



## ‘Bricklayers’ and You

➤ A new ruling gives union funds lien rights in Pennsylvania – and it might have particular impact on lower-tiered contractors throughout the Northeast.

**The Pennsylvania Superior Court** recently issued a decision in the case of *Bricklayers of Western Pennsylvania Combined Funds Inc. vs. Scott’s Development Co.*

The *Bricklayers* ruling expands the class of claimants that are entitled to assert a mechanic’s lien claim under Pennsylvania’s mechanics’ lien statute to include union benefit trust funds. While the Pennsylvania con-

struction industry waits for the Pennsylvania Supreme Court to decide whether to allow an appeal of the Superior Court’s decision, readers should consider how this issue varies from state to state and how it affects construction practices. We will review the state of the law in Pennsylvania, Maryland, New Jersey and New York, as well as discuss recommended practices.

### **Pennsylvania**

The key issue in *Bricklayers* was whether trustees of union member benefit funds

have lien rights in Pennsylvania. The court held that union members hired by a subcontractor under a collective bargaining agreement were “subcontractors” as defined in the statute because they entered into implied contracts with the hiring party.

The court concluded that the funds have lien rights because they are contractually obligated to receive and collect member benefits and, therefore, “stand in the shoes” of the union members. Therefore, in Pennsylvania, funds possess lien rights – unless and until the Supreme Court of Pennsylvania concludes otherwise on appeal.

### **Maryland**

In Maryland, union member benefit funds also have standing to assert mechanics’ liens for unpaid benefits on behalf of individual union members who performed



work on a construction project, provided the union members who performed the work held individual contracts of hire with the subcontractor that failed to pay the union benefits. The Court of Appeals of Maryland made this determination in *National Electrical Industry Fund vs. Bethlehem Steel Corporation*, upon which the *Bricklayers* court relied to reach the same conclusion.

### New Jersey

The courts in New Jersey have not specifically addressed the issue. Without the benefit of applicable case law, it is critical to review the manner in which the terms “subcontractor” and “contract” are defined in the New Jersey Construction Lien Statute.

In the state of New Jersey, a “subcontractor” is defined as being “any person providing work or services in connection with the improvement of real property pursuant to a contract with a contractor.” This definition is quite similar to the Maryland and Pennsylvania definitions. Therefore, it is conceivable that a New Jersey court presented with this issue could conclude that union member benefit funds have construction lien rights in New Jersey.

On the other hand, a “contract” as defined in the New Jersey Construction Lien statute must be in writing for lien rights to exist, whereas in Maryland and Pennsylvania, the contract or subcontract giving rise to the mechanics’ lien can be express or implied and does not need to be in writing.

This distinction in definition is significant because the premise underlying the *Bricklayers* and *National Electrical* decisions was that the union members who performed work were hired by the subcontractor pursuant to implied contracts, not express written contracts. Because of the more strict definition of “contract” in the New Jersey statute, a court could deny lien rights in the absence of a written contract between the union members and the contractor

or subcontractor who employs them for a particular project.

### New York

In New York, the mechanics’ lien statute expressly provides that union member benefit funds possess lien rights to collect benefits and wage supplements. However, the New York courts have concluded that these lien rights are preempted by the Employee Retirement Income Security Act (“ERISA”), a federal statute. Preemption is a legal doctrine through which a state law may become invalid if it conflicts with a federal law.

The New York courts have concluded that ERISA preempts the portion of the New York mechanics’ lien statute bestowing lien rights to these funds because the New York statute duplicates the benefits enforcement mechanism created under ERISA.

### What You Can Do About It

As is evident from this state-to-state analysis, the law with regard to lien rights of a union member benefit fund is unclear and somewhat undeveloped. It is almost a certainty, however, that if a fund files a mechanics’ lien for unpaid benefit contributions, the owner will push its obligation to the fund downstream to the contractor, exposing the contractor to liability for a subcontractor’s failure to make fund contributions – regardless of whether the lien is valid.

In the face of this uncertainty, the safest construction practices will be those premised on the presumption that the funds possess lien rights. Contractors and subcontractors should reexamine their subcontracts and consider including the following contractual requirements:

- » Condition payment to lower-tiered contractors on providing proof that their obligations to their funds have been satisfied.
- » Require lower-tiered contractors to execute partial and final releases with language representing and warranting their obligations to the funds have been satisfied to date.

- » Require lower-tiered contractors to provide indemnification for their failure to make payments to the funds.

Contractors and subcontractors may also consider the following more onerous – but also more protective – measures:

- » Require lower-tiered contractors to enter into a joint check agreement to ensure firsthand that benefit contributions are paid. (It is critical to consult with your attorney to ensure that the agreement’s scope is clearly limited to the specific job at issue.)
- » Prior to commencement of work, require lower-tiered contractors to post a bond sufficient to protect against the risk of nonpayment.

### The Bottom Line

Decisions like *Bricklayers* will likely result in greater contractual requirements for and heavier monitoring of lower-tiered contractors’ payments of fund benefits. *Bricklayers* also highlights how truly important it is for lower-tiered contractors to stay current with their union benefit contributions.

In some states and commonwealths (e.g., Pennsylvania), liability for nonpayment of benefits is not limited to the corporation that fails to pay. Indeed, it extends personally to the owners of that corporation (e.g., under the Pennsylvania Wage Payment and Collection Law). In a down economy in which the next job is anything but guaranteed, the fundamental and obvious concept that individuals and companies should strive to live up to the contracts into which they enter cannot be overstated. ☹

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