

Querrey  *Harrow*

Copyright © 2005 Querrey & Harrow, Ltd. All Rights Reserved.

Illinois Mechanics Lien Law

*Prepared and Presented
for Educational Purposes Only
by the Attorneys of*

Querrey & Harrow

Contractor's Liens

Presented by

Anthony J. Madormo

ELEMENTS OF A LIEN

- Expressed or Implied Contract
- Contract with Owner or Authorized Person
- Improve Land or Manage Structure
- Furnish Materials, Fixtures, Apparatus, Machinery or Form Work
- Contract to Build, Repair, Alter or Ornament
- Services Performed, Costs Incurred, Property Enhanced

WHO CAN HAVE A LIEN ?

- General Contractor
- Sub-Contractor
- Sub-Sub-Contractor
- Material Suppliers
- Architects
- Engineers
- Construction Manager
(Services During Construction Only)

CONTRACTOR'S LIENS

- Has a Direct Contract With Owner
 - General Contractor
 - Contractor performing repair work on existing structure
 - Architect
 - Engineer
 - Construction Manager
- Two Different Liens Possible
 - Lien Against Property
 - Lien Against Material and Equipment Furnished

REQUIREMENTS FOR A SUBCONTRACTOR'S LIEN

- Contract Between Owner and Contractor
- Contract Between Sub-Contractor & Contractor
- Furnishing Lienable Materials and Services
- Performance or Legal Excuse for Non-Performance



SUB-CONTRACTOR'S LIENS

- Four Possible Liens
 - Lien Against Property
 - Liens Against Material & Equipment Supplied
 - Lien Against General Contractor for Funds Paid for Its Waiver of Lien
 - Lien Against Owner for Funds Held in Retention Account

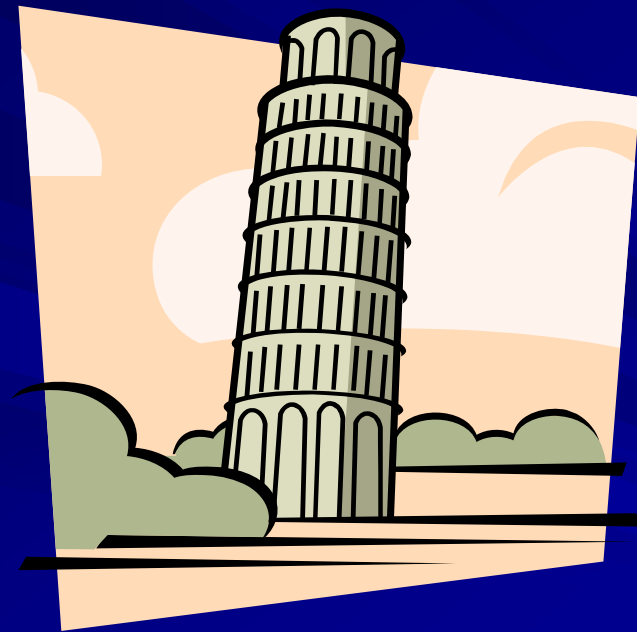
LIMITATIONS AGAINST SUB-CONTRACTOR'S LIENS

- Limited by Contractor's Contract
 - Sub-Contractor's Lien Attaches When Contractor's Lien Attaches
 - Recovery Limited to Subcontract Price Less Payments
 - Extras Must Be Authorized by Owner

REMEDIES AVAILABLE TO SUB-CONTRACTOR

- Cease Working If Default Caused by Owner
- Continue Working If Owner Permits, and Assert Lien Rights
- Remove Material Not Incorporated Into Improvement
- If Finished, Assert Regular Lien Rights

WHAT IS LIENABLE?



NATURE OF IMPROVEMENTS

Any Person Who Contracts With “the Owner of a Lot or Tract of Land, or With Whom the Owner Has Authorized or Knowingly Permitted to Contract, to Improve the Lot or Tract of Land, or to Manage a Structure Thereon, or to Furnish Materials, Fixtures, Apparatus or Machinery” Shall Be Entitled to a Lien.

3 -PART TEST

- Method of Attachment
- Necessary for the Purpose of the Premises
- Whether Intended to Become Part of Real Estate
- Does it enhance the property?



LIENABLE

- ❖ Custom Made Equipment
- ❖ Electrical Wiring System
- ❖ Carpeting
- ❖ Landscaping
- ❖ Demolition & Hauling
- ❖ Materials

NOT LIENABLE

- Cost of Performance Bond
- Cost of Rental Equipment
- Items That Do Not Enhance Property
 - Lockers
 - Shelves
 - Plastic Ductwork

PROPERTY OR INTEREST SUBJECT TO LIEN

Owner is One Who Has Improved
Any Tract or a Lot of Land in Which
He Has an Estate, Right, or
Interest.



EXAMPLES OF OWNERS

- ❖ Trustee Holding Legal Title
- ❖ Beneficiary of Land Trust
- ❖ Lessee
- ❖ Spouses
- ❖ Vendor/Vendee Installment Contract
- ❖ Joint Owners
- ❖ Condominiums

AMOUNT OF LIEN

- ❖ Contract Price Less Amount Paid
- ❖ Fraud Defeats a Lien
- ❖ Quantum Meruit
- ❖ Problem With Extras
- ❖ Cost to Complete



PERFECTION ??

Presented by

Thomas C. Kaufmann

6/14/2005

What is Perfection?

Perfecting a lien makes the lien valid against the property in question and, *if all the proper steps are taken in compliance with the statute*, the lien holder may receive property over not only the owner of the property, but also over third parties, lenders, and other mechanics lien claimants.

My Job for Clients. . .

- ✓ On behalf of contractors → determine how to find perfection when there has been some deviation from the statutory requirements

OR

- ✓ On behalf of lenders & owners → argue that the lien has not been perfected as to my client

Traps to Watch for...

- 4 month recording requirement
- 90 day notice requirement
- 60 day notice requirement



Completion

- Why start with completion?
 - Most perfection requisites are tied to completion date
- Does all work have to be finished?
 - No, just substantial completion
- What extends the completion date?
 - NOT punch list work
 - NOT repair or warranty work
 - NOT maintenance work
 - Extra work generally DOES

Contractor's Claims

- Within four months (not 120 days) after completion, the contractor must either:
 - Record a written mechanics lien claim in the county where the property is located
 - OR
 - File a lawsuit foreclosing its lien
- If a claim is recorded, then contractor has two years to file its claim.
 - Exception → Section 34 notice

What if contractor doesn't record lien OR file suit within time limit?

- If don't file suit within 2 years →
 - No lien!
 - Possible breach of contract action
- If file suit within 2 years, but don't record claim or file suit within 4 months after completion →
 - Lien will prevail against the owner...BUT NOT against 3rd parties

Lien Requirements

- Must be verified by contractor, agent or employer
- Must describe the work that was performed under the contract
- Must claim a balance due after allowing for all credits and setoffs
- Must provide a sufficient description of the lots or tracts of land subject to the lien claim

Other Contractor Issues

- Legal Description
- Allocation (when single contract covers several parcels of land)
 - ✓ NO allocation → If work on all lots completed within 4 months prior to date of lien recording
 - ✓ SHOULD allocate → If work on various lots completed at different times, and not within the 4 months

Subcontractor's Claims

Within 90 days after completion date, send by

1. registered or certified mail with return receipt requested and delivery limited to addressee OR
2. personally serve notice on the owner, his agent, or architect and lender (if known) the following information:
 - ✓ Name of owner
 - ✓ Name of contractor
 - ✓ Value of contract
 - ✓ Description of property subject to lien
 - ✓ Amount Due

Other Subcontractor Issues

- If working on single-family owner residences, must also:
 - Serve notice on owners within 60 days of starting
 - Strictly adhere to statute requirements
 - Serve 60-day notice in same manner as 90-day
- What else besides 60 and 90-day notices?
 - Record claim for lien within 4 months after completion date

Amendment of Lien Claim

- Generally not permitted
 - *Possibly* able to correct owner information
 - No amendment if interested party has relied on the inaccurate information
- Strict conformity with statute is required
- ***GET IT RIGHT THE FIRST TIME!!***

Priorities: Who is Paid First ?

Presented by

Timothy R. Rabel

Public Property vs. Private Property

- a) No preference issues on
Public Property
 - i. Pro-rata

- b) Private Property
 - i. Need to determine priority

Effects of Filing a Lien

- a) Gives notice to world that there is a claim affecting the property
- b) Force sale with judgment
- c) Needs to be addressed when go to sell property or obtain financing
 - 1. Otherwise subsequent purchaser takes subject to

Effects of Filing a Lien

- d) Issue of priority arises when multiple liens on property
 1. Mortgage
 2. Mechanics
 - i. Labor
 - ii. Material
 3. Judgment
 4. Tax
- e) Issue arises when not enough money to pay all claimants

Priorities Under the Act

- ❖ Between contractors and owner
 - ❖ Priority over owner's interest
 - ❖ Homestead interest
 - ❖ Third parties

Priorities Under the Act

- Between contractors
 - Section 15
 - No priority between contractors and subcontractors
 - Section 16, 19, 26
 - Wages for labor have priority, regardless of whether filed before or after a mortgage.

Priorities Under the Act

- Between contractors and mortgagees
 - a) Non-wage labor claimants
 - b) Date of contract
 - c) “First in time, first in right”
 - d) If filed mortgage before contract then contractor is on equal footing to extent enhanced property
 - e) “Lien attaches as of date of contract”,
Section 1

Priorities Under the Act

- Between contractors and mortgagees
 - f) If filed mortgage after contract then contractor has priority
 - g) Extras
 - Contractor has priority if general contract predates filing of mortgage
 - h) Those who filed within 4 months
 - i) Those who filed after 4 months

Priorities Under the Act

- a) Mortgage filed before contract
- b) Mortgagee has priority claim to contractor on the land and attachments at time of contract
- c) Contractor priority on improvements

Priorities Under the Act

Other Ways to Assert Priority

- ◆ Equitable Estoppel
- ◆ Constructive Fraud
- ◆ Equitable Subrogation
- ◆ Assignment

Public Projects

Liens on Public Funds

Bond Claims

Prompt Payment Acts

Presented by

Timothy R. Rabel

Topics for Discussion: Section 23

- Separate from remainder of Act
- Who is the Remedy for?
- What is the Remedy?
- What is the Procedure?



Who is the Remedy for?

- Anyone other than the General Contractor
- Anyone who furnishes...
 - Material
 - Apparatus
 - Fixtures
 - Machinery
 - Labor
- Any Contractor on a Public Project



What is the Remedy?



- Lien on the
 - Money
 - Bonds
 - Warrants

NOT the Public Property!



What is the Procedure?

Local Public Bodies

v.

State

What is the Procedure?

- Local Public Projects
- Lien Exists on Public Funds if . . .
 - before payment is made to Contractor
 - supplier notifies clerk or secretary of the public body
 - by written notice
 - and serving a copy on contractor
 - by certified/registered mail limited delivery to addressee return receipt requested

What is the Procedure?

- One Shot to Perfect the Lien!
- Bring Action within 90 Days of the Notice of Lien
- Serve clerk with complaint within same 90 days

Noticeable Differences Between Public & Private

- No time by which to file lien
 - Pros
 - Cons
- Lien on Funds not property
 - No building to sell
 - No money being held no recovery
- Time to bring suit is shorter
 - 90 days of service
 - 2 years

What is the Procedure?

- State Projects
 - generally same as local public projects
 - notice containing sworn statement to
 - director who let contract
 - bring suit within 90 days of notice or 15 days if money appropriated

Claims on Bonds and Prompt Payment Acts

- Illinois Public Construction Bond Act
- Miller Act
 - Federal projects
 - No Lien rights on Federal projects
- Prompt Payment Act

Illinois Public Construction Bond Act

- File Verified Notice
- With the Public Body
- Within 180 Days of Finishing Work
- Furnish Contractor with a Copy within 10 Days
- Wait 120 days after work finished to sue but not more than six months

Contents of Notice

- Name & address of claimant
- Name of Prime Contractor
- Name of Contractor/Subcontractor to whom furnished labor or material
- Amount claimed
- Description of Public Improvement

Miller Act

- Bond on Projects (for U.S.-- Performance and Payment Bond)
- Wait 90 Days after furnishing to sue on Bond - No more than 1 year
- Written Notice within 90 days containing
 - amount claimed
 - name of contractor material was furnished to
 - served on contractor
- Need Direct Contract



Prompt Payment Act

- Must Contractually Require Payment within 7 Days of Receipt & Interest
- Retainage for Non-Conforming Work with Notice

Enforcing a Mechanics Lien

Presented by

Scott B. Krider

Documents To File Lawsuit

- information on property
- information on bonding
- information on financing
- information on contracts

Identify

- The Potential Unknown Owners and Non-Record Claimants
- Whether There Are Problems With Apportioning the Lien Between Several Tracts of Land or Several Contracts

Consider

- Which Parties Have Submitted Lien Waivers
- SOL and How SOL Will Affect the Claim
- Economics of Claim
- Best Forum to Resolve this Dispute

Pleadings: Claims Under the Act

- General vs. Owner to Foreclose Their Mechanics Lien
- Sub vs. General and Owner Jointly or Individually to Foreclose their Mechanics Lien
- Owner Claim for an Accounting
- Sub Claim for Accounting on Public Funds Due the General Contractor



Pleadings: Other Types

- Sub Claim vs. General Contractor's Bond
- Contract
- Quantum Meruit



Necessary Parties

- Private Jobs
- Public Jobs

Counterclaims



Discovery

- interrogatories
- production requests
- subpoenas
- depositions

Damages

- Measure “the Amount Due”
- Contract Price Is Prima Facie Evidence of Value of Contract Item and Establishes Value of Improvements
- If There is Substantial Performance, Measure is Contract Price Less the Necessary Cost of Performing the Work Per Contract

If Owner Is In Breach and Contractor Has Not Substantially Performed... Contractor's Damages

- Contractor's Actual Expenditures to Date of the Breach
- Less Value of Materials on Hand
- Plus Reasonably Certain Profit Contractor Would Have Realized From Full Performance.

Additional Damages

- Extras
- Delay
- Attorney Fees



Motions

- Discovery
- Pleadings
- Summary Judgment
- Priorities

Bankruptcy

- Perfect Lien
- File Lawsuit



ADR

- Mediation
- Arbitration

Lien Waivers

- Clear intent
- Public Policy
- Did owner reasonably rely on waiver



Lien Waiver Strategies

- Conditional Language
- Direct Payment
- Simultaneous Exchange
- Joint Check
- Escrow
- Phased Payments

If You Have Not Been Paid After
Sending and Recording Your Lien

YOU HAVE A CHOICE:

CONTINUE WAITING

OR

FILE A LAWSUIT

Issues Commonly Raised in Litigation of Mechanics Lien Claims

Presented by

Jennifer J. Sackett Pohlenz

Before you file a lawsuit. . .

- Is there an arbitration clause in your contract?
- Are there any counterclaims that will be made against you?
- Balance expense (\$ and business strategy) v. potential gain (\$ and business/legal strategy)

Arbitration

- An arbitration clause may be included in a contract. Review your contract carefully to determine whether there is such clause and the scope of that clause.

What is Arbitration?

Arbitration - an out-of-court proceeding, intended to help parties resolve their claims without court action.

Two basic categories of arbitration:

- binding and
- non-binding

However, arbitration can be as simple or complex as the parties make it and the type of arbitration should be specified in the contract.

- **Binding Arbitration:** parties agree to accept the results of the arbitrator.



- **Non-Binding Arbitration:** parties do not agree to accept the result of the arbitration and can reject result and proceed to litigation.



What if there is an arbitration clause in my contract and a party to the contract files suit?

- Unless the issue being raised in the lawsuit is specifically excluded from the arbitration clause (or unrelated to the contract), it is typical that a court will:
 - Stay litigation and order parties to proceed to arbitration;
 - Dismiss lawsuit with or without leave to refile pending results of the arbitration (if non-binding arbitration is required in the contract); OR
 - Compel party who filed the litigation to submit to arbitration and stay or set a date for status of the arbitration (if non-binding).

Your right to arbitration can be waived!

- Either by explicit waiver;
- Or by action or inaction (*i.e. acting inconsistently with the arbitration clause*).

Can you file for foreclosure of your lien if you have a contract with an arbitration clause?

Yes.

You can either waive your right to arbitration and file suit (and you may find the other party filing a motion to enforce the arbitration clause and stay or dismiss the litigation) or, you can file a foreclosure suit and simultaneously file a motion to stay the litigation and enforce the arbitration and include in your complaint a brief statement preserving your arbitration rights under the contract.

Common Counterclaims

- Defective Materials/Construction
- Changes & Extras
- Construction Delay Claims

What is a Defective Construction Claim?

- A breach of contract claim stating that the “work” and/or “materials” did not comply with the contract specifications.
- A breach of express or implied warranty claim stating that the “work” and/or “materials” failed to comply with an express and/or implied warranty (except to the extent specifically excluded by the contract).

Examples of breach of contract and/or warranty claims:

Failure to build according to plans and specs	Failure to build according to applicable building codes and/or other laws	Failure to build in a workmanlike manner
Claim for Contractor's Warranty of Materials and Equipment	Claim for Contractor's Warranty of his Construction Services	Claim for Contractor's Call Back Warranty

Examples of breach of contract and/or warranty claims:

Failure to build according to plans and specs	Failure to build according to applicable building codes and/or other laws	Failure to build in a workmanlike manner
Claim for Contractor's Warranty of Materials and Equipment	Claim for Contractor's Warranty of his Construction Services	Claim for Contractor's Call Back Warranty

Failure to build in a workmanlike manner. . .

IF a contract does not contain a specific warranty or term regarding workmanlike performance, courts will imply a “good and workmanlike” requirement.



Examples of breach of contract and/or warranty claims:

Failure to build according to plans and specs	Failure to build according to applicable building codes and/or other laws	Failure to build in a workmanlike manner
Claim for Contractor's Warranty of Materials and Equipment	Claim for Contractor's Warranty of his Construction Services	Claim for Contractor's Call Back Warranty

Breach of Warranty

- A warranty is either express, meaning that it is written into your contract; or
- A warranty is implied, meaning it is not written in the contract, but otherwise recognized by law.



Typical Express Warranties

- Claim for Contractor's **Warranty** of Materials and Equipment
 - Typically warrants to the owner that the materials and equipment utilized in the project will be proper, functional, and comply with the drawings and specifications.

Typical Express Warranties

- Claim for Contractor's **Warranty** of his Construction Services
 - Typically the effect of this provision is to broaden that the work will be performed in a “workmanlike manner” and also require that the work is “fit and proper for its intended use.”

Typical Express Warranties

- Claim for Contractor's Call Back
Warranty
 - This provision typically requires the contractor, within a certain time (such as one year) after “substantial completion” of the work and after receipt of written notice from the owner, to correct work that is found not to be in accordance with the requirements of the contract.

Examples of Implied Warranties

- If project is residential construction, consider potential claims under Implied Warranty of Habitability.
- To establish claim under implied warranty, claimant must show:
 - Owner purchased home from builder-seller (except some Illinois courts have held that this warranty survives a second sale);
 - The home is of new or reasonably new construction;
 - The alleged defects at issue are latent that are not easily discoverable at the time of sale;
 - The alleged defects are caused by improper design, materials or workmanship; and
 - The defects render property not reasonably fit for use as a home.

Examples of Implied Warranties

- Other implied warranties may exist, particularly under the Uniform Commercial Code.
- The Uniform Commercial Code applies if the transaction is determined to be predominantly one for the “sale of goods” with services incidentally involved.

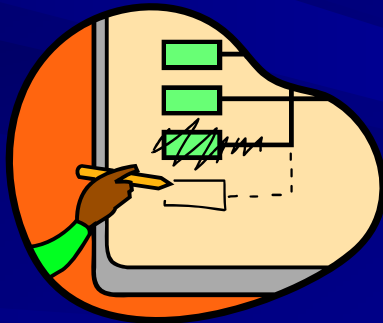
Common Counterclaims

- Defective Materials/Construction
- Changes & Extras
- Construction Delay Claims

What are they?

- Changes:

Modifications of part of the work required by the contract.



- Extras:

Additional work not required by the original contract.



Why are these frequently a subject of litigation?

- Change is so large that, essentially, contractor is being asked to perform project not originally contemplated by contract.
- Price for or description of change to or extra work not put in writing and signed by owner and applicable contractors.
- Contract provides that, in event of dispute over price, the contract should proceed with change/extra and owner or another contractor makes interim determination as to price which can be accepted or rejected by contractor performing change/extra.
- Change/extra results in delay or change of schedule not documented in written agreement for change/extra.

Common Counterclaims

- Defective Materials/Construction
- Changes & Extras
- Construction Delay Claims

Construction Delay Claims

- Excusable and non-excusable
- Compensable and non-compensable
- Concurrent and non-concurrent
- Critical and non-critical



Excusable

- A delay which justifies an extension of time for performing the contract, such as, for example, owner changes or differing site conditions.

Non-Excusable

- A delay for which the party assumes the risk under the contract, such as, for example, providing adequate labor and material for the project.

Compensable

- A delay which is excusable and compensated with either or a combination of additional time to complete the work or payment of costs caused by the delay.

Non-Compensable

- Non-Excusable.
- Proof of delay damages are too speculative and uncertain.
- No damages for delay clause.

Concurrent

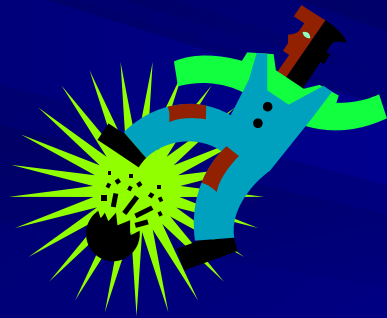
- When there are two or more delays during the same time period.

Non-Concurrent

- Distinguishable periods of time where delays occurred.

Critical

- Delay the completion of the entire project.



Non-Critical

- Delay work on only a portion of the project.

Balance expense (\$ and business strategy)

v.

Potential gain (\$ and business/legal strategy)

Examples of things to consider before you file a lawsuit:

- How much will the lawsuit cost?
- Will you get additional business from the company you're asserting a claim against?
- What are the chances you will win the lawsuit and how much is the maximum you will recover if everything goes your way?
- Do you need to file suit to preserve your rights?

Mechanics Liens Under Bankruptcy Law

Presented by

Bruce H. Schoumacher

- Automatic Stay
- Secured vs. Unsecured Creditors
- Using the Mechanics Lien to Become a Secured Creditor
- Preferences
- Proof of Claim

The Bankruptcy Code

- **Comprehensive Federal Scheme**
 - Bankruptcy law determines how claims and creditors will be paid.
 - State law may determine rights of creditors and the validity of claims.
- **Only Bankruptcy Courts can hear bankruptcy cases.**

Bankruptcy Cases

- **Voluntary or Involuntary**
- **Chapter 7:**
 - Goal: orderly liquidation of assets
 - Trustee in charge of debtor
- **Chapter 11:**
 - Goal: consensual plan of reorganization
 - Debtor in Possession: fiduciary duty to creditors

The Chapter 11 or Chapter 7 Case

- ❖ Begins on the Petition Date
- ❖ Automatic Stay
- ❖ The Bankruptcy Estate

The Chapter 7 Case

Liquidation

Creditors

❖ **Secured Creditors**

- Secured claim to the extent of the value of the lien.
- Unsecured claim for the remainder.

❖ **Unsecured Creditors**

The Chapter 11 Case

- Pre-petition debts may only be paid under a plan of reorganization.
- Post-petition debts may be paid by the debtor in possession in the ordinary course of business.
- Confirmation of a Plan of Reorganization.
- Discharge of Pre-petition debts.

The Automatic Stay

- Generally precludes taking any action to collect amounts owed by the debtor.
- Includes actions to foreclose a mechanics lien.
- Tolls 2-year limitations period for filing a foreclosure action.
- Does not toll the 4-month period to perfect a mechanics lien.

A Mechanics Lien Transforms
an Unsecured Creditor Into a
Secured Creditor

What happens to a mechanics lien when the owner of the subject property files for bankruptcy?

Illinois Mechanics Liens

- ❖ Lien arises upon (substantial) completion of work.
- ❖ Perfection within 4 months relates back to the date of the contract.
- ❖ Lien is good against intervening buyer.

1. You perfected a mechanics lien before the owner filed for bankruptcy.

- You hold a secured claim equal to the value of your lien.
- You hold an unsecured claim for any deficiency.
- Your lien cannot be avoided by the Trustee.

2. Owner files for bankruptcy within four months after you completed work.

- You may record your notice of lien after the bankruptcy filing.
- Perfection relates back to the (pre-petition) date of contract.
- You hold a pre-petition secured claim.
- The trustee may not avoid your lien.

3. You failed to perfect your mechanics lien.

➤ Under Illinois Law:

- Your lien is enforceable against the owner;
- Your lien is junior to other liens against property;
- Your lien is unenforceable against subsequent purchaser of the property.

➤ Under Bankruptcy Law:

- The trustee stands in the shoes of subsequent purchaser;
- The trustee may void your lien, leaving you with only an unsecured claim.

Trustee's "Strong Arm"

- ❖ **The Trustee may avoid:**
 - Unperfected Liens
 - To the extent a purchaser could avoid the lien on the petition date.



Preferences

- 90-Day Preference Period
- Presumption of Preferential Treatment
- Defenses
 - Ordinary Course of Business
 - New Value
 - Contemporaneous Exchange

Notices and Claims

- ❑ **Notice of Filing**
- ❑ **Notice of Bar Date**
- ❑ **Filing a Proof of Claim**

Querrey  *Harrow*

175 West Jackson Boulevard

Suite 1600

Chicago, IL 60604-2827

312-540-7000

www.querrey.com