SENATE JUDICIARY
Exhibit No. 8
Date 3-27-07
Bill No. HB 657

RE: HB 657
Senate Judiciary Committee Hearing- March 27, 2007, 2007.
Testator: Nancy L. MacCracken, Senior Law Clerk
Sixth Judicial District, State of Montana

Chairman Laslovich and Honorable Senators:

I come before you today in support of HB 657. I am the senior law clerk for the Sixth Judicial District, in Park and Sweet Grass Counties, Montana. District Judge Nels Swandal, for whom I clerk, and I, requested a change in the construction lien law and this bill is the result. The reason for the request was the inequity of the current M.C.A. §71-3-551. As it now reads, whenever a construction lien has been filed, the property owner may file a bond with the clerk of district court at any time before a lien claimant commences an action to foreclose the construction lien. That, in itself, is not a problem. The problem arises when the lien claimant, (construction company), files a construction lien and files suit or commences an action to foreclose the construction lien **on the same day**.

First, let me address some distractions that have been tossed at you by the construction industry and their attorneys. The current lien statutes have existed for many years, but the bond amount portion of the statute, (1 ½ times the amount of the lien), was enacted in 1971 and has not changed since then. The bond amount is not being addressed or amended by this bill. The construction industry argues that the bond amount is insufficient, but that is currently not applicable to this bill. If you determine that the bond amount should be amended, two times the amount of the lien should more than amply cover the lien amount and the amount of reasonable attorney fees and costs.

Next, the construction industry would like to divert this committee's attention by seeking sympathy for the contractor or subcontractor who doesn't know that he may give the property

owner a notice of right to claim a lien or the contractor who has been "coerced" into not filing a notice of right to claim a lien by an overbearing land owner. The statute as it stands, and with the proposed amendment does not address that issue either. If the contractor can file a lien and foreclose on the lien, he must be able to give the property owner a notice of right to claim a lien. The right to claim a lien has existed for many, many years and if the subcontractor or contractor does not exercise that right, it is unfortunate, but not applicable to this bill.

The construction industry also claims that by allowing the bond to substitute for the lien, payment to the contractor may be greatly delayed. The alternative- leaving the statute as it is- may result in payment to the contractor being delayed for thirty or forty years, or never being received at all. The bond protects the contractor by having money available in the Court to be paid immediately upon judgment. No bond may mean no money and no recourse for the contractor.

The last distraction thrown at you is that once the bond is substituted for the lien and the construction lien is released, the owner is free to sell the property and never pay the contractor. That, ladies and gentlemen, is very inaccurate! If the construction company prevails in court, the bond amount is immediately paid. The construction company is paid for their work, and their attorney is also paid his or her reasonable fees. In addition, however, if the construction company prevails in Court, and the amount awarded greatly exceeds the bond amount, the construction company has, and has always had, the option of then filing a judgment lien on the property, and if they do so, the owner cannot sell the property without paying the judgment lien. The construction company is again protected, or at least is in no worse position than it would be without the bond, with just a construction lien.

Currently, M.C.A. §71-3-551 does not allow the property owner to file a bond once the

foreclosure action is begun, which places the property owner in a very difficult position. Construction may be halted, the bank may not extend further credit until the matter is resolved and most people would not have independent resources to continue construction without the construction loan monies from the bank. §71-3-551, as it currently exists, not only allows foreclosure on the construction lien, but also forecloses the property owner from relief until the case is resolved, and resolution may be months or years in the making. The proposed change not only allows a property owner time before foreclosure proceedings begin to file a bond, but an additional thirty (30) days after a foreclosure action is commenced to file a bond. This alleviates the inequity in the present law.

The normal wording on the substitution of bond for construction lien states that it is "submitted on the condition that if the lien claimant is adjudged to be entitled to recover upon the claim, the owners or their sureties shall pay to the claimant the amount of the judgment together with any costs and attorney fees to which the claimant is entitled." The money is there, and is payable to the construction company immediately upon resolution in their favor. The construction company does not lose that money. On the other hand, if the law stays as is, and the construction company files to foreclose on the lien at the same time the lien is filed, without time for the owner to file a bond in substitution for the lien, there is no money or surety bond being held by the Clerk of Court, and while the construction company may have a lien and a possible judgment, in an extreme case, they may not be able to collect until the owner sells the property in ten or thirty or forty years. How heartbreaking would it be for the 30-year old construction worker, just starting out, to wait for forty years for payment?

It is clearly in the best interests of the property owner to be able to file a substitution of bond and to be able to continue construction. It is clearly in the best interests of the construction

company to allow the bond to be filed in substitution for the lien to have money available to pay them if they prevail. The best interests of both sides are served by allowing a bond to be filed and the proposed changes in this bill will allow time for that to happen and for the legal and equitable rights of all parties to be served.

The last thing I would say to you is that the legal and equitable rights of both parties should be paramount to this committee and the legislature. Please do not be side-tracked by blatant emotional appeals, but consider that both the construction industry and the home owner's rights and equities are better preserved by this amendment. Thank you.

Should you have any questions, or need any further documentation or information, please feel free to contact me.

Nancy L. MacCracken
Senior Law Clerk
Sixth Judicial District
State of Montana
414 East Callender Street
Livingston, Montana 59047
(406) 222-4130