day payment cycle today is, for the most part, sheer fantasy. Given current economic conditions, payment cycles of 60 days are commonplace, and 90 to even 180 days are not uncommon.

Because subcontractors are required to give 30 days advance notice before filing a lien they need to be geared up within five months with a six-month deadline and 90 days with a four month deadline. That 90 days often fall within what today constitutes a normal pay cycle. Contrary to what some

of my friends from the owner or lender community may want the Committee to believe, contractors and subcontractors don't like to file liens, often agonize over doing so. Remember, in the private sector, this is often a business built on relationships. Anything that requires a shorter lien filing period will almost certainly result in more liens being filed. This can't be good for anyone.

I won't purport to speak for contractors when it comes to all of Section 501, but from the subcontractor perspective, it appears to be an all-out assault on the practical ability to file a lien. There are at least four problems with the proposed preliminary notice requirement:

1. The notion of constructive notice—filing with the prothonotary—is a fiction. As a practical matter lower tiers do not, and often cannot check lien dockets. Not every county makes records available online, and when they do, they are often not easy to work with.

2. The concept that a contractor must provide a copy of the Owner's notice to a subcontractor *that requests it seems* calculated to assure that as many subcontractors as possible lose their right to file a lien. If the Owner files a notice, it should be mandatory that the contractor deliver that notice to each subcontractor, and to each sub-subcontractor and supplier of which the contractor becomes aware. As written, Section 501 appears to want to keep knowledge of the notice hidden from those who do not check the public filings or know to ask the contractor for a copy of the notice. With respect to the requirement that an owner or contractor post the notice "at the time physical work commences upon the property" there is no requirement that such posting be maintained. Most subcontractors are not present when work begins, and some do not come on site until close to the end of the job (i.e. painters, landscapers, etc)

3. If the Committee decides to follow the "Notice of Commencement" route (a move the MCA opposes in its current form), Section 501 should be modified to place the burden on the Contractor to get that notice out on as widespread a basis as possible. The 2006 Amendments provide that requiring a waiver of lien rights without payment violates the public policy of the Commonwealth. A requirement that backdoors to the

same effect shouldn't become law. But proposed Section 501does precisely that.

4. With respect to the requirement that a subcontractor furnish notice within 20 days of first work or services, because with specialty trades there is often pre-jobsite work that may predate the Notice of Commencement, the timing should run from work first performed at the jobsite. Also, the 20 day period is unreasonably short. Extending it to 60 days would not harm the owner, but might facilitate the subcontractor actually learning of the requirement and complying with it.

5. There is no reason to burden the subcontractor with providing the information set forth under Section 501((b)(3). If the problem requiring a solution is that the owner wants to know about "strangers" performing work, the only information necessary is that the subcontractor identify itself, provide a general description of what it is doing, and provide information how it can be reached. That is more than enough to allow the owner or contractor to track whether payment has gotten down to the sub-subcontractor level. The requirement to provide other information—including the machinery and tools and estimated price does nothing to protect the owner, and seems calculated to erect yet another hurdle for a subcontractor to clear before being able to file a lien. Also, the requirement that notice be given by certified mail is a product of a bygone age. Most commercial contracts allow for notice by a nationally recognized overnight delivery service. Those services have better tracking mechanisms than the Postal Service, and if any notice requirement is retained, use of one of them should be an option.

Section 501 (4) creates an ambiguity. For new erection or construction, Section 508(a) provides that except in certain circumstances, the lien relates back to the "date of the visible commencement upon the ground..." The language in Section 501(4) raises the question whether the lien is effective only as of the time services were first performed, or whether it relates back in the manner provided by Section 508(a).

The MCA appreciates that there are competing interests when it comes to mechanics liens, but asks that the Committee keep in mind that the lien law was remedial legislation to incentivize contractors to perform work on the credit of the building, and to make sure that those who improve real property—be they the men and women who work with the tools, or the companies that employ them—constituents all, have a means of getting paid for that work and continuing in business. As written HB 1602 disrupts that purpose, and tilts the balance toward owners and lenders,

Also, the lien law is by nature, technical. I've pointed out some of the problems with how these proposed changes mesh with other provisions of the existing law, and with more time to review and discuss the bill, could find others. This bill was introduced on May 25th, and we have only had this proposed language for about 10 days. Given the importance of the statute, and the number of small businesses that depend upon it, changes should be made with care, and not fast tracked. That said, we remain ready to work toward a mutually acceptable solution.

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