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MECHANICS LIENS

2023

Chapter authors:
Eric A. Berg
W. Matthew Bryant
Lori Chen
Brandon R. Clark
Timothy R. Conway
James M. Dash
Jennifer L. Johnson
Peter M. King
Kenneth A. Michaels Jr.
Steven D. Mroczkowski
John S. Mrowiec
William Norman
Dennis J. Powers
James T. Rohlfing
Carolina Y. Sales
Michael J. Torchalski

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About the Authors

Eric A. Berg is Of Counsel to Ogletree, Deakins, Nash, Smoak & Stewart, P.C., in Chicago, where he focuses on construction transactions and litigation. He has been rated AV Preeminent (5 out of 5) by Martindale-Hubbell and is a member of the Society of Illinois Construction Attorneys and the American Bar Association Forum on Construction Law. Mr. Berg received his B.A. from Yale University and his J.D. from the Northwestern University Pritzker School of Law.

W. Matthew Bryant is Counsel to Saul Ewing LLP in Chicago, where he focuses on construction law. He is a member of the Trial Bar of the United States District Court for the Northern District of Illinois, the Steering Committee of the American Bar Association Forum on Construction Law Division 7, and the Society of Illinois Construction Lawyers. Mr. Bryant received his B.A. from the University of Chicago and his J.D. from the Loyola University Chicago School of Law.

Lori Chen is an associate at Ogletree, Deakins, Nash, Smoak & Stewart, P.C., in Chicago, where she focuses on construction. She is a member of the American Bar Association Forum on Construction Law and the National Association of Women Lawyers. Ms. Chen received her B.Arch. from the University of Southern California and her J.D. from the Indiana University Maurer School of Law.

Brandon R. Clark is an associate at Saul Ewing LLP in Chicago, where he focuses on complex litigation and ADR proceedings involving disputes arising from commercial construction projects. He is a member of the Chicagoland Associated General Contractors' Government Relations Committee and the American Bar Association Forum on Construction Law. Prior to entering the law, he was a licensed mechanical engineer. Mr. Clark received his B.S. in mechanical engineering from the University of Wisconsin-Madison and his J.D. cum laude from the DePaul University College of Law.

Timothy R. Conway is Of Counsel to Conway & Mrowiec Attorneys LLLP in Chicago, where he focuses on construction law. He is a member of the Society of Illinois Construction Attorneys and the American Bar Association Forum on Construction Law. Mr. Conway received his B.A. from DePaul University and his J.D. from the Northwestern University Pritzker School of Law.

James M. Dash is a Founding Member/Manager at Carlson Dash, LLC, in Chicago, where he focuses on construction. He is the Managing Editor of TURNER ON ILLINOIS MECHANIC'S LIENS (3d ed.), a Past Chair of the Illinois State Bar Association's Construction Law Section Council (2016 – 2017), and a Past Chair of the Chicago Bar Association's Mechanic's Lien Subcommittee (1999 – 2000). Mr. Dash received his J.D. from the University of Houston Law Center, where he was Senior Associate Editor of the Houston Law Review.

Jennifer L. Johnson is a Partner at Zanck, Coen, Wright & Saladin, P.C., in Crystal Lake, where she focuses on civil litigation, construction/mechanics liens, and real estate. She is a Past President of the McHenry County Bar Association, received the Prairie State Legal Services Pro Bono Award for 2018, and is a Board Member of the Senior Care Volunteer Network in Crystal Lake. Ms. Johnson received her B.A. from Marshall University and her J.D. cum laude from the Western Michigan University Cooley Law School.

Peter M. King is a Partner at King Holloway LLC in Chicago, where he represents parties in real estate disputes and represents employers in labor and employment matters. He is a member of the Illinois Land Title Association and the Defense Research Institute. He also served an externship with the Special Prosecutions Bureau of the Cook County State's Attorney's Office in Chicago. Mr. King received his undergraduate degree from Eastern Illinois University and his J.D. from the University of Illinois Chicago Law School.

Kenneth A. Michaels Jr. is a Partner at Bauch & Michaels, LLC, in Chicago, where he focuses on real property transactions, management, and litigation. He is an adjunct professor and the University of Illinois Chicago Law School, a member of Scribes — The American Society of Legal Writers, and a member of the American, Illinois State, Chicago, and Illinois Appellate Attorneys Bar Associations. Mr. Michaels received his B.A. in philosophy from Loyola University of Chicago and his J.D. from the University of Illinois Chicago Law School. He is matriculating at the University of St. Mary of the Lake Mundelein Seminary.

Steven D. Mroczkowski is a Partner at Ice Miller LLP in Chicago, where he focuses on construction litigation. He is a member of the Society of Illinois Construction Attorneys, a Past Chair of the Illinois State Bar Association's Construction Law Section Council, and a Super Lawyers Rising Star in Construction Litigation. Mr. Mroczkowski received his B.A. from North Central College and his J.D. from the Chicago-Kent College of Law.

John S. Mrowiec is a General Partner at Conway & Mrowiec Attorneys LLLP in Chicago, where he focuses on construction litigation and contracts. He is a member of the Society of Illinois Construction Attorneys. He was the Best Lawyers Construction Law Lawyer of the Year, Chicago (2014) and the Best Lawyers Litigation — Construction Lawyer of the Year, Chicago (2019). Mr. Mrowiec received his J.D. from DePaul University School of Law, where he was the Lead Articles & Notes Editor of the DePaul Law Review.

William Norman is a Partner at King Holloway LLC in Chicago, where he focuses on commercial and real estate litigation and insurance defense. Mr. Norman received his J.D. with a Certificate in Trial Advocacy from the Loyola University Chicago School of Law.

Dennis J. Powers is a Partner at DLA Piper LLP (US) in Chicago, where he focuses on construction law and real estate and commercial litigation. He has been selected to Best Lawyers in America in the area of construction law, been designated an Illinois Super Lawyer in construction litigation, and is a member of the American and Chicago Bar Associations and the American Bar Association Forum on Construction Law. Mr. Powers received his B.S. from Western Illinois University and his J.D. from the DePaul University College of Law.

James T. Rohlfing is a Partner at Saul Ewing LLP in Chicago, where he focuses on construction law and commercial litigation. He is an Editor and author for the ILLINOIS CONSTRUCTION LAW MANUAL (Thomson Reuters), Special Counsel and a Past President of the Illinois Mechanical & Specialty Contractors Association, and a member of the Society of Illinois Construction Attorneys. Mr. Rohlfing received his B.S. from Marquette University Business School and his J.D. from the DePaul University College of Law.

Carolina Y. Sales is a Partner at Bauch & Michaels, LLC, in Chicago, where she focuses on commercial litigation and bankruptcy. She is the Treasurer of the Diversity Scholarship Foundation, NFP, and a member of the Chicago Bar Association Judicial Evaluation Committee. She was named an Emerging Lawyer in 2018 – 2022 and a Leading Lawyer in 2021 – 2022. Ms. Sales received an Honors B.A. cum laude from Marquette University and her LL.M. with honors and J.D. cum laude from the University of Illinois Chicago School of Law.

Michael J. Torchalski is the owner of Torch Legal in Cary, where he focuses on civil litigation, including mechanics lien; real estate tax appeal; estate planning, probate, and trust administration; real estate transactions, and title insurance. He served a judicial internship with Judge Thomas R. McMillen of the United States District Court. He is a licensed title insurance agent and a member of the Heartland Realtor Organization's Governmental Affairs Committee. Mr. Torchalski received his B.A. from the University of Illinois at Urbana-Champaign and his J.D. with honors from the Chicago-Kent College of Law, where he was a member of the Bar and Gavel Society.

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1 Introduction to the Illinois Mechanics Lien Statute

JENNIFER L. JOHNSON
Zanck, Coen, Wright & Saladin, P.C.
Crystal Lake

I. [1.1] INTRODUCTION

This handbook surveys the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* and ancillary topics. This chapter provides an overview of the Act. The subsequent chapters of this handbook address the individual sections of the Act and issues arising thereunder in greater detail.

II. [1.2] MECHANICS LIEN STATUTE AND COMMON LAW

At common law, a contractor could not obtain a lien on real property merely because it had improved it. A common-law lien is "the right to retain possession until some obligation of the owner is satisfied." *Oppenheimer v. Szulerecki,* 297 Ill. 81, 130 N.E. 325, 328 (1921). Upon the surrender of the property, the lien would be lost. To permit a contractor to assert a lien on the material that it had delivered to another's real property and that had been incorporated into that real property either by the contractor or by the owner would be contrary to the concept of the lien as a right to retain possession. Historically, therefore, neither the common law nor equity recognized a mechanics lien on real property in the absence of statute. *North Side Sash & Door Co. v. Hecht,* 295 Ill. 515, 129 N.E. 273, 274 (1920); *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291, 292 (1911).

The first mechanics lien act in Illinois was passed in 1825. It was subsequently reenacted and amended numerous times until the present Mechanics Lien Act became effective in 1903, which, though it has been amended from time to time, was substantially the same as what is used today. *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990).

III. [1.3] PURPOSE OF THE MECHANICS LIEN ACT

The Mechanics Lien Act provides a lien for payment to those who furnish labor, material, fixtures, apparatuses, machinery, or those services specified in §1 of the Act (770 ILCS 60/1), with the construction of improvements on real property, whether owned privately or by state or municipal governments. The Act has two primary purposes. The first is to provide security to assure that payment is made for labor, material, and/or services furnished to increase the value or improve the condition of real property, thereby creating a benefit to the owner of the property. *Mostardi-Platt Associates, Inc. v. Czerniejewski,* 399 Ill.App.3d 1205, 929 N.E.2d 94, 340 Ill.Dec. 790 (5th Dist. 2010); *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC,* 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill.Dec. 615 (1st Dist. 2005); *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005); *Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington,* 251 Ill.App.3d 256, 620 N.E.2d 469, 189 Ill.Dec. 501 (4th Dist. 1993); *Prior v. First Bank & Trust Co. of Mt. Vernon, Illinois,* 231 Ill.App.3d 331, 596 N.E.2d 891, 892, 173 Ill.Dec. 267 (5th Dist. 1992); *Watson v. Watson,* 218 Ill.App.3d 397, 578 N.E.2d 275, 161 Ill.Dec. 148 (3d Dist. 1991); *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983); *Colp v. First Baptist Church of Murphysboro,* 341 Ill. 73, 173 N.E. 67 (1930); *Rasmussen v. Harper,* 287 Ill.App. 404, 5 N.E.2d 257 (1st Dist. 1936).

The second purpose is to provide an equitable balancing of the rights and duties of each class of persons in a construction project (*i.e.,* owners, lenders, architects, original contractors, subcontractors, material suppliers, and laborers), including protecting innocent third parties from having their interest in the real estate encumbered by liens. *Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, 39 N.E.3d 8, 395 Ill.Dec. 541; *Struebing Construction Co. v. Golub-Lake Shore Place Corp.,* 281 Ill.App.3d 689, 666 N.E.2d 846, 217 Ill.Dec. 177 (1st Dist. 1996); *Alliance Steel, Inc. v. Piercy,* 277 Ill.App.3d 632, 660 N.E.2d 1341, 214 Ill.Dec. 392 (4th Dist. 1996).

IV. [1.4] WHO IS ENTITLED TO ASSERT A MECHANICS LIEN?

Section 1 of the Mechanics Lien Act addresses who is entitled to claim a mechanics lien. 770 ILCS 60/1. Section 1(a) states "[a]ny person who shall by any contract or contracts, express or implied, or partly express or implied, with the owner of a lot of tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land, or to manage a structure under construction thereon, is known under this Act as a contractor and has a lien upon the whole of such lot or tract of land." 770 ILCS 60/1(a). This section of the Mechanics Lien Act goes on to define "improve" as "to furnish labor, services, material, fixtures, apparatus or machinery, forms or form work in the process of construction." 770 ILCS 60/1(b).

Section 1(b) of the Mechanics Lien Act specifically identifies persons who are entitled to a mechanics lien. Generally speaking, persons entitled to a mechanics lien for their services performed in accordance with the Mechanics Lien Act are those who improve property in the process of construction where cement, concrete, or like material is used for the purpose of or in the building, altering, repairing, or ornamenting of any house or other building, walk or sidewalk, driveway, fence, or adjoining sidewalk, street, or alley; do fill, sod, or excavating work; do landscaping work; raise or lower any house or structure thereon or remove a house or structure from a parcel of land (excluding demolition and debris haulage (*Robinette v. Servite Fathers,* 49 Ill.App.3d 585, 364 N.E.2d 679, 7 Ill.Dec. 518 (1st Dist. 1977)); do architectural, structural engineering, professional engineering, land surveying, interior design, or property management work; perform services as a superintendent, time keeper, mechanic, or laborer in the building, altering, repairing, or ornamenting of a structure; are material or machinery suppliers; drill a water well; or are project supervisors (*Malesa v. Royal Harbour Management Corp.,* 187 Ill.App.3d 655, 543 N.E.2d 591, 135 Ill.Dec. 208 (2d Dist. 1989)). 770 ILCS 60/1(b).

It should also be noted that §37 of the Mechanics Lien Act allows for a lien on a boat, barge, other watercraft, or mobile home. 770 ILCS 60/37. Section 37 of the Mechanics Lien Act allows for a lien by an architect, contractor, subcontractor, material supplier, or other person who furnishes labor or material for the purpose of building, altering, or repairing a boat, barge, other watercraft, or mobile home. Repair and maintenance services do not give rise to a mechanics lien. *Bull v. Mitchell,* 114 Ill.App.3d 177, 448 N.E.2d 1016, 70 Ill.Dec. 138 (3d Dist. 1983).

V. [1.5] TYPES OF MECHANICS LIENS

In the broadest sense, a lien is a legal hold on property as security for a debt. *Moulding-Brownell Corp. v. E.C. Delfosse Const. Co.,* 291 Ill.App. 343, 9 N.E.2d 459 (1st Dist. 1937). The lien attaches to the property and not to the owner. *Swords v. Risser,* 55 Ill.App.3d 676, 371 N.E.2d 182, 13 Ill.Dec. 487 (4th Dist. 1977); *Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987). The Mechanics Lien Act distinguishes between (a) liens on real property and funds due to the general contractor from an owner resulting from private construction, (b) liens on the funds due to the general contractor from a public body resulting from public construction, and (c) contractors' and subcontractors' lien claims.

A. [1.6] Private Construction

Sections 1 – 22 and 24 – 39 of the Mechanics Lien Act deal with private construction. 770 ILCS 60/1 – 60/22, 60/24 – 60/39. If improvements are made to privately held real property, the right of mechanics lien is the right to charge real property with the payment of the value of the material, fixtures, labor, or services that have been used to improve it. It is an encumbrance that attaches to the property and is effective not only against the owner of the premises but also, under certain circumstances, against purchasers, other encumbrancers, and generally third parties claiming any rights with reference to the real property. A mechanics lien is foreclosed in the same manner as a mortgage, and there is a statutory provision for a deficiency judgment against the owner in the event of a sale. 770 ILCS 60/19; *Hinkle v. Creek,* 113 Ill.App.2d 454, 251 N.E.2d 111 (4th Dist. 1969).

As it relates to private property, the mechanics lien attaches to, covers, or "extends to an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire and this lien attaches as of the date of the contract." 770 ILCS 60/1(a); *Construx of Illinois, Inc. v. Kaiserman,* 345 Ill.App.3d 847, 800 N.E.2d 1267, 279 Ill.Dec. 684 (4th Dist. 2003).

The property to which the lien attaches in private construction is (1) the owner's interest in the real estate on which the improvements are made, (2) the money due from the owner to the contractor or paid by the owner to the contractor in derogation of the rights of the subcontractors, and (3) the material, fixtures, apparatuses, or machinery furnished. *Bethlehem Steel Corp. v. Tishman-Adams, Inc.,* 45 Ill.App.3d 1003, 360 N.E.2d 475, 4 Ill.Dec. 539 (1st Dist. 1977).

B. [1.7] Public Construction

Section 23 of the Mechanics Lien Act is the only section devoted to public construction. 770 ILCS 60/23. A lien on public property is a remedy available for subcontractors and is a lien on the funds to become due to the general contractor, not the real property, as private individuals cannot have a hold on public property. *West Chicago Park Com'rs v. Western Granite Co.,* 200 Ill. 527, 66 N.E. 37, 38 (1902); *McMillan v. Joseph P. Casey Co.,* 311 Ill. 584, 143 N.E. 468 (1924). It is not a lien on public funds generally. In public construction, the lien is only on the funds due to the general contractor from the public body. *Northwest Water Commission v. Carlo V. Santucci, Inc.,* 162 Ill.App.3d 877, 516 N.E.2d 287, 114 Ill.Dec. 132 (1st Dist. 1987). The general contractor, however, does not have a lien right against the public funds as its contractual rights with the public owner would provide the equivalent remedy as a lien against the funds.

Although there is authority to the effect that §23 of the Mechanics Lien Act stands alone, courts have referred to other sections of the Act for assistance in deciding public funds cases involving lien rights. *Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 269 Ill.Dec. 556 (1st Dist. 2002); *R.W. Dunteman Co. v. C/G Enterprises, Inc.,* 181 Ill.2d 153, 692 N.E.2d 306, 229 Ill.Dec. 533 (1998); *S.J. Groves & Sons Co. v. Midwest Steel Erection Co.,* 666 F.Supp. 129, 131 (N.D.Ill. 1986); *Gunther v. O'Brien Bros. Const. Co.,* 369 Ill. 362, 16 N.E.2d 890 (1938).

There are no lien rights whatsoever on projects owned by the United States government. As such, the Miller Act, ch. 642, 49 Stat. 793, affords protection to workers on public projects and requires contractors contracting with the United States government for more than $100,000 for public works projects to furnish payment and performance bonds. 40 U.S.C. §3131(b).

C. [1.8] Contractors' Liens and Subcontractors' Liens

In addition to the difference between private and public liens, there is also a distinction between contractors who have contractual privity with the owner, the owner's agent, or one knowingly permitted by the owner to contract for the construction of improvements, defined as "contractors" in the Mechanics Lien Act, and those who furnish labor, material, fixtures, and those services specified in §21 of the Act (770 ILCS 60/21), pursuant to a contract with the contractor or upper-tier subcontractor. Those lacking contractual privity with the owner are referred to in the Act as "subcontractors." *Decatur Bridge Co. v. Standart,* 208 Ill.App. 592 (2d Dist. 1917). Material suppliers to the general contractor or a subcontractor have been included when the Act uses the word "subcontractor." *Brady Brick & Supply Co. v. Lotito,* 43 Ill.App.3d 69, 356 N.E.2d 1126, 1 Ill.Dec. 844 (2d Dist. 1976). However, other than the manner in which they are to be perfected and enforced, there is no distinction between the lien of a contractor and that of a subcontractor.

Notably, a subcontractor cannot assume the status of a contractor under the Mechanics Lien Act by asserting that the contractor was the agent of the owner or one knowingly permitted to contract for the improvements. There is no merit to the contention that the contractor is the superintendent or agent of the owner. *Castle Concrete Co. v. Fleetwood Associates, Inc.,* 131 Ill.App.2d 289, 268 N.E.2d 474 (1st Dist. 1971); *Malicki v. Holiday Hills, Inc.,* 30 Ill.App.2d 459, 174 N.E.2d 915 (2d Dist. 1961). To this end, as noted by the third district in *Philip S. Lindner & Co. v. Edwards,* 13 Ill.App.3d 365, 300 N.E.2d 283, 287 (3d Dist. 1973):

> **It has been consistently held that if the owner of real estate has let out the entire work to an original contractor, then he may not be deemed to have "knowingly permitted" or "authorized" any subcontractor of the original contractor to furnish any service or material, since the owner is justified in assuming that such subcontractor is doing the work and furnishing materials for the original contractor, and not the owner.**

While it is not an admission against interest to claim the status of a subcontractor and later determine that in fact the subcontractor was actually a contractor, if one assumes it is a contractor and then does not send the required statutory notice pursuant to §24 (the subcontractor's 90-day notice), its liens will be lost unless otherwise protected by an owner's sworn statement (770 ILCS 60/5). Note that §24(b) of the Mechanics Lien Act specifically states that if a notice is served under §24(a), it "shall not constitute an admission by the lien claimant that its status is that of subcontractor if it is later determined that the party with whom the lien claimant contractor was the owner or an agent of the owner." 770 ILCS 60/24(b).

VI. PRINCIPALS OF THE MECHANICS LIEN ACT

A. [1.9] Mechanics Lien Act Is Part of Every Contract

Section 1 of the Mechanics Lien Act states that every contractor that has a contract with an owner or an owner's agent to improve real property shall have a lien on the premises. 770 ILCS 60/1. This right is inherent in every such contract. *Deerfield Electric Co. v. Herbert W. Jaeger & Associates, Inc.,* 74 Ill.App.3d 380, 392 N.E.2d 914, 30 Ill.Dec. 149 (2d Dist. 1979); *Mirar Development, Inc. v. Kroner,* 308 Ill.App.3d 483, 720 N.E.2d 270, 241 Ill.Dec. 815 (3d Dist. 1999); *Robertson v. Huntley & Blazier Co.,* 351 Ill.App. 378, 115 N.E.2d 533 (4th Dist. 1953). The lien attaches as of the date of the contract, as further discussed in §1.18 below. 770 ILCS 60/1(a).

B. [1.10] There Must Be a Contract To Improve Real Estate

The corollary to the concept that the right of a mechanics lien is inherent in every contract between an owner and the one to improve the owner's property is that there must be a contract to support the right of a lien. *Douglas Lumber Co. v. Chicago Home for Incurables,* 380 Ill. 87, 43 N.E.2d 535, 539 (1942); *Von Platen & Dick v. Winterbotham,* 203 Ill. 198, 67 N.E. 843 (1903); *Mirar Development, Inc. v. Kroner,* 308 Ill.App.3d 483, 720 N.E.2d 270, 274, 241 Ill.Dec. 815 (3d Dist. 1999), quoting *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.,* 119 Ill.App.3d 663, 456 N.E.2d 889, 896, 75 Ill.Dec. 68 (2d Dist. 1983). This basic tenant of lien law was recognized in *Rittenhouse & Embree Co. v. Warren Const. Co.,* 264 Ill. 619, 106 N.E. 466, 468 (1914), in which the Illinois Supreme Court stated:

> **The foundation of the right to a mechanic's lien is a valid contract with the owner of the lot or tract of land to be improved, or with his duly authorized agent, for the construction of an improvement thereon and the furnishing of material and labor pursuant to the provisions of such contract, for while it is true that the lien is not created by the contract of the parties, but is created by the statute, still a contract is essential to the creation of any valid lien under the statute.**

"A mechanics' lien must be based upon a valid contract, and in its absence the lien is unenforceable." *Mirar Development, supra,* 720 N.E.2d at 274, quoting *Pascal P. Paddock, Inc. v. Glennon,* 32 Ill.2d 51, 203 N.E.2d 421, 422 (1964). *See also G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.,* 355 Ill.App.3d 428, 822 N.E.2d 905, 291 Ill.Dec. 30 (3d Dist. 2005).

The right of a subcontractor to a lien is dependent on the contract between the owner and the contractor. If there is no contract between the owner and the contractor under the terms of which a lien may be established, then the subcontractor has no lien. *Douglas Lumber, supra.* It has been held consistently that a subcontractor's lien, arising under §21 of the Mechanics Lien Act (770 ILCS 60/21), depends on the existence of a contract between the owner and the contractor. *Martinez v. Knochel,* 123 Ill.App.3d 555, 462 N.E.2d 1281, 78 Ill.Dec. 927 (4th Dist. 1984); *B & C Electric, Inc. v. Pullman Bank & Trust Co.,* 96 Ill.App.3d 321, 421 N.E.2d 206, 51 Ill.Dec. 698 (1st Dist. 1981); *Dunlop v. McAtee,* 31 Ill.App.3d 56, 333 N.E.2d 76 (2d Dist. 1975); *Shaffer v. Cullerton Corp.,* 13 Ill.App.2d 72, 141 N.E.2d 77 (1st Dist. 1957); *Douglas Lumber, supra; North Side Sash & Door Co. v. Hecht,* 295 Ill. 515, 129 N.E. 273 (1920); *Von Platen, supra.*

Notably, however, while the existence of the subcontractor's lien emanates from a valid contract with the contractor, who in turn has a contract for improvements with the owner, the enforcement of a subcontractor's lien does not depend, in any manner, on perfection or enforcement of the original contractor's lien. Thus, if a contractor fails or declines to assert a lien claim against an owner, it will not bear on the efficacy of the subcontractor's ability to perfect its own lien rights. *Keeley Brewing Co. v. Neubauer Decorating Co.,* 194 Ill. 580, 62 N.E. 923 (1902).

Likewise, in public construction, there must be a contract for the improvement of public real property for a lien in favor of the subcontractors against the funds due the original contractor from the public owner. *McMillan v. Joseph P. Casey Co.,* 311 Ill. 584, 143 N.E. 468, 470 (1924).

While a written contract is usually preferable for defining the terms and conditions between the parties, the rights of a lien are the same whether the contract is written or oral; no distinction is made. *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983); *Edward M. Cohon & Associates, Ltd. v. First National Bank of Highland Park,* 249 Ill.App.3d 929, 618 N.E.2d 676, 188 Ill.Dec. 106 (1st Dist. 1993) (oral contract supported lien claim). *See also Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington,* 251 Ill.App.3d 256, 620 N.E.2d 469, 189 Ill.Dec. 501 (4th Dist. 1993).

C. [1.11] Contract Must Be with the Owner or One Knowingly Permitted by the Owner

In addition to the fact that the original contractor must have a contract to improve real property, this contract must be with the owner of the property or one knowingly permitted by the owner of the property to have improvements performed on the property. Pursuant to 770 ILCS 60/1, the owner is the person with whom the original contractor must establish a contractual relationship to be entitled to a lien. Correspondingly, an owner is one who has an equitable or legal interest in the land. "An owner . . . is one who has had improved any tract or lot of land in which he has such an estate, right, or interest defined and set forth in section 1" of the Mechanics Lien Act, namely, an "estate in fee, for life, for years, or any other estate, or any right of redemption or other interest which such owner may have." *Hacken v. Isenberg,* 288 Ill. 589, 124 N.E. 306, 308 (1919); *M. Ecker & Co. v. LaSalle National Bank,* 268 Ill.App.3d 874, 645 N.E.2d 335, 339, 206 Ill.Dec. 330 (1st Dist. 1994).

> **"[T]he owner of any lot or piece of land," as used in the first section, [**means**] the owner of any interest or estate in such lot or land. It is indispensable that the party with whom the contract is made shall have some estate or interest in the premises upon which the building is erected or improvement made, but such estate may be the fee, or an estate for life or for years, or any interest, legal or equitable, in the land. This has been the uniform construction placed on the statute by this court.** *Paulsen v. Manske,* 126 Ill. 72, 18 N.E. 275, 276 (1888).

The word "owner" in the statute includes the owner in equity as well as at law. *Springer v. Kroeschell,* 161 Ill. 358, 43 N.E. 1084, 1086 (1896). In *Williams v. Vanderbilt,* 145 Ill. 238, 34 N.E. 476, 476 (1893), the court said:

The party with whom the contract is made by the person furnishing the labor or materials is only regarded as owner, within the meaning of the law, to the extent of the interest which he owns. It is that interest which is subjected to the lien.

In addition, for purposes of receiving notice, the owner at the time the lien is to be recorded or notice is to be sent is the party to whom notice must be sent. In *Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987), the court held that when the owner of the property at the time of the filing of the lien was different from the owner at the time of the contract, the notice of lien had to be served on the owner of record at the time of service, and the filing of a claim for lien had to be against the owner of the property as of the time of filing. The court said:

In our opinion, the legislative addition of "of record" must be read to mean the owner of the property existing not at the time of contracting but rather at the time the contractor is required to serve notice. . . . [T**]he current property owner must be able to protect his or her property interests.** 518 N.E.2d at 175.

1. Ownership Interests

a. [1.12] Joint Owners

Within the context of the Mechanics Lien Act, a contractor who has entered into a contract with one of several coowners of the property may subject an individual owner's interest in the property to a lien and, correspondingly, all the coowners to the lien, without apportioning, if the contract is with all of the coowners. *Rubendall v. Tarbox,* 200 Ill.App. 260 (2d Dist. 1916). Even if the contract is only with some of the owners, a contractor could establish a lien as to all of the coowners by showing that the improvements were knowingly permitted to be made by all of the owners. *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990).

In a case in which the discrepancy between a coownership and a contractor was reviewed, the court determined that a member of a limited liability company (LLC) that owned the property was not a coowner but rather a contractor under the Mechanics Lien Act. *Peabody-Waterside Development, LLC v. Islands of Waterside, LLC,* 2013 IL App (5th) 120490, 995 N.E.2d 1021, 374 Ill.Dec. 524. The court distinguished this case from the proposition that coowners cannot lien their own property (*see Fitzgerald v. Van Buskirk,* 16 Ill.App.3d 348, 306 N.E.2d 76 (2d Dist. 1974); *Bonhiver v. State Bank of Clearing,* 29 Ill.App.3d 794, 331 N.E.2d 390 (1st Dist. 1975)) on the grounds that an LLC is a legal entity distinct from its members. Illinois law clearly states that membership in an LLC does not confer any ownership interest in the property, real or personal, of the LLC to the member. Therefore, the grading and site development work performed by the member of the LLC for the LLC did give rise to a claim for a mechanics lien in favor of the member.

b. [1.13] Vendee

Section 1 of the Mechanics Lien Act provides that a mechanics "lien extends to an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have in the lot or tract of land at the time of making such contract or may subsequently

acquire." 770 ILCS 60/1(a). Because the lien may attach to any equitable interest in real property, it may attach to the equitable interest of a vendee in an executory installment contract for the purchase of real property. *Construx of Illinois, Inc. v. Kaiserman,* 345 Ill.App.3d 847, 800 N.E.2d 1267, 1273, 279 Ill.Dec. 684 (4th Dist. 2003). The vendee is an owner within the meaning of the Mechanics Lien Act, not a mere lienholder. *Id.* Because the vendee's interest is subject to the vendor's rights under the contract, a mechanics lien claimant that proceeds only against the vendee's interest must take that interest subject to the rights of the vendor under the contract. For instance, if the vendor were to terminate the contract with the vendee after the lien was asserted, it could destroy the very estate against which the lien attached. To avoid such a result, a lien claimant may assert, if the facts permit, that the vendor had knowingly permitted the improvement and thereby subjected its estate to the lien, thus permitting the lien claimant to assert the lien against the vendor's fee interest in the property. *Id.*

In cases in which a court has found that the seller, under an executory contract to sell real property, knowingly permitted (or at least did not object to) the construction of the improvements, it has held that the mechanics lien claims attach to the seller's fee interest. *Id.; City of Decatur, Illinois v. Ballinger,* 2013 IL App (4th) 120456, 988 N.E.2d 737, 370 Ill.Dec. 539; *Martinez v. Knochel,* 123 Ill.App.3d 555, 462 N.E.2d 1281, 78 Ill.Dec. 927 (4th Dist. 1984); *Wanzer v. Smorgas-Brickan Developers, Inc.,* 130 Ill.App.2d 378, 264 N.E.2d 435 (2d Dist. 1970).

c. [1.14] Tenant

A mechanics lien may attach to the leasehold estate of a tenant for work performed for the tenant. As the following discussion indicates, the lien also may attach, under many circumstances, to the interests of the owner of the property for work performed for a tenant. *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 176 Ill.2d 385, 680 N.E.2d 283, 223 Ill.Dec. 550 (1997). Section 1 of the Mechanics Lien Act expressly states that the lien may attach to an estate "for life, for years, or any other estate . . . or other interest that the owner may have." 770 ILCS 60/1(a). As stated in *Matot v. Barnheisel,* 212 Ill.App. 489, 494 (1st Dist. 1918): "[A] lessee for 99 years was, within the purview of section 1 of the Liens Act . . . an owner." [Citation omitted.] A tenant for life or for years is thus an owner in any case in which its interest (*i.e.,* the tenant's leasehold estate) is sought to be subjected to the lien. The interest of a tenant for years may be subjected to a mechanics lien and sold by chancery proceedings to satisfy that lien. *Fehr Construction Co. v. Postl System of Health Building,* 189 Ill.App. 519 (1st Dist. 1914); *Weil v. Bomash,* 237 Ill.App. 544 (1st Dist. 1925). A lien may also attach to a private lease of public property.

To avoid the obvious limitations of a lien attaching to only a leasehold interest in the premises, a lien claimant's lien can attach to the owner's fee interest in the premises if it is found to have knowingly permitted the tenant to make the improvements. *Norman A. Koglin Associates, supra; Abbott Electrical Construction Co. v. Ladin,* 144 Ill.App.3d 974, 494 N.E.2d 1251, 98 Ill.Dec. 924 (2d Dist. 1986); *Armco Steel Corp. v. LaSalle National Bank,* 31 Ill.App.3d 695, 335 N.E.2d 93 (2d Dist. 1975); *Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131 (5th Dist. 1973); *Boyer v. Keller,* 258 Ill. 106, 101 N.E. 237 (1913).

It should be noted that, as against a contractor of its tenant, the landlord or owner of the fee title is not a creditor, encumbrancer, or purchaser within the meaning of §7 of the Mechanics Lien Act. *National Theater Supply Co. v. Blum,* 276 Ill.App. 122 (1st Dist. 1934). Rather, both the tenant and the owner will be considered owners of the property.

d. [1.15] Equitable Ownership

A lien may also attach to an equitable ownership in property. For instance, a trustee holding title to property under a land trust is an owner under the statute. It holds both the legal and equitable title to the real estate. *Edward Hines Lumber Co. v. Dell Corp.,* 49 Ill.App.3d 873, 364 N.E.2d 368, 7 Ill.Dec. 207 (1st Dist. 1977). Similarly, a beneficiary under a land trust is an owner under the Mechanics Lien Act. *Dunlop v. McAtee,* 31 Ill.App.3d 56, 333 N.E.2d 76 (2d Dist. 1975); *Hill Behan Lumber Co. v. American National Bank & Trust Company of Waukegan,* 101 Ill.App.3d 268, 427 N.E.2d 1325, 56 Ill.Dec. 779 (2d Dist. 1981); *Dual Temp Installations, Inc. v. Chicago Title & Trust Co.,* 41 Ill.App.3d 415, 354 N.E.2d 131 (1st Dist. 1976); *Matthews Roofing Co. v. Community Bank & Trust Company of Edgewater,* 194 Ill.App.3d 200, 550 N.E.2d 1189, 141 Ill.Dec. 143 (1st Dist. 1990) (beneficiary of land trust is owner sufficient for serving 770 ILCS 60/34 notice).

2. [1.16] Knowingly Permitted

As noted in §1.11 above, the Mechanics Lien Act requires that the original contractor has a contract with an owner that has knowingly permitted the improvements to the property. There is no distinction between an owner who authorizes and one who knowingly permits. *Cooper v. Palais Royal Theatre Co.,* 242 Ill.App. 184, 195 (1st Dist. 1926). *See Hacken v. Isenberg,* 288 Ill. 589, 124 N.E. 306 (1919). Hence, a tenant is a classic example of one who knowingly permits, particularly when the actual owner is somewhat removed from the actual construction.

Section 1 of the Mechanics Lien Act permits a lien to "[a]ny person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land . . . or to manage a structure under construction thereon." 770 ILCS 60/1(a). The words " 'knowingly permit' are to be taken in the general sense of being aware of and consenting to such improvements." *Armco Steel Corp. v. LaSalle National Bank,* 31 Ill.App.3d 695, 335 N.E.2d 93, 96 (2d Dist. 1975). "The owner is presumed 'to have "knowingly permitted" the improvements where he knew and failed to protest or accepted the benefits of the improvements.' " *Construx of Illinois, Inc. v. Kaiserman,* 345 Ill.App.3d 847, 800 N.E.2d 1267, 1276, 279 Ill.Dec. 684 (4th Dist. 2003), quoting *Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131, 133 (5th Dist. 1973).

D. [1.17] Mechanics Lien Is Cumulative and Additional Remedy

The Mechanics Lien Act is an additional and cumulative remedy given to those who furnish labor and material to the real estate in addition to other remedies they may have to collect the amount owed for work performed. *Matanky Realty Group, Inc. v. Katris,* 367 Ill.App.3d 839, 856 N.E.2d 579, 305 Ill.Dec. 774 (1st Dist. 2006); *Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington,* 251 Ill.App.3d 256, 620 N.E.2d 469, 189 Ill.Dec. 501 (4th Dist. 1993); *Decatur Bridge Co. v. Standart,* 208 Ill.App. 592, 596 (2d Dist. 1917); *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.,* 119 Ill.App.3d 663, 456 N.E.2d 889, 75 Ill.Dec. 68 (2d Dist. 1983); *Rockwood Sprinkler Co. v. Phillips Co.,* 265 Ill.App. 267 (1st Dist. 1932); *H.G. Wolff Co. v. Gwynne,* 246 Ill.App. 86 (1st Dist. 1927); *Erikson v. Ward,* 266 Ill. 259,

107 N.E. 593 (1914); *M. Pugh Co. v. Wallace,* 198 Ill. 422, 64 N.E. 1005 (1902); *Culver v. Elwell,* 73 Ill. 536 (1874). The law is well settled that a lienor may pursue several remedies at the same time for the satisfaction of its claim as long as there is only one satisfaction. *Culver, supra,* 73 Ill. at 541.

Hence, a subcontractor that has perfected its lien may have four remedies: (1) a breach-of-contract action at law against the original contractor alone; (2) an action at law against the original contractor and owner jointly under §28 of the Mechanics Lien Act (770 ILCS 60/28) for a money judgment; (3) an action in equity to enforce its lien; and (4) an action under the payment bond, if one was provided for the job. Although the remedies are alternative, they should be joined in one suit along with any other lien claimants that have instituted proceedings relating to the project through consolidation or joinder. See 770 ILCS 60/9.

E. [1.18] Relation-Back Doctrine

The relation-back doctrine refers to the concept that the lien attaches and exists from the date of the contract between the owner and the original contractor. 770 ILCS 60/1; *Petroline Co. v. Advanced Environmental Contractors, Inc.,* 305 Ill.App.3d 234, 711 N.E.2d 1146, 238 Ill.Dec. 485 (1st Dist. 1999). Although the lien attaches at the time of the owner-contractor contract, the notice of the claim must be given and recorded and suit must be filed within the times prescribed by statute to preserve and enforce the lien. *Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987); *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986); *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983); *Pittsburgh Plate Glass Co. v. Kransz,* 291 Ill. 84, 125 N.E. 730 (1919); *St. Louis & P.R. Co. v. Kerr,* 153 Ill. 182, 38 N.E. 638 (1894).

The concept of the lien relating back to the inception of the owner-contractor contract is a fundamental premise of the Mechanics Lien Act. 770 ILCS 60/1. As the Illinois Supreme Court observed in *Pittsburgh Plate Glass, supra,*

> **any other construction of the statute would render it inoperative, because it would make the statutory lien subject to any other lien placed upon the property, or any conveyance thereof made, after the beginning of the work and before the notice was served or filed.** 125 N.E. at 732, quoting *W. W. Brown Const. Co. v. Central Illinois Const. Co.,* 234 Ill. 397, 84 N.E. 1038, 1040 (1908).

Thus, without the statute operating to create a security interest at the time of the owner's contract with the contractor, third-party interests that might arise during the construction of the improvements prior to liens being recorded would have priority. Additionally, pursuant to §16 of the Mechanics Lien Act, the claimant will have priority to the extent of the value of enhancement provided to the premises by the claimant's work over a mortgagee whose mortgage was recorded prior to the date of the contract between the owner and the original or general contractor. 770 ILCS 60/16. Section 16 of the Mechanics Lien Act has been amended to make clear that a lien claimant has absolute priority as to the improvements and over the previously recorded lender. In *LaSalle Bank National Ass'n v. Cypress Creek 1, LP,* 242 Ill.2d 231, 950 N.E.2d 1109, 351 Ill.Dec. 281

(2011), the Illinois Supreme Court ultimately ruled that the lender had priority to the extent of the land prior to improvement and also shared pro rata with the lien claimants to the extent of the construction funded by the lender. The lender thus was given lien rights without having perfected its right in accordance with the Mechanics Lien Act. The ultimate effect of this decision is that the lien claimants received a far smaller percentage and amount of the value of the improvement under §30 of the Mechanics Lien Act than they otherwise would have received under the historical interpretation of §16. In response to this decision, the Illinois legislature amended the statute to include language that makes it clear that the lien claimant has priority over the lender with respect to the improvements:

> **[**A**]ny lien creditors shall have a paramount lien in the portion of the proceeds attributable to the value of all subsequent improvements made to the property.** 770 ILCS 60/16.

On the other hand, if the date of the original or general contractor's contract predates the date the mortgage was recorded, the language of §16, as it relates to the proof of enhancement, has been held to be inapplicable, and the entire amount of the lien claim, if properly perfected under the Mechanics Lien Act, has absolute priority as to both land and improvements. *Detroit Steel Products Co. v. Hudes,* 17 Ill.App.2d 514, 151 N.E.2d 136 (4th Dist. 1958); *State Bank of Lake Zurich v. Winnetka Bank,* 245 Ill.App.3d 984, 614 N.E.2d 862, 185 Ill.Dec. 421 (2d Dist. 1993). "[W]hoever purchases the property after the contract [for the improvement] is made purchases subject to the lien under that contract and is bound by it." *Boyer v. Keller,* 258 Ill. 106, 101 N.E. 237, 240 (1913). *See Springer v. Kroeschell,* 161 Ill. 358, 43 N.E. 1084, 1087 (1896); *Goldstein v. Weisberg,* 258 Ill.App. 228 (1st Dist. 1930). *See also Application of Bickel,* 301 Ill. 484, 134 N.E. 76 (1922); *United Cork Cos. v. Volland,* 365 Ill. 564, 7 N.E.2d 301, 305 (1937).

VII. [1.19] PERFECTING THE MECHANICS LIEN

Notwithstanding the statutory creation of an inchoate lien upon the furnishing of work and materials, the lien must be perfected through the notice and recording requirements of the Mechanics Lien Act. *Decatur Bridge Co. v. Standart,* 208 Ill.App. 592 (2d Dist. 1917); *Board of Education of School District No. 108, Tazewell County, Illinois ex rel. A.Y. McDonald Manufacturing Co. v. Collom,* 77 Ill.App.2d 479, 222 N.E.2d 804 (3d Dist. 1966). The lien that attaches concurrently with performance ceases to exist if not perfected as provided in the statute. *Application of Bickel,* 301 Ill. 484, 134 N.E. 76 (1922). Further, it cannot be stressed enough that the time periods established by the Mechanics Lien Act are mandatory for the existence of the right to enforce the lien. *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000); *JoJan Corp. v. Brent,* 307 Ill.App.3d 496, 718 N.E.2d 539, 240 Ill.Dec. 906 (1st Dist. 1999); *Braun-Skiba, Ltd. v. LaSalle National Bank,* 279 Ill.App.3d 912, 665 N.E.2d 485, 216 Ill.Dec. 425 (1st Dist. 1996); *North Side Sash & Door Co. v. Hecht,* 295 Ill. 515, 129 N.E. 273 (1920). If the time periods in which to send notice, record the claims, and file suit are not strictly met, priority of the claim may be compromised and the lien itself may be extinguished. Further, a court will have no discretion to extend the time periods, regardless of the reason. Courts have made it very clear that the Mechanics Lien Act is strictly construed. *Garbe Iron Works, Inc. v. Priester,* 110 Ill.App.3d 948, 443 N.E.2d 204, 66

Ill.Dec. 521 (1st Dist. 1982); *Bull v. Mitchell,* 114 Ill.App.3d 177, 448 N.E.2d 1016, 70 Ill.Dec. 138 (3d Dist. 1983); *Wise v. Jerome,* 5 Ill.App.2d 214, 125 N.E.2d 292 (2d Dist. 1955). Illinois courts have noted that once the statutory requirements to establish a lien have been met, the court should give the Mechanics Lien Act a liberal construction to allow justice to be done between the parties. *Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131 (5th Dist. 1973).

A. [1.20] 770 ILCS 60/5 and 60/21 — Subcontractor on Single-Family Residential Property

The subcontractor performing work on owner-occupied, single-family residential property must serve the notice set forth in §§5 and 21 of the Mechanics Lien Act on the owner within 60 days of beginning its work. 770 ILCS 60/5, 60/21. However, failure to provide the 60-day notice will not serve to defeat the lien claim if there is no prejudice to the owner. *Crawford Supply Co. v. Schwartz,* 396 Ill.App.3d 111, 919 N.E.2d 5, 335 Ill.Dec. 484 (1st Dist. 2009). This is the only notice provision under the Mechanics Lien Act in which the court can exercise discretion based on the findings relative to prejudice to the owner. Notably, the requirement to serve the 60-day notice to the owner does not waive the subcontractor's requirement to also serve a 90-day notice (see 770 ILCS 60/24, 60/25) at the conclusion of the project. *Gary L. Brown Painting & Decorating, Ltd. v. David E. Comeau, Ltd.,* 159 Ill.App.3d 746, 512 N.E.2d 795, 111 Ill.Dec. 406 (2d Dist. 1987). Further, in at least one instance, it was determined that there was no requirement to serve the 60-day notice when the owners were not residing on the premises during the construction. *Pittman v. Manion,* 212 Ill.App.3d 342, 570 N.E.2d 1169, 156 Ill.Dec. 447 (5th Dist. 1991).

B. [1.21] 770 ILCS 60/24 and 60/25 — Subcontractor's 90-Day Notice

Whether a subcontractor is working on a single-family residential project or a commercial private project, it must serve notice of its claim to the owner and the lender as specified in §24 of the Mechanics Lien Act or §25, if applicable, within 90 days of the last date the subcontractor performed work or delivered material to the project to enforce its lien against the owner, lender of record, or third parties. 770 ILCS 60/24, 60/25; *Gary L. Brown Painting & Decorating, Ltd. v. David E. Comeau, Ltd.,* 159 Ill.App.3d 746, 512 N.E.2d 795, 111 Ill.Dec. 406 (2d Dist. 1987); *J.E. Milligan Steel Erectors, Inc. v. Garbe Iron Works, Inc.,* 139 Ill.App.3d 303, 486 N.E.2d 945, 93 Ill.Dec. 412 (3d Dist. 1985); *Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 76 Ill.Dec. 931 (1st Dist. 1984). Note that the 90-day time frame runs from the last day of contract work or contracted extra work and not warranty work. *Cyclonaire Corp. v. ISG Riverdale, Inc.,* 378 Ill.App.3d 554, 882 N.E.2d 684, 317 Ill.Dec. 804 (1st Dist. 2007). Failure to serve the lender with a 90-day notice will render the lien claim inoperable as to the lender, but the subcontractor would still have lien rights as to the owner. *Hill Behan Lumber, supra.* This statement is true only to the extent that the subcontractor is not listed on the contractor's sworn statement. If the subcontractor or the material supplier fails to serve notice in accordance with §24 or §25, the subcontractor may enforce its lien as to both the owner and the lender to the extent that it has been shown on the contractor's sworn statement, given pursuant to 770 ILCS 60/5, it being the owner's obligation to ensure that the lender is informed of the information on the sworn statements. *Hill Behan Lumber, supra.* If the subcontractor fails to serve notice of its claim and is not shown on the contractor's sworn statement given pursuant to §5, the subcontractor or material supplier has no lien. *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970).

Section 24 gives a form for the 90-day notice required by the Mechanics Lien Act. 770 ILCS 60/24. Additionally, the 90-day notice must contain the exact location, must state that the claimant is asserting or claiming a mechanics lien, and must state that the claimant is claiming an interest in the property where the project occurred. *Seasons-4, Inc. v. Hertz Corp.,* 338 Ill.App.3d 565, 788 N.E.2d 179, 272 Ill.Dec. 875 (1st Dist. 2003).

C. [1.22] 770 ILCS 60/7 — Content of Lien and Time To Record Lien and File Suit

Section 7 of the Mechanics Lien Act not only addresses time requirements, as discussed below, but also sets forth the requirements of the content of the mechanics lien claim, which requires the lien to contain a verification by the affidavit of the contractor or his or her agent or employee, as well as "a brief statement of the claimant's contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same." 770 ILCS 60/7(a); *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986). Courts have also ruled that although §7 does not specifically require a completion date in the claim for lien, it is an inferred requirement. *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000).

For both the general contractor and the subcontractor on private projects, regardless of whether it is a single-family residential or a private commercial project, a lien must be recorded or suit filed within four months of the date last worked to be enforceable against the lender of record, encumbrancers, or third-party purchasers. 770 ILCS 60/7; *Braun-Skiba, Ltd. v. LaSalle National Bank,* 279 Ill.App.3d 912, 665 N.E.2d 485, 216 Ill.Dec. 425 (1st Dist. 1996); *Merchants Environmental Industries, supra; Mutual Services, Inc. v. Ballantrae Development Co.,* 159 Ill.App.3d 549, 510 N.E.2d 1219, 110 Ill.Dec. 188 (1st Dist. 1987); *D.M. Foley Co. v. North West Federal Savings & Loan Ass'n,* 122 Ill.App.3d 411, 461 N.E.2d 500, 77 Ill.Dec. 877 (1st Dist. 1984); *Waldbillig Woodworking, Inc. v. King Arthur's North, Ltd.,* 104 Ill.App.3d 417, 432 N.E.2d 1048, 60 Ill.Dec. 149 (1st Dist. 1982).

No lien is enforceable against any lender or third party unless it is recorded or suit is brought within four months of the date the claimant last performed work, as set forth in §7. The purpose of the §7 requirement, which states that the lien claim must be filed within a stated time, is that third persons dealing with the property may have notice of the existence, nature, amount, and character of the lien, as well as the times when the material was furnished and labor performed, and thus be able to learn from the claim itself whether it is enforceable. *Braun-Skiba, supra; Mutual Services, supra,* 510 N.E.2d at 1222; *Federal Savings & Loan Insurance Corp. v. American National Bank & Trust Company of Chicago,* 115 Ill.App.3d 426, 450 N.E.2d 820, 71 Ill.Dec. 132 (1st Dist. 1983); *Components, Inc. v. Walter Kassuba Realty Corp.,* 64 Ill.App.3d 140, 381 N.E.2d 42, 21 Ill.Dec. 107 (2d Dist. 1978); *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291 (1911); *Buckley v. Commercial Nat. Bank of Chicago,* 171 Ill. 284, 49 N.E. 617 (1898).

Further, a general contractor or a subcontractor that has filed a timely claim for lien and, if necessary, the appropriate notice, must file suit within two years of the date last worked to enforce its lien against the owner, encumbrancers, or purchasers. 770 ILCS 60/7; *P.H. Broughton & Sons, Inc. v. Muller & Allen Realty Co.,* 40 Ill.App.3d 776, 353 N.E.2d 30 (4th Dist. 1976); *Mixer v.*

Billingsley, 110 Ill.App.3d 239, 442 N.E.2d 275, 66 Ill.Dec. 3 (4th Dist. 1982). If a contractor fails to comply with §7, the lien may not be enforceable against third parties but, nonetheless, may be enforced against the original owner. *Merchants Environmental Industries, supra; Apollo Heating & Air Conditioning Corp. v. American National Bank & Trust Co.,* 135 Ill.App.3d 976, 482 N.E.2d 690, 693, 90 Ill.Dec. 711 (1st Dist. 1985). If the owner has notice of the subcontractor's claim through the contractor's sworn statement (770 ILCS 60/5) or the subcontractor's notice (770 ILCS 60/24) and the subcontractor fails to record its lien claim, the subcontractor has no lien against third persons but may proceed against the property, if still owned by the same owner, or the funds due to the general contractor from that owner within two years of completion of the project.

VIII. [1.23] CONTRACTORS' SWORN STATEMENTS AND SUBCONTRACTORS' AFFIDAVITS

The Mechanics Lien Act expressly states that the owner shall not be compelled to pay a greater sum for the completion of the project than the price of the original contract unless payment has been made in violation of the rights of those that were intended to benefit from the Act. 770 ILCS 60/21. This means that an owner is protected under §21 (a) by insisting on properly completed contractor's sworn statements from the general contractor and subcontractor's affidavits from the subcontractors and (b) by paying only in reliance thereon directly to the person to whom the money is shown to be due for each line item. *Contractors' Ready-Mix, Inc. v. Earl Given Construction Co.,* 242 Ill.App.3d 448, 611 N.E.2d 529, 183 Ill.Dec. 266 (4th Dist. 1993). In addition, as further protection, an owner may make direct payment to the subcontractors and suppliers of the contractor as set forth in §27 of the Mechanics Lien Act, 770 ILCS 60/27. Further, the owner should make independent reviews of the sworn statements and affidavits even if a title company is handling the payments on a project. While the escrowee insures the lender's interests in the project, it may not be fully aligned with the owner. *Fantino v. Lenders Title & Guaranty Co.,* 303 Ill.App.3d 204, 707 N.E.2d 756, 236 Ill.Dec. 629 (2d Dist. 1999).

Section 5 of the Mechanics Lien Act requires contractors to provide owners with a list of the subcontractors and suppliers with whom the contractor contracts, and the owners are required to ask for this information prior to issuing payments. 770 ILCS 60/5. Similarly, §22 of the Mechanics Lien Act states that, upon request by the owner or the contractor, a subcontractor shall provide an affidavit with the amount due to it and its sub-subcontractors and material suppliers. 770 ILCS 60/22. While §22 does not direct the owner to request this information, §5 clearly requires the owner to request a sworn statement from the contractor. Moreover, the Mechanics Lien Act clearly states that payments made in derogation of notice of amounts owed through §5, §22, or §24 could expose an owner to paying amounts in excess of the original contract. 770 ILCS 60/21, 60/27, 60/32. Thus, it becomes the duty of the owner to withhold payment of sufficient funds from the original contractor to provide for payment to the subcontractors of whose claim the owner is made aware under §5, §22, §24, or §25 of the Mechanics Lien Act. *Weather-Tite, Inc. v. University of St. Francis,* 383 Ill.App.3d 304, 892 N.E.2d 49, 322 Ill.Dec. 802 (3d Dist. 2008); *Robertson v. Huntley & Blazier Co.,* 351 Ill.App. 378, 115 N.E.2d 533 (4th Dist. 1953); *Hall v. Harris,* 242 Ill.App. 315 (1st Dist. 1926).

If an owner pays a contractor and does not retain sufficient funds to pay a subcontractor after receiving notice under §5 or §24 that a subcontractor is owed money, such payment shall be

considered illegal and made in violation of the subcontractor's rights. *Weather-Tite, supra; Alliance Steel, Inc. v. Piercy,* 277 Ill.App.3d 632, 660 N.E.2d 1341, 214 Ill.Dec. 392 (4th Dist. 1996), citing *Hudson v. Caterpillar Tractor Co.,* 117 Ill.App.3d 720, 453 N.E.2d 880, 73 Ill.Dec. 55 (4th Dist. 1983). Further, if the owner makes such a payment before receiving the contractor's sworn statement, either because the owner failed to ask or the contractor failed to provide one, the owner may be compelled to pay subcontractors even if the contractor has been paid in full. *Brady Brick & Supply Co. v. Lotito,* 43 Ill.App.3d 69, 356 N.E.2d 1126, 1 Ill.Dec. 844 (2d Dist. 1976); *Malesa v. Royal Harbour Management Corp.,* 187 Ill.App.3d 655, 543 N.E.2d 591, 135 Ill.Dec. 208 (2d Dist. 1989).

However, an owner who receives a sworn statement that meets the requirements of §5 may rely on it and be protected by it, even though it is false. *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005); *Contractors' Ready-Mix, supra; Sanaghan v. Lawndale National Bank,* 90 Ill.App.2d 254, 232 N.E.2d 546 (1st Dist. 1967); *Knickerbocker Ice Co. v. Halsey Bros. Co.,* 262 Ill. 241, 104 N.E. 665 (1914); *John E. Burns Lumber Co. v. W.J. Reynolds Co.,* 148 Ill.App. 356 (1st Dist. 1909).

As noted, §5 requires that the contractor submit to the owner a list of the subcontractors and suppliers with whom the contractor has contracts performing the work and the amount due and to become due to each. 770 ILCS 60/5. The statement must be in writing, under oath or verified by affidavit, and must contain the names and address of the subcontractors. 770 ILCS 60/5(a). If an owner receives a sworn statement that is not in compliance with the requirements of the Mechanics Lien Act, a second payment may be required. *Fred C. Kramer Co. v. LaSalle National Bank,* 36 Ill.App.2d 406, 184 N.E.2d 739 (1st Dist. 1962). In *Fred C. Kramer,* a supplier sued the owner to foreclose its mechanics lien. The owner defended on the basis that it had received sworn statements from the contractor. The statements from the contractor contained the familiar language: "All materials taken from stock and paid for." 184 N.E.2d at 741. The court held that this language did not comply with the §5 requirements of listing the names and addresses "of all parties furnishing materials and labor and of the amounts due or to become due each." *Id.* Thus, the owner was not protected. However, in a more recent case, this same language relied on in a §22 affidavit was found to be sufficient. *Lazar Brothers Trucking, Inc. v. A & B Excavating, Inc.,* 365 Ill.App.3d 559, 850 N.E.2d 215, 302 Ill.Dec. 778 (1st Dist. 2006).

Similarly, in *Deerfield Electric Co. v. Herbert W. Jaeger & Associates, Inc.,* 74 Ill.App.3d 380, 392 N.E.2d 914, 30 Ill.Dec. 149 (2d Dist. 1979), the court determined that the standard American Institute of Architects (AIA) request for payment form and statement of values lacked sufficient information to qualify as a sworn statement under the Mechanics Lien Act. The AIA forms provide a breakdown only by trade and the value of the work performed to date, not by the name and address of each subcontractor furnishing labor or material to the project. The AIA forms do not permit an owner or disbursing agent to match the names of all the parties entitled to lien rights as would be shown on a properly completed contractor's sworn statement. Thus, the AIA forms do not readily permit an owner to fulfill its obligations under §27 of the Mechanics Lien Act and to be protected from mechanics lien claims as contemplated by §5 of the Act. Conversely, however, the Appellate Court for the Fourth District has confirmed that §5 does not require any specific form as long as the subcontractors and the amounts due are identified. *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, 992 N.E.2d 27, 372 Ill.Dec. 488.

Note also that even if an owner fails to obtain a contractor's sworn statement, the owner has no liability to a subcontractor of whom the owner has not received notice under §5, §22, §24, or (if applicable) §25. *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451, 453 (2d Dist. 1971); *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602, 604 (2d Dist. 1967); *Decatur Bridge Co. v. Standart,* 208 Ill.App. 592 (2d Dist. 1917); *Berkshire Warehouse Co. v. Hilger & Co.,* 268 Ill. 463, 109 N.E. 287 (1915); *Brennan v. William P. McEvoy & Co.,* 196 Ill.App. 336 (2d Dist. 1915); *Shaw v. Chicago Sash, Door & Blind Manuf'g Co.,* 144 Ill. 520, 33 N.E. 870 (1893).

In *Cityline Construction Fire & Water Restoration, Inc. v. Roberts,* 2014 IL App (1st) 130730, 7 N.E.3d 235, 379 Ill.Dec. 809, the court held that the failure of a contractor to furnish a contractor's sworn statement when requested to do so by the owner for purposes of making progress payments excused the owner from making further payments and caused it to lose its lien rights. Further, when a contractor refused to perform further without the payments, the contractor was held to be in breach of contract and lost its lien rights. *Ambrose v. Biggs,* 156 Ill.App.3d 515, 509 N.E.2d 614, 108 Ill.Dec. 918 (2d Dist. 1987); *Deerfield Electric, supra*.

Significantly, however, the owner must request the sworn statement from the contractor before it can deny the contractor's lien claim or breach-of-contract claim. As noted in *Prior v. First Bank & Trust Co. of Mt. Vernon, Illinois,* 231 Ill.App.3d 331, 596 N.E.2d 891, 892, 173 Ill.Dec. 267 (5th Dist. 1992):

> **Defendants [**(the owners)**] never requested a sworn statement from plaintiff [**(the contractor)**], consequently the duty to provide them with one never arose. They cannot now defeat plaintiff's claim merely on this basis alone. . . . [**W**]e believe the owner under section 5 of the Act has more than just the duty to refrain from paying the contractor until he receives the contractor's sworn statement. Defendants knowingly allowed the work to be done to their property and in so doing recognized a benefit to their land. [**Citations omitted.**]**

See also National Wrecking Co. v. Midwest Terminal Corp., 234 Ill.App.3d 750, 601 N.E.2d 999, 176 Ill.Dec. 301 (1st Dist. 1992).

The mutual obligations on an owner and a contractor in §5 seem to dictate clearly that a contractor's sworn statement is due from the contractor to the owner before the owner is obligated to pay any funds to the general contractor, whenever a sworn statement is requested. The balance breaks down with third-party claimants, however, in that the owner will not be required to pay twice if it relied on proper sworn statements and the sub-subcontractors properly sent notice under the Mechanics Lien Act. *See Gerdau Ameristeel US, supra; Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, 39 N.E.3d 8, 395 Ill.Dec. 541.

The principles discussed in this section do not necessarily apply in public construction cases. In public construction mechanics lien cases, any payment to an intermediary subcontractor is a defense to a mechanics lien claim brought by a subcontractor or a material supplier. *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990); *Decatur Housing Authority ex rel. Harlan E. Moore & Co. v. Christy-Foltz, Inc.,* 117 Ill.App.3d 1077, 454 N.E.2d 379, 73 Ill.Dec. 519 (4th Dist. 1983); *Koenig v. McCarthy Const. Co.,*

344 Ill.App. 93, 100 N.E.2d 338 (2d Dist. 1951). Note, however, that the same payment that is a defense to a mechanics lien claim in public construction cases is not a defense to a claim against the surety under the Public Construction Bond Act, 30 ILCS 550/0.01, *et seq*. *Aluma Systems, supra; City of Chicago, ex rel. Charles Equipment Co. v. United States Fidelity & Guaranty Co.,* 142 Ill.App.3d 621, 491 N.E.2d 1269, 96 Ill.Dec. 809 (1st Dist. 1986); *Housing Authority of County of Franklin, Illinois, ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873 (5th Dist. 1970).

IX. [1.24] BENEFITS CONVEYED UNDER THE MECHANICS LIEN ACT

The Mechanics Lien Act is legislation that attempts to convey rights to diverse parties that share common interests but that can be adverse to each other. The significance of the Act is how it regulates these competing interests and how, if followed properly, it would substantially result in all parties in the construction transaction prevailing. *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005); *Struebing Construction Co. v. Golub-Lake Shore Place Corp.,* 281 Ill.App.3d 689, 666 N.E.2d 846, 217 Ill.Dec. 177 (1st Dist. 1996); *Alliance Steel, Inc. v. Piercy,* 277 Ill.App.3d 632, 660 N.E.2d 1341, 214 Ill.Dec. 392 (4th Dist. 1996).

A. [1.25] Security Interests and Apportionment

Primarily, the Mechanics Lien Act provides contractors and subcontractors with a security interest for amounts due for the construction of improvements to real property; such a security interest will have priority over interested third parties. 770 ILCS 60/16; *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983); *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.,* 119 Ill.App.3d 663, 456 N.E.2d 889, 75 Ill.Dec. 68 (2d Dist. 1983); *Robertson v. Huntley & Blazier Co.,* 351 Ill.App. 378, 115 N.E.2d 533 (4th Dist. 1953); *Moulding-Brownell Corp. v. E.C. Delfosse Const. Co.,* 291 Ill.App. 343, 9 N.E.2d 459, 461 (1st Dist. 1937); *Colp v. First Baptist Church of Murphysboro,* 341 Ill. 73, 173 N.E. 67 (1930). This is significant as otherwise a secured party (such as a lender) could assume priority even after the work was performed and before the claim was actually recorded. Section 16 of the Mechanics Lien Act, therefore, protects a mortgagee that predates the construction contract to the extent of the value of the land and protects the claimants to the extent of the value of the improvements.

B. [1.26] Interest Earned on Lien Claims Until Payment

Pursuant to §1 of the Mechanics Lien Act, contractors and subcontractors are entitled to interest at a rate of ten percent per annum for unpaid amounts from the date due until the claim is paid. 770 ILCS 60/1(a); *Premier Electrical Construction Co. v. American National Bank of Chicago,* 276 Ill.App.3d 816, 658 N.E.2d 877, 213 Ill.Dec. 128 (1st Dist. 1995); *Edward Electric Co. v. Automation, Inc.,* 229 Ill.App.3d 89, 593 N.E.2d 833, 171 Ill.Dec. 13 (1st Dist. 1992); *Charter Bank & Trust of Illinois v. Edward Hines Lumber Co.,* 233 Ill.App.3d 574, 599 N.E.2d 458, 174 Ill.Dec. 674 (2d Dist. 1992); *Fischer v. McHenry State Bank,* 74 Ill.App.3d 509, 392 N.E.2d 995, 30 Ill.Dec. 230 (2d Dist. 1979); *William Aupperle & Sons, Inc. v. American National Bank & Trust*

Company of Chicago, 28 Ill.App.3d 573, 329 N.E.2d 458 (3d Dist. 1975); *Ahmer v. Peters,* 17 Ill.App.2d 113, 149 N.E.2d 503 (1st Dist. 1958); *Carey-Lombard Lumber Co. v. Jones,* 187 Ill. 203, 58 N.E. 347, 351 (1900).

C. [1.27] Subcontractor Granted Remedy Against Owner Without Privity of Contract

The Mechanics Lien Act allows for a subcontractor to file an action against the owner's property and for a money judgment without being in privity of contract. This is itself an extraordinary remedy. 770 ILCS 60/21(e), 60/28; *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 167 Ill.Dec. 354 (4th Dist. 1992); *D.E. Wright Electric, Inc. v. Henry Ross Construction Co.,* 183 Ill.App.3d 46, 538 N.E.2d 1182, 131 Ill.Dec. 626 (5th Dist. 1989).

D. [1.28] Owners' Liability Is Limited

While granting a security interest in favor of the worker, the Mechanics Lien Act correspondingly protects the owner by limiting its liability to an amount equal to the improvements received or the amount of the contract, including extras. 770 ILCS 60/5, 60/21; *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451 (2d Dist. 1971); *Traubco Food Equipment Fabricators, Inc. v. United Auto Workers, Local 588, Rank & File Union Center, AFL-CIO,* 123 Ill.App.2d 106, 258 N.E.2d 817 (1st Dist. 1970) (abst.); *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602 (2d Dist. 1967).

E. [1.29] Owners Can Accelerate Statute of Limitations To Adjudicate Lien Claims

The Mechanics Lien Act provides for a mechanism for an owner to accelerate the time in which suit must be brought from within 2 years of the claimant's last performed work to 30 days of notice by serving a notice on the lien claimant pursuant to §34 of the Act. 770 ILCS 60/34; *Krzyminski v. Dziadkowiec,* 296 Ill.App.3d 710, 695 N.E.2d 1275, 231 Ill.Dec. 156 (1st Dist. 1998). The claimant then must file suit or join in any pending foreclosure within 30 days or forfeit its lien claim (770 ILCS 60/34; *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC,* 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill.Dec. 615 (1st Dist. 2005); *Vernon Hills III Limited Partnership v. St. Paul Fire & Marine Insurance Co.,* 287 Ill.App.3d 303, 678 N.E.2d 374, 222 Ill.Dec. 762 (2d Dist. 1997); *Charter Bank & Trust of Illinois v. Edward Hines Lumber Co.,* 233 Ill.App.3d 574, 599 N.E.2d 458, 174 Ill.Dec. 674 (2d Dist. 1992); *Pickus Construction & Equipment Co. v. Bank of Waukegan,* 158 Ill.App.3d 141, 511 N.E.2d 228, 110 Ill.Dec. 393 (2d Dist. 1987); *Matthews Roofing Co. v. Community Bank & Trust Company of Edgewater,* 194 Ill.App.3d 200, 550 N.E.2d 1189, 141 Ill.Dec. 143 (1st Dist. 1990); *M.L. Ensminger Co. v. Chicago Title & Trust Co.,* 74 Ill.App.3d 677, 393 N.E.2d 663, 30 Ill.Dec. 627 (1st Dist. 1979)) unless the time is extended by the bankruptcy of a necessary party (*Chicago Whirly, Inc. v. Amp Rite Electric Co.,* 304 Ill.App.3d 641, 710 N.E.2d 45, 237 Ill.Dec. 622 (1st Dist. 1999)). This procedure is also available to owners, general contractors, and subcontractors in public construction. See 770 ILCS 60/23(b), 60/23(c). This facilitates a procedure to clear title or adjudicate a public fund, as the case may be, in an efficient, expedited manner. Section 34 contains mandatory language for a written demand made under this section. 770 ILCS 60/34(b).

F. [1.30] Third Parties' Liability Is Limited

Contractors and subcontractors are generally precluded from asserting priority over the lender or purchasers of the property unless the claimant has complied with the rigid, technical requirements of the Mechanics Lien Act. *Mutual Services, Inc. v. Ballantrae Development Co.,* 159 Ill.App.3d 549, 510 N.E.2d 1219, 110 Ill.Dec. 188 (1st Dist. 1987); *Waldbillig Woodworking, Inc. v. King Arthur's North, Ltd.,* 104 Ill.App.3d 417, 432 N.E.2d 1048, 60 Ill.Dec. 149 (1st Dist. 1982). For instance, the lender of record at the time the construction takes place is protected against claims not shown on the contractor's sworn statement to the same extent as the owner by the fact that it must also be given the same notice as the owner under §24 or, if applicable, §25 of the Mechanics Lien Act. 770 ILCS 60/24, 60/25. *See Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 76 Ill.Dec. 931 (1st Dist. 1984). Similarly, a mortgagee has priority over a lien claimant that has failed to record or foreclose its lien claim within four months of the claimant's last completed work on the property. See 770 ILCS 60/7. This is the case even though notice was provided to the owner and the lender financing the improvements to the property may very well be aware of the work or existence of the claimant. *R.W. Boeker Co. v. Eagle Bank of Madison County,* 170 Ill.App.3d 693, 525 N.E.2d 146, 121 Ill.Dec. 340 (5th Dist. 1988); *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986); *Mutual Services, supra; P.H. Broughton & Sons, Inc. v. Muller & Allen Realty Co.,* 40 Ill.App.3d 776, 353 N.E.2d 30 (4th Dist. 1976).

X. [1.31] WAIVERS OF LIEN

The general rule is that a clear, unambiguous waiver of a contractor's or subcontractor's mechanics lien rights bars an action under the Mechanics Lien Act. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008); *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000); *Country Service & Supply Co. v. Harris Trust & Savings Bank,* 103 Ill.App.3d 161, 430 N.E.2d 631, 58 Ill.Dec. 599 (2d Dist. 1981); *Contract Builders Service Corp. v. Eland,* 101 Ill.App.3d 366, 428 N.E.2d 178, 56 Ill.Dec. 859 (2d Dist. 1981). The rule applies to public as well as private construction. *S.J. Groves & Sons Co. v. Midwest Steel Erection Co.,* 666 F.Supp. 129 (N.D.Ill. 1986); *Chicago Bridge & Iron Co. v. Reliance Insurance Co.,* 46 Ill.2d 522, 264 N.E.2d 134 (1970).

A. [1.32] Reasonable Reliance

The foregoing rule (see §1.31 above) is applicable, however, only when an innocent party has relied on the waiver in making payments to the general contractor. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008); *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000); *Fisher v. Harris Bank & Trust Co.,* 154 Ill.App.3d 79, 506 N.E.2d 418, 106 Ill.Dec. 711 (2d Dist. 1987); *Premier Electrical Construction Co. v. LaSalle National Bank,* 132 Ill.App.3d 485, 477 N.E.2d 1249, 87 Ill.Dec. 721 (1st Dist. 1984); *Luczak Brothers, Inc. v. Generes,* 116 Ill.App.3d 286, 451 N.E.2d 1267, 71 Ill.Dec. 900 (1st Dist. 1983); *Contract Builders Service Corp. v. Eland,* 101 Ill.App.3d 366, 428 N.E.2d 178, 56

Ill.Dec. 859 (2d Dist. 1981); *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 936, 140 Ill.Dec. 282 (3d Dist. 1990). Whether there has been innocent, good-faith reliance is a question of fact. *Merchants Environmental Industries, supra.* When an owner paid a general contractor knowing that a sub-subcontractor that supplied a waiver of lien had not been paid, the court held that the owner and the contractor bore the risk of nonpayment to the sub-subcontractor. *Prepakt Concrete Co. v. Fidelity & Deposit Company of Maryland,* 393 F.2d 187 (7th Cir. 1968). *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.,* 218 Ill.2d 326, 843 N.E.2d 327, 300 Ill.Dec. 69 (2006), presents a question as to whether a lender can rely on the title company handling the construction escrow in reviewing lien waivers.

A waiver of lien does not need to be supported by consideration (*i.e.,* a waiver of lien cannot be repudiated for partial or inadequate consideration). *Capitol Plumbing & Heating Supply Co. v. Snyder,* 104 Ill.App.2d 431, 244 N.E.2d 856 (4th Dist. 1969); *Contract Builders Service, supra; Premier Electrical Construction, supra; Country Service & Supply Co. v. Harris Trust & Savings Bank,* 103 Ill.App.3d 161, 430 N.E.2d 631, 58 Ill.Dec. 599 (2d Dist. 1981); *Luczak, supra; Chicago Bridge & Iron Co. v. Reliance Insurance Co.,* 46 Ill.2d 522, 264 N.E.2d 134 (1970); *Edward Hines Lumber Co. v. Dell Corp.,* 49 Ill.App.3d 873, 364 N.E.2d 368, 7 Ill.Dec. 207 (1st Dist. 1977); *Richard's Lumber & Supply Co. v. National Bank of Joliet,* 32 Ill.App.3d 835, 336 N.E.2d 820 (3d Dist. 1975); *William Aupperle & Sons, Inc. v. American National Bank & Trust Company of Chicago,* 28 Ill.App.3d 573, 329 N.E.2d 458 (3d Dist. 1975); *H.G. Wolff Co. v. Gwynne,* 246 Ill.App. 86 (1st Dist. 1927). Although failure of consideration alone will not vitiate the waiver given (*Timber Structures, Inc. v. Chateau Royale Corp.,* 49 Ill.App.2d 343, 199 N.E.2d 623 (1st Dist. 1964) (contractor's check bounced)), a waiver may be revoked if the revocation is communicated to the parties responsible for payment in each tier above the party seeking to revoke its waiver before it is relied on. *Edward Hines Lumber, supra; Decatur Lumber & Mfg. Co. v. Crail,* 350 Ill. 319, 183 N.E. 228 (1932). This exception also requires that there is money left due and owing to the general contractor, that the owner is not required to pay more than the contract price, and that there are funds remaining after payment to subcontractors having valid lien claims. *Capitol Plumbing & Heating Supply, supra.*

The prohibition of a lien waiver in §1(d) of the Mechanics Lien Act should be distinguished from the custom and practice of contractors and subcontractors giving waivers of lien in advance of receiving payment but after work has been performed. 770 ILCS 60/1(d). Furnishing waivers of lien in advance of receipt of payment has been held to be a binding term of the general conditions of the project. *J.M. Process Systems, Inc. v. W.L. Thompson Electric Co.,* 218 Ill.App.3d 350, 578 N.E.2d 264, 161 Ill.Dec. 137 (1st Dist. 1991); *State of Illinois Capital Development Board ex rel. P.J. Gallas Electrical Contractors, Inc. v. G.A. Rafel & Co.,* 143 Ill.App.3d 553, 493 N.E.2d 348, 351 – 352, 97 Ill.Dec. 685 (2d Dist. 1986). Knowledge of this custom and practice of the industry has been used in cases to defeat the elements of justified reliance on the waiver of lien given by the defendant. *See Fisher, supra; Capital Development Board, supra; Chicago Bridge & Iron, supra.* Regardless, waivers of lien are a commercial necessity in the industry, and because the subcontractor is not required to submit one in exchange for payment unless specifically asked by the owner and/or contractor in accordance with 770 ILCS 60/22, the express requirement that payment be conditioned upon submission of the lien waiver is recommended to be included in construction contracts.

Additionally, §1(d) (formerly §1.1) prohibits as against public policy any contractual provision that attempts to eliminate contractors' and subcontractors' lien rights in advance of the work. Section 1(d) states:

> **An agreement to waive any right to enforce or claim any lien under this Act, or an agreement to subordinate the lien, where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, either express or implied, to perform work or supply materials for an improvement upon real property is against public policy and unenforceable. This Section does not prohibit release of lien under subsection (b) of Section 35 of this Act, nor does it prohibit an agreement to subordinate a mechanics lien to a mortgage lien that secures a construction loan if that agreement is made after more than 50% of the loan has been disbursed to fund improvements to the property.** 770 ILCS 60/1(d).

Unless otherwise stated in the waiver, a waiver of lien has been held not to be a waiver of the party's other remedies. It does not modify or extinguish the underlying obligation. *Brown & Kerr, Inc. v. American Stores Properties, Inc.,* 306 Ill.App.3d 1023, 715 N.E.2d 804, 240 Ill.Dec. 117 (1st Dist. 1999); *Lyons Federal Trust & Savings Bank, supra; William Aupperle & Sons, supra,* 329 N.E.2d at 462; *Capitol Plumbing & Heating Supply, supra; H.G. Wolff, supra.* An important exception to the rule that a waiver of lien rights waives no remedies other than mechanics lien rights is that it has been held that a waiver of lien does operate as a waiver of rights against a private payment bond unless it expressly states that it is not releasing the payment bond. *William Aupperle & Sons, Inc. v. American Indemnity Co.,* 75 Ill.App.3d 722, 394 N.E.2d 725, 31 Ill.Dec. 523 (3d Dist. 1979).

B. [1.33] Less Innocent Party Doctrine

The question of whether a waiver of lien is effective to bar the enforcement of a lien is, under appropriate fact situations, determined by which of the parties is more culpable and, therefore, should bear the loss. The doctrine repeated in equity cases is "that where one of two innocent persons must suffer by the fraud of a third person, the loss must fall upon him who by his conduct put it i[n] the power of such third person to cause the injury." *Decatur Lumber & Mfg. Co. v. Crail,* 350 Ill. 319, 183 N.E. 228, 230 (1932). In *Decatur Lumber,* a contractor exchanged its lien waivers for two checks, one from the lender and one from the owner, as part of a loan payout to other lien claimants, with excess proceeds going to the owner. The owner's check to the contractor bounced, and the issue before the Supreme Court was the priority of the lender's mortgage vis-à-vis the contractor's lien claim. Relying on the above-quoted doctrine, the Supreme Court reversed the trial court and the appellate court and held in favor of the lender, stating that the lender had been induced to act in the payment of its money by the contractor's waiver and by the contractor's acceptance of the owner's check. The lender also had changed its position to its detriment in reliance thereon, permitting the contractor later to repudiate his waiver, and to give him a lien on the owner's property prior to the lien of the lender. The Supreme Court found that this would be inequitable.

In *Richard's Lumber & Supply Co. v. National Bank of Joliet,* 32 Ill.App.3d 835, 336 N.E.2d 820 (3d Dist. 1975), a material supplier and a bank mortgagee were both foreclosing their liens on the subject property. The bank filed a motion for summary judgment on the issue of priority of its

mortgage over the lien of the material supplier. The material supplier asserted that its waiver was not valid because an employee of the supplier had stolen pre-signed, blank waivers that he then furnished to the owners. The court, relying on the less innocent party doctrine, upheld the bank's motion for summary judgment on the basis that the bank had paid the owners of the property in reliance on the waivers of lien furnished by the material supplier. The court found that the supplier had made it possible for its employee's fraud to occur and, therefore, was the less innocent party of the two.

But see Gary-Wheaton Bank v. Burt, 104 Ill.App.3d 767, 433 N.E.2d 315, 60 Ill.Dec. 518 (2d Dist. 1982), in which the lender paid out on a duplicate original copy of a promissory note for which the original was used as collateral for a separate loan obligation by the guarantor. The guarantor, who did not know of the fraud, was considered the more innocent of the two parties, as his conduct did not put it in the power of the third person to cause the injury to the other innocent party.

XI. [1.34] ENHANCEMENT DOCTRINE

The purpose of the Mechanics Lien Act is to permit a lien on real property when benefit has been received by the owner and when the value or condition of the property has been increased or improved by the furnishing of services, labor, or materials, which activities are enumerated in §1 of the Act, 770 ILCS 60/1. The focus of the inquiry to determine whether a mechanics lien should be granted is generally whether the work performed has enhanced the value of the land to be charged with the lien. *Mostardi-Platt Associates, Inc. v. Czerniejewski,* 399 Ill.App.3d 1205, 929 N.E.2d 94, 340 Ill.Dec. 790 (5th Dist. 2010); *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 160 Ill.Dec. 101 (1st Dist. 1991). The mechanics lien is given on the condition that the work, labor, or material has been a benefit to the realty or has enhanced its value. *Id.* "Section 1 of the Act permits a lien upon premises where the value or the condition of the property has been increased by reason of the furnishing of labor and materials." *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust,* 274 Ill.App.3d 348, 653 N.E.2d 875, 877 – 878, 210 Ill.Dec. 680 (1st Dist. 1995). If the owner's interest is not improved, then, typically, there is no right of a lien. *L.J. Keefe Co. v. Chicago & Northwestern Transportation Co.,* 287 Ill.App.3d 119, 678 N.E.2d 41, 222 Ill.Dec. 634 (1st Dist. 1997).

However, it is not necessary to prove that the items were actually incorporated into the project under construction to have a valid lien against the real estate, only that they were intended to be incorporated into the improvements. *Moser Lumber, Inc. v. Morgan,* 106 Ill.App.2d 339, 245 N.E.2d 310 (2d Dist. 1969). Section 7(a) of the Mechanics Lien Act provides, in part:

> **No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud; nor shall any such lien for material be defeated because of lack of proof that the material after the delivery thereof, actually entered into the construction of such building or improvement, although it be shown that such material was not actually used in the construction of such building or improvement; provided, that it is shown that such**

> **material was delivered either to the owner or his or her agent for that building or improvement, to be used in that building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction.** 770 ILCS 60/7(a).

See Kupferschmid, Inc. v. Rodeghero, 139 Ill.App.3d 975, 488 N.E.2d 305, 94 Ill.Dec. 479 (3d Dist. 1986); *R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co.,* 236 Ill. 452, 86 N.E. 248 (1908). The owner is not, however, precluded from rebutting, by competent evidence, the fact (if such is the fact) that the materials were not delivered for use in the construction of the improvements. *Colp v. First Baptist Church of Murphysboro,* 341 Ill. 73, 173 N.E. 67 (1930); *Cooper v. Palais Royal Theatre Co.,* 242 Ill.App. 184 (1st Dist. 1926). Therefore, activities or services actually specified in the Mechanics Lien Act, such as forms for concrete, that are removed and do not become part of the permanent physical improvement, as well as architectural services, engineering services, and the like, which arguably do not constitute a physical enhancement of the property, are lienable services, as they provide value to the property. Another example is found in favor of architects who do not complete the project due to the fault of the owner. The project does not have to go forward for the architect or engineer to have a lien for the work performed. The reason is that the Mechanics Lien Act gives a lien to architects, structural engineers, professional engineers, land surveyors, and property managers for improving property. *Crowen v. Meyer,* 342 Ill. 46, 174 N.E. 55 (1930).

XII. [1.35] THERE MUST BE STRICT COMPLIANCE WITH TECHNICAL REQUIREMENTS

The lien is valid only if each of the statutory requirements is scrupulously observed. *Watson v. Watson,* 218 Ill.App.3d 397, 578 N.E.2d 275, 161 Ill.Dec. 148 (3d Dist. 1991). This is true in both private and public construction cases. *Premier Electrical Construction Co. v. American National Bank of Chicago,* 276 Ill.App.3d 816, 658 N.E.2d 877, 213 Ill.Dec. 128 (1st Dist. 1995); *Teerling Landscaping, Inc. v. Chicago Title & Trust Co.,* 271 Ill.App.3d 858, 649 N.E.2d 538, 208 Ill.Dec. 482 (2d Dist. 1995); *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990) (public construction); *North Side Sash & Door Co. v. Hecht,* 295 Ill. 515, 129 N.E. 273 (1920) (private construction). Mechanics liens are purely statutory, in derogation of the common law, and must be strictly construed. *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC,* 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill.Dec. 615 (1st Dist. 2005); *Seasons-4, Inc. v. Hertz Corp.,* 338 Ill.App.3d 565, 788 N.E.2d 179, 272 Ill.Dec. 875 (1st Dist. 2003); *Bale v. Barnhart,* 343 Ill.App.3d 708, 798 N.E.2d 750, 278 Ill.Dec. 366 (4th Dist. 2003); *Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington,* 251 Ill.App.3d 256, 620 N.E.2d 469, 189 Ill.Dec. 501 (4th Dist. 1993). "[T]he statute must be strictly construed with reference to those requirements upon which the right depends." *Tefco Construction Co. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714, 829 N.E.2d 860, 863, 293 Ill.Dec. 935 (1st Dist. 2005).

The rule of strict compliance applies to (a) the nature of the work for which the right to lien exists; (b) the timing, contents, and method of delivery of the notices required to be given by subcontractors to perfect their liens; (c) the timing and contents of the claim for lien; (d) the time

period within which suit to enforce the lien must be brought; and (e) the requirements of providing contractors' sworn statements. The burden of proving that each requisite on which the lien depends has been satisfied is on the party seeking to enforce the lien. *Watson, supra; Aluma Systems, supra; Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987); *Hacken v. Isenberg,* 288 Ill. 589, 124 N.E. 306 (1919).

The courts have also specifically applied the general rule to liens on funds for public improvements under §23 of the Mechanics Lien Act. 770 ILCS 60/23. *E.g., Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 269 Ill.Dec. 556 (1st Dist. 2002); *Aluma Systems, supra; Gunther v. O'Brien Bros. Const. Co.,* 293 Ill.App. 28, 12 N.E.2d 23 (2d Dist. 1937); *Alexander Lumber Co. v. Coberg,* 356 Ill. 49, 190 N.E. 99 (1934).

A. [1.36] Reasons for Rule of Strict Compliance

Either one or both of two reasons traditionally have been given by courts for the doctrine of strict construction.

1. [1.37] Mechanics Lien Is in Derogation of Common Law

The first reason given by courts for the rule requiring strict construction is that, because mechanics liens exist only by virtue of the Mechanics Lien Act creating them, being recognized neither by common law nor in equity, such statutes must be construed strictly with reference to the requirements on which the right depends. *Watson v. Watson,* 218 Ill.App.3d 397, 578 N.E.2d 275, 161 Ill.Dec. 148 (3d Dist. 1991); *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990); *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986); *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983); *Mixer v. Billingsley,* 110 Ill.App.3d 239, 442 N.E.2d 275, 66 Ill.Dec. 3 (4th Dist. 1982); *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602 (2d Dist. 1967); *D.D. Kennedy, Inc. v. Lake Petersburg Ass'n,* 54 Ill.App.2d 85, 203 N.E.2d 145 (4th Dist. 1964); *Gunther v. O'Brien Bros. Const. Co.,* 293 Ill.App. 28, 12 N.E.2d 23 (2d Dist. 1937); *Rasmussen v. Harper,* 287 Ill.App. 404, 5 N.E.2d 257 (1st Dist. 1936); *F.E. Schoenberg Manufacturing Co. v. Broadway Central Hotel Corp.,* 259 Ill.App. 40 (4th Dist. 1930); *Schwulst Gerling Co. v. Frost,* 269 Ill.App. 213 (3d Dist. 1933); *Armstrong v. Obucino,* 300 Ill. 140, 133 N.E. 58 (1921); *Cronin v. Tatge,* 281 Ill. 336, 118 N.E. 35 (1917); *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291, 292 (1911); *Joseph N. Eisendrath Co. v. Gebhardt,* 222 Ill. 113, 78 N.E. 22 (1906); *Williams v. Rittenhouse & Embree Co.,* 198 Ill. 602, 64 N.E. 995, 998 (1902); *Cook v. Heald,* 21 Ill. 425 (1859).

2. [1.38] Mechanics Lien Is Extraordinary Remedy

More to the point, however, is the explanation that the mechanics lien statute affords extraordinary remedies to certain classes of contractors, and the statute must be strictly construed with reference to all requirements on which such liens depend. *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983); *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602, 603 (2d Dist. 1967). The Mechanics Lien Act provides extraordinary remedies, not the least of which, in both private and public construction, is the ability to skip privity of contract (*i.e.,* the ability to bring an action against one with whom the claimant has not contracted and by whom the claimant may or may not be known).

Regardless of the rationale given, the necessity of strictly complying with the procedural requirements set forth in the Mechanics Lien Act for perfecting the lien as a condition precedent to the lien's enforcement is the means used by Illinois courts to protect innocent owners and third parties from having their interests in the subject property encumbered by liens of which they could be unaware and thus have no reasonable opportunity to ascertain or avoid. That being said, however, once there is compliance with the statutory requirements of procedure, the Mechanics Lien Act should be given a liberal construction so that justice will be served. A suit to foreclose a mechanics lien is a suit in equity, and equitable principles apply. *Armco Steel Corp. v. LaSalle National Bank,* 31 Ill.App.3d 695, 335 N.E.2d 93, 97 (2d Dist. 1975).

B. Steps for Technical Compliance

1. [1.39] 770 ILCS 60/5 and 60/21 — 60-Day Notice

A subcontractor that fails to serve notice of its contract on the owner of owner-occupied, single-family residential property in accordance with §§5 and 21 of the Mechanics Lien Act (770 ILCS 60/5 and 60/21) has been held to have no lien rights for its delivered materials. *Hill Behan Lumber Co. v. American National Bank & Trust Company of Waukegan,* 101 Ill.App.3d 268, 427 N.E.2d 1325, 56 Ill.Dec. 779 (2d Dist. 1981). Note that the particular provision of the Mechanics Lien Act has been twice amended since the decision in *Hill Behan Lumber* so that it is now a 60-day notice and any notice given after 60 days by the subcontractor shall preserve its lien but only to the extent that the owner has not been prejudiced by payments made before receipt of the notice. 770 ILCS 60/5(b)(iii), 60/21(c). However, failure to provide the 60-day notice will not serve to defeat the lien claim if there is no prejudice to the owner. *Crawford Supply Co. v. Schwartz,* 396 Ill.App.3d 111, 919 N.E.2d 5, 335 Ill.Dec. 484 (1st Dist. 2009). This is the only notice provision under the Mechanics Lien Act in which the court can exercise discretion based on the findings relative to prejudice to the owner.

2. [1.40] 770 ILCS 60/24 — 90-Day Notice

The principle of strict construction has been applied to the failure to timely serve the 90-day notice required by §24 of the Mechanics Lien Act (770 ILCS 60/24) to be given to owners and lenders by subcontractors. *A & A Acoustics, Inc. v. Valinsky,* 202 Ill.App.3d 516, 559 N.E.2d 1180, 147 Ill.Dec. 840 (1st Dist. 1990); *Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987); *J.E. Milligan Steel Erectors, Inc. v. Garbe Iron Works, Inc.,* 139 Ill.App.3d 303, 486 N.E.2d 945, 93 Ill.Dec. 412 (3d Dist. 1985); *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451, 453 (2d Dist. 1971); *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970); *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602, 603 (2d Dist. 1967); *Liese v. Hentze,* 326 Ill. 633, 158 N.E. 428, 430 (1927); *Decatur Bridge Co. v. Standart,* 208 Ill.App. 592 (2d Dist. 1917). This rule is only slightly mitigated if there was no 90-day notice given but the subcontractor was on an owner's 770 ILCS 60/5 affidavit. Then, the lien could be asserted for the amount shown on the sworn statement as to both the owner and its lender. *Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 76 Ill.Dec. 931 (1st Dist. 1984).

3. [1.41] 770 ILCS 60/7 — Four-Month Recording and Lien Content

The principle of strict construction has been applied to the untimely recording and nonconforming content of the claim for lien required by §7 of the Mechanics Lien Act, 770 ILCS 60/7. *E.g., Tefco Construction Co. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714, 829 N.E.2d 860, 863, 293 Ill.Dec. 935 (1st Dist. 2005); *Bale v. Barnhart,* 343 Ill.App.3d 708, 798 N.E.2d 750, 278 Ill.Dec. 366 (4th Dist. 2003); *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000); *Ronning Engineering Co. v. Adams Pride Alfalfa Corp.,* 181 Ill.App.3d 753, 537 N.E.2d 1032, 130 Ill.Dec. 703 (4th Dist. 1989); *Mutual Services, Inc. v. Ballantrae Development Co.,* 159 Ill.App.3d 549, 510 N.E.2d 1219, 110 Ill.Dec. 188 (1st Dist. 1987); *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986); *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291 (1911).

4. [1.42] 770 ILCS 60/7 — Two-Year Filing

The rule of strict construction has also been held to apply to the time periods in which a party must file suit. *Bank of New York v. Jurado,* 2012 IL App (1st) 112116, 977 N.E.2d 1202, 365 Ill.Dec. 103; *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC,* 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill.Dec. 615 (1st Dist. 2005) (under 770 ILCS 60/34); *Mixer v. Billingsley,* 110 Ill.App.3d 239, 442 N.E.2d 275, 66 Ill.Dec. 3 (4th Dist. 1982); *C.S. Lewis, Inc. v. Cabot Corp.,* 85 Ill.App.3d 708, 407 N.E.2d 84, 40 Ill.Dec. 853 (4th Dist. 1980); *Muehlfelt v. Vlcek,* 112 Ill.App.2d 190, 250 N.E.2d 14 (2d Dist. 1969); *Anderson v. Gousset,* 60 Ill.App.2d 309, 208 N.E.2d 37 (3d Dist. 1965); *North Side Sash & Door Co. v. Hecht,* 295 Ill. 515, 129 N.E. 273, 274 (1920).

Bank of New York, supra, is an example of strict compliance that elevates form over substance. In *Bank of New York,* a lien claimant had been named in a foreclosure action as an interested party and filed an answer and a motion to foreclose within two years of completion of the project. However, the court did not rule on the claimant's motion to file a counterclaim to foreclose until after two years had expired. The court stated that it was too late at that time to proceed, as the actual complaint to foreclose was not file stamped until after two years had expired. The motion seeking leave to foreclose had been file stamped with the court within two years, but the complaint to foreclose, which was an exhibit to the motion, was not.

C. [1.43] Third Parties and Strict Construction

When the interest of a lender or third-party purchaser is involved, the Mechanics Lien Act will be even more strictly construed than what is followed in cases arising between the contractor or material supplier and the original owner. *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990). While the Mechanics Lien Act is construed strictly with respect to the notice required to be given to owners by subcontractors (a party with respect to whom the owner is not in privity of contract) (*J.E. Milligan Steel Erectors, Inc. v. Garbe Iron Works, Inc.,* 139 Ill.App.3d 303, 486 N.E.2d 945, 93 Ill.Dec. 412 (3d Dist. 1985); *Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 76 Ill.Dec. 931 (1st Dist. 1984); *Vanderlaan v. Berry Construction Co.,* 119

Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970); *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602 (2d Dist. 1967)), it is not as strictly construed as if the interests of a third party were involved. *Compare A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 167 Ill.Dec. 354 (4th Dist. 1992).

D. [1.44] Reasonability Factor with Application of Rule of Strict Construction

"[N]otwithstanding the strict construction generally given to all sections of the Mechanics' Liens Act, there is authority which favors some flexibility in applying the general rules, so that the statute's provisions are not construed so technically that its remedial purpose is undermined and all but lost in the process." *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 1287, 151 Ill.Dec. 618 (1st Dist. 1990); *Fitzgerald v. Van Buskirk,* 96 Ill.App.2d 432, 239 N.E.2d 330 (2d Dist. 1968) (allegations in complaint construed liberally). *See also Abbott Electrical Construction Co. v. Ladin,* 144 Ill.App.3d 974, 494 N.E.2d 1251, 98 Ill.Dec. 924 (2d Dist. 1986); *Armco Steel Corp. v. LaSalle National Bank,* 31 Ill.App.3d 695, 335 N.E.2d 93 (2d Dist. 1975); *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 176 Ill.2d 385, 680 N.E.2d 283, 223 Ill.Dec. 550 (1997).

Section 12 of the Mechanics Lien Act dictates that the rule of strict construction does not apply to technical objections to pleadings. 770 ILCS 60/12; *Norman A. Koglin Associates, supra.* In *Norman A. Koglin Associates,* the contractor filed an answer but no counterclaim. When the plaintiff subcontractor settled and dismissed its suit, the trial court dismissed the contractor over its objection. The Supreme Court found that the contractor's answer stated sufficient facts to serve as a counterclaim and contained a prayer for relief and held that the contractor should have been permitted to amend its answer to fully state a counterclaim after the two-year period in which to file suit had expired. However, *see Bank of New York v. Jurado,* 2012 IL App (1st) 112116, 977 N.E.2d 1202, 365 Ill.Dec. 103, in which the contractor was not allowed to proceed on a counterclaim to foreclose after the two years. *See also Privatebank & Trust Co. v. 3232 Peterson LLC,* 2012 IL App (1st) 113049-U, and how it distinguishes *Norman A. Koglin Associates, supra.*

In *United Cork Cos. v. Volland,* 365 Ill. 564, 7 N.E.2d 301 (1937), the claim for lien and the lien claimant's intervening petition alleged completion of the work on December 1, 1930. Most of the work was completed July 1, 1930, but all of it was not completed until April 6, 1931. The appellate court held this a fatal variance, but the Supreme Court reversed and allowed the lien, stating:

> **It is sufficient to notice that the strict construction of the statute was applied in each of [**the prior cases**] because a material requirement of the statute had been omitted. The doctrine of strict construction was never meant to be applied as a pitfall to the unwary, in good faith pursuing the path marked by the statute, nor as an ambuscade from which an adversary can overwhelm him for an immaterial misstep. Its function is to preserve the substantial rights of those against whom the remedy offered by the statute is directed, and it is never employed otherwise. . . .**
>
> **These provisions of the statute disclose a manifest legislative intent to remove, as far as practicable, technical requirements as a material element of the right to enforce a valid lien, and to clarify questions touching the materiality of the steps prescribed by the statute.** 7 N.E.2d at 305.

See also Lundy v. Boyle Industries, Inc., 46 Ill.App.3d 809, 361 N.E.2d 321, 5 Ill.Dec. 182 (3d Dist. 1977); *DuPage Bank & Trust Co. v. DuPage Bank & Trust Co.,* 122 Ill.App.3d 1015, 462 N.E.2d 25, 78 Ill.Dec. 309 (2d Dist. 1984); *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983).

The plaintiff was permitted to amend its complaint to correct a misnomer in the plaintiff's name in the original complaint after the 30-day period in which to file suit had expired in *Bristow v. Westmore Builders, Inc.,* 266 Ill.App.3d 257, 640 N.E.2d 339, 203 Ill.Dec. 680 (2d Dist. 1994).

In *Aluma Systems, supra,* the court permitted the claimant, who had twice made a good-faith effort to cut through governmental bureaucracy and serve the proper governmental official with its notice of lien, to maintain its suit even though technically the 90-day period in which to bring suit after its first effort to serve notice had lapsed, and, pursuant to §23 of the Mechanics Lien Act (770 ILCS 60/23), the time in which to file suit cannot be extended by a second service. The court also extended the lien in that case to a third-tier subcontractor, which is not expressly provided for in the Mechanics Lien Act.

Similarly, the court in *Mass Transfer Inc. v. Vincent Construction Co.,* 223 Ill.App.3d 746, 585 N.E.2d 1286, 166 Ill.Dec. 264 (5th Dist. 1992), did not deprive a material supplier of its lien on public funds due to the general contractor when it (1) failed to file suit within 90 days of a defective notice but did file suit within 90 days of its second, proper notice and (2) served only one of four officials, two of whose signatures were required on checks issued by the public body.

The Appellate Court for the Fourth District upheld a 770 ILCS 60/24 notice from a subcontractor to the owner that (1) omitted the name of the general contractor and (2) was sent to the owner by regular mail instead of certified mail with a return receipt requested and restricted delivery as required by statute, when actual receipt was admitted by the owner. *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 167 Ill.Dec. 354 (4th Dist. 1992). This case, too, extended the lien right to a third-tier material supplier not expressly included in §22 of the Mechanics Lien Act (770 ILCS 60/22).

Similarly, in *Watson v. Auburn Iron Works, Inc.,* 23 Ill.App.3d 265, 318 N.E.2d 508, 514 (2d Dist. 1974), the court held that notice sent by certified mail, but not "delivery limited to addressee only," was sufficient when the notice was in fact received. Conversely, the Appellate Court for the First District more recently held that a timely faxed notice of a subcontractor's claim did not comply with the requirements of §24. *Seasons-4, Inc. v. Hertz Corp.,* 338 Ill.App.3d 565, 788 N.E.2d 179, 272 Ill.Dec. 875 (1st Dist. 2003). Notably, however, the court also found other deficiencies in the faxed notice, only one of which (the address of the property in question) is required by §24. That leaves open the question of whether it would have been sufficient if a more complete notice, such as that given in *A.Y. McDonald, supra,* had been faxed.

In *Connelly, supra,* the court said that the apportionment rule for blanket liens on multiple parcels of real estate improved by the claimant under one contract was not a per se rule applicable to all blanket liens but only a rule that applied if the claim was not filed within four months after the claimant last performed work on any one or more of the lots covered by the lien claim. It should be noted that the court's decision in *Connelly* did not validate the lien being asserted; it simply permitted the claim to survive a motion to dismiss when there was no evidence as to whether the claim was untimely in relation to any of the parcels included.

The court in *Armco Steel, supra,* refused to apply a strict construction to the definition of "knowingly permitted." In *Armco Steel,* the beneficial owner of the land in question entered into a lease with Meadowdale International Raceways, under which Meadowdale was to improve an automobile racetrack on the property and operate it under Meadowdale's name. Meadowdale, in turn, contracted with the lien claimant to install steel fencing. In response to the contractor's lien claim, the "lessor contends he did not 'knowingly permit' the improvements to proceed." 335 N.E.2d at 96. While the landlord knew improvements were to be made, the landlord did not know that the steel fence was to be constructed. The landlord argued that the term "knowingly permit" must be given a strict construction because the Mechanics Lien Act "is in derogation of the common law and is to be strictly construed." 335 N.E.2d at 97. The appellate court held that while the doctrine of strict construction was applicable to the technical aspects of the procedural steps to be taken under the statute, once the statutory procedural requirements have been complied with, the statute should be given a liberal construction so that justice will be done. *Id.*

In *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990), the court held that a statement of the contract date in the lien claim (a fact material to the issue of priority of the mechanics lien claim vis-à-vis the mortgagee) was not a binding judicial admission as against the lender in a case in which the plaintiff proved his contract was entered into on an earlier date. The mechanics lien claimant thereby gained priority over the lender's mortgage. The court based its decision on the fact that the date of the contract is not required by §7 of the Mechanics Lien Act (770 ILCS 60/7) to be included in the lien claim and that there was no evidence that any party had relied to its detriment on the statement in the lien claim. *But see Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000), which denied a lien claim for an inaccurate final date of the completion of the work, which is not required by the statute.

XIII. [1.45] MECHANICS LIEN ACT IS LIBERALLY CONSTRUED AS REMEDY

Section 39 of the Mechanics Lien Act states: "This act is and shall be liberally construed as a remedial act." 770 ILCS 60/39. Thus, "[o]nce a proper lien claimant has 'strictly complied with each of the statutory requirements, he has a right to expect that his lien will be completely enforceable.' " *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 1287, 151 Ill.Dec. 618 (1st Dist. 1990), quoting *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 319, 73 Ill.Dec. 454 (1983). *See also DuPage Bank & Trust Co. v. DuPage Bank & Trust Co.,* 122 Ill.App.3d 1015, 462 N.E.2d 25, 78 Ill.Dec. 309 (2d Dist. 1984). The statute is to be construed so as to do substantial justice once there is strict compliance with the statutory notice requirements. *Armco Steel Corp. v. LaSalle National Bank,* 31 Ill.App.3d 695, 335 N.E.2d 93 (2d Dist. 1975).

As noted in §1.19 above, the procedures for perfecting the lien claim have been held to be duties that are conditions precedent to the right to enforce the lien. Once the claimant has fulfilled these duties, however, the Mechanics Lien Act should be construed liberally to carry out its remedial purpose. *Premier Electrical Construction Co. v. American National Bank of Chicago,* 276 Ill.App.3d 816, 658 N.E.2d 877, 213 Ill.Dec. 128 (1st Dist. 1995); *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 160 Ill.Dec. 101 (1st Dist. 1991).

A reconciliation of the doctrine of strict construction and liberal remedy was made in *Petroline Co. v. Advanced Environmental Contractors, Inc.,* 305 Ill.App.3d 234, 711 N.E.2d 1146, 238 Ill.Dec. 485 (1st Dist. 1999). In this case, the owner argued that a subcontractor's 770 ILCS 60/24 notice was fatally defective because, although the subcontractor had served the owner of the property, the subcontractor had not served the lender whose interest was recorded. The court observed:

> **Almost every case dealing with the Act states that the Act is in derogation of the common law and must, therefore, be strictly construed. See, *e.g., Watson v. Auburn Iron Works, Inc.,* 23 Ill.App.3d 265, 273, 318 N.E.2d 508, 514 (1974). The owners contend that the rule of strict construction mandates the conclusion that any deviance from the procedure outlined in section 24 will serve to invalidate the lien. Section 39 of the Act, however, provides that the Act "is and shall be liberally construed as a remedial act." 770 ILCS 60/39 (West 1996). Courts have reconciled these two precepts by holding that the rule of strict construction applies to the requirements upon which the right to a lien depends but that, once a lien has properly attached, liberal construction applies. *Watson,* 23 Ill.App.3d at 273, 318 N.E.2d at 514. Thus, in order to know whether to apply strict or liberal construction, we must determine whether 90 day's notice to the mortgagee was intended to be a requirement upon which the right to a lien depends.** 711 N.E.2d at 1149.

While the court found that the 90-day notice is a requirement on which the right to assert a lien against the mortgagee's interest depends, it is not a requirement on which the right to a lien against the owner depends: "A contrary rule would frustrate the purpose of the mechanic's lien statute as a whole 'to protect those who in good faith furnish material or labor for the construction of a building.' " 711 N.E.2d at 1151, quoting *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 277 Ill.App.3d 142, 659 N.E.2d 971, 975, 213 Ill.Dec. 625 (1st Dist. 1995).

XIV. [1.46] MULTIPLE PARCELS OF PROPERTY

Section 1 of the Mechanics Lien Act provides that a contractor shall have
a lien upon the whole of such lot or tract of land and upon adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business; and in case the contract relates to 2 or more buildings, on 2 or more lots or tracts of land, upon all such lots and tracts of land and improvements thereon for the amount due to him or her. 770 ILCS 60/1(a).

Section 7(b) of the Mechanics Lien Act, which also applies to this issue, provides:

> **In case of the construction of a number of buildings under contract between the same parties, it shall be sufficient in order to establish such lien for material, if it be shown that such material was in good faith delivered at one of these buildings for the purpose of being used in the construction of any one or all of such buildings, or delivered to the owner or his or her agent for such buildings, to be used therein; and such lien for**

> **such material shall attach to all of said buildings, together with the land upon which the same are being constructed, the same as in a single building or improvement. In the event the contract relates to 2 or more buildings on 2 or more lots or tracts of land, then all of these buildings and lots or tracts of land may be included in one statement of claims for a lien.** 770 ILCS 60/7(b).

A. [1.47] Multiple Lots, One Contract, and One Owner

In cases in which the lien claimant has a single contract and performs work on several lots or on one parcel that is subdivided into several lots prior to the filing of the claim, the claimant has a lien on all of the separate lots for the total amount due and may file one blanket lien claim against all the lots, provided that the lien claim is timely filed with respect to each lot. *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983); *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291 (1911); *Calumet Concrete Construction Co. v. Fillipovich,* 227 Ill.App. 250 (1st Dist. 1922). The Illinois Supreme Court recognized long ago that §§1 and 7 of the Mechanics Lien Act (770 ILCS 60/1 and 60/7) permit the contractor to file one claim against separate buildings on lots that were not adjacent to or adjoining each other, provided that the work was performed or material furnished for all of such buildings under one entire contract. *Schmidt, supra*. However, the court in *Schmidt* went on to qualify that a blanket lien on multiple parcels would need to be timely as to each parcel:

> **In our judgment, the Legislature did not intend to permit two or more buildings on two or more tracts of land to be included in one claim for lien, unless the claim was filed within four months after the last labor was performed or the material furnished on each of the buildings.** 97 N.E. at 292.

> **[**To hold otherwise**] would practically nullify that part of section 7 which provides that no lien shall be enforced to the prejudice of any other creditor, encumbrancer, or purchaser, unless within four months the claim for lien is filed or suit begun.** *Id.*

Because the lien claim was not timely as to all of the lots, the *Schmidt* court dismissed the claim.

Two lines of cases evolved from *Schmidt.* One held that *Schmidt* imposed a per se rule that, whenever a lien claim is recorded against more than one lot, it must allocate or apportion the amount of the claim asserted against each. *Federal Savings & Loan Insurance Corp. v. American National Bank & Trust Company of Chicago,* 115 Ill.App.3d 426, 450 N.E.2d 820, 71 Ill.Dec. 132 (1st Dist. 1983). The other line of cases followed the above-quoted language from *Schmidt, supra,* and held that apportionment was necessary only if the claim was filed more than four months after the work on any of the lots included in the claim was completed. *E.g., Barker-Lubin Co. v. Unknown Heirs or Devisees of Barker,* 106 Ill.App.3d 89, 435 N.E.2d 493, 61 Ill.Dec. 796 (4th Dist. 1982). The issue was ultimately resolved in *Connelly, supra,* in which the Illinois Supreme Court held that apportionment was necessary only if the claim was filed more than four months after the work on any of the lots included in the claim was completed. If, however, the claimant does not apportion its claim and the claim is recorded late as to any one of the lots, it is void as to all. *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986).

In a situation, however, in which there is one contract, one owner, and multiple parcels, if the improvements are only on some but not all of the parcels, the lien will need to be limited to the parcels involved with the improvements. *See Hill Behan Lumber Co. v. First National Bank of Woodstock,* 95 Ill.App.3d 426, 420 N.E.2d 268, 50 Ill.Dec. 951 (2d Dist. 1981), in which a beneficial owner of land consisting of an eight-parcel subdivision zoned for 96 units had commenced work on only two buildings on separate lots and work was limited to these two buildings, each of which would constitute separate premises when completed. The court held that there was no basis for an extension of a mechanics lien to all eight lots even though the single owner was in the business of developing and selling all the lots in the subdivision and intended eventually to construct units on all eight lots and even though the claimant had a single contract extending to all eight lots. The court focused on two facts to distinguish the case from those imposing a blanket lien on all the tracts: (1) that, when completed, the buildings would constitute separate premises and (2) that the claimants had worked on only two lots and afforded the contractor a lien only on the lots on which it had performed work. Thus, the lien, in this instance, could be a blanket lien for those lots worked on by the contractor, but not beyond this scope.

B. [1.48] Multiple Lots, One Use, One Contract, and Multiple Owners

When the separate lots are owned by different owners but a common agent makes a single, entire contract for the erection of a separate building on each of the lots, the mechanics lien claimant may assert its lien against each of the lots for a proportionate share of the balance due. *Chicago Brick Co. v. McLester,* 165 Ill.App. 114 (1st Dist. 1911). In other words, the provision of §1(a) of the Mechanics Lien Act giving the contractor a lien "in case the contract relates to 2 or more buildings, on 2 or more lots or tracts of land, upon all such lots and tracts of land and improvements thereon for the amount due to him or her" applies when the several lots are owned by different owners as well as when they are owned by one, as long as there is a single, entire contract relating to all the lots made by a common agent. 770 ILCS 60/1(a).

Similarly, a lien for the full amount of the improvements may be maintained against one of two adjacent lots when a building stands on two tracts of land by mistake, each owned by different people, when the owner of the second lot did not knowingly permit the construction on his or her lot. *Abbott Electrical Construction Co. v. Ladin,* 144 Ill.App.3d 974, 494 N.E.2d 1251, 98 Ill.Dec. 924 (2d Dist. 1986); *Donkle & Webber Lumber Co. v. Rehrmann,* 310 Ill.App. 17, 33 N.E.2d 709 (3d Dist. 1941).

When several lots owned by separate individuals are assembled for a single project, the courts have viewed it as inappropriate to file independent liens against each lot for the entire amount due. In *Lohmann Golf Designs, Inc. v. Keisler,* 260 Ill.App.3d 886, 632 N.E.2d 121, 198 Ill.Dec. 62 (1st Dist. 1994), a developer entered into contracts to acquire a number of parcels, including three contiguous farms, intending to develop a golf course. The lien claimant who provided architectural services filed a lien against each of the three farm properties in the full amount of its total lienable work. The trial court found that, as a prospective purchaser checking the public records would think that each individual property was responsible for the entire lien amount, rather than a proportionate share, the act of recording three liens constituted constructive fraud, denied the lien claim, and awarded attorneys' fees against the lien claimant. Although the Illinois Supreme Court had previously ruled in *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d

242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983), that if a blanket lien was timely filed as to each lot it did not need to be apportioned among them, the claimant in *Lohmann, supra,* filed a separate lien as to each of the lots for the entire amount. Thus, under the Mechanics Lien Act and caselaw interpreting the same, the *Lohmann* claimant could have (1) filed a blanket lien for the entire project for the amount of the contract work performed, assuming the filing was within four months of the work performed as to each lot (see 770 ILCS 60/7), or (2) filed three separate liens and allocated the value of the amount of work allocated for each piece of property.

The recommended practice, when in doubt, is to timely record one lien against all of the lots, state in the lien claim that it is not known whether apportioning is necessary but, if it is, state the amount apportioned to each lot and the basis for making the apportionment.

XV. [1.49] SUBSTITUTION OF BOND

In 2016, §38.1 of the Mechanics Lien Act was added. 770 ILCS 60/38.1. This section addresses substitution of bond for lien claims. It applies to liens arising under §1 or §21 of the Mechanics Lien Act and to claims or actions arising under §9, §27, or §28 of the Mechanics Lien Act. 770 ILCS 60/38.1(b). An applicant can file a petition to substitute bond for the property that is subject to a lien claim with the circuit court clerk of the county in which the property against which the lien claim is asserted is located. If there is a pending action to foreclose the lien claim, the applicant can file the petition at any time prior to five months after a claimant files a complaint or counterclaim to enforce its lien claim. 770 ILCS 60/38.1(c). Section 38.1 of the Mechanics Lien Act contains the requirements of the petition, notice requirements, and procedure if an objection is filed, or alternatively no objection is filed.

2 Requirements for the Original Contractor's Lien on Private Projects

TIMOTHY R. CONWAY
JOHN S. MROWIEC
Conway & Mrowiec Attorneys LLLP
Chicago

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I. OVERVIEW

A. [2.1] Purpose of a Mechanics Lien

A mechanics lien is a statutory remedy for certain trades, suppliers, and professions that contribute to the improvement of a building or real estate.

In Illinois, the right to and methods of preserving and enforcing a mechanics lien are governed by the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.*

A mechanics lien is security for the amount owed. *Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987). The original contractor's contract claim for the amount due on a construction project is an unsecured claim, and a judgment on that claim may not be collectible. The mechanics lien allows the contractor to recover the amount due from the property on which the work was performed. That is, the private property that is the subject of a lien can be sold at a sheriff's sale following foreclosure, and the proceeds of that sale will be applied to satisfy the amount due.

B. [2.2] Public vs. Private Projects

This chapter outlines an original contractor's mechanics lien rights against properties that are owned by private parties as opposed to properties owned by governmental units. For projects or property owned by the State of Illinois, state agencies, counties, cities, villages, and other special-purpose districts, an original contractor typically does not have mechanics lien rights in real property owned by the government. See Chapter 5 of this handbook.

The government's present ownership might not defeat lien rights if the government is a transferee of property with the deed recorded after the date of an "original contract." If a project was privately owned at the time the contract giving rise to the claim of lien was entered into, a later conveyance to a local governmental unit will not defeat a mechanics lien claim. *City of Salem v. Lane & Bodley Co.,* 189 Ill. 593, 60 N.E. 37 (1901). That is because a claimant's rights relate back to the date of its contract. Relation back may be an issue with infrastructure improvement projects or other projects first performed by private developers who then convey the improvements to a local government.

Moreover, the distinction between public and private lien rights on the very same real estate can be illustrated by work performed for airlines who lease portions of a municipal public airport. A contractor under a contract with the municipality cannot enforce a private lien against the government's fee interest in the airport property. The airlines as private parties, however, may have valuable leasehold interests in the terminals and cargo facilities at the airport. Under a contract with an airline, it is the private ownership interest of an airline, as lessee, that can be liened under the provisions governing private lien rights (but the lien might result in the lessor declaring the lessee in default leaving the claimant's security worthless).

C. [2.3] Outline of Requirements

To assert an original contractor's mechanics lien, a contractor (1) must have an enforceable oral or written contract (a) directly with the owner or (b) with a person authorized or knowingly permitted by the owner to enter into the construction contract; (2) must perform lienable work; (3) must perform the contract and substantially perform all contract provisions that have not been waived or excused; (4) must provide a contractor's sworn statement or establish that the owner has waived this requirement; (5) must timely record a proper claim for lien (which may be satisfied by timely suit instead); and (6) must timely file a lawsuit to foreclose the mechanics lien.

The first requirement, an enforceable contract (770 ILCS 60/11) is fundamental and determined by the law of contract. *Universal Structures, Ltd. v. Buchman,* 402 Ill.App.3d 10, 937 N.E. 668, 674 – 675, 344 Ill.Dec. 645 (1st Dist. 2010) (valid lien depends on valid contract); *Link Company Group, LLC v. Cortes,* 2018 IL App (1st) 171785-U, ¶20 (lack of definite and certain terms necessary for enforceable contract and mechanics lien claim); *Excellent Builders, Inc. v. Pioneer Trust & Savings Bank,* 15 Ill.App.3d 832, 305 N.E.2d 273, 278 (1st Dist. 1973) (reversing trial court's summary judgment for owner because of illegal contract when, despite illegality, claimant raised question of fact on whether "doctrine of imbalance of culpability" might apply as exception to mechanics lien requirement of enforceable contract when claimant obtained building permit without knowledge of owner's illegal fraud on city). *But see Power Dry of Chicago, Inc. v. Bean,* 2022 IL App (2d) 210043, ¶¶35 – 36, 41 – 44 (unlicensed public adjustor's putative contract for emergency restoration and public adjusting in contravention of Illinois Insurance Code, 215 ILCS 5/1, *et seq.,* constituted "public nuisance" and was void and unenforceable, defeating mechanics lien claim). The remaining requirements are discussed in this chapter.

II. IDENTIFYING CONTRACTORS AND PERSONS AUTHORIZED OR KNOWINGLY PERMITTED BY OWNERS

A. [2.4] Distinction Between Contractors and Subcontractors

The requirements for perfecting and enforcing mechanics lien rights are different for contractors and subcontractors. The same company performing identical work may be a "contractor" on one job and a "subcontractor" on another or even on the same project under separate contracts. Moreover, industry designations of "contractor" and "subcontractor" do not necessarily govern for purposes of the Mechanics Lien Act.

Within the meaning of the Mechanics Lien Act, a "contractor" is anyone who has contracted directly with (1) the owner, (2) the owner's agent, or (3) one whom the owner has knowingly permitted to contract for the improvement of the real estate. The term "knowingly permit" is understood in the general sense to refer to an owner's awareness of and consent to the improvements. *Abbott Electrical Construction Co. v. Ladin,* 144 Ill.App.3d 974, 494 N.E.2d 1251, 98 Ill.Dec. 924 (2d Dist. 1986). For a case discussing under what circumstances an owner can be subject to a lien claim based on an agent's actions and the imputation of an agent's knowledge of construction activities to an owner, *see Martinez v. Knochel,* 123 Ill.App.3d 555, 462 N.E.2d 1281, 78 Ill.Dec. 927 (4th Dist. 1984).

A "subcontractor" within the meaning of the Mechanics Lien Act is anyone who performs work for a "contractor." A "subcontractor" also includes what the construction industry designates as "sub-subcontractors" and "suppliers." The Mechanics Lien Act was amended, effective January 1, 2006, to provide that a claimant would not be bound by its self-designation as a "subcontractor" in a notice of lien claim or lien claim if it is determined later that the claimant was actually an original contractor. 770 ILCS 60/7, 60/24. For a claimant that is unsure of its status as a subcontractor or original contractor, the most conservative approach might be to comply with the requirements for both a subcontractor's lien and an original contractor's lien. For example, a claimant that believes it is likely to be treated as an original contractor could serve the 90-day notice required of subcontractors but state in the notice that the claimant is serving this notice only in the event it is found not to be an original contractor.

Examples of fact situations addressing who is a "contractor" and under what circumstances an owner will be deemed to have authorized or knowingly permitted work are discussed in §§2.5 – 2.9 below.

B. [2.5] Architects and Engineers

Under the principles discussed in §2.4 above, architects or engineers who enter into contracts directly with the owner, the owner's agent, or a person knowingly permitted by the owner to enter into the contract are "contractors" for purposes of the Mechanics Lien Act. The industry designation of "design professionals" is immaterial, and such architects or engineers must satisfy requirements that apply to any "original" general contractor's lien rights. However, if the architect or engineer does not contract with the owner, the owner's agent, or a person knowingly permitted by the owner to enter into the contract, then it is a "subcontractor."

C. [2.6] Illinois Land Trusts

Title to some properties in Illinois is held by land trusts that own legal and equitable title to the property. The beneficial interest in the land trust is personal property, and it is this interest that the beneficiary of the land trust owns.

It is common for a contractor to enter into a contract with the beneficiary of a land trust and not with the land trustee on behalf of the land trust itself. In such a case, the contractor must contend that the beneficiary was an agent of the land trust or a person knowingly permitted by the land trust to enter into the construction contract.

D. [2.7] Landlord-Tenant Issues

A contractor may enter into a contract with a tenant of a building or property. There are two property interests to which the mechanics lien may attach. The lien may attach to the tenant's leasehold interest, which may be of little value if the tenant defaults under the lease (and allowing mechanics lien claims usually is a default) and the landlord terminates the tenant's leasehold interest. The lien also may attach to the landlord's fee interest in the building or property as long as the landlord knowingly permitted the tenant to make contracts for improvements. In practice, boilerplate lease provisions by which a landlord seeks to prohibit tenants from entering into

contracts for improvements without the landlord's express written approval usually will not defeat a contractor's claim that a landlord knowingly permitted a tenant's contract, even if there is no express written consent from the landlord. *See Armco Steel Corp. v. LaSalle National Bank,* 31 Ill.App.3d 695, 335 N.E.2d 93 (2d Dist. 1975); *Loeff v. Meyer,* 284 Ill. 114, 119 N.E. 908 (1918). For example, in downtown office buildings, a contractor undoubtedly will have contact with building management personnel to obtain entry into the building and access to service elevators. Such contacts can be used as evidence of the building owner's awareness of the contract for improvements even if the tenant did not directly request the landlord's approval of the work.

Of course, if the lease provides for improvements to the leased premises or the condition of the premises necessarily contemplates build-out before the premises can be occupied, the landlord's fee interest will be subject to the contractor's lien, and the landlord generally will be unsuccessful in arguing that the work was excessive or more costly than expected. *R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co.,* 236 Ill. 452, 86 N.E. 248 (1908); *Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131 (5th Dist. 1973).

A tenant who performs lienable work at the request of a landlord is entitled to a mechanics lien against the landlord's property. *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust,* 274 Ill.App.3d 348, 653 N.E.2d 875, 210 Ill.Dec. 680 (1st Dist. 1995). In *Leveyfilm,* the landlord requested that the tenant, who had occupied the space for a number of years, patch foundation walls, remove cement floor tiles, remove carpet tile debris, and remove asbestos insulation.

The appellate court in *Leveyfilm* described the tenant as having provided the services and labor that, along with expenses, were the subject of the tenant's lien claim. The court therefore distinguished those cases in which a tenant's space is built out by contractors who enter into contracts with tenants who themselves perform no lienable work. The court also allowed the tenant to avoid a lease provision that prohibited the placement of liens on the leased property. The court ruled (1) that the clause was intended to bar third-party liens and (2) that there was a question of fact regarding the landlord's waiver of the no-lien provision because the landlord had specifically requested that the work be performed on the leased premises.

Governmental regulatory agreements also may establish that a lessor/owner knowingly permitted a tenant's improvement. A United States Department of Housing and Urban Development regulatory agreement for multifamily housing projects required a landlord to maintain the property in good repair in *Golfview Developmental Center, Inc. v. All-Tech Decorating Co. (In re Golfview Developmental Center, Inc.),* 309 B.R. 758, 763 (Bankr. N.D.Ill. 2004). This was one fact supporting the court's conclusion that the landlord knowingly permitted the tenant to make lienable improvements to the property.

E. [2.8] Development Companies

An owner of a property may form a separate entity to enter into construction contracts or operate under the name of a development company. Although the facts of such cases will vary, contractors who deal with such entities generally can claim that they are contractors and not subcontractors for purposes of the Mechanics Lien Act under the principles that such entities and the owner are one and the same or that the entity is the owner's agent. *Marshall v. Butler,* 174 Ill.App. 502 (1st Dist. 1912); *Seymour v. Woodstock & Sycamore Traction Co.,* 281 Ill. 84, 117 N.E. 729 (1917).

However, depending on the facts, it may be more advantageous for the lien claimant to argue that it is a subcontractor of the owner's development entity, thus allowing relation back to the date of an "original" contract for priority purposes as against a mortgage lender. *State Bank of Lake Zurich v. Winnetka Bank,* 245 Ill.App.3d 984, 614 N.E.2d 862, 185 Ill.Dec. 421 (2d Dist. 1993).

In *Peabody-Waterside Development, LLC v. Islands of Waterside, LLC,* 2013 IL App (5th) 120490, 995 N.E.2d 1021, 374 Ill.Dec. 524, a lien claimant was allowed to enforce its original contractor's lien even though it had a 50-percent membership interest in the limited liability company that owned the property. The court reasoned that, by statute, a membership interest in a limited liability company did not give the individual member an ownership interest in the property that was owned by the company. 2013 IL App (5th) 120490 at ¶9. The court also noted that day-to-day management of the limited liability company was controlled by the other 50-percent member, the member who was not the lien claimant. 2013 IL App (5th) 120490 at ¶11.

The Third District appeared to apply an intent test to the characterization of a lien claimant as a subcontractor, and not an original contractor, in *Carpenter Contractors of America, Inc. v. JP Morgan Chase Bank, NA,* 2013 IL App (3d) 120872-U. The owner of a development under construction was Bloomfield Estates, LLC. Kirk Corporation was the managing agent of Bloomfield Estates, LLC. The mechanics lien claimant, Professional Plumbing, Inc., entered into a contract entitled "SUBCONTRACT AGREEMENT between BLOOMFIELD ESTATES, LLC THE KIRK CORPORATION, [ITS] MANAGER and PROFESSIONAL PLUMBING, INC. for HERRINGTON ESTATES BOLINGBROOK, IL." 2013 IL App (3d) 120872-U at ¶8. The lien claimant's recorded lien claim referred to the lien claimant as a subcontractor.

In the foreclosure lawsuit, the lien claimant argued that it was an original contractor and, therefore, it did not need to send a 90-day notice of lien to a construction lender. The court rejected the argument and found that the "clear intent" of Bloomfield Estates, Kirk Corporation, and the lien claimant was to create a subcontract relationship. 2013 IL App (3d) 120872-U at ¶20. A dissenting opinion pointed out that §7 of the Mechanics Lien Act (770 ILCS 60/7) made the lien claimant's self-description in its lien claim irrelevant; that, at the very least, Kirk Corporation was knowingly permitted by the fee owner, Bloomfield Estates, to enter into the contract; that Bloomfield Estates in fact made payments to the lien claimant; and that the use of form contracts or subcontracts should not control the outcome. 2013 IL App (3d) 120872-U at ¶¶31 – 36.

In *Dirtwerks Excavating, Inc. v. Koritala,* 2013 IL App (2d) 130329-U, a developer was in title at the time the contract with the mechanics lien claimant was formed. By the time lien claims were recorded, the developer had conveyed homes to individual owners. Because the lien claimant's status as an original contractor was to be determined at the time the contract for improvements was entered into (and not when the liens were recorded), the court ruled that the lien claimant was an original contractor who did not need to comply with the lien perfection requirements applicable to subcontractors. Although the lien claimant described itself as a "subcontractor" in an unverified complaint to foreclosure, the court noted that this characterization had been superseded by an amended complaint and that the description of "original contractor" or "subcontractor" was a legal conclusion, not a factual admission. 2013 IL App (2d) 130329-U at ¶7.

F. [2.9] Contract Purchasers

In *Construx of Illinois, Inc. v. Kaiserman,* 345 Ill.App.3d 847, 800 N.E.2d 1267, 279 Ill.Dec. 684 (4th Dist. 2003), a contract seller was found to have authorized or knowingly permitted construction arranged by an installment contract buyer even though the buyer did not tell the seller about the contract for construction. The *Construx* court noted that the buyer had provided the seller with an appraisal stating that certain repairs to the property were needed and that the seller saw the construction in progress and did not object.

The *Construx* court also ruled that a contract seller of property is treated as an owner under §1 of the Mechanics Lien Act and not as a lienholder under §16 of the Act. See 770 ILCS 60/1, 60/16. The court rejected the contract seller's argument that the contract seller was a lienholder with priority over the mechanics lien claimant except to the extent of enhancement. 800 N.E.2d at 1276. As an owner under §1, the contract seller's interest was subject to the mechanics lien based on the full contract price. The court rejected the argument that under the doctrine of equitable conversion, the contract seller's interest was one of a lienholder.

III. IDENTIFYING LIENABLE WORK

A. [2.10] Lienable Work

Not all costs in connection with a construction project are lienable. Section 1 of the Mechanics Lien Act sets forth the general categories of work that are eligible for lien rights. 770 ILCS 60/1. Eligible categories include work that serves to

1. furnish labor, services, material, fixtures, apparatus, or machinery for the purpose of building, altering, repairing, or ornamenting any house or other building;

2. furnish material, fixtures, apparatus, or machinery for the purpose of building, altering, repairing, or ornamenting any walk or sidewalk, whether the walk or sidewalk is on the land or bordering thereon, driveway, fence, or improvement or appurtenances to a lot or tract of land or connected therewith, and on, over, or under a sidewalk, street, or alley adjoining the land;

3. fill, sod, or excavate a tract of land or do landscape work;

4. raise, lower, or remove any house or structure from land;

5. perform any services or incur any expenses as an architect, structural engineer, or professional engineer;

6. perform any services or incur any expenses as a registered interior designer;

7. perform any services or incur any expenses as a land surveyor;

8. perform any services or incur any expenses as a property manager in the management of a structure;

9. drill any water well;

10. furnish or perform labor or services as superintendent, timekeeper, mechanic, laborer, or otherwise in the building, altering, repairing, or ornamenting any building or tract of land;

11. furnish forms or form work used in the process of construction when cement, concrete, or like material is used; or

12. manage a structure under construction (*see Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008) (construction managers as agents entitled to lien rights)).

1. [2.11] Environmental Services

Services provided by environmental professionals in connection with the actual excavation and removal of contaminated soil on a project are lienable. *Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington,* 251 Ill.App.3d 256, 620 N.E.2d 469, 189 Ill.Dec. 501 (4th Dist. 1993) (removal of petroleum-contaminated soil is lienable, as are disposal charges from landfill). The remediation work itself is also lienable, even though such work does not result in the construction of a building on the site. 620 N.E.2d at 474.

By comparison, the mere removal of drums with contaminated waste from a site, along with some incidental cleaning, was not lienable according to the court in *Inter-Rail Systems, Inc. v. Ravi Corp.,* 387 Ill.App.3d 510, 900 N.E.2d 407, 326 Ill.Dec. 771 (1st Dist. 2008). The *Inter-Rail* court noted that in *Midwest Environmental, supra,* the contractor had performed excavation work and the excavation and removal of underground storage tanks improved the property. The removal and disposal of wastes in *Inter-Rail* was not lienable because it was maintenance and not part of an overall plan to improve the property. 900 N.E.2d at 413.

Similarly, in *In re Resource Technology Corp.,* No. 03 C 3971, 2004 WL 161491 (N.D.Ill. Jan. 14, 2004), an engineering firm's services were found to be not lienable. The engineer prepared applications for Illinois Environmental Protection Agency (IEPA) permits for the operation of landfills that generated methane gas used to power engines located on the landfills. The engineer also assisted the landfill owner in monitoring compliance under the IEPA permits.

The *Resource Technology* court took the approach that the engineering services needed to provide a benefit to the land, such as design work for physical structures on the land. The permit application and permit monitoring services did not provide a benefit to the land. The court also considered the possibility that a parcel of land might have an identified environmental problem that could be permanently removed with engineering services. In this case, however, the removal of methane from the landfill was an ongoing maintenance problem. Even though the claimant was a licensed engineer, the engineer's services did not result in an improvement to the landfills, and these services did not enhance the value of the landfills.

In *Mostardi-Platt Associates, Inc. v. Czerniejewski,* 399 Ill.App.3d 1205, 929 N.E.2d 94, 340 Ill.Dec. 790 (5th Dist. 2010), the court held that environmental consulting services were not lienable even though the feasibility study and other services were to secure IEPA permits for the construction of a new coal gasification plant. The court failed to see any enhancement to the value of the land because the plant had yet to be built, and the court noted that the services had been performed for an optionee, not the current fee owner of the land. The court saw no benefit to the fee owner, only a benefit to the optionee who was to use the claimant's services "not for the purpose of improving the land but . . . for the purpose of determining" whether to exercise the "option to purchase the land and thereafter build a coal gasification facility." 929 N.E.2d at 99.

2. [2.12] Surveying Services

Surveying services are lienable even if there is no physical improvement to the property or calculable increase in the property's value. *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois,* 2015 IL 118955, 43 N.E.3d 963, 398 Ill.Dec. 53. The surveying services, however, must be for purposes of improving the property and not some other purpose.

In *Burke Engineering,* the surveying services consisted of a plat of subdivision, a wetlands survey, and planning out roads and sewers. One house was actually built, although the planned residential subdivision was never completed. 2015 IL 118955 at ¶4. These services were lienable because they were for purposes of improving the property. 2015 IL 118955 at ¶12 (distinguishing *Mostardi-Platt Associates, Inc. v. Czerniejewski,* 399 Ill.App.3d 1205, 929 N.E.2d 94, 340 Ill.Dec. 790 (5th Dist. 2010), in which non-lienable services were for purpose of deciding whether to exercise option to purchase property).

3. [2.13] Pre-Construction Services by Contractors or Construction Managers

Pre-construction services by contractors, such as working with owners on preliminary estimating, scheduling, and project scope, may not be lienable unless such work becomes part of actual construction. Contractors who provide such services but who are not ultimately selected to build the project may not be entitled to lien rights. *See First Bank of Roscoe v. Rinaldi,* 262 Ill.App.3d 179, 634 N.E.2d 1204, 199 Ill.Dec. 850 (2d Dist. 1994); *BRL Carpenters, Ltd. v. American National Bank & Trust Co.,* 126 Ill.App.3d 137, 466 N.E.2d 1166, 81 Ill.Dec. 364 (1st Dist. 1984). *See also Contract Development Corp. v. Beck,* 255 Ill.App.3d 660, 627 N.E.2d 760, 194 Ill.Dec. 423 (2d Dist. 1994).

4. [2.14] Lienability of "Delay Damages"

The label "delay damages" is imprecise and not useful in the context of the Mechanics Lien Act. Under §1, labor, material, services, superintendence, and equipment costs are lienable. 770 ILCS 60/1. Such costs that appear to be due to extended durations or out-of-sequence work may have as their root cause changes in the work or changed conditions. By this reasoning, such additional labor, material, or equipment costs are no different from other categories of lienable extra or additional work.

In *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 1059, 160 Ill.Dec. 101 (1st Dist. 1991), the court allowed a mechanics lien for an amount "which constituted damages flowing from [the general contractor's] delays on the job as well as extras and the unpaid balance due." *See Oxford 127 Huron Hotel Venture, LLC v. Dellisart-Chicago B, LLC,* No. 08 CH 37270, slip op. at 85 – 86 (Cook Cty.Cir. Dec. 24, 2012) (costs associated with delay are lienable).

Yet, in *Antonic Rigging & Erecting of Minnesota, Inc. v. MDCON, Inc.,* No. 90 C 4800, 1991 WL 56351 (N.D.Ill. Apr. 4, 1991), the federal court ruled that delay damages were not lienable. The court also ruled against the lien claimant on other grounds. The lien claimant in *Antonic Rigging* was a subcontractor on a private project. The claimant made a delay damages claim for $1,910,874.50 in addition to an original contract claim of $490,795. 1991 WL 56351 at *1. The court noted that §21 of the Mechanics Lien Act (770 ILCS 60/21) permitted a subcontractor to lien for "extra work and materials." 1991 WL 56351 at *3. The court then held that a subcontractor could not claim a lien for "delay expenses not attributable to the cost of extra material and work." *Id.* In granting summary judgment against the lien claimant, however, the court noted that "the exact amount of [the claimant's] damage claim that is attributable solely to delay" could not be determined from the summary judgment submissions. 1991 WL 56351 at *2 n.3. While ruling against the claimant, *Antonic Rigging* actually left open the possibility that there are categories of expenses caused by disruption and extended duration that are extra work and materials. Extended home office overhead charges should not be included in a lien claim because such charges (not labor) are not likely to be extra work.

Not only is there a distinction between costs of labor, material, superintendence, and equipment associated with delay (which are lienable) and other non-lienable damages attributable solely to the delay, but the ruling in *Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 269 Ill.Dec. 556 (1st Dist. 2002), *appeal denied,* 204 Ill.2d 661 (2003), expands the categories of lienable items. Although the case was decided under §23 of the Mechanics Lien Act (770 ILCS 60/23), which governs liens on public funds, the *Luise* court referred to "the totality of the developing case law in all sections of the Act." 781 N.E.2d at 363. In ruling that trucking services were lienable, the court rejected the argument that in order to be lienable under §23, the furnished labor or material needed to be used or consumed during the act of constructing the public improvement, to become a constituent part of the public improvement, or to be employed in preparing the site for construction of the public improvement.

5. [2.15] Drawings for an Abandoned Project

Architects are entitled to lien rights for their services in preparing drawings and specifications, and the express statutory language appears to recognize such lien rights even if the owner abandons the project. *Crowen v. Meyer,* 342 Ill. 46, 174 N.E. 55 (1930). Similarly, surveyors who perform services for the improvement of a property are entitled to lien rights, even if the development of the property does not proceed. *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois,* 2015 IL 118955, ¶¶12 – 20, 43 N.E.3d 963, 398 Ill.Dec. 53. If a project is abandoned because of changed economic conditions, however, unless the architect can prove that the collateral's value was enhanced by, for example, a zoning change obtained by use of the plans, the architect may have difficulty relying on the enhancement doctrine discussed in §2.52 below to establish priority, which is often critical to the practical value of the lien claim.

6. [2.16] Materials, Fixtures, and Machinery

In order to have a lien for materials, a contractor need not prove that the materials were, in fact, incorporated into the project. The Mechanics Lien Act recognizes lien rights for material if delivered to the owner or the owner's agent or if delivered to the project site for use in the construction. The burden is on the owner to present proof that materials so delivered were not, in fact, incorporated. *Luczak Brothers, Inc. v. Generes,* 116 Ill.App.3d 286, 451 N.E.2d 1267, 71 Ill.Dec. 900 (1st Dist. 1983); 770 ILCS 60/7. For fixtures or machinery as opposed to materials, the lien claimant must prove that the items were actually incorporated. *Kupferschmid, Inc. v. Rodeghero,* 139 Ill.App.3d 975, 488 N.E.2d 305, 94 Ill.Dec. 479 (3d Dist. 1986) (items furnished found to be materials rather than fixtures, apparatus, or machinery).

Airtite, Division of Airtex Corp. v. DPR Limited Partnership, 265 Ill.App.3d 214, 638 N.E.2d 241, 202 Ill.Dec. 595 (4th Dist. 1994), discusses a further distinction between trade fixtures, which are not lienable, and permanent fixtures, which are lienable. The lien claimant in *Airtite* had supplied and installed steel-raised flooring with carpet tiles in an office building. The court applied the following three-part analysis and ruled that the steel flooring was lienable as a permanent fixture even though the flooring was removable:

a. the means by which the fixture was annexed to the building (the steel flooring was attached to the premises);

b. whether the item was adapted to and necessary for a particular purpose for which the property was devoted (the steel flooring was designed specifically for the property, and the building was built to accommodate this type of flooring); and

c. whether the owner or person having an interest in the property intended the item to become a permanent part of the property (the steel flooring was to remain in the building regardless of who occupied the building). 638 N.E.2d at 246.

In an unreported Supreme Court Rule 23 decision, *Communications Contractors, Inc. v. Madison Two Associates,* 345 Ill.App.3d 1155, 883 N.E.2d 1147, 318 Ill.Dec. 553 (1st Dist. 2005) (Rule 23), the court applied the *Airtite* factors to rule that possibly impermanent fiber-optic communications cable and conduits were not lienable fixtures. Among other factors, the court looked to the license agreement between the owner of the office building and the company that was to provide telecommunications services to tenants of the building. Although the installing contractor who worked for the telecommunications company was not a party to that license agreement, the court noted that the license agreement required the telecommunications company to remove all of the cable and conduits at the expiration of the license, unless the building owner opted to allow the cable and conduits to remain. That the cable and conduits remained in the building, as permitted by the license agreement at the option of the building owner, did not change the fact that there was no intent to make the cable and conduits a permanent fixture. In addition, the cable and conduits were not installed within the walls and floors. Although the cable itself would be damaged in the removal process, the building would suffer only minimal damage as junction boxes and brackets were unscrewed from walls and floors. Finally, the court noted that the cable and conduits were not specifically adapted to, or necessary for, a particular purpose. Other telecommunications companies had installed competing infrastructures in the office building, and the cable and conduits in question may never have been used. The installing contractor was not entitled to a lien.

Similarly, in *AUI Construction Group, LLC v. Vaessen,* 2016 IL App (2d) 160009, ¶19, 67 N.E.3d 500, 409 Ill.Dec. 288, the court found that a contractor who built the foundation and tower for a wind turbine did not have lien rights, even though the multimillion dollar installation included a tower that was over 500 feet tall and a foundation that extended underground to a depth of up to 12 feet.

The court noted that the easement agreement between the wind farm developer and the individual farmers (who owned the property on which the wind tower and turbine were built) provided that the wind tower and turbine would remain the developer's property and would be removable by the developer upon three months' notice. This easement agreement, along with the construction contracts that identified the developer as the owner of the wind farm project, led the court to conclude that the tower was not intended to be a lienable permanent improvement. 2016 IL App (2d) 160009 at ¶¶20 – 22.

The court also found that the annual rent paid to the individual farmers under the easement agreement was not a sufficient benefit to the owner for mechanics lien purposes. 2016 IL App (2d) 160009 at ¶¶26 – 27.

Finally, even though substantial demolition charges would have been incurred to remove the tower, the court concluded that unless removal was physically impossible, the tower was intended to be a temporary, non-lienable trade fixture and not a lienable, permanent improvement. 2016 IL App (2d) 160009 at ¶¶34 – 37.

7. [2.17] Streets

The Mechanics Lien Act provides a lien for work done to an improvement in a street, but the improvement must be connected to an improvement on the lot or tract of land. A water main installed in a street was not lienable even though the water main was intended to service lots in a subdivision and tap-ins to individual lots subsequently occurred. *Water Products Company of Illinois, Inc. v. Gabel,* 120 Ill.App.3d 668, 458 N.E.2d 594, 76 Ill.Dec. 194 (2d Dist. 1983).

8. [2.18] Equipment

Equipment can be treated as a lienable fixture depending on (a) the physical attachment of the item to the real estate, (b) the adaptation of the item to the subject property, and (c) the intention to consider the item as part of the realty. *Crane Erectors & Riggers, Inc. v. LaSalle National Bank,* 125 Ill.App.3d 658, 466 N.E.2d 397, 80 Ill.Dec. 945 (2d Dist. 1984) (overhead crane installed in warehouse found to be lienable fixture). This three-part test is similar to that used to distinguish lienable permanent fixtures from non-lienable trade fixtures in §2.16 above. *See Airtite, Division of Airtex Corp. v. DPR Limited Partnership,* 265 Ill.App.3d 214, 638 N.E.2d 241, 202 Ill.Dec. 595 (4th Dist. 1994).

9. [2.19] Equipment Rental

The charges for leasing equipment to others for use on or about the site of an improvement are lienable unless the improvement is a single-family residence or a multifamily residence with fewer than 12 units. 770 ILCS 60/1.2.

10. [2.20] Construction Managers and Property Managers

The Mechanics Lien Act expressly grants lien rights to construction managers who "manage a structure under construction." 770 ILCS 60/1(a). This includes construction managers who act as "agents," although performing general contracting services will support the lienability of the construction manager's work. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 499, 320 Ill.Dec. 330 (1st Dist. 2008); 770 ILCS 60/1. The language, however, does not provide a manager of unimproved farmland with lien rights, and a property manager is otherwise unable to establish lien rights in the absence of enhancement to the value of the property as a result of the taxes and other expenses paid. *Watson v. Watson,* 218 Ill.App.3d 397, 578 N.E.2d 275, 161 Ill.Dec. 148 (3d Dist. 1991).

11. [2.21] "Ornamenting" Property

Under the statutory language granting a lien for "altering" or "ornamenting" property, removing and replacing mini-blinds was found lienable in *Lyons Savings v. Gash Associates,* 279 Ill.App.3d 742, 665 N.E.2d 326, 216 Ill.Dec. 266 (1st Dist. 1996), despite the relatively short useful life of such ornaments.

12. [2.22] Cleaning and Moving

If cleanup work is required because of demolition or construction, the cleaning will be lienable. *Lyons Savings v. Gash Associates,* 279 Ill.App.3d 742, 665 N.E.2d 326, 216 Ill.Dec. 266 (1st Dist. 1996); *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 160 Ill.Dec. 101 (1st Dist. 1991). In *Lyons Savings,* a contractor who cleaned tile and grout on a renovation project was not entitled to a lien because the cleaning was not necessitated by the work of other contractors on the project.

If furniture moving is a necessary part of painting or repairing walls or a necessary part of removing and replacing carpeting and padding, the moving charges will be lienable. 665 N.E.2d at 331.

13. [2.23] Union Wages and Union Fringe Benefits

The priority lien claim for wages granted by 770 ILCS 60/13, 60/15, 60/16, and 60/19 is not preempted by the Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136. *In re Bentz Metal Products Co.,* 253 F.3d 283 (7th Cir. 2001) (en banc). In *Bentz,* the Seventh Circuit overruled *In re Bluffton Casting Corp.,* 186 F.3d 857 (7th Cir. 1999), which had suggested that state mechanics lien protection for unpaid wages or fringe benefits may be preempted by federal labor law. At issue in *Bentz* and *Bluffton* was the Indiana mechanics lien statute, but the conclusion in *Bentz* that mechanics lien claims are not preempted by federal labor law applies to claims under the Illinois statute. The argument that 29 U.S.C. §1441(a), the preemption clause of the Employee Retirement Income Security Act of 1974, Pub.L. No. 93-406, 88 Stat. 829, preempts union benefit fund liens or bond actions was rejected in *Central Laborers' Pension Fund v. Nicholas & Associates, Inc.,* 2011 IL App (2d) 100125, ¶¶38 – 40, 956 N.E.2d 609, 353 Ill.Dec. 747.

14. [2.24] Trucking Services

Under the lien on public funds statute (770 ILCS 60/23), the court in *Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 269 Ill.Dec. 556 (1st Dist. 2002), *appeal denied,* 204 Ill.2d 661 (2003), held that hauling excavated debris from a jobsite was lienable, as were the delivery costs of raw materials. Although the case was decided under §23, the *Luise* court referred to "the totality of the developing case law in all sections of the Act." 781 N.E.2d at 363. The court rejected the argument that, in order to be lienable under §23, the labor or material furnished needed to be used or consumed during the act of constructing the public improvement, to become a constituent part of the public improvement, or to be employed in preparing the site for construction of the public improvement.

15. [2.25] Fee, Profit, and Overhead

In *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 501, 320 Ill.Dec. 330 (1st Dist. 2008), the court explained that a fee, representing compensation for overhead and profit, was lienable, at least if combined with a lien for other services.

16. [2.26] Temporary Staffing Labor — Not Lienable

A temporary staffing agency that provided temporary employees to a contractor did not have mechanics lien rights for amounts due for workers provided to the contractor. *Onsite Engineering & Management, Inc. v. Illinois Tool Works, Inc.,* 319 Ill.App.3d 362, 744 N.E.2d 928, 253 Ill.Dec. 195 (1st Dist. 2001). The workers were provided under a written nationwide agreement that did not state a specific project or type of work. The temporary staffing agency did not have mechanics lien rights because, even though the agency furnished labor to the contractor, the agency did not do so as a specific subset of the contractor's contractual obligations on any project. The court also rejected an attempt by the staffing agency to amend its complaint to allege an oral agreement for the specific project in question. The proposed amendment was offered more than two years after the labor had been furnished, and the amendment could not relate back to the original complaint that alleged a lien based on the written, nationwide agreement.

Onsite Engineering was explained in *Midwest Generation EME LLC v. Estes Group, Inc. (In re Estes Group, Inc.),* 299 B.R. 502, 503 (Bankr. N.D.Ill. 2003), in which the bankruptcy court upheld the mechanics lien claim of a company providing personnel or "staff augmentation" services. The contract between the personnel agency and the subcontractor did not include a specific job or a specific description of the services to be performed by the workers. Nevertheless, the recitals to the agreement between the personnel agency and the subcontractor referred to the subcontractor's obligations to perform for others. This allowed the inference that the personnel agency was obligated to perform some portion of the subcontractor's contractual obligations to others even though the contract did not refer to a specific project or any service descriptions. The court also noted that the Mechanics Lien Act does not require an agreement to expressly detail job descriptions or services.

17. [2.27] Interior Designers

Under a 2018 amendment to the Mechanics Lien Act, services provided by a registered interior designer are lienable. 770 ILCS 60/1(b). Interior designers are registered under the Registered Interior Designers Act, 225 ILCS 310/1, *et seq.*

B. [2.28] Combining Lienable and Non-Lienable Work

Even if a claim for lien includes both lienable and non-lienable categories of work, as long as the lien claim does not fraudulently overstate the amount due, the lien may still be valid. See 770 ILCS 60/7 (no lien shall be defeated because of error or overcharging unless the error or overcharge was made with intent to defraud). At the bill of particulars stage or at trial, the contractor should have records or testimony that clearly separates the dollar amount claimed for lienable work from the dollar amount claimed for non-lienable work. *Flader Plumbing & Heating Co. v. Callas,* 171 Ill.App.3d 74, 524 N.E.2d 1097, 121 Ill.Dec. 49 (1st Dist. 1988). The court in *Inter-Rail Systems, Inc. v. Ravi Corp.,* 387 Ill.App.3d 510, 900 N.E.2d 407, 414, 326 Ill.Dec. 771 (1st Dist. 2008), suggested that a claimant that can segregate lienable from non-lienable work may be required to do so at the pleadings stage. However, in cases involving lump-sum contracts for lienable and arguably non-lienable work, the contractor should consider arguing that the allegedly non-lienable work is inseparable from the unquestionably lienable work or that all of the work is, in fact, lienable. *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 160 Ill.Dec. 101 (1st Dist. 1991) (debris removal inseparable from demolition).

In deciding what items are lienable, the court in *Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 269 Ill.Dec. 556 (1st Dist. 2002), *appeal denied,* 204 Ill.2d 661 (2003), reexamined the rule for lienable and non-lienable activities that are inseparable under a lump-sum contract. Although *Luise* was decided under the lien on public funds provision of the Mechanics Lien Act (770 ILCS 60/23), the court referred to the pertinent history of the provisions applicable to liens on private property (770 ILCS 60/1, 60/21). According to the court, if a lump-sum contract involves both lienable and non-lienable work that cannot be separated, then both types of work are lienable. The *Luise* court, citing *Verplank Concrete & Supply, Inc. v. Marsh,* 40 Ill.App.3d 742, 353 N.E.2d 27 (4th Dist. 1976), used the example of non-lienable cement truck rental (under prior law) and lienable concrete mixed in the truck. Both the truck rental and the concrete were lienable. 781 N.E.2d at 362. The court also used the example of lienable demolition work that was inseparable from the removal of debris from a site, both of which were lienable in *Cleveland Wrecking, supra.*

The facts of *Luise* involved a trucking subcontractor that removed debris excavated by a prime contractor. The court found that the two activities of hauling and excavation were performed by separate contractors and were separable. Although the court ultimately ruled that the hauling services of the trucking contractor were lienable, it did not treat the trucking services as inseparable from the unquestionably lienable excavation services.

The doctrine of equitable allocation of payments also may allow a contractor to allocate payments received to non-lienable items of work so that the amounts remaining unpaid will be lienable items. *See Crane Erectors & Riggers, Inc. v. LaSalle National Bank,* 125 Ill.App.3d 658, 466 N.E.2d 397, 80 Ill.Dec. 945 (2d Dist. 1984).

C. [2.29] Other Categories of Lienable and Non-Lienable Items

The following list of lienable items and work was compiled by Sidney Frisch, Jr., and Irving B. Ribstein for ILLINOIS MECHANICS' LIENS §3.23 (IICLE®, 1986) (no longer in print but may be available in certain law libraries):

1. acoustical block for ceilings and walls (*Johns-Manville Corporation of Delaware v. La Tour D'Argent Corp.,* 277 Ill.App. 503 (1st Dist. 1934));

2. asbestos curtain, stage wings, and scenery (*Schmeling v. Rockford Amusement Co.,* 154 Ill.App. 308 (2d Dist. 1910));

3. board, traveling expenses, and time of technician needed to set up a machine that, by agreement of parties, was added to cost of machine (*City of Salem v. Lane & Bodley Co.,* 189 Ill. 593, 60 N.E. 37 (1901));

4. crane and operator used to hoist into place sheet metal plates that were welded permanently to the structure (*C.S. Lewis, Inc. v. Cabot Corp.,* 85 Ill.App.3d 708, 407 N.E.2d 84, 40 Ill.Dec. 853 (4th Dist. 1980));

5. carpeting, under certain circumstances (*Wanzer v. Smorgas-Brickan Developers, Inc.,* 130 Ill.App.2d 378, 264 N.E.2d 435 (2d Dist. 1970));

6. cleaning, discing, and replanting the land (*Robb v. Lindquist,* 23 Ill.App.3d 186, 318 N.E.2d 301 (3d Dist. 1974) (but lienability was not raised by defendant in trial court));

7. coal mine tipple and top works (*Bingaman v. Dahm,* 307 Ill.App. 432, 30 N.E.2d 509 (4th Dist. 1940); *Henry v. Miller,* 145 Ill.App. 628 (3d Dist. 1908));

8. demurrage, a custom in the trade to charge extra at the rate of $20 per hour if concrete is poured at a slower rate than ten minutes per cubic yard (*Hollembeak v. National Starch & Chemical Corporation, Engineers, Inc.,* 95 Ill.App.3d 309, 420 N.E.2d 172, 50 Ill.Dec. 855 (4th Dist. 1981));

9. ditch constructed to straighten creek (*Bartson v. Wiekert,* 193 Ill.App. 467 (3d Dist. 1915) (abst.));

10. dummy elevator installed by the tenant (*Pitt Engineering Co. v. Soteros,* 243 Ill.App. 616 (1st Dist. 1926) (abst.));

11. electric sign and electrical work (*Young v. Bergner,* 243 Ill.App. 473 (4th Dist. 1927) (dictum));

12. electric wiring and conduits held not to be trade fixtures (*Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131 (5th Dist. 1973));

13. gas ranges and gas laundry stoves installed in an apartment building (*Lyle v. Rosenberg,* 192 Ill.App. 378 (1st Dist. 1915));

14. gravel bin with heavy concrete foundation (*Alexander Lumber Co. v. Swindlehurst,* 309 Ill.App. 433, 32 N.E.2d 637 (3d Dist. 1941) (abst.));

15. heating plant (*Decker v. Cochran,* 182 Ill.App. 584 (2d Dist. 1913) (abst.));

16. house painting (*Martine v. Nelson,* 51 Ill. 422 (1869); *Henry DeCicco & Co. v. Drucker,* 101 Ill.App.2d 340, 243 N.E.2d 456 (1st Dist. 1968));

17. plumbing and heating repairs and installations for restaurant (*Crowley Bros. v. Ward,* 322 Ill.App. 687, 54 N.E.2d 753 (2d Dist. 1944) (abst.));

18. special purpose apparatus, equipment, and machinery necessary for conversion of building to meat-processing plant held to be intended to be permanent improvement (*Dual Temp Installations, Inc. v. Chicago Title & Trust Co.,* 41 Ill.App.3d 415, 354 N.E.2d 131 (1st Dist. 1976));

19. storm drains, sanitary sewers, and water mains (*Berry v. Blackard Construction Co.,* 13 Ill.App.3d 768, 300 N.E.2d 627 (4th Dist. 1973));

20. tanks and cisterns, in pits, connected with boiler by pipes (*Beck Coal & Lumber Co. v. H.A. Peterson Mfg. Co.,* 237 Ill. 250, 86 N.E. 715 (1908));

21. tanks and kettles to be used in dyeing plant (*Edward Hines Lumber Co. v. Great Lakes Chemical Works, Inc.,* 237 Ill.App. 246 (2d Dist. 1925) (dictum));

22. trade fixtures installed by the tenant when the landlord paid partly for the installation and thus showed intention to have them remain permanently (*Schmeling, supra*); and

23. truck rental as part of the price of concrete mix since concrete mixing trucks are actually part of manufacturing cost (*Verplank Concrete & Supply, Inc. v. Marsh,* 40 Ill.App.3d 742, 353 N.E.2d 27 (4th Dist. 1976)).

The following list of non-lienable items and work was also originally compiled by Sidney Frisch, Jr., and Irving B. Ribstein for ILLINOIS MECHANICS' LIENS §3.23 (IICLE®, 1986) (no longer in print but may be available in certain law libraries):

1. advances made by a bank to a subcontractor to enable it to pay its laborers (*Manhattan State Bank v. C.J. Moritz, Inc.,* 238 Ill.App. 103 (2d Dist. 1925));

2. disappearing beds, combination writing desks, and bookcases (*Herr v. Henriksen,* 189 Ill.App. 115 (1st Dist. 1914) (abst.));

3. dumpsters (*RB Services & Hauling, LLC v. Hunter 1011-1012 Hillcrest, LLC,* 2018 IL App (2d) 170985-U, ¶16);

4. exhaust fan (determined to be a removable trade fixture) (*McAlear v. New York Life Insurance & Trust Co.,* 177 Ill.App. 339 (1st Dist. 1913));

5. hardware furnished with knowledge that it was not going to be used in building (*Vierck v. Lindberg,* 313 Ill.App. 150, 39 N.E.2d 393 (2d Dist. 1942) (abst.));

6. heat furnished to building in course of construction (*Hoier v. Kaplan,* 313 Ill. 448, 145 N.E. 243 (1924));

7. performance bond cost (*Atlee Electric Co. v. Johnson Construction Co.,* 14 Ill.App.3d 716, 303 N.E.2d 192 (1st Dist. 1973));

8. piling driven into bed of Lake Michigan for a riparian owner, title to bed being in the state (*Mears Slayton Building Material Co. v. Boynton,* 233 Ill.App. 256 (1st Dist. 1924));

9. premiums on public liability and workers' compensation insurance (*Hoier, supra*); and

10. telephone services (*City of Staunton v. Cole & Fauber,* 254 Ill.App. 377 (3d Dist. 1929)).

D. [2.30] Interest on Unpaid Amounts, Costs of Collection, and Attorneys' Fees

Mechanics lien claims bear interest by statute at the rate of ten percent per year "from the date the same is due." 770 ILCS 60/1(a). A higher rate of interest may be allowed if expressly provided in the contract (but, to the extent of the higher contractual rate, is non-lienable). To stop the accrual of interest, unconditional payment in full must be tendered to the claimant. *Advance Steel Erection, Inc. v. Urbanscape Development, LLC,* 2014 IL App (1st) 132907-U, ¶39.

Original contractors can recover their attorneys' fees if an owner fails to pay "the full contract price, including extras, without just cause or right." 770 ILCS 60/17(b). "Without just cause or right" is defined by the statute to mean that the owner has asserted a defense to the lien claim "which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." 770 ILCS 60/17(d). The standard is similar to that used for awarding fees under S.Ct. Rule 137. *Thomas Hake Enterprises, Inc. v. Betke,* 301 Ill.App.3d 176, 703 N.E.2d 114, 234 Ill.Dec. 502 (2d Dist. 1998).

Failure to pay an undisputed amount may give rise to an attorneys' fee recovery. In *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc.,* 2016 IL App (3d) 140946, 65 N.E.3d 340, 408 Ill.Dec. 118, attorneys' fees were awarded to lien claimants even though the trial court found that the claimants were not entitled to recover disputed extras. The owner had no justification for refusing to pay undisputed amounts. 2016 IL App (3d) 140946 at ¶¶55 – 57. *See Walter Daniels Construction Co. v. Dundee Reger LLC,* 2016 IL App (1st) 151112-U, ¶10.

In *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC,* 391 Ill.App.3d 533, 909 N.E.2d 294, 330 Ill.Dec. 581 (1st Dist. 2009), the court ruled that a subcontractor was entitled to statutory attorneys' fees because the owner failed to pay an admitted amount due of $47,562.19 out of a total claim of $135,599.50. *But see Superior Structures Construction, Ltd. v.*

Parkway Bank & Trust Co., 2011 IL App (1st) 111266-U, ¶57 (citing *O'Connor Construction* but allowing proof of owner's settlement offer to negate mechanics lien claimant's accusation of bad faith); *RB Services & Hauling, LLC v. Hunter 1011-1012 Hillcrest, LLC,* 2018 IL App (2d) 170985-U, ¶19 (trial court has discretion under §17 to deny fees to owner who withheld undisputed $16,029.66 amount owed when claimant's complaint to foreclose also included $6,152.20 for non-lienable amount not removed from lien claim until second amended complaint, distinguishing *O'Connor Construction, supra,* and *Roy Zenere Trucking, supra*).

Likewise, §17 allows owners to recover attorneys' fees from a lien claimant who brings an action to assert a lien without just cause or right. Under §17, the award of attorneys' fees is discretionary. *Father & Sons Home Improvement II, Inc. v. Stuart,* 2016 IL App (1st) 143666, ¶¶47 – 48, 52 N.E.3d 581, 402 Ill.Dec. 660. The owner must have "contracted to have the improvements made and defended the action." 770 ILCS 60/17(c). In *Thomas Hake Enterprises, supra,* the court narrowly construed the term "owner" so that a relative of an owner was not able to invoke the statute against an unsuccessful lien claimant.

Similarly, in denying attorneys' fees under §17 sought by a lien claimant against a construction lender who acquired all of the owner's assets through a bankruptcy plan of reorganization, the court limited the term "owner" to the owner who contracted to have the improvements made. That the lender forced the lien claimant to litigate its lien rights was immaterial. *In re 1555 Wabash LLC,* 493 B.R. 756, 768 – 769 (Bankr. N.D.Ill. 2013). *See Action Plumbing Co. v. Bendowski,* 402 Ill.App.3d 681, 934 N.E.2d 35, 40, 343 Ill.Dec. 35 (2d Dist. 2010) (award of fees assessed only against developer who contracted for improvements, not subsequent homeowners, and could not be part of judgment on lien foreclosure count).

As a final example of the narrow application of 770 ILCS 60/17(b) and 60/17(c), in *Lesniak v. Wesley's Flooring, Inc.,* 2014 IL App (1st) 131345-U, the court ruled that there was no basis for awarding fees to an owner who successfully sued a lien claimant to remove and discharge a lien claim. Although the court awarded costs under §17(a), no attorneys' fees were awarded because the owner's suit to have the lien declared invalid was not a suit brought by a lien claimant, which is the predicate to recovery under §17(c).

As a practical matter, the cases decided under §17 may be superseded by the prevailing party tests for awarding attorneys' fees when the §38.1 lien release bond applies. 770 ILCS 60/38.1. If a person or entity other than the owner provides the bond releasing a lien claim, the owner will not be a party to the enforcement lawsuit. 770 ILCS 60/38.1(h). The owner's liability for, or right to, attorneys' fees under §17 will not apply; the attorneys' fees may be recovered by the bond principal or claimant, depending on percentage outcome. The §38.1 "prevailing party" provisions are discussed in §2.55 below.

The Mechanics Lien Act provides for the taxing of costs and the equitable allocation of costs such as filing fees and court reporter fees. 770 ILCS 60/17; *Martinez v. Knochel,* 123 Ill.App.3d 555, 462 N.E.2d 1281, 78 Ill.Dec. 927 (4th Dist. 1984).

Attorneys' fees and experts' fees are collectible if there is an express provision in the contract. *See Mirar Development, Inc. v. Kroner,* 308 Ill.App.3d 483, 720 N.E.2d 270, 241 Ill.Dec. 815 (3d

Dist. 1999); *Eastabrooks v. Ravlin,* 109 Ill.App.2d 277, 248 N.E.2d 529 (2d Dist. 1969) (abst.); *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership,* 325 Ill.App.3d 276, 757 N.E.2d 1271, 259 Ill.Dec. 136 (5th Dist. 2001).

Another basis for an award of attorneys' fees in a mechanics lien case, as in other Illinois litigation, is S.Ct. Rule 137 regarding the signature of pleadings by counsel: "The signature of an attorney . . . constitutes a certificate [that the document] is well grounded in fact and is warranted by existing law or a good-faith argument for the extension . . . of existing law." Supreme Court Rule 137(a). A denial of attorneys' fees to a lien claimant under §17 does not preclude an award of a lesser amount of fees for the defendant's Rule 137 violation. *See Panel Built, Inc. v. DeKalb County, Illinois,* 2019 IL App (2d) 180334, 124 N.E.3d 579, 429 Ill.Dec. 383 (even though defendants won summary judgment on mechanics lien count, trial court correctly awarded lesser amount to claimant under Rule 137 for defendants' admission that project was public work, unnecessarily extending litigation).

IV. CONTRACT PROVISIONS AND LIEN RIGHTS

A. [2.31] No-Lien Contracts

Contract provisions that purport to require a contractor to waive its lien rights are void and unenforceable as a matter of public policy. *See Brown & Kerr, Inc. v. American Stores Properties, Inc.,* 306 Ill.App.3d 1023, 715 N.E.2d 804, 240 Ill.Dec. 117 (1st Dist. 1999) (last paragraph of §1 of Mechanics Lien Act (now 770 ILCS 60/1(d)) defeated general contractor's defense that subcontractor was required to tender final waivers, despite general contractor's refusal to pay all amounts claimed by subcontractor, as condition to payment); 770 ILCS 60/1. The constitutionality of what is now §1(d) was upheld by the Illinois Supreme Court in 1998. *R.W. Dunteman Co. v. C/G Enterprises, Inc.,* 181 Ill.2d 153, 692 N.E.2d 306, 229 Ill.Dec. 533 (1998).

As an example of lien waivers that were permitted under what is now §1(d) of the Mechanics Lien Act, the Supreme Court in *Dunteman* cited agreements to waive liens made after the completion of work. The Supreme Court did not give any examples of enforceable no-lien provisions in contracts entered into before work began. Hypothetically, it may be possible to have a pre-construction lien waiver supported by a separate consideration or payment to the contractor.

B. [2.32] Subordination Agreements

Effective July 16, 2014, agreements to subordinate a mechanics lien to the mortgage lien of a lender or any other interest "where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, either express or implied" are void and unenforceable as a matter of public policy. 770 ILCS 60/1(d). The 2014 amendment allows some agreements to subordinate a mechanics lien to a mortgage lien that secures a construction loan, but only if the agreement is entered into after the construction lender has disbursed more than 50 percent of the loan to fund improvements to the property. *Id.*

C. [2.33] Waivers of Lien

Construction contracts typically require contractors to provide lien waivers with each request for payment during construction. Owners and lenders frequently attempt to use the waivers of lien to prevent the contractor from claiming extras or additional amounts in excess of the contract price indicated on the contractor's waivers. A waiver will be enforced unless the contractor demonstrates that the owner or lender did not innocently rely in good faith on the waiver. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 545, 334 Ill.Dec. 710 (1st Dist. 2009); *In re T. Brady Mechanical Services Inc.,* 133 B.R. 441 (Bankr. N.D.Ill. 1991); *Premier Electrical Construction Co. v. LaSalle National Bank,* 132 Ill.App.3d 485, 477 N.E.2d 1249, 87 Ill.Dec. 721 (1st Dist. 1984). A waiver of lien to date, using a date beyond the lien claimant's date of completion, also can be explained by extrinsic evidence, such as an accompanying contractor's affidavit showing a substantial contract balance, to avoid a finding that all lien rights were waived. The lien claimant can also provide evidence of industry custom that waivers of lien to date were intended to be limited to the current payment being made and that title officers in fact regard such waivers as partial waivers. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 520, 525, 320 Ill.Dec. 330 (1st Dist. 2008); *Mormat Electrical & Construction Services, LLC v. Hunter Construction Services, Inc.,* 2019 IL App (5th) 170316, ¶¶11 – 12, 126 N.E.3d 728, 430 Ill.Dec. 640.

Even if the language of a lien waiver indicates that it is a final waiver, extrinsic evidence can be used to demonstrate that the waiver should be given effect only as a partial waiver and limited to the consideration paid. *Cordeck Sales, supra* (name of waiver form, supporting affidavit showing work remaining, and testimony of title officer confirmed that "final" waiver was partial only).

In *Metropolitan Pier & Exhibition Authority ex rel. Pitt-Des Moines, Inc. v. Mc3D, Inc.,* 56 F.Supp.2d 984 (N.D.Ill. 1999), the court emphasized that the only persons who can take advantage of a subcontractor's lien waiver form are those who rely in good faith on the statements in the lien waiver. A general contractor and an owner who have notice of a subcontractor's claims for extra work will not be entitled to rely on the statements in the lien waiver form. In *Metropolitan Pier,* the owner itself issued changes in the work and was aware of the extra claims. Thus, the owner and general contractor were unable to use a subcontractor's lien waiver to limit the subcontractor's claim.

The *Metropolitan Pier* court also stated that industry custom and usage and the course of dealing between the parties could be considered in evaluating a contractor's or owner's good-faith reliance on a lien waiver. This was consistent with cases holding that the contractor may be able to introduce evidence of custom and usage with respect to the interpretation and use of waivers of lien that are submitted with requests for progress payments or the final payment. *Premier Electrical Construction, supra.*

In ruling that there was a question of fact regarding the effect of a waiver of lien to date, the court in *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 407, 246 Ill.Dec. 866 (1st Dist. 2000), looked to the course of dealing between the parties, which included past payouts on lien waivers that all parties knew did not accurately reflect the subcontractor's "full, up-to-date contract price." The court also noted that the parties referred to contemporaneous disputes about amounts claimed in excess of the lien waiver

in question to indicate that the owner did not rely in good faith on the lien waiver. Finally, the court cited meetings, which occurred before the lien waiver to date was delivered, at which the owner and contractor had discussed the contractor's extra claims.

There are decisions, such as *Lazar Brothers Trucking, Inc. v. A & B Excavating, Inc.,* 365 Ill.App.3d 559, 850 N.E.2d 215, 302 Ill.Dec. 778 (1st Dist. 2006), and *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005), discussed below, in which the courts allowed owners to rely on waivers and contractors' affidavits to avoid liability. However, the Illinois Supreme Court's decision in *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 330 Ill.Dec. 808 (2009), demonstrates how an owner might end up paying twice depending on the facts. In *Weather-Tite,* the Illinois Supreme Court ruled that an owner could not defeat a subcontractor's lien claim even though the owner paid the general contractor the amount shown for the subcontractor on a sworn statement. The owner's reliance on the general contractor to pay the amount shown was not sufficient to defeat the subcontractor's lien claim for the amount shown in the sworn statement, which the general contractor failed to pay after the owner paid the general contractor. 909 N.E.2d at 836.

A first-tier subcontractor's lien waiver combined with payment in full before a second-tier subcontractor's 90-day notice of lien was served defeated the second-tier subcontractor's lien in *Lazar Brothers, supra.* In *Lazar Brothers,* the owner of a property was a construction company that also acted as its own general contractor on a project. The first-tier subcontractor, A & B Excavating, submitted false affidavits that failed to list a second-tier subcontractor, Lazar Brothers. 850 N.E.2d at 219. The general contractor paid the first-tier subcontractor in full, in reliance on the first-tier subcontractor's final waiver, before the second-tier subcontractor served its notice of lien.

The court ruled that the second-tier subcontractor had the burden of proving the general contractor's bad faith and failure to reasonably rely on the first-tier subcontractor's waivers. The second-tier subcontractor failed to meet its burden even though the general contractor may have made advance payment to the first-tier subcontractor — *i.e.,* the progress payments may have exceeded the value of work in place from time to time. The second-tier subcontractor was also unable to meet its burden by claiming "on information and belief" that there were representatives of the general contractor on site who must have seen 40 trucks with the second-tier subcontractor's name on the side. 850 N.E.2d at 220. There was insufficient evidence that the general contractor (1) knew of the second-tier subcontractor's work at the site or (2) knew of the falsity of the first-tier subcontractor's affidavit at the time the general contractor made final payment to the first-tier subcontractor. *Id.*

The *Lazar Brothers* court also ruled that the second-tier subcontractor could not reach any payments from the property owner to itself as general contractor because all such payments had been made before the time the second-tier subcontractor's notice of lien was served. *Id.* The second-tier subcontractor lost even though its 90-day notice of lien was timely served.

Similarly, in *Bricks, supra,* a second-tier supplier's lien was limited to the $10,000 that remained due to the first-tier subcontractor at the time the second-tier supplier timely served its 90-day notice of lien. 836 N.E.2d at 745 – 746. The owner of the property was entitled to rely on the first-tier subcontractor's affidavits and waivers, which failed to identify the second-tier supplier.

The court ruled that the owner was entitled to rely on a contractor's affidavit and waivers in making payments as long as the owner had no knowledge or notice that the affidavit contained false or incomplete information. 836 N.E.2d at 749.

Pursuant to P.A. 93-562 (eff. Aug. 20, 2003), a waiver under the Public Construction Bond Act, 30 ILCS 550/0.01, *et seq.,* must refer specifically to bond rights as well as mechanics lien rights in order to effectively waive bond as well as lien rights. 30 ILCS 550/2. Although this statutory requirement applies to publicly funded projects, because contractors might use the same forms for private as well as public projects, the forms should waive both bond and lien rights.

Releases of recorded lien claims are subject to different principles under §35 of the Mechanics Lien Act. 770 ILCS 60/35. Waivers of lien are delivered to the owner, lender, or others during construction of a project. Releases of recorded liens are recorded with the recorder in whose office the claim for lien had been filed. Absent fraud, recorded lien releases will be enforced, even if the release of lien was recorded in exchange for a promise of payment that was never made. *Oxford 127 Huron Hotel Venture, LLC v. CMC Organization, LLC,* 2014 IL App (1st) 130265 (Rule 23); *CapitalSource Finance, LLC v. CMC Organization, LLC,* No. 1-10-2580, 2011 WL 10071860 (1st Dist. May 17, 2011); *Rochelle Vault Co. v. First National Bank of DeKalb,* 5 Ill.App.3d 354, 283 N.E.2d 336, 337 (2d Dist. 1972).

D. [2.34] Three-Year/Five-Year Rule and Contract Completion

Between January 1, 2013, and December 31, 2024, §6 of the Mechanics Lien Act, amended by P.A. 102-563 (eff. Aug. 20, 2021), P.A. 101-639 (eff. June 12, 2020), P.A. 99-852 (eff. Aug. 19, 2016), and P.A. 97-966 (eff. Jan. 1, 2013), provides:

> **In no event shall it be necessary to fix or stipulate in any contract a time for the completion or a time for payment in order to obtain a lien under this act, provided, that the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material in the case of work done or material furnished as to residential property; and within 5 years from the commencement of said work or the commencement of furnishing said material in the case of work done or material furnished as to any other type of property. The changes made by Public Act[**s**] 97-966[**, 99-852, 101-639, and 102-563**] are operative from January 1, 2013 through December 31, 2024.** 770 ILCS 60/6.

The five-year time period for nonresidential property was enacted to address the suspension of construction projects because of adverse economic conditions during the "Great Recession."

Absent a further amendment, for time periods other than January 1, 2013, through December 31, 2024, §6 provides:

> **In no event shall it be necessary to fix or stipulate in any contract a time for the completion or a time for payment in order to obtain a lien under this act, provided, that the work is done or materials furnished within three years from the commencement of said work or the commencement of furnishing said material.**

Caselaw interpreting the three-year period in §6 should apply to the similar language used for the 2013 – 2024 version of §6 with its five-year period for nonresidential projects.

The three-year or five-year period is determined by reference to the particular work for which the individual lien claimant is seeking a lien. The three-year period does not commence with the date of the lien claimant's contract or the date upon which the lien claimant first begins work. In *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.,* 403 Ill.App.3d 468, 932 N.E.2d 1073, 1087, 342 Ill.Dec. 612 (1st Dist. 2010), the court held that because a claimant was seeking a lien for $50,013.65 for work that commenced after February 28, 2000, and that was completed July 17, 2002 (within three years), the lien claim satisfied §6. That the lien claimant had begun all work in April 1999 was immaterial. *Id.*

In *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 542 – 543, 334 Ill.Dec. 710 (1st Dist. 2009), the court ruled that a subcontractor's lien rights were not affected by the general contractor's failure to complete work within three years.

However, a federal bankruptcy court determining how Illinois law would be applied has ruled that §6 imposes a three-year limitation from commencement for a contractor to maintain the right to a lien. *Acme Steel Co. v. Raytheon Engineers & Constructors, Inc. (In re Acme Metals Inc.),* 257 B.R. 714, 723 (Bankr. D.Del. 2000). This limitation applies, according to the *Acme Metals* court, even if the written contract specified a time for completion of performance and even if extra work requested by the owner extended the actual completion date. This ruling is questionable after the decision in *Doornbos, supra*.

E. [2.35] Failure To Satisfy All Contract Conditions

The Mechanics Lien Act gives the contractor a lien "for the amount due." 770 ILCS 60/1(a). Many construction contracts have provisions that the contractor is not entitled to a payment until a certain number of days have passed after payment is requested in a payment application or pay request. Many contracts also purport to make an architect's certificate that approves the contractor's payment request or confirms the completion of construction a condition to payment.

Ideally, the contractor should timely submit all payment applications so that contractual time periods can expire. However, if the contractor is facing the four-month, two-year, or other time limit for perfecting lien rights, the contractor will need to consider filing a claim for lien for those amounts that are currently due. Even if other amounts may need to be billed to the owner, a contractor that has completed work should not jeopardize the bulk of its lien claim because relatively small amounts need to be submitted. Under the applicable contract law of conditions, the contractor may be able to argue that the final billing is excused (*e.g.,* by the owner's unreasonable delay in closing out a contract).

Similarly, although there are cases enforcing an architect's certificate as a condition for payment (*Barney v. Giles,* 120 Ill. 154, 11 N.E. 206 (1887)), the contractual requirement of a certificate can be waived by an owner who accepts the building (*Hood v. Community High School District No. 304, Christian County, Illinois,* 223 Ill.App. 451 (3d Dist. 1921)) or excused if the architect has acted arbitrarily or the owner has interfered or otherwise prevented the contractor from

obtaining the certificate. *See Turnes v. Brenckle,* 249 Ill. 394, 94 N.E. 495 (1911); *Anderson-Ross Floors, Inc. v. Scherrer Construction Co.,* 62 Ill.App.3d 713, 379 N.E.2d 786, 19 Ill.Dec. 914 (2d Dist. 1978).

To enforce a mechanics lien, the contractor need not perform perfectly, but substantial performance in a workmanlike manner is required. *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 243 Ill.Dec. 740 (1st Dist. 1999) (contractor who breached contract not entitled to mechanics lien, but allowed to recover on quantum meruit basis including overhead, fees, and general conditions); *Mani Electrical Contractors v. Kioutas,* 243 Ill.App.3d 662, 611 N.E.2d 1167, 183 Ill.Dec. 519 (1st Dist. 1993); *V&V Cement Contractors, Inc. v. LaSalle National Bank,* 119 Ill.App.3d 154, 456 N.E.2d 655, 74 Ill.Dec. 934 (1st Dist. 1983); *Weidner v. Szostek,* 245 Ill.App.3d 487, 614 N.E.2d 879, 185 Ill.Dec. 438 (2d Dist. 1993).

F. Legality of Contract

1. [2.36] Home Repair and Remodeling Act

For contractors performing home repair or remodeling work, the Home Repair and Remodeling Act, 815 ILCS 513/1, *et seq.,* should not affect the enforceability of lien rights and contract claims. The Act applies only to general contractors. *MD Electrical Contractors, Inc. v. Abrams,* 228 Ill.2d 281, 888 N.E.2d 54, 320 Ill.Dec. 837 (2008). In *Central Illinois Electrical Services, L.L.C. v. Slepian,* 358 Ill.App.3d 545, 831 N.E.2d 1169, 294 Ill.Dec. 844 (3d Dist. 2005), the court ruled that the Act applied to a home renovation project that was performed on a time-and-material basis over a two-year period at a cost of approximately $1 million. The owner's ever-changing scope of work did not excuse the Act's requirement that "[p]rior to initiating home repair or remodeling work for over $1,000, a person engaged in the business of home repair or remodeling shall furnish to the customer for signature a written contract or work order that states the total cost, including parts and materials listed with reasonable particularity and any charge for an estimate." 831 N.E.2d at 1172, quoting 815 ILCS 513/15.

The failure to provide the brochure or written contract required by the statute, however, does not invalidate the contractor's mechanics lien or contract rights. *K. Miller Construction Co. v. McGinnis,* 238 Ill.2d 284, 938 N.E.2d 471, 481 – 482, 345 Ill.Dec. 32 (2010); *Universal Structures, Ltd. v. Buchman,* 402 Ill.App.3d 10, 937 N.E.2d 668, 676, 344 Ill.Dec. 645 (1st Dist. 2010); *Artisan Design Build, Inc. v. Bilstrom,* 397 Ill.App.3d 317, 922 N.E.2d 361, 371, 337 Ill.Dec. 238 (2d Dist. 2009). Although there are earlier cases barring or limiting contractors' remedies because of violations of the statute, those cases were decided before the 2010 amendments to the statute. See P.A. 96-1023 (eff. Jan. 1, 2010). Those amendments eliminated references to "unlawful" home repair contracts and expressly created a damages remedy for homeowners under the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* See 815 ILCS 513/30; *K. Miller Construction, supra,* 938 N.E.2d at 481.

2. [2.37] Licensing Requirements

In *G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.,* 355 Ill.App.3d 428, 822 N.E.2d 905, 291 Ill.Dec. 30 (3d Dist. 2005), the court did not allow an architectural firm to pursue a mechanics lien because the firm itself was not registered, one principal of the firm was

not licensed, and the other principal of the firm had an inactive license that did not permit him to practice architecture in Illinois. The court indicated, however, that the contract for architectural services would have been legal if either of the firm's principals had been authorized to practice architecture in Illinois, even though the firm was not registered in Illinois. 822 N.E.2d at 910. The court relied on the rationale of *Hattis Associates, Inc. v. Metro Sports Inc.,* 34 Ill.App.3d 125, 339 N.E.2d 270 (1st Dist. 1975).

The Illinois Supreme Court's discussion of licensing requirements for expert testimony may also have some bearing on the legality of the contract issue. In *Thompson v. Gordon,* 221 Ill.2d 414, 851 N.E.2d 1231, 303 Ill.Dec. 806 (2006), the court ruled that an engineer was not prohibited from giving an expert opinion on engineering issues solely because the engineer lacked an Illinois license. The *Thompson* court indicated that the penalties for practicing engineering without a license generally were to be addressed by the Department of Financial and Professional Regulation and its administrative proceedings.

In *Parkman & Weston Associates, Ltd. v. Ebenezer African Methodist Episcopal Church,* No. 01 C 9839, 2003 WL 22287358 (N.D.Ill. Sept. 30, 2003), the court allowed an architect to pursue breach-of-contract, mechanics lien, and federal copyright claims despite violations of the licensing requirements of the Illinois Architecture Practice Act of 1989, 225 ILCS 305/1, *et seq.* The claimant in *Parkman & Weston* was an architect who was licensed individually but whose firm was not registered under the Architecture Practice Act. The court allowed the architect's claims to proceed because the Architecture Practice Act already provided specific penalties and there was no need to impose an additional penalty by barring the architect's claims. The court cited the Illinois Supreme Court decision in *Grody v. Scalone,* 408 Ill. 61, 96 N.E.2d 97 (1950), and rejected the appellate court decision in *Kaplan v. Tabb Associates, Inc.,* 276 Ill.App.3d 320, 657 N.E.2d 1065, 212 Ill.Dec. 720 (1st Dist. 1995). The court also rejected an unclean hands defense because the architect's alleged violations of the Assumed Business Name Act, 805 ILCS 405/0.01, *et seq.,* the Illinois Architecture Practice Act, the Consumer Fraud and Deceptive Business Practices Act, and the Business Corporation Act of 1983, 805 ILCS 5/1.01, *et seq.,* did not rise to the level of blatant, willful fraud requiring a finding of unconscionability. The court once again reasoned that each of the statutes at issue provided a specific penalty and that the plaintiff architect's violations did not require a further court-imposed penalty. *See Blythe Holdings, Inc. v. Flawless Financial Corp.,* No. 06-C-5262, 2009 WL 103196 (N.D.Ill. Jan. 15, 2009).

In *Power Dry of Chicago, Inc. v. Bean,* 2022 IL App (2d) 210043, the court did not allow a contractor that performed emergency property mitigation following a house fire to enforce a mechanics lien. The contractor was not licensed under two provisions of the Illinois Insurance Code pertaining to public adjustors (one of which was subsequently repealed). 2022 IL App (2d) 210043 at ¶¶40 – 44. The court rejected the contractor's argument that the contract was divisible between the post-fire remediation services and reconstruction, finding that the agreement was one unified agreement. 2022 IL App (2d) 210043 at ¶28. The court observed that not only was the contractor performing acts defined to be acts of a public adjustor, but also one of the company's staff had held himself out as possessing a public adjustor license (but did not). Because the firm was unlicensed, the entire contract was void ab initio. Without a valid contract, there can be no lien. 2022 IL App (2d) 210043 at ¶44, citing *G.M. Fedorchak & Associates, Inc.,* 355 Ill.App.3d 428, 822 N.E.2d 905, 909, 291 Ill.Dec. 30 (2d Dist. 2022).

3. [2.38] Permit Requirements

Local governments may have licensing requirements for contractors. See Chicago Municipal Code §4-36-020. The penalties for noncompliance, however, need to be reviewed to see if they are only monetary (*i.e.,* Chicago Municipal Code §4-36-190), with no effect on the enforceability of contracts or lien rights.

The failure of a contractor to obtain a required building permit may not affect the validity of the contractor's mechanics lien. *Mani Electrical Contractors v. Kioutas,* 243 Ill.App.3d 662, 611 N.E.2d 1167, 183 Ill.Dec. 519 (1st Dist. 1993).

G. [2.39] Section 5 Sworn Statements — Contractor's Affidavit

In connection with requests for payment from the contractor to the owner, the contractor should provide a sworn contractor's statement. A sworn statement sets forth all of the contractor's subcontractors and direct suppliers, their subcontract amounts (including approved extras), payments made to date, and the current payments to be made to each of them. The requirement that the contractor provide a sworn statement is found in §5 of the Mechanics Lien Act. 770 ILCS 60/5(a). For work performed on an owner-occupied, single-family residence, the statute additionally requires the original contractor to provide written notice to the owner (in ten-point, boldface type) of the owner's right to a sworn statement. 770 ILCS 60/5(b)(i), 60/5(b)(iii).

An owner who does not request a sworn statement may be found to have waived the statutory right to a sworn statement. *Prior v. First Bank & Trust Co. of Mt. Vernon, Illinois,* 231 Ill.App.3d 331, 596 N.E.2d 891, 173 Ill.Dec. 267 (5th Dist. 1992); *National Wrecking Co. v. Midwest Terminal Corp.,* 234 Ill.App.3d 750, 601 N.E.2d 999, 176 Ill.Dec. 301 (1st Dist. 1992).

If the owner requests a sworn statement, however, the contractor must provide one that is accurate and complies with all of the technical requirements of §5. In *Pyramid Development, LLC v. Dukane Precast, Inc.,* 2014 IL App (2d) 131131, 40 N.E.3d 1185, 397 Ill.Dec. 1, the owner requested sworn statements. The original contractor provided them, but the sworn statements were not accurate. Even though the falsity of the sworn statements was facially apparent, and even though the owner must have known of the inaccuracies, the court ruled that the contractor's failure to provide compliant sworn statements defeated the contractor's lien claim. 2014 IL App (2d) 131131 at ¶29. The court reasoned that under the "plain language" of §5, "an owner waives the requirement that a contractor furnish a compliant sworn affidavit only by not requesting it." *Id.*

Similarly, in *Meridian Group, Inc. v. Geppert,* 2018 IL App (1st) 171355-U, the owner requested a sworn statement on several occasions. At one point, the owner indicated that he was willing to accept an unsigned draft of the sworn statement for review by the owner's attorney. The court nevertheless found that the owner was entitled to a fully compliant sworn statement and there was no waiver of the owner's rights under §5. The lien was invalidated. 2018 IL App (1st) 171355-U at ¶¶21 – 22.

In *Cityline Construction Fire & Water Restoration, Inc. v. Roberts,* 2014 IL App (1st) 130730, 7 N.E.3d 235, 379 Ill.Dec. 809, the original contractor lost its lien rights by failing to provide a sworn statement in response to the owner's request. The contractor's affidavit that all

subcontractors had been paid was not sufficient because that affidavit did not provide the statutorily required information. That the time period for subcontractors to assert lien claims had expired, such that the owner was not actually prejudiced by the absence of a sworn statement, did not excuse compliance with §5. 2014 IL App (1st) 130730 at ¶18. The contractor, however, was allowed to pursue breach-of-contract and quantum meruit claims. 2014 IL App (1st) 130730 at ¶19.

The failure of an original contractor to deliver a sworn statement pursuant to §5, despite a specific request from the owner, defeated an original contractor's mechanics lien in *Weydert Homes, Inc. v. Kammes,* 395 Ill.App.3d 512, 917 N.E.2d 64, 334 Ill.Dec. 467 (2d Dist. 2009). In *Weydert Homes,* the owner requested a sworn statement after the original contractor recorded its lien and after the 90-day period for subcontractors to give notice of their liens expired. The court nevertheless ruled that the original contractor should have provided a sworn statement. A statement under oath from the contractor that was not notarized did not satisfy the statutory requirement of a contractor's affidavit. The lien count was therefore dismissed, although the court allowed a breach-of-contract claim and an alternative quantum meruit count.

The *Weydert Homes* court distinguished the earlier decision in *Northwest Millwork Co. v. Komperda,* 338 Ill.App.3d 997, 788 N.E.2d 399, 273 Ill.Dec. 90 (2d Dist. 2003). In *Northwest Millwork,* the Second District Appellate Court distinguished *Ambrose v. Biggs,* 156 Ill.App.3d 515, 509 N.E.2d 614, 108 Ill.Dec. 918 (2d Dist. 1987), and *Malesa v. Royal Harbour Management Corp.,* 187 Ill.App.3d 655, 543 N.E.2d 591, 135 Ill.Dec. 208 (2d Dist. 1989). The court in *Northwest Millwork* indicated that a §5 sworn statement was required only if the owner faced exposure to subcontractors' lien claims and only if the owner requested sworn statements from the original contractor. The owner in *Northwest Millwork* did not request sworn statements, and the court also concluded that the owner was not exposed to subcontractors' lien claims because the original contractor had completed its work and the only subcontractor lien claims were known as of the date the original contractor filed its suit. The decisions in *Ambrose, supra,* and *Malesa, supra,* were distinguished as involving projects that were not completed, which created a need, in the *Northwest Millwork* court's view, to protect owners from subcontractors' lien claims so that the contractor was allowed to pursue a breach-of-contract (not a lien) claim.

Even if there are facts indicating that the owner has waived its right to sworn statements and no sworn statements previously have been provided to the owner during the course of a project, the contractor, as a conservative, precautionary measure, may want to prepare and deliver the statement before recording the claim for lien. Even if the contractor, defined under statute to include architects and construction managers who have direct contracts with an owner, does not have any subcontractors or suppliers, a sworn statement setting forth the contractor's contract amount and stating that there are no subcontractors or suppliers could be provided to assure against a *Malesa* argument.

A successful lien claimant must comply with other contract requirements for payment in addition to addressing the need for a §5 sworn statement. For example, in *Kasinecz v. Duffy,* 2013 IL App (2d) 121329-U, the court found that no §5 statement was required because the owner had not expressly requested one, and the absence of a sworn statement caused no prejudice to the owner. The lien claimant, however, failed to properly invoice for the amounts it sought and otherwise failed to substantially perform; therefore, the owner prevailed. 2013 IL App (2d) 121329-U at ¶23.

V. THE CLAIM FOR LIEN — TIMING AND CONTENTS

A. Timing Requirements To Preserve Lien Rights

1. [2.40] Four-Month/Two-Year Rules

A lien claim recorded between four months and two years after completion is enforceable against the original owner's interest in the property. The mechanics lien in such cases has priority over the owner's homestead exemption. *In re Bunch,* No. 04-70142, 2005 Bankr. LEXIS 154 (Bankr. C.D.Ill. Feb. 7, 2005); *In re Cramer,* 393 B.R. 611 (Bankr. N.D.Ill. 2008).

In order to have a lien that affects the interests of the owner and third parties such as mortgage lenders, a contractor must record a claim for lien with the recorder for the county in which the real estate is located within four months after completion of the contractor's work. 770 ILCS 60/7; *Active Concrete, Inc. v. Poter Construction & Development Co.,* No. 1-10-0104, 2011 WL 10068757 (1st Dist. Jan. 20, 2011). After recording the claim for lien within four months, the contractor then must file suit to foreclose within two years after completion. 770 ILCS 60/7. Instead of recording a claim for lien, the contractor can file a lawsuit to foreclose with a properly recorded lis pendens within four months after completing the work.

If the contractor does not record a claim for lien or file a suit to foreclose within the four-month period, the interests of third parties such as mortgage lenders will not be affected, and the contractor will not be able to use the statutory provisions that may give a mechanics lien priority over a lender's mortgage lien. The contractor still can impose a lien on the owner's interest in the subject property by filing a claim for lien or filing a suit to foreclose within two years after completion. In any event, the suit to foreclose must be filed within two years after completion of the contractor's work. *Id.*

The lien claimant may not be the first party to file suit. As a defendant-counterplaintiff, the lien claimant must make sure a counterclaim to foreclose is filed within two years. In *Bank of New York v. Jurado,* 2012 IL App (1st) 112116, 977 N.E.2d 1202, 365 Ill.Dec. 103, a lender began a mortgage foreclosure lawsuit and named a mechanics lien claimant. The lien claimant was defaulted but then filed a motion to vacate the default and sought leave to file its counterclaim to foreclose the lien claim. Although the motions were filed within two years after completion, the motions were not granted until after the two-year period. The mechanics lien claim was barred as untimely. 2012 IL App (1st) 112116 at ¶25.

The court in *Jurado* distinguished the decision in *Wasilevich Construction Co. v. LaSalle National Bank,* 222 Ill.App.3d 927, 584 N.E.2d 499, 165 Ill.Dec. 320 (1st Dist. 1991), in which the lien claimant filed a counterclaim within the two-year period, along with a motion to intervene. Even though the motion to intervene was not granted until after the two-year period had expired, the filing of the counterclaim, before leave to intervene was granted, saved the lien claim. 2012 IL App (1st) 112116 at ¶21.

In *Privatebank & Trust Co. v. 3232 Peterson LLC,* 2012 IL App (1st) 113049-U, a foreclosing lender named a mechanics lien claimant as a defendant. The mechanics lien claimant filed an answer but failed to file a counterclaim to foreclose within the two-year period; therefore, the

mechanics lien claim was barred. 2012 IL App (1st) 113049-U at ¶8. The court in *Privatebank* distinguished the ruling in *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 176 Ill.2d 385, 680 N.E.2d 283, 223 Ill.Dec. 550 (1997), in which an answer was sufficient to satisfy the two-year period. The answer in *Norman A. Koglin* set forth the specifics of a lien claim, attached the recorded lien claim as an exhibit, and included a prayer for relief seeking a determination of the amount and priority of the lien. 680 N.E.2d at 285. The answer in *Privatebank* did not contain this affirmative matter.

The foreclosure suit should be filed in the county "where the improvement is located." 770 ILCS 60/9. Forum-selection clauses requiring suit to be brought in another state are no longer effective, depending on when the contract containing the clause was effective.

For construction contracts entered into after July 16, 2002, if the contract is to be performed in Illinois, the Building and Construction Contract Act, 815 ILCS 665/1, *et seq.,* provides that the contract cannot make the laws of a state other than Illinois controlling, and the contract cannot require that litigation, arbitration, or other dispute resolution proceedings take place in a state other than Illinois. 815 ILCS 665/10. The statute is not retroactive, however, and applies only to contracts entered into after July 16, 2002. 815 ILCS 665/99; *Foster Wheeler Energy Corp. v. LSP Equipment, LLC,* 346 Ill.App.3d 753, 805 N.E.2d 688, 282 Ill.Dec. 69 (2d Dist. 2004) (subcontractor on Illinois project required to litigate in New York; Illinois mechanics lien lawsuit stayed).

Section 10 of the Building and Construction Contract Act was intended to supersede such court rulings as *Plant Systems, Inc. v. TE Products Pipeline Co.,* No. 01 C 4057, 2001 WL 1175091 (N.D.Ill. Oct. 3, 2001), in which a contractual forum-selection clause requiring all actions to be brought in a Texas court was enforced. In *Plant Systems,* a mechanics lien foreclosure action against a property located in Illinois was transferred to Texas. The court viewed the mechanics lien claim as derivative of a contract claim and, therefore, subject to the forum-selection clause in the parties' contract.

Another exception to the effectiveness of the Building and Construction Contract Act is preemption under the Federal Arbitration Act (FAA), ch. 213, 43 Stat. 883 (1925). If a contract with at least some elements of interstate commerce requires arbitration in a specific state, a court may find that the FAA preempts the effects of 770 ILCS 60/9.

The automatic stay provision of the Bankruptcy Code, 11 U.S.C. §362, may not excuse a lien claimant from recording a lien or filing a lawsuit within four months after the last day of work. In *Knopfler v. Addison Building Material Co. (In re Germansen Decorating, Inc.),* 149 B.R. 522 (Bankr. N.D.Ill. 1993), Bankruptcy Judge Ginsberg rejected a lien claimant's argument that the time for taking action under the four-month requirement was suspended by a bankruptcy automatic stay.

Bankruptcy Judge Ginsberg distinguished the decision in *Garbe Iron Works, Inc. v. Priester,* 99 Ill.2d 84, 457 N.E.2d 422, 75 Ill.Dec. 428 (1983), in which the court held that the automatic stay tolled the two-year statute of limitations for bringing an action to enforce a lien. The four-month requirement for perfecting a lien was different than the two-year statute of limitations.

Interestingly, the *Germansen* court noted that for bankruptcy court purposes, §546(b) of the Bankruptcy Code (11 U.S.C. §546(b)) allowed perfection of a lien claim by the filing of a bankruptcy proof of claim within the four-month time limit. 149 B.R. at 528. This was viewed by the court as equivalent to commencing a lawsuit within four months of the last day of work.

Germansen must be compared to *Chicago Whirly, Inc. v. Amp Rite Electric Co.,* 304 Ill.App.3d 641, 710 N.E.2d 45, 237 Ill.Dec. 622 (1st Dist. 1999), in which the court held that the bankruptcy of an interested party suspended the 30-day period under §34 of the Mechanics Lien Act (770 ILCS 60/34) for a lien claimant's response to an owner's demand for foreclosure. See §2.45 below.

2. [2.41] "Completion" of the Work

For purposes of the statutory time limits, the contractor conservatively should use the date of substantial completion as the date of "completion." Construction contracts typically provide for the "substantial completion" of a project, which generally is defined as the point in time when the owner has beneficial use of the project. The substantial completion of a project ordinarily is followed by the performance of punch list corrections or completion, when the project then reaches the final completion stage. See AIA Document A201-2017, *General Conditions of the Contract for Construction* art. 9. Certificates from the project architect may contractually fix the dates of substantial completion and final completion.

Although the statutory concept of completion does not necessarily follow the parties' contractual definitions, minor, punch list-type work generally does not count for purposes of computing the statutory time periods for preserving mechanics lien rights. *Miller Bros. Industrial Sheet Metal Corp. v. LaSalle National Bank,* 119 Ill.App.2d 23, 255 N.E.2d 755 (2d Dist. 1969). Repair work or warranty work generally will not extend the completion date. *Cyclonaire Corp. v. ISG Riverdale, Inc.,* 378 Ill.App.3d 554, 882 N.E.2d 684, 690, 317 Ill.Dec. 804 (1st Dist. 2007) (repair work to equipment did not extend time for supplier's lien notice); *D.M. Foley Co. v. North West Federal Savings & Loan Ass'n,* 122 Ill.App.3d 411, 461 N.E.2d 500, 77 Ill.Dec. 877 (1st Dist. 1984) (maintenance on landscaping work did not extend time for recording lien). However, in *DuPage Bank & Trust Co. v. DuPage Bank & Trust Co.,* 122 Ill.App.3d 1015, 462 N.E.2d 25, 78 Ill.Dec. 309 (2d Dist. 1984), the court ruled that repair work to a ventilation system for a restaurant was necessary for the completion of the work and extended the time limits for a mechanics lien even though the work was done after the restaurant had opened for business. In *Daily v. Mid-America Bank & Trust Company of Carbondale,* 130 Ill.App.3d 639, 474 N.E.2d 788, 85 Ill.Dec. 828 (5th Dist. 1985), repair work to two doors was consistent with the owner's practice on the particular project of ordering additional work, and such work was found to extend the time for filing a lien claim.

To be enforceable against third parties other than the original owner, a mechanics lien claim should include a completion date. *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000). Although §7 of the Mechanics Lien Act (770 ILCS 60/7) does not expressly require that a lien claim include a completion date, the *Merchants Environmental* court inferred such a requirement. The mechanics lien claim in *Merchants Environmental* was declared invalid as to a third-party purchaser. Note that *Merchants Environmental* contradicts the Illinois Supreme Court's decision in *First Federal*

Savings & Loan Association of Chicago v. Connelly, 97 Ill.2d 242, 454 N.E.2d 314, 318 – 319, 73 Ill.Dec. 454 (1983) (expressly declining to impose completion date requirement as necessary component of lien claim).

The First District's ruling in *Merchants Environmental* was expressly criticized by the Second District in *National City Mortgage v. Bergman,* 405 Ill.App.3d 102, 939 N.E.2d 1, 345 Ill.Dec. 272 (2d Dist. 2010). The *National City Mortgage* court held that no completion date need be stated in the recorded lien claim, at least if there were no issues regarding the apportionment of a total claim amount among specific parcels. 939 N.E.2d at 8.

The *Merchants Environmental* court also discussed when the four-month period begins to run, reviewing the principle that for purposes of §7 of the Mechanics Lien Act, "completion" does not refer to the completion of the contract but instead to the completion of the work for which the contractor claims a lien. 731 N.E.2d at 401. The court also reviewed the factors to determine whether the work was merely trivial and thus did not extend the time to record a lien, including

a. whether the work was needed to complete the contract;

b. whether the work was requested by the owner; and

c. whether the work was needed to make the project suitable for its intended use or was maintenance or correction of a completed job.

Applying these factors, the court concluded that the ceiling grills installed by a mechanical contractor months after a restaurant opened were not trivial even though the ceiling grill installations were not needed to make the building operable. The court reasoned that the factor of whether the work was essential to the completion of the contract was as important a factor as operability or suitability, if not more important. 731 N.E.2d at 402 – 403.

Contractors also must be careful if they have more than one contract with an owner. Separate completion dates will be applied for each contract. In *Lyons Savings v. Gash Associates,* 279 Ill.App.3d 742, 665 N.E.2d 326, 216 Ill.Dec. 266 (1st Dist. 1996), a demolition contractor submitted two proposals to an owner for demolition work on a building. This, together with the fact that the contractor used a separate job number for each proposal, led the court to conclude that there were two separate phases for the demolition work and two separate completion dates.

A contractor also may have separate contracts with separate owners, resulting in multiple completion dates. In *M. Ecker & Co. v. LaSalle National Bank,* 268 Ill.App.3d 874, 645 N.E.2d 335, 206 Ill.Dec. 330 (1st Dist. 1994), a material supplier's delivery of materials to a building's major tenant was found to be the subject of a contract that was separate from the supplier's original contract with the building's owner. The supplier was not able to rely on the completion date of the later deliveries to the tenant even though the materials delivered initially were included in the original contract with the building's owner. The supplier previously had stopped deliveries to the building's owner because of nonpayment.

A contractor who has been terminated by an owner should use the date that significant work was last performed on the project. *See Daily, supra.*

The date of the contractor's invoice or payment application may or may not fix the completion date for lien purposes. In *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008), a lien claimant submitted a bill on April 30, 2003, for the amount ultimately liened but nevertheless was able to use a May 31, 2003, completion date. The lien claimant submitted an affidavit that it commonly sent in payment applications for work that had yet to be performed. 887 N.E.2d at 527.

Even if a project is suspended years earlier, a completion date in a recorded lien claim need not be supported by a detailed description of the work performed within four months of the stated completion date. Supporting proof is a matter for discovery and trial. *PNC Bank, National Ass'n v. 35th & Morgan,* No. 11 C 9255, 2012 WL 6605010 (N.D.Ill. Dec. 18, 2012).

The complexity of proving completion dates is illustrated by the decision in *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 2013 IL App (1st) 112150-U. The issue in this appeal was proof of a steel erection crew's presence on site in the absence of contemporaneous records (and the loss of scanned computer records). The mechanics lien claimant was nevertheless able to establish a timely completion date. 2013 IL App (1st) 112150-U at ¶24.

In determining the date on which the contractor last performed significant work, the contractor should be aware that the owner may attempt to use the date stated in the lien claim as evidence to support the owner's claim that the project was delayed, thereby supporting an owner's delay claim.

3. [2.42] Incorrect Completion Date

What if a recorded lien claim and the complaint to foreclose that lien contain an incorrect completion date? If (a) both the incorrect and correct completion dates are within four months of when the lien claim was recorded, and (b) the use of an incorrect completion date was due to honest mistake, the lien claimant may be able to amend its foreclosure complaint to allege the correct completion date.

In *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, 20 N.E.3d 104, 386 Ill.Dec. 243, an original contractor recorded a lien claim with an incorrect completion date of February 27, 2009. The lien claim was recorded on June 26, 2009 (within four months of February 27, 2009). At deposition, the contractor ultimately testified that the correct completion date was March 4, 2009 (within four months of June 26, 2009). 2014 IL App (1st) 123784 at ¶¶28 – 43. There was no evidence that any work was in fact performed on February 27, 2009. 2014 IL App (1st) 123784 at ¶171.

The court in *North Shore* rejected the argument that the incorrect February 27, 2009, completion date in the recorded lien claim was a binding judicial admission that could not be varied by a proposed amended foreclosure complaint using the correct completion date of March 4, 2009. Instead, the court reasoned that because both the incorrect date (February 27, 2009) and the correct date (March 4, 2009) were within four months of when the contractor recorded its lien (June 26, 2009), the lien claimant would be allowed to amend its foreclosure complaint. 2014 IL App (1st) 123784 at ¶111. Either date satisfied the statutory purpose of providing the owner, lender, and other third parties with timely notice of a valid lien. 2014 IL App (1st) 123784 at ¶¶98 – 99. The court

also accepted the contractor's explanation that the "sporadic nature" of its schedule and the "ma" and "pa" operation of its small business justified a finding of honest mistake. 2014 IL App (1st) 123784 at ¶¶128 – 129.

The court distinguished the ruling in *Braun-Skiba, Ltd. v. LaSalle National Bank,* 279 Ill.App.3d 912, 665 N.E.2d 485, 216 Ill.Dec. 425 (1st Dist. 1996), in which the court did not allow an incorrect completion date in a recorded lien claim to be corrected. The *North Shore* court agreed with this ruling because the lien claim in *Braun-Skiba* was facially invalid because the use of an incorrect completion date in the recorded lien claim meant that the lien claim was untimely. Under the judicial admission doctrine, the claimant in *Braun-Skiba* was not allowed to amend the completion date in order to make a facially invalid lien claim valid. By comparison, the contractor in *North Shore* was not seeking to make a facially invalid lien valid. 2014 IL App (1st) 123784 at ¶111. The court in *North Shore* also suggested that because completion dates may be based on documents and information provided from several persons, completion dates in lien claims may not be "clear, unequivocal statements about a concrete fact uniquely within plaintiffs' knowledge." 2014 IL App (1st) 123784 at ¶130, quoting *In re Estate of Rennick,* 181 Ill.2d 395, 692 N.E.2d 1150, 1156, 229 Ill.Dec. 939 (1998).

A typographical error regarding the date of last work was fatal to the lien claim in *Braun-Skiba, supra.* The lien claimant in *Braun-Skiba,* an architectural firm, recorded a lien claim that stated a completion date of March 7, 1987. The date should have been March 7, 1989. The lien claim was recorded July 5, 1989. 665 N.E.2d at 487.

The court rejected the lien claimant's argument that the error in the stated completion date was immaterial because §7 of the Mechanics Lien Act did not require a lien claim to state the date of completion. Because the lien claimant had attempted to state a completion date and because the rights of a subsequent owner were at issue, the date of last work on the recorded lien claim was material. The *Braun-Skiba* court also emphasized that the completion date in the lien claim was a formal, binding admission of fact.

The lien claimant was not allowed to argue that the subsequent owner had actual notice of the claim when it purchased the property. The lien claimant was also unable to argue that there was an "obvious typographical error" on the face of the document that should have been excused. 665 N.E.2d at 490 n.7. The court did not see the use of a 1987 date to be such an obvious error.

The court's discussion also limited the ruling in *United Cork Cos. v. Volland,* 365 Ill. 564, 7 N.E.2d 301 (1937), which stated the proposition that an error in a stated completion date will not invalidate a lien. In *United Cork,* the contractor had recorded a lien during the progress of the work, before work was in fact completed. The contractor's lien claim did not seek to enforce a lien for work performed after the completion date stated in the lien. Under these circumstances, the later actual completion date did not invalidate the lien.

The *Braun-Skiba* lien claimant did not seek to reform its recorded lien claim. An amended complaint seeking reformation was not tendered until after proofs were closed. Instead of seeking reformation, the lien claimant recorded a second lien claim on September 25, 1989, that used a completion date of June 9, 1989. The June 9, 1989, date of last work was not supported by the evidence. 665 N.E.2d 487 – 488.

4. [2.43] Allocation and Apportionment Issues

Projects that are located on two or more lots or tracts of land or that involve more than one building may raise allocation and apportionment issues. This discussion of such issues assumes that there is a single contract between the contractor and the owner as opposed to separate contracts for the work on each of the lots or buildings. This discussion also assumes that the adjoining or adjacent lots are not used by a single owner as a place of residence or business. 770 ILCS 60/1.

In those situations in which the contractor has completed its work on all of the lots or tracts of land and all of the buildings within the four months prior to the date the claim for lien is recorded, the contractor should not have to allocate the dollar amount claimed as to each of the lots or buildings if a single "blanket lien" covering all lots is used. *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983).

However, even if work on all lots was done within four months of recording, apportioning the amount due with respect to each lot is advisable. This allows the owner of each lot to know what amount must be paid to obtain a release of lien for that owner's particular lot. *See Lohmann Golf Designs, Inc. v. Keisler,* 260 Ill.App.3d 886, 632 N.E.2d 121, 198 Ill.Dec. 62 (1st Dist. 1994).

In those situations in which the contractor arguably completed its work on some of the lots or buildings more than four months prior to the date the claim for lien is recorded, the contractor should anticipate that the owner or owners of the different lots or buildings will argue that (a) the amount claimed must be allocated separately to each of the lots or buildings in question, and (b) a separate completion date must be stated for each of the lots or buildings. The owner or owners will rely on such decisions as *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291 (1911), and *Dougherty-Janssen Co. v. Danage Enterprises, Inc.,* 80 Ill.App.3d 1112, 400 N.E.2d 1023, 36 Ill.Dec. 443 (3d Dist. 1980). Although a general contractor can argue that its overall responsibility for the supervision of construction on the entire project means that the general contractor does not complete its work on any lot or building until work is completed on all the lots or buildings that are covered by a contract, the more conservative approach is to allocate, *i.e.,* determine the amount unpaid for the work on each of the lots or buildings. In such cases, the claim for lien might state, for example:

To the extent allocation among the lots included in the Real Estate is required, Claimant states that the amount claimed as to each lot is as follows:

Lot 1	**$17,000**
Lot 2	**$80,000**
Lot 3	**$83,000**

If the contractor must concede that there are separate completion dates for each of the lots or buildings, the completion dates should be stated for each lot or building.

The principles regarding allocation by lot and computation of separate completion dates for each lot were applied in *In re Pak Builders,* No. 00-82412, 2002 WL 31719864 (Bankr. C.D.Ill. Mar. 15, 2002), in which the court rejected the plumbing subcontractor's argument that its plumbing work was necessarily staggered and that there should be a single completion date for its work.

The above discussion assumes a single contract for construction for all of the lots or all of the buildings. If there are separate contracts, separate claims for lien will be needed for each lot or building. 770 ILCS 60/1, 60/7. The above discussion also assumes that the contractor has performed work on all of the lots covered by a contract. A blanket lien may not be allowed to reach separate parcels on which no work was performed unless the adjoining or adjacent lots constitute the same premises and are used by an owner as a place of residence or business. *Hill Behan Lumber Co. v. First National Bank of Woodstock,* 95 Ill.App.3d 426, 420 N.E.2d 268, 50 Ill.Dec. 951 (2d Dist. 1981).

Condominium projects may present special allocation and apportionment issues depending on the facts of the case. The most extensive discussion of condominium mechanics lien claims by original contractors is *Edgecrete, Inc. v. Cole Taylor Bank Skokie,* No. 92 CH 10813 (Cook Cty.Cir. Sept. 17, 1993) (Meacham, J.), in which the trial court denied a developer's and unit owner's motion to dismiss an original contractor's complaint to foreclose its mechanics lien. In *Edgecrete,* the construction contract was entered into prior to recording of the condominium declaration. The lien claim was recorded after recording of the condominium declaration. The contractor's lien claim used the original legal description without reference to townhouse units created under a condominium declaration. The lien claim was unallocated among the units.

The first issue concerned whether the legal description, which did not reference individual condominium units, was "sufficiently correct." The *Edgecrete* court noted that the appellate court's apportionment decision in *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986), "does not require a perfect legal description be used in every instance." The contractors had used the correct legal description for the land, "albeit without unit designations." Because original contractors' lien claims attach as of the date of the contract and the contract was effective prior to recordation of the condominium declaration, adding a description of units "does not alter the existing legal description but adds additional information in the description."

Further, the condominium unit purchasers also had the additional protection of §9.1(a) of the Condominium Property Act, 765 ILCS 605/1, *et seq.,* which requires the developer to record or provide a unit purchaser with a release or a bond to ensure against liens created by the developer prior to the sale of the unit. Therefore, the *Edgecrete* court held that in the context of a lien arising from a contract that predates recording of the condominium declaration, use of the correct legal description obtained at the time of the contract is "sufficiently correct" to satisfy the purpose of giving notice to third parties.

However, having a sufficiently correct legal description is not the end of the inquiry. Is the contractor required to apportion the amount due and allocate completion dates to individual units?

Without necessarily endorsing the analysis, the *Edgecrete* court referred to the decision in *Argonne Construction Co. v. Norton,* 29 B.R. 731, 737 (N.D.Ill. 1983), in which the court discussed the need for apportionment of mechanics liens based on the interrelationship of §7 of the Mechanics Lien Act and §9.1 of the Condominium Property Act.

The *Argonne Construction* court found four basic fact patterns and analyzed three of the four:

Pattern No.	Facts in Chronological Order	Result per *Argonne Construction* Analysis
1	Declaration recorded Contract effective Lien recorded Third parties purchase units	Apportionment required
2	Declaration recorded Contract effective Third parties purchase units Lien recorded	Apportionment required
3	Contract effective Declaration recorded Lien recorded Third parties purchase units	Apportionment not required
4	Contract effective Declaration recorded Third parties purchase units Lien recorded	Not discussed in *Argonne Construction*

The facts in *Argonne Construction* were the second pattern. The court reasoned that first, a lien attaches as of the date of the contract (770 ILCS 60/1) but is not perfected until all relevant provisions of the statute have been strictly complied with and not at the time of the contract. Section 9.1(a) of the Condominium Property Act provides: "Subsequent to the recording of the declaration, no liens of any nature shall be created or arise against any portion of the property except against an individual unit or units." 765 ILCS 605/9.1(a). Equating "perfection" with "created or arise," the *Argonne Construction* court held that the contractor was required to apportion when the declaration was recorded prior to the contract date and third parties purchased units before the lien claim was recorded.

Edgecrete, supra, involved either the third or fourth fact pattern listed by the *Argonne Construction* court. Under the third fact pattern, the *Argonne Construction* court reasoned that a blanket, nonapportioned lien would be appropriate. The reasoning was that, under 765 ILCS 605/9.1(a), during the period between recording of the declaration and conveyance of units, there remains the same owner.

While the *Argonne Construction* court did not discuss the fourth fact pattern, the *Edgecrete* court did, concluding that under this pattern, the contractor should apportion "if work is performed outside the four month period." The *Edgecrete* court reasoned that a third-party purchaser who purchases prior to recording a lien is not protected under §9.1(a) of the Condominium Property Act from later recorded lien claims. The unit purchaser's protection is under §§1 and 7 (four-month rule) of the Mechanics Lien Act.

In *Edgecrete,* however, on the motion to dismiss, the movants had not presented evidence that unit owners purchased their units prior to recording of the lien claim or whether work was completed on any unit's interest more than four months prior to recording of the claim.

Work on the condominium building's "common elements" may constitute the completion date for all units. Because condominium buildings often also include non-condominium elements, special care must be employed.

5. [2.44] Overstated Liens

Proper allocation and apportionment minimizes the possibility of overstated lien issues. Section 7 of the Mechanics Lien Act provides that overstated liens are allowed "unless it shall be shown that such error or overcharge is made with intent to defraud." 770 ILCS 60/7(a).

Generally, the contractor should not use overlapping blanket and individual lot liens or multiple individual lot liens that duplicate the amount due. However, in *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive at Oakwood, LLC,* 387 Ill.App.3d 906, 901 N.E.2d 978, 327 Ill.Dec. 245 (1st Dist. 2009), the court allowed a mechanics lien claimant to record two liens on two parcels, each lien for the total amount due. Even though the two liens together were for an amount double the amount actually due, the court ruled that there needed to be evidence of fraud in addition to and apart from the overstatement included in the subcontractor's lien itself. 901 N.E.2d at 985. The *Springfield Heating* court distinguished *Bank of America National Trust & Savings Ass'n v. Zedd Investments, Inc.,* 276 Ill.App.3d 998, 658 N.E.2d 849, 213 Ill.Dec. 100 (3d Dist. 1995), and *Lohmann Golf Designs, Inc. v. Keisler,* 260 Ill.App.3d 886, 632 N.E.2d 121, 198 Ill.Dec. 62 (1st Dist. 1994), as cases in which there were other documents in addition to the lien claim that evidenced an intent to defraud. 901 N.E.2d at 984 – 985. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 543, 334 Ill.Dec. 710 (1st Dist. 2009) (additional evidence of intent beyond overstated lien required).

In *Zedd Investments, supra,* an electrical contractor filed individual lien claims against 60 residences in a subdivision. Each individual lien claim was for the value of work performed on a specific, individual lot. The aggregate value of these individual lien claims exceeded $122,000. 658 N.E.2d at 850. Certain individual lien claims were untimely, having been recorded more than four months after the date of last work on that lot. Perhaps in an attempt to address this timeliness issue, the electrical contractor filed a blanket lien against all of the property in the subdivision. The amount of this claim exceeded $138,000. *Id.* Finally, the contractor also filed a pair of liens, totaling over $138,000, against two lots that were still owned by the original developer. The other lots had been sold. The electrical contractor then filed suit to foreclose all of the liens. The total of all liens was over $400,000, even though the total value of the work performed was only approximately $138,000. 658 N.E.2d at 851.

The *Zedd Investments* appellate court invalidated all of the liens. The multiple liens, which misrepresented the amount owed, constituted constructive fraud. Each parcel in the subdivision was subjected to two lien claims based on different contracts and different completion dates. The effect of the multiple lien claims was to overstate the amount claimed on each lot in the subdivision. *Id.*

The *Zedd Investments* appellate court cited *Lohmann Golf Designs, supra,* as another example of multiple, fraudulent liens. The lien claimant claimed the entire amount due (about $145,000) on each of three separate but contiguous parcels of land. The three lien claims created the false impression that the lien claimant was owed a total of over $400,000. Allocation of the amount claimed with respect to each parcel was required. *But see Springfield Heating, supra* (duplicative lien claims alone do not constitute constructive fraud).

Apart from overlapping and multiple lien claims, a lien claim may be subject to challenge under the constructive fraud standard of §7. That standard requires more than just an overstated lien clam. There must be some other evidence from which an intent to defraud can be inferred. *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, ¶¶144 – 149, 20 N.E.3d 104, 386 Ill.Dec. 243; *Cordeck Sales, supra,* 917 N.E.2d at 543. Depending on the facts, internal reports on the progress of the work may not satisfy this requirement. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 517, 521 – 522, 320 Ill.Dec. 330 (1st Dist. 2008).

A lien claimant may be able to provide an innocent explanation for the overstatement. *North Shore, supra,* 2014 IL App (1st) 123784 at ¶¶144 – 149 (accounting for payment to related entity affected computation of lien amount). If a lien claim is overstated because it does not reflect all payments made, the claimant may have to use the timing of the payment or other facts to explain the overstatement. *Cordeck Sales, supra,* 887 N.E.2d at 512.

Courts also may consider the magnitude of the overcharge. *North Shore, supra,* 2014 IL App (1st) 123784 at ¶¶28, 149 (lien claim for $101,755 not constructively fraudulent even if amount due only $64,351). In *ARC One, LLC. v. Rockford Structures Construction Co.,* 2012 IL App (2d) 120215-U, no fraudulent intent was found even though the lien claim was originally recorded for $210,091 and the final adjudicated amount of the lien was only $86,830.50. In finding that the "unexplained overages" were only a "fraction of the total contract," the court did not compare the original amount of the lien claim to the final, adjudicated lien amount. 2012 IL App (2d) 120215-U at ¶30. Instead, the court compared the total contract amount ($295,674) to the amount of the lien claim that was never explained at trial ($45,000). *Id.*

When the owner has terminated the contractor or otherwise wrongfully prevented the contractor from finally completing its work, appropriate deductions should be calculated. In *Edward M. Cohon & Associates, Ltd. v. First National Bank of Highland Park,* 249 Ill.App.3d 929, 618 N.E.2d 676, 188 Ill.Dec. 106 (1st Dist. 1993), the court granted an architect a mechanics lien in the amount of $211,886.01 even though (a) this was $62,973.01 less than the amount in the claim for lien and (b) the architect allegedly did not complete its services. There was no fraudulent intent in the overstated dollar amount. Nor was the court concerned that the lien against a shopping center parcel included fees for services rendered on other parcels that were included along with the shopping center parcel in the agreement between the owner and architect.

Recording a lien claim against a single-family residence before any work was performed was found to be constructively fraudulent in *Father & Sons Home Improvement II, Inc. v. Stuart,* 2016 IL App (1st) 143666, ¶¶40 – 43, 52 N.E.3d 581, 402 Ill.Dec. 660. The court found that the lien claimant falsely claimed that all the work had been completed. An affidavit supporting the lien claim and documents establishing that work was not in fact complete when the lien was recorded provided the "other evidence" of an intent to defraud. 2016 IL App (1st) 143666 at ¶¶36 – 39.

Fraudulent overstatement can be found on summary judgment. *See, e.g., MEP Construction, LLC v. Truco MP, LLC,* 2019 IL App (1st) 180539, 125 N.E.3d 1130, 430 Ill.Dec. 112. In *MEP Construction,* a claimant foreclosed a mechanics lien claim for $250,000 in principal. In sworn response to the defendants' interrogatories, the claimant admitted to performing only $124,000 of work and that the $126,000 balance of the claim was owed to entities with whom the claimant had no contractual (or assignment) relationship. After that response, and two weeks prior to the defendants filing their summary judgment motion, the defendants wrote to the claimant's counsel advising that, based on the responses, the defendants contended constructive fraud. The claimant did not reduce its claim. The trial court granted summary judgment to the defendants.

On appeal, the claimant relied on *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc.,* 2016 IL App (3d) 140946, 65 N.E.3d 340, 408 Ill.Dec. 118, to argue against the trial court's finding of constructive fraud. The *MEP Construction* appellate court distinguished *Roy Zenere Trucking.* In that case, the subcontractor claimant presented evidence that it advised the general contractor each time additional expense was incurred and the general contractor ordered the subcontractor claimant to proceed. By contrast, in *MEP Construction,* there was no evidence that the claimant had any contractual relationship with the other contractors to justify a doubling of the lien claim.

In addition, the claimant argued it should have been entitled to oral discovery to contest constructive fraud. But the *MEP Construction* appellate court held that the claimant's failure to file an affidavit in opposition to the summary judgment motion conforming to S.Ct. Rule 191(b) and setting forth that the affirmative facts were known only to a witness whose affidavits the summary judgment respondent had been unable to obtain was fatal.

6. [2.45] Thirty-Day Rule — Section 34

Section 34 of the Mechanics Lien Act provides that an owner, lienor, or other person interested in the real estate can serve a notice by personal service or registered or certified mail to a contractor requiring the contractor to file suit to foreclose or enforce a mechanics lien. 770 ILCS 60/34; *Matthews Roofing Co. v. Community Bank & Trust Company of Edgewater,* 194 Ill.App.3d 200, 550 N.E.2d 1189, 141 Ill.Dec. 143 (1st Dist. 1990). After such a notice is received, the contractor has 30 days to file suit to foreclose or any mechanics lien is lost. *See Pickus Construction & Equipment Co. v. Bank of Waukegan,* 158 Ill.App.3d 141, 511 N.E.2d 228, 110 Ill.Dec. 393 (2d Dist. 1987).

Section 34 of the Mechanics Lien Act was amended by P.A. 97-1165 (eff. Feb. 11, 2013) to require explicit warnings to lien claimants in 10-point, boldface type:

> **A written demand under this Section must contain the following language in at least 10 point bold face type: "Failure to respond to this notice within 30 days after receipt, as required by Section 34 of the Mechanics Lien Act, shall result in the forfeiture of the referenced lien."** 770 ILCS 60/34.

The apparent intent of this amendment is to effectively overrule cases such as *Vernon Hills III Limited Partnership v. St. Paul Fire & Marine Insurance Co.,* 287 Ill.App.3d 303, 678 N.E.2d 374, 222 Ill.Dec. 762 (2d Dist. 1997), in which the court held that a lien claimant lost its lien rights when it failed to file suit within 30 days after receiving a certified mail letter from the owner that

demanded that the lien claimant either immediately release the lien or bring suit. The owner's letter did not mention §34 or the 30-day time period to file suit. The owner's letter also did not state that the lien would be lost if suit were not filed. Nevertheless, the *Vernon Hills* court held that the certified mail letter from the owner was a sufficient demand to trigger §34.

The letter would not be sufficient under the current version of §34.

Before the 2013 amendment, there were cases that treated a summons served on a lien claimant as a §34 demand. In response to a summons in a lawsuit filed by a lender, the owner, or another contractor, the lien claimant was required to file an answer within 30 days of service. *Wheaton Bank & Trust Co. v. Star Tech Glass, Inc.,* 2016 IL App (1st) 140797-U, ¶19. Filing a counterclaim with the answer was the better practice, but a counterclaim to foreclose could be filed later. *Charter Bank & Trust of Illinois v. Edward Hines Lumber Co.,* 233 Ill.App.3d 574, 599 N.E.2d 458, 174 Ill.Dec. 674 (2d Dist. 1992). With the 2013 amendment, a summons alone, that is not accompanied by a notice with the explicit statutory warning, should not be treated as a §34 demand.

If, however, there is a notice with the explicit statutory warning that is served at the same time as a summons in a pending lawsuit, filing an answer and counterclaim (or a separate foreclosure lawsuit) within 30 days of the §34 notice is required, even if rules of procedure allow a longer time period to respond to the summons. In *Faith Technologies, Inc. v. Arlington Downs Residential, LLC,* No. 15 C 7903, 2016 WL 757998 (N.D.Ill. Feb. 26, 2016), an owner served a §34 demand and filed a declaratory judgment action seeking to invalidate a contractor's lien. The Federal Rules of Civil Procedure gave the contractor 60 days to respond to the declaratory judgment complaint. The court nevertheless invalidated the lien because the contractor did not file a separate suit or counterclaim to foreclose within 30 days of the §34 demand. 2016 WL 757998 at *4.

In *Krzyminski v. Dziadkowiec,* 296 Ill.App.3d 710, 695 N.E.2d 1275, 231 Ill.Dec. 156 (1st Dist. 1998), §34 was interpreted as applying only to claimants with recorded lien claims. An owner's attempt to use §34 before a lien claim was even recorded was therefore unsuccessful.

The 30-day time limit of §34 can be extended by the bankruptcy of one of the parties. In *Chicago Whirly, Inc. v. Amp Rite Electric Co.,* 304 Ill.App.3d 641, 710 N.E.2d 45, 237 Ill.Dec. 622 (1st Dist. 1999), an owner served a §34 demand on a subcontractor after the general contractor filed for bankruptcy. The court ruled that the general contractor was a necessary party to any lien foreclosure action, that the subcontractor was prohibited from filing suit because of the general contractor's bankruptcy, and that the subcontractor was not required to file a motion with the bankruptcy court to lift the automatic bankruptcy stay so that a lien foreclosure action naming the general contractor could be filed within 30 days.

In *Lesniak v. Wesley's Flooring, Inc.,* 2014 IL App (1st) 131345-U, the court applied the ruling in *Chicago Whirly* to excuse a subcontractor's failure to file suit in response to a §34 demand because of the general contractor's bankruptcy. The owner who issued the §34 demand sought relief from the bankruptcy court to lift the automatic stay, but because the bankruptcy court's order allowed the owner to proceed only against "nondebtors," the debtor-general contractor's bankruptcy stayed the effect of the §34 demand. 2013 IL App (1st) 122146-U at ¶21.

The prime contractor is a necessary party to a subcontractor's lien foreclosure suit, and the filing of a bankruptcy petition by the prime contractor stays all proceedings in the lien foreclosure suit. *Concrete Products, Inc. v. Centex Homes,* 308 Ill.App.3d 957, 721 N.E.2d 802, 242 Ill.Dec. 523 (2d Dist. 1999). This ruling is consistent with cases holding that the 30-day time period to respond to a §34 demand and the two-year time period for filing a foreclosure suit were also tolled by the federal bankruptcy case of the general contractor, a necessary party to any subcontractor's foreclosure action. 721 N.E.2d at 804, citing *Garbe Iron Works, Inc. v. Priester,* 99 Ill.2d 84, 457 N.E.2d 422, 75 Ill.Dec. 428 (1983); *Chicago Whirly, supra.*

Mortgagees and other security interest holders are also necessary parties in a mechanics lien foreclosure. In *CB Construction & Design, LLC v. Atlas Brookview, LLC,* 2021 IL App (1st) 200924, 196 N.E.3d 115, 458 Ill.Dec. 1, the court applied *Garbe* and *Chicago Whirly,* to hold that the contractor's failure to join the mortgagee and assignee of rents and leases in its otherwise timely suit to enforce the lien after a §34 demand resulted in forfeiture of its lien. 2021 IL App (1st) 200924 at ¶30. Because the mortgagee and assignee of rents and leases both held security interests in the property subject to the lien claim, both were necessary parties. 2021 IL App (1st) 200924 at ¶25 n.1 (party with secured interest in property that would be affected by mechanics lien is indispensable), citing *Clark v. Manning,* 95 Ill. 580, 583 (1880).

A contractor that files a foreclosure suit in response to a §34 demand need not waive the right to arbitrate the dispute. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC,* 382 Ill.App.3d 1171, 890 N.E.2d 1220, 322 Ill.Dec. 301 (4th Dist. 2008); *La Hood v. Central Illinois Construction, Inc.,* 335 Ill.App.3d 363, 781 N.E.2d 585, 269 Ill.Dec. 788 (3d Dist. 2002). In *La Hood,* the contractor filed for arbitration before the owner served a §34 demand. In response to the §34 demand, the contractor filed its lien foreclosure suit and immediately moved to stay the litigation. Under these circumstances, the court found that the contractor did not waive its right to arbitrate.

By comparison, an owner that sent a §34 notice and compelled the contractor to file suit to foreclose a mechanics lien was found to have waived the owner's right to arbitrate in *Illinois Concrete-I.C.I., Inc. v. Storefitters, Inc.,* 397 Ill.App.3d 798, 922 N.E.2d 542, 337 Ill.Dec. 419 (2d Dist. 2010). The owner's demand that the contractor file suit in response to the §34 demand was inconsistent with the owner's right to seek arbitration. 922 N.E.2d at 547 – 548.

A §34 demand may be served on more than one representative of the lien claimant. In that event, the lien claimant must file suit within 30 days of the first demand to be received. *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC,* 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill.Dec. 615 (1st Dist. 2005). The owner and mortgage lender in *Gateway Concrete* sent a §34 demand addressed to the lien claimant's office, the lien claimant's registered agent, and the lien claimant's attorney. The notices were received March 12, March 15, and March 18, 2004, at the various locations. 826 N.E.2d at 1053. The court ruled that the earliest date of receipt, March 12, was controlling for purposes of §34. The lien claimant's foreclosure suit was untimely because it was not filed within 30 days of the earliest date of receipt.

Foreclosing lenders who invoke §34 may complicate their mortgage foreclosure proceedings. In *Lake County Grading Co. v. Forever Construction Co.,* 2017 IL App (2d) 160359, 79 N.E.3d 743, 414 Ill.Dec. 108, a lender obtained a judgment of foreclosure and was the successful bidder at

the sheriff's sale. The lender filed a motion to confirm the results of the sale, but the subject building was destroyed by fire. The building was demolished, and when the demolition contractor was not paid for its work, a lien was recorded.

The mortgagee served the contractor with a §34 demand. The contractor filed a timely, separate lawsuit to foreclose its mechanics lien. In the mortgage foreclosure action, however, the mortgagee proceeded to obtain a judgment deed. 2017 IL App (2d) 160359 at ¶16.

The mortgagee attempted to argue that the lis pendens doctrine extinguished the contractor's mechanics lien because the contractor failed to intervene in the mortgage foreclosure case. The court rejected this argument, noting that the foreclosing mortgagee had itself requested the demolition work after obtaining a judgment of foreclosure. Further, the lender's decision to serve a §34 demand necessarily led the contractor to commence a separate action, rather than intervene in the mortgage foreclosure action. 2017 IL App (2d) 160359 at ¶¶65 – 68.

The court distinguished the decision in *R.W. Boeker Co. v. Eagle Bank of Madison County,* 170 Ill.App.3d 693, 525 N.E.2d 146, 121 Ill.Dec. 340 (5th Dist. 1988). In *Boeker,* the mortgagor (not the lender-mortgagee) had a contractor perform work while a mortgage foreclosure case was pending. Under the lis pendens doctrine, the contractor's mechanics lien was extinguished by the judgment of foreclosure that was subsequently entered in favor of the mortgagee. By comparison, in *Lake County Grading, supra,* the lien claimant's work was requested by the lender, not the borrower. The lender in *Lake County Grading* also required the lien claimant to file a separate foreclosure lawsuit by serving a §34 demand. 2017 IL App (2d) 160359 at ¶¶70 – 76.

B. [2.46] Information Needed To Prepare the Claim for Lien

Before preparing a claim for lien (or a suit to foreclose), the contractor should assemble or review the following:

1. the contract, which will identify the party who signed on behalf of the owner and describe the work performed by the contractor;

2. sworn statements that satisfy the requirements of §5 of the Mechanics Lien Act (770 ILCS 60/5);

3. change orders and proposed change orders or claims documentation that will fix the amount to be claimed;

4. field reports or time records that will be useful in fixing the last day of substantial work on a project;

5. title information; and

6. a survey, if possible.

Before the advent of online recorders' offices, title information was most efficiently and accurately obtained from a title company. The two methods of obtaining title information that are generally available are (1) a tract search and (2) "minutes of foreclosure," which is a commitment for an owner's title policy.

A tract search will designate the current owner of the property, provide a legal description for the property, and reflect all conveyances and documents recorded against title (including other lien claims) during the period from the present back through any date requested of the title company. The contractor necessarily must make a judgment call in setting the time period for the tract search. A tract search is generally less expensive than minutes of foreclosure, but the contractor or its attorney must be familiar with interpreting the information in such a search.

Minutes of foreclosure will designate the current owner of the property, provide a legal description of the property, and contain the title company's analysis of the liens and other interests in the property. The advantage of requesting minutes of foreclosure is that the contractor receives the benefit of the title company's analysis of the state of title.

To order a tract search or minutes of foreclosure, at a minimum the contractor will need to provide a street address. However, most title companies prefer to receive a legal description and a property index number (PIN). Moreover, a street address may result in an over- or under-inclusive legal description when compared to a survey.

Between the time of recording the lien claim and recording the lis pendens, the tract search or other title information should be updated. This will allow the lis pendens, which is recorded at the time the complaint is filed, to contain the most accurate description of the property.

Online title information is now available in Cook County and many other counties. Likewise, real estate tax information is available for some counties. Title companies do not always agree to provide tract searches, or the time to perform the search might jeopardize timely recording. Online information might be the only available alternative. Online information is available by a number of search methodologies such as street address, PIN, grantor, and grantee. For many commercial developments, other Internet information is available that is often of starting assistance. Just as with searches by title companies, online information typically has a time lag.

C. [2.47] Preparing the Claim for Lien

Section 7 of the Mechanics Lien Act has four statutory requirements for a claim for lien. The claim for lien must (1) be verified by the affidavit of the contractor, its agent, or its employee; (2) describe the work that was performed under the contract; (3) claim a balance due after allowing all credits; and (4) provide a "sufficiently correct" description of the lot, lots, or tracts of land that are subject to the lien claim. 770 ILCS 60/7.

Most claims for lien, however, contain additional information. Further, court decisions and the practices of county recorders may require other items. A sample claim for lien follows in §2.48 below, together with a discussion of issues to be considered in preparing such a form in §2.49 below. Note, however, that errors in information not required by the Mechanics Lien Act are immaterial and will not invalidate the lien. *Lyons Federal Trust & Savings Bank v. Moline National*

Bank, 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990) (date contract was entered into as stated in lien claim not binding). *But see Braun-Skiba, Ltd. v. LaSalle National Bank,* 279 Ill.App.3d 912, 665 N.E.2d 485, 216 Ill.Dec. 425 (1st Dist. 1996) (completion date in lien claim was binding admission of fact); *Mutual Services, Inc. v. Ballantrae Development Co.,* 159 Ill.App.3d 549, 510 N.E.2d 1219, 110 Ill.Dec. 188 (1st Dist. 1987) (completion date in lien claim treated as sworn admission).

In preparing the claim for lien, the contractor should keep in mind that because a lien right is statutory and in derogation of the common law, the requirements of the Mechanics Lien Act will be construed strictly. Once the lien claimant has complied with the statutory requirements, the statute will be given a liberal construction to carry out its remedial purpose. *Delaney Electric Co. v. Schiessle,* 235 Ill.App.3d 258, 601 N.E.2d 978, 176 Ill.Dec. 280 (1st Dist. 1992).

D. [2.48] Sample Claim for Lien

NOTE: Items followed by a number in the following sample form are discussed in §2.49 below. Section 7 of the Mechanics Lien Act provides the necessary contents of a lien claim. 770 ILCS 60/7. *See also First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983). The sample lien claim also contains additional language, the use of which will vary depending on the specific situation.

ORIGINAL CONTRACTOR'S CLAIM FOR MECHANICS LIEN[1]

STATE OF ILLINOIS)
) ss:[2]
COUNTY OF COOK)

The claimant, ABC Contractors, Inc., an Illinois corporation (Claimant), with an address at 123 Oak Drive, Chicago, Illinois,[3] files its original contractor's claim for mechanics lien on the Real Estate (as hereinafter described) and against the interest of the following entity in the Real Estate (Owner):[4]

Chicago Trust Company, as trustee under trust agreement dated October 2, 20__, and known as Trust No. 8643 and the beneficiary or beneficiaries of the trust,[5]

and any person claiming an interest in the Real Estate (as hereinafter described) by, through, or under Owner.[6]

Claimant states:

1. Since on or about August 8, 20__,[7] and subsequently, Owner owned a fee simple interest, and possibly other interests, in the Real Estate[8] (including all land and improvements thereon) in Cook County, Illinois, commonly known as 295 95th Street, Chicago, Illinois,[9] and legally described as follows:

Lot 1 of Meadowlark subdivision as shown in the plat of Meadowlark subdivision recorded as Document No. 91384236 on August 1, 20__, with the Cook County

recorder, township 39 north, range 15 east of the third principal meridian, in Cook County, Illinois.[10]

(Real Estate). The real estate tax property index number of the Real Estate is 26-07-110-001.[11]

2. Claimant made a contract (Contract) dated August 15, 20__,[12] with Brown Development Company (Brown).[13] Under the Contract, Claimant agreed to provide all necessary labor, material, and services as general contractor to erect a two-story warehouse on the Real Estate for the original contract amount of $780,000[14] subject to changes, extras, differing site conditions, delays, and allowances.

3. The Contract was entered into by Brown as Owner's agent, and the work was performed with the knowledge and consent of Owner. Alternatively, Owner authorized Brown to enter into the Contract. Alternatively, Owner knowingly permitted Brown to enter into the Contract for the improvement of the Real Estate.[15]

4. Claimant performed additional work in the amount of $212,000[16] at the request of Brown, as Owner's agent or as an entity authorized by Owner or knowingly permitted by Owner, so that the final adjusted contract sum was $988,000.

5. Claimant completed the work for which Claimant claims a lien on November 30, 20__.[17]

6. As of the date of this Claim, there is due, unpaid, and owing to Claimant, after allowing all credits, the principal sum of $180,000,[18] which principal amount bears interest at the statutory rate of 10 percent per annum.[19] Claimant claims a lien on the Real Estate (including all land and improvements thereon) in the amount of $180,000 plus interest.[20]

7. Claimant revokes any waiver of rights for which Claimant has not received payment.[21]

Dated: December 30, 20__[22]

ABC CONTRACTORS, INC.[23]

By _____
Vice President[24]

This document has been prepared by and after recording should be returned to:

Robert Thomas
ABC Contractors, Inc.
123 Oak Drive
Chicago, Illinois 60999[25]

PIN: 26-07-110-001[26]

VERIFICATION[27]

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

Robert Thomas, being first duly sworn on oath, states that he is Vice President of Claimant, ABC Contractors, Inc., an Illinois corporation, that he is authorized to sign this verification to the foregoing Original Contractor's Claim for Mechanics Lien, that he has read the Original Contractor's Claim for Mechanics Lien, and that the statements contained in the Claim are true.

_____
Robert Thomas

Subscribed and sworn to before me this 30th day of December, 20__.

_____
Notary Public

My commission expires _____, 20__.

E. [2.49] Commentary on Sample Claim for Lien

Following is a commentary on the sample claim for lien appearing in §2.48 above, by note number:

1. Identify the lien claim as one for an original contractor as opposed to one for a subcontractor. If the claimant believes it is an original contractor but there may be a later finding that the claimant was a subcontractor, alternative language under 770 ILCS 60/7 and 60/24 might be added. See §2.4 above.

2. State the location where the claim for lien was signed. Note that this may be different from the county in which the real estate is located and where the claim for lien must be recorded.

3. Identify the contractor and state the contractor's address. Failing to identify the proper parties to the contract can render the lien claim invalid. In *Candice Co. v. Ricketts,* 281 Ill.App.3d 359, 666 N.E.2d 722, 217 Ill.Dec. 53 (1st Dist. 1996), a corporation that was in the business of making loans for home repairs became the assignee of a contractor that performed home repairs. The loan company recorded a lien claim against a home on which the contractor had made repairs.

In the lien claim, the loan company identified itself as a party to the contract for home repairs. This was inaccurate and fatal to the enforceability of the lien claim. The court also noted that the contract for home repairs was entered into by a tenant, not the owner, of the house. Because the loan company was seeking to enforce its lien claim against the owner, *i.e.,* a third party, "even stricter compliance" with the Mechanics Lien Act's requirements was justified. 666 N.E.2d at 725.

Candice illustrates the dangers in using forms in preparing lien claims. Because a form was used that assumed that the claimant was also a party to the home repair contract, the loan company failed to properly identify the parties to the contract. As an assignee, the loan company needed to correctly identify itself as the owner of the lien claim and its assignor, the home improvement contractor, as one of the parties to the contract.

In *Bale v. Barnhart,* 343 Ill.App.3d 708, 798 N.E.2d 750, 278 Ill.Dec. 366 (4th Dist. 2003), a mechanics lien claim was invalidated because the recorded claim did not describe the claimant accurately. The caption of the lien claim correctly identified the contractor, but the person who signed the lien claim as agent or employee of the contractor inserted her own name as the claimant in the text of the lien claim. The court treated the conflict between the name in the caption and the name of the claimant in the text as an ambiguity that failed to satisfy the Mechanics Lien Act. Other courts are not as strict. *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, 20 N.E.3d 104, 386 Ill.Dec. 243.

4. State the interests against which the lien attaches. A mechanics lien cannot be asserted against the interest of the owner of an easement appurtenant, unless lienable work was also performed on that owner's principal property to which the easement is related. *Matanky Realty Group, Inc. v. Katris,* 367 Ill.App.3d 839, 856 N.E.2d 579, 305 Ill.Dec. 774 (1st Dist. 2006) (owner of out-lot at shopping center with easement to parking lot for purposes of ingress, egress, and parking was not liable for costs of repairing and maintaining parking lot because no work was performed on out-lot itself).

In *AUI Construction Group, LLC v. Vaessen,* 2016 IL App (2d) 160009, 67 N.E.3d 500, 409 Ill.Dec. 288, the court concluded that the interests of a grantee under an easement for a wind energy farm were not subject to mechanics lien claims.

A mechanics lien cannot be asserted against a licensee's interest in a property. The owner's interest generally cannot be charged with a mechanics lien arising out of work performed for the licensee. *L.J. Keefe Co. v. Chicago & Northwestern Transportation Co.,* 287 Ill.App.3d 119, 678 N.E.2d 41, 222 Ill.Dec. 634 (1st Dist. 1997).

5. State the identity of the legal titleholder. This information can be determined by a search of the recorder's records or confirmed with a title company. However, because the Mechanics Lien Act itself does not require a contractor to identify the owner in the claim for lien, an error in or the omission of this information may not be fatal to the validity of the lien claim.

6. Include a broad, catchall description of the interests of all other persons or entities who may claim an interest in the subject property.

7. Assuming that the owner was in title at the time the contractor's contract was entered into, state an "in title" date before the date of the contract. In certain cases, the contractor may begin work without a signed contract, and a written contract is entered into later. On such projects, ideally the contract will bear the earlier commencement date but, if not, the contractor should use the date of an oral contract or the date that work began.

8. Describe the legal interest that the owner holds in the subject property.

9. Use the common address of the property. The Mechanics Lien Act requires a "sufficiently correct" description of the subject property. 770 ILCS 60/7. Although a legal description is desirable, a common address arguably may cover any defects in a legal description. In *Acme Steel Co. v. Raytheon Engineers & Constructors, Inc. (In re Acme Metals Inc.),* 257 B.R. 714 (Bankr. D.Del. 2000), the court upheld the sufficiency of a legal description in a lien claim that referred to a single, almost vacant lot that was adjacent to a site on which a new five-story steel plant had been constructed. The court ruled that the legal description for the single, almost vacant lot was sufficient to impose a lien on the entire plant (though the court ultimately ruled that the lien was invalid under 770 ILCS 60/6). *See also Ehlers Construction, Inc. v. Timbers of Shorewood, L.P.,* No. 03 C 6966, 2004 WL 816748 (N.D.Ill. Mar. 11, 2004) (legal description combining two lots owned by separate owners into one legal description not valid to support lien claim identifying only one owner; blanket lien doctrine did not apply because general contractor performed work under two contracts, not one, each with separate owners).

In *U.S. Bank v. Unknown Heirs & Legatees of McGraw,* 2013 IL App (5th) 120084-U, the court confirmed the jurisdiction of a trial court, which had previously entered a judgment of foreclosure in favor of a mechanics lien claimant. The recorded mechanics lien referred to only one of two specifically numbered lots and referred to only one of two property index numbers. Nevertheless, the recorded lien claim used a street address that applied to both lots and PINs, and all pleadings in the mechanics lien foreclosure suit referred to all lots. For purposes of giving res judicata effect to the earlier judgment, the appellate court ruled that the legal description was sufficiently correct for purposes of §7. The court indicated that the test was whether "a party familiar with the locality [would be able] to identify the premises intended to be described with reasonable certainty." 2013 IL App (5th) 120084-U at ¶23, quoting *Donkle & Webber Lumber Co. v. Rehrmann,* 310 Ill.App. 17, 33 N.E.2d 709, 712 (3d Dist. 1941).

10. State the legal description of the property that is subject to the lien. In *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 545, 334 Ill.Dec. 710 (1st Dist. 2009), a mechanics lien claim was valid even though the legal description was based on a plat of survey and not the more recently recorded declaration of condominium ownership that divided the property into condominium unit numbers with ownership percentages. The *Cordeck Sales* court ruled that it was not necessary to use the most recent legal title information available, as long as the description of the land was sufficient. The undisputed testimony of an employee of the recorder's office, the correct PINs, and the correct common street address supported the sufficiency of the description.

The reasoning of the court in *Cordeck Sales* was applied in *Christopher B. Burke Engineering, Ltd. v. Harkins,* 2011 IL App (3d) 100949-U. At the time the construction contract was entered into, the subject property had a metes and bounds description and two platted lots. By the time work was completed, the entire property had been replatted, and the two old lot numbers had been changed (as part of the new plat of subdivision). The recorded lien claim, however, used the old metes and bounds description and the old lot numbers but also used 29 of the new PINs that corresponded to the most recent plat of subdivision. (There were a total of 49 new PINs.) 2011 IL App (3d) 100949-U at ¶9. As to a mortgage lender and purchaser of one of the lots, the court held that there were questions of fact regarding the sufficiency of the legal description. Summary

judgment against the mechanics lien claimant was reversed. 2011 IL App (3d) 100949-U at ¶¶12 – 13. *See also Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois,* 2015 IL 118955, 43 N.E.3d 963, 398 Ill.Dec. 53.

The decision in *Cordeck Sales, supra,* limited the earlier ruling in *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986), which suggested that a contractor needed to use the most current legal description at the time the claim for lien is recorded. In *Steinberg,* the property was legally described by a metes and bounds description at the time an excavation contract was made. By the time the lien claim was recorded, a plat of subdivision dividing the property into lots had been recorded. The *Steinberg* court ruled that the claim for lien had to use a legal description based on the plat of subdivision in order to be "sufficiently correct." 491 N.E.2d at 1296. The court went on to require allocation of the lien claim among the individual lots in the subdivision.

Ever since the ruling in *Cordeck Sales, supra,* using the most recent legal description with lots may be the better practice, especially if there are issues as to the timeliness of work on each lot and apportionment. See the discussion in §2.43 above regarding allocation and apportionment.

11. State the real estate tax PIN for the property that is subject to the lien. Note that new tax numbers often issue because of a subdivision accomplished near the time of the construction contract. The claimant should consider using old and new numbers as long as the old does not designate property on which the claimant did not work and that is not used to benefit the new parcel.

12. State the date that the contract was entered into. To support a mechanics lien, there must be a sufficiently definite and enforceable contract. *Link Company Group, LLC v. Cortes,* 2018 IL App (1st) 171785-U, ¶15. Even though §7 of the Mechanics Lien Act does not require a recorded lien claim to provide a contract date, §11 requires the foreclosure complaint to correctly state the date. *Sutton Siding & Remodeling, Inc. v. Baker,* 2017 IL App (4th) 150956-U, ¶¶33 – 34. Further, there are cases that indicate a correct date for the contract is needed in the lien claim. *Ronning Engineering Co. v. Adams Pride Alfalfa Corp.,* 181 Ill.App.3d 753, 537 N.E.2d 1032, 130 Ill.Dec. 703 (4th Dist. 1989). *Ronning* was distinguished in *Peter J. Hartmann Co. v. Capital Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004). In *Peter J. Hartmann,* the lien notices referred to a contract entered into on December 7, 1989. The complaint for foreclosure referred to a contract "on or about November 24, 1989." 817 N.E.2d at 916. The 14-day discrepancy did not invalidate the lien, unlike the 10-month discrepancy in dates at issue in *Ronning, supra.* 817 N.E.2d at 922. *See also Otto Baum Co. v Sud Family Limited Partnership,* 2016 IL App (3d) 140821-U, ¶¶42 – 45 (description of contracts in several lien claims sufficiently correct despite discrepancy in dates).

The date of an oral contract or the date that work began should be used if there is no written contract or the work began before the earlier of (a) the date on which the contract was physically signed or (b) the contract "effective" date (but distinguish any "work began" date from the contract date).

13. Identify the entity that entered into the contract with the contractor.

14. Provide a description of the work that was performed under the contract. A claim for lien that describes the wrong contract will not be enforceable.

A construction manager who was described in its contract as agent for the owner was entitled to a lien claim even though it performed general contracting services such as scheduling and coordination that went beyond the original contract. There was no misdescription of the contract. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 500, 320 Ill.Dec. 330 (1st Dist. 2008).

A lien claim's description of the contract as "written" was found sufficient in *North Shore, supra,* even though the "contract" did not consist of an integrated, single document signed by its parties. Instead, the letters, e-mails, proposals, and change orders exchanged between the parties constituted a written contract sufficiently matching the description in the lien claim. 2014 IL App (1st) 123784 at ¶142. *See Otto Baum, supra,* 2016 IL App (3d) 140821-U at ¶¶42 – 45 (description of contracts in several lien claims sufficiently correct despite discrepancy in dates, unsigned written contracts, and written contract consisting of several writings).

15. Provide a statement that the entity that entered into the contract was the owner or an entity authorized or knowingly permitted by the owner to enter into the contract. 770 ILCS 60/1.

The words "knowingly permitted" mean being aware of and consenting to the improvements or failing to protest and accepting the benefits of the contractor's work. *Young v. CES, Inc.,* 2014 IL App (2d) 131090-U, ¶125.

If the contract was entered into with a contract purchaser before the contract purchaser closed the purchase and became the owner, the lien claimant will need to prove that the contract seller knowingly permitted or authorized the contract purchaser to enter into the contract. *Burke Engineering, supra,* 2015 IL 118955 at ¶¶22 – 26.

A mortgagee in possession after entry of a judgment of foreclosure (but before issuance of a judicial deed) was found to be acting as agent of the foreclosed mortgagor in entering into a demolition contract in *Lake County Grading Co. v. Forever Construction Co.,* 2017 IL App (2d) 160359, 79 N.E.3d 743, 414 Ill.Dec. 108. The court also approved a lien claim that identified both the mortgagee and mortgagor as owners of the property and parties to the contract. 2017 IL App. (2d) 160359 at ¶¶82 – 89.

16. State the amount of any additional work that increased the contract amount beyond the original dollar amount.

17. State the date on which work was last performed under the contract. For contracts involving work on more than one lot or building, see §2.43 above regarding allocation issues. To be enforceable against parties other than the original owner, a mechanics lien claim should include a completion date. *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000). *But see First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 318 – 319, 73 Ill.Dec. 454 (1983) (completion date requirement not necessary component of lien claim); *National City Mortgage v. Bergman,* 405 Ill.App.3d 102, 939 N.E.2d 1, 345 Ill.Dec. 272 (2d Dist. 2010) (completion date not required unless there are issues of apportionment to multiple parcels).

18. State the amount due after giving the owner credit for all payments and any other credits, such as the deletion of any work from the original contract scope.

19. Include an express claim for statutory interest in the amount claimed.

20. Include an affirmative statement of a claim for lien for the principal amount due plus interest.

21. Provide a revocation of any outstanding unpaid waivers of lien.

22. State the date that the claim for lien is signed.

23. State the name of the claimant.

24. Include the signature of an authorized officer or agent of the claimant.

25. Provide information regarding the preparer of the document as typically required by the recorder's office so that the original recorded claim for lien can be returned to the claimant.

26. State the real estate tax PIN as typically required by the recorder's office to permit recording.

27. Include a proper verification notarized by a notary public as required by state law. 770 ILCS 60/7. The lien claim must be verified by the lien claimant or an agent or employee of the lien claimant. A lien signed by the president of a contractor, but not verified, was held invalid in *Tefco Construction Co. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714, 829 N.E.2d 860, 293 Ill.Dec. 935 (1st Dist. 2005). The *Tefco Construction* court ruled that the remedial purposes of the Mechanics Lien Act did not excuse noncompliance with the specific statutory requirement that the claim for lien be verified.

In *Vancil Contracting, Inc. v. Tres Amigos Properties, LLC (In re Vancil Contracting, Inc.),* 381 B.R. 243 (Bankr. C.D.Ill. 2008), the court made clear that §7 of the Mechanics Lien Act required a verification by affidavit, not just an acknowledgment by a notary. The person signing the lien claim must be placed under oath and must verify the truth of the matters set forth in the lien claim.

28. For liens on an owner-occupied, single-family residence, the recorded lien claim must be sent to the owner within ten days after recording. If the owner can prove damages because the notice of lien was not timely sent, the lien is extinguished to the extent of the damages. 770 ILCS 60/7(d). On other liens of an "original contractor," no notice to the owner is required. However, some contracts and contractor consents to assignment might require notice to the owner or lender as a condition to a separate contractual remedy.

F. [2.50] Amended Lien Claims

Lien claims may not be amended to the prejudice of subsequent purchasers even if amendments are recorded within four months after the claimant's last work for which the lien is claimed. *Acme*

Steel Co. v. Raytheon Engineers & Constructors, Inc. (In re Acme Metals Inc.), 257 B.R. 714, 719 (Bankr. D.Del. 2000); *Federal Savings & Loan Insurance Corp. v. American National Bank & Trust Company of Chicago,* 115 Ill.App.3d 426, 450 N.E.2d 820, 822, 71 Ill.Dec. 132 (1st Dist. 1983); *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 939, 140 Ill.Dec. 282 (3d Dist. 1990). This rule was applied in *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008), in which a construction manager recorded amended lien claims increasing the amount due as work continued on a project. As to a third-party mortgage lienor, the court ruled that only the first lien claim was valid. 887 N.E.2d at 503 – 504.

The use of amended lien claims was allowed under certain circumstances in *Peter J. Hartmann Co. v. Capital Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004). *Peter J. Hartmann* involved two lien claims recorded with the recorder of deeds and two lien documents registered in 1990 with the Cook County Registrar of Titles. All four documents were recorded or registered within four months of the completion date. The contractor's complaint to foreclose and lis pendens were filed within four months of the completion date. The court allowed the multiple recordings, after noting that the subsequent filings were amendatory in nature, merely adding necessary parties or clarifying the amount owed. 817 N.E.2d at 921. The court also noted that in its complaint to foreclose, the contractor sought only a single dollar amount. There was no attempt by the contractor to cumulate the dollar amounts in the separate notices.

After 14 years of litigation, there was also a jury verdict rejecting a fraud claim by the owner against the contractor. The *Peter J. Hartmann* court therefore ruled that the general rule against multiple lien claims that overstate the amount due did not apply. The court distinguished the decisions in *Bank of America National Trust & Savings Ass'n v. Zedd Investments, Inc.,* 276 Ill.App.3d 998, 658 N.E.2d 849, 213 Ill.Dec. 100 (3d Dist. 1995), *Lohmann Golf Designs, Inc. v. Keisler,* 260 Ill.App.3d 886, 632 N.E.2d 121, 198 Ill.Dec. 62 (1st Dist. 1994), and *Fedco Electric Co. v. Stunkel,* 77 Ill.App.3d 48, 395 N.E.2d 1116, 32 Ill.Dec. 735 (4th Dist. 1979).

G. [2.51] Priority of the Perfected Lien Claim

The discussion of priority of the perfected lien claim in §§2.52 and 2.53 below assumes that the contractor has complied with all time requirements for filing a claim for lien and for filing a lawsuit to foreclose that lien and that the lien claim has been properly perfected in accordance with the statute. *See Detroit Steel Products Co. v. Hudes,* 17 Ill.App.3d 514, 151 N.E.2d 136, 138 – 139 (4th Dist. 1958) (mechanics lien not properly perfected has no right to priority over mortgage lien). *See also Lobo IV, LLC v. V Land Chicago Canal, LLC,* 2019 IL App (1st) 170955, 138 N.E.3d 824, 435 Ill.Dec. 210 (payor of mechanics lien claim had no subrogation rights when paid lien claim not properly perfected).

1. [2.52] Mortgage Lenders, Time of Recording and Contract Date, and the Enhancement Doctrine

On many projects, priority issues do not have to be decided because the owner has enough equity in the property after deducting the value of mortgage liens and mechanics liens that the owner or mortgage lender will arrange a settlement rather than allow the property to be sold at a sheriff's sale after foreclosure. In other cases, however, the owner has no equity and is willing to

abandon the property to the mortgage lender and the mechanics lien claimants, usually with some concession from the lender. In such cases, priority disputes between mortgage liens and mechanics liens must be decided.

Section 16 of the Mechanics Lien Act addresses priority issues between perfected mechanics liens and mortgage lenders or other lien creditors who are not mechanics lien claimants. 770 ILCS 60/16. A mechanics lien relates back to the date that the general contract was made. "[T]his lien attaches as of the date of the contract." 770 ILCS 60/1(a). Thus, if the date of the general contract is before the date that the lender recorded its mortgage, the contractor's mechanics lien has priority over the mortgage lien. *State Bank of Lake Zurich v. Winnetka Bank,* 245 Ill.App.3d 984, 614 N.E.2d 862, 185 Ill.Dec. 421 (2d Dist. 1993). That is, the proceeds of any sheriff's sale following foreclosure will be paid first to the contractor before any proceeds are paid to the lender. If work begins before a written contract is formally signed, the contractor should argue that the first day of work fixes the date of the contract and the contract should be entered into as of that date.

If the contractor's mechanics lien has priority based on the time of recording, the amount of the lien is based on the contract amount and not the reasonable value of the claimant's work. *Crescent Electric Supply Co. v. Diamac Electric, Inc.,* 312 Ill.App.3d 1194, 769 N.E.2d 566, 264 Ill.Dec. 64 (1st Dist. 2000) (Rule 23). While *Crescent Electric* did not involve enhancement issues, the reasonable value of the claimant's work far exceeded an amount that was fixed by a change order settlement agreement. The agreed contract value should have been used to determine the amount of the claimant's lien, along with any adjustments under the contract requirements for extra work.

If the date of the contract is later than the date on which the lender recorded its mortgage, the contractor cannot use the relation-back rule of §1 of the Mechanics Lien Act to establish priority. Instead, the contractor must use the enhancement doctrine under §16 to establish priority.

Section 16 was amended by P.A. 97-1165 (eff. Feb. 11, 2013) to supersede the decision in *LaSalle Bank National Ass'n v. Cypress Creek 1, LP,* 242 Ill.2d 231, 950 N.E.2d 1109, 351 Ill.Dec. 281 (2011). The amended §16 provides:

> **No incumbrance upon land, created before or after the making of the contract for improvements under the provisions of this act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished material (hereinafter "lien creditor") shall have been satisfied, and upon any questions arising between incumbrancers and lien creditors, all previous incumbrances shall be preferred only to the extent of the value of the land at the time of making of the contract for improvements, but shall not be preferred to the value of any subsequent improvements, and each lien creditor shall be preferred to the value of all the subsequent improvements erected on said premises, whether or not provided by the lien creditor, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest. All incumbrances, whether by mortgage, judgment or otherwise, charged and shown to be fraudulent, in respect to creditors, may be set aside by the court, and the premises freed and discharged from such fraudulent incumbrance. When the proceeds of a sale are insufficient to satisfy the claims of both**

> **previous incumbrancers and lien creditors, the proceeds of the sale shall be distributed as follows: (i) any previous incumbrancers shall have a paramount lien in the portion of the proceeds attributable to the value of the land at the time of making of the contract for improvements; and (ii) any lien creditors shall have a paramount lien in the portion of the proceeds attributable to the value of all subsequent improvements made to the property.** 770 ILCS 60/16.

Section 16 provides that when a mortgage or other lien predates the contract date, the mortgage lender is "preferred only to the extent of the value of the land at the time of making of the contract" for construction. *Id.* The lender, however, is "not . . . preferred to the value of any subsequent improvements." *Id.* Each mechanics lien claimant is "preferred to the value of all the subsequent improvements erected on said premises," whether or not provided by the individual mechanics lien claimant. *Id.* When the proceeds of a foreclosure sale are insufficient to satisfy the claims of both the lender and mechanics lien claimants, §16 provides that the proceeds of the sale shall be distributed as follows: (a) any previous incumbrancers shall have a paramount lien in the portion of the proceeds attributable to the value of the land at the time of making of the contract for improvements; and (b) any lien creditors shall have a paramount lien in the portion of the proceeds attributable to the value of all subsequent improvements made to the property.

This statutory language usually is restated to mean that as between mechanics lien claimants and lenders, if the lien claimants can prove that construction work increased or enhanced the value of the property (whether such work was performed by the lien claimants, by contractors who have already been paid in full, or by contractors who may not have been paid but who are not pursuing lien claims), to the extent of such increased value, the mechanics lien claimants have priority even over a mortgage lien that predates the construction contract.

This method of proving enhancement is known as the "market value method." Under this theory, the value of the property before all improvements is determined (as of "the time of the making of the contract"), and the value of the property after all improvements are completed is determined. The value of the improvements is determined by subtracting the (a) value of the property before the improvements from (b) the value of the property after the improvements. The ratio of (c) the original value of the property before the improvements to (d) the total value of the property after the improvements is calculated, as is the ratio of (e) the value of the improvements to (f) the total value of the property after the improvements. The ratios are applied to the foreclosure sale proceeds. As a group, the mechanics lien claimants' share of the foreclosure sale proceeds is based on the ratio of (e) to (f); the mortgage lender's share is based on the ratio of (c) to (d). As among individual mechanics lien claimants, the share of the sale proceeds allocated to the group of mechanics lien claimants would presumably follow the ratio of the amount of each claimant's lien to the total of the mechanics lien claims. See 770 ILCS 60/19.

Note that the value of the improvement itself (appraised value of property after the improvement is completed less the original value of the property before the improvement) may not equal the cost of the improvement. *Moulding-Brownell Corp. v. E.C. Delfosse Const. Co.,* 304 Ill.App. 491, 26 N.E.2d 709 (1st Dist. 1940).

The cost of the work or the contract price generally cannot be used to prove the increase in value of the property resulting from the improvement of the property. *Id.* Appraisal evidence may be needed.

The amended version of §16, with the added last sentence expressly directing the distribution of sale proceeds in the event of insufficient sale proceeds, presumably supersedes that part of the *LaSalle Bank National Ass'n v. Cypress Creek 1, L.P.,* 398 Ill.App.3d 592, 925 N.E.2d 233, 338 Ill.Dec. 736 (3d Dist. 2010), litigation that applied 735 ILCS 5/15-1512(b) to give priority to a foreclosing lender's claim for attorneys' fees under a mortgage. Compare 770 ILCS 60/16 with *Cypress Creek; LaSalle Bank National Ass'n v. Cypress Creek I, L.P.,* 2013 IL App (3d) 130196-U. As for the priority of a mechanics lien claimant's right to attorneys' fees, because 770 ILCS 60/17(b) limits the recovery of fees to the owner, there may be difficulties in including attorneys' fees in a judgment of foreclosure affecting other mechanics lien claimants and the lender as well as the owner. *See Action Plumbing Co. v. Bendowski,* 402 Ill.App.3d 681, 934 N.E.2d 35, 343 Ill.Dec. 35 (2d Dist. 2010); *Thyssenkrupp Elevator Corp. v. Community Investment Corp.,* 2012 IL App (2d) 101172-U, ¶29.

The amended version of §16 was applied to a mechanics lien claim arising out of a 2009 construction contract in *In re Thigpen,* Bankruptcy No. 12 B 50810, 2014 WL 1246116 (Bankr. N.D.Ill. Mar. 20, 2014). There was no discussion of the amended statute's applicability.

Under certain circumstances, however, the use of the market value method may be impossible. This is the case with work that is relatively insignificant compared to the total value of the property. In *Lyons Savings v. Gash Associates,* 279 Ill.App.3d 742, 665 N.E.2d 326, 330, 216 Ill.Dec. 266 (1st Dist. 1996), three lien claimants provided labor and materials for a total amount of $100,908.44 on a renovation project. The building under renovation was later sold at a mortgage foreclosure sale for $4,005,000. 665 N.E.2d at 329. At trial, the lien claimants' appraiser testified that the margin of error for evaluating properties was 10 percent. The total amount of the improvements was approximately 2.5 percent of the property value, within the 10-percent margin of error. Under these circumstances, the court ruled that the market value approach to proving enhancement was inappropriate.

The lien claimants in *Lyons Savings* were allowed to use their contract prices (original contract price less payments received) as the measure of the value of the enhancements. The lien claimants had to prove that

a. the work was authorized by the owner;

b. the contract price was reasonable for the work done;

c. the lien claimants performed under their contract; and

d. the work constituted a valuable and permanent improvement to the property. 665 N.E.2d at 331.

Satisfaction of these four elements was proof of enhancement — *i.e.,* that the improvements "aided the property in achieving its highest and best use." *Id.*

In markets with overall declining real estate values, the contractor will need to consider carefully evidence of the value of the property at the time the construction contract was made. The lender will have priority to the extent of this value, and the lender's appraisal and assumptions about value at the time the loan was made may not be accurate.

In determining the date that a mortgage lien was recorded, a renewal note and mortgage that does not extinguish the earlier debt is not a new transaction, and the mortgage lender will have its priority determined as of the date of the earlier mortgage. All obligatory advances under a construction loan will relate back to the date the mortgage was recorded. *State Bank of Lake Zurich, supra;* 735 ILCS 5/15-1302.

2. [2.53] Priority Among Mechanics Lien Claimants

The contractor may find that it is competing with subcontractors and unpaid workers who have their own mechanics liens against the property. In such cases, §§26 and 30 of the Mechanics Lien Act establish a priority for lien claims of laborers for wages and a pro rata allocation for all other lien claimants. 770 ILCS 60/26, 60/30.

3. [2.54] Priority of Receivers' Certificates

A receiver appointed by the court under the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101, *et seq.,* or §12 of the Mechanics Lien Act, 770 ILCS 60/12, may subordinate a contractor's or subcontractor's mechanics lien through receivers' certificates. In *REEF-PCG, LLC v. 747 Properties, LLC,* 2020 IL App (2d) 200193, ¶38, 157 N.E.3d 1122, 441 Ill.Dec. 765, the court held that a court-appointed receiver has the power to subordinate a mechanics lien to a receiver's certificate despite the language of §16 of the Mechanics Lien Act, 770 ILCS 60/16. However, the appellate court reversed, finding that there was no evidence in the record (other than a lease with the General Services Administration) to support the trial court's ruling to authorize issuance of new debt to the detriment of existing lienholders.

The property in question in *REEF-PCG* involved an approximately $16.9 million mortgage to buy and remodel an office building. Shortly after the mortgage was executed, the owner, 747 Properties, signed two leases with tenants, Pomeroy IT Sales (Pomeroy) and the U.S. General Services Administration (GSA). Pomeroy then hired a contractor to build out the tenant space and to repair the common elements. After Pomeroy failed to pay, the general contractor and subcontractors filed mechanics liens totaling approximately $15 million. 2020 IL App (2d) 200193 at ¶6. The mortgagee, REEF-PCG, subsequently filed a mortgage foreclosure action against the mortgagor, 747 Properties, and the lienholders (as necessary parties) to pay amounts due on the mortgage and, because of mortgagor's failure to pay lien claimants, allowing mechanics liens to be filed.

Shortly after filing the mortgage foreclosure action, the mortgagee moved to have a receiver appointed. The receiver, in conjunction with the mortgagee, requested the court to issue receiver certificates in the amount of $12 million. The receiver and mortgagee also requested that the receiver's certificates be given priority over the mechanics liens and all other encumbrances. The lienholders opposed the motion, noting that §16 of the Mechanics Lien Act prohibits subordination of the mechanics liens to later encumbrances (*i.e.,* the receiver's certificates). The trial court rejected that position, stating that the Illinois Supreme Court in *Pittsburgh Plate Glass Co. v. Kransz,* 291 Ill. 84, 125 N.E. 730 (1919), established precedent to subordinate mechanics liens to receiver's certificates. 2020 IL App (2d) 200193 at ¶13. The lienholders then appealed.

The appellate court began by examining the language of §16 (see §2.52 above), which provides that no encumbrance after the date of the contract for improvements shall be effective as against the property until the mechanics lien has been satisfied. The mortgagee and receiver directed the court's attention to *Pittsburgh Plate Glass,* which the court acknowledged as being similar to and controlling in the present matter, aside from the dollar amounts in question. The court summarized what it described as "byzantine," the procedural history and facts of *Pittsburg Plate Glass,* and found it to apply. 2020 IL App (2d) 200193 at ¶25.

In *Pittsburg Plate Glass,* four subcontractors filed suit against the owner, general contractor, and Kransz, holder of the trust deed securing the property, seeking foreclosure of their liens after the general contractor had gone bankrupt. Kransz subsequently sought to foreclose his trust deed as well. As the building being constructed had not been completed, Kransz subsequently sought to have a receiver appointed, with the power to "take possession of the premises, complete the building, borrow money for that purpose, and secure the same by receiver certificates secured by a mortgage on the premises, which should be a first lien on the property and prior to the liens of all the parties" of said causes. 2020 IL App (2d) 200193 at ¶23. The chancellor ordered that the mechanics liens be given priority over the receiver certificates. Kransz and the receiver appealed, and the appellate court affirmed. In reversing the appellate court and the chancellor, the Illinois Supreme Court noted that §12 of the Mechanics Lien Act, which permits the court to appoint a receiver to for the property and which gives the receiver power to complete any unfinished building — when it is in the best interests of all concerned — implicitly conferred on the court the power to declare a receiver's certificate a first lien over the underlying mechanics lien. The Supreme Court cautioned that the practice, while generally used with railroad and public service corporations, should be used with great caution in the context of individuals and private corporations.

Relying on *Pittsburg Plate Glass, supra,* and §12 of the Mechanics Lien Act, the *747 Properties* appellate court held that the trial court had the authority to subordinate the mechanics liens to a receiver's certificate. The court observed that the receiver's powers included securing tenants, collecting rents, and employing others to operate, manage, and conserve the property in question. 2020 IL App (2d) 200193 at ¶36. However, the court questioned the necessity of further improvement because, unlike *Pittsburg Plate Glass,* the building would not succumb to the elements without additional improvements. 2020 IL App (2d) 200193 at ¶34. The appellate court also noted that while the liens to be subordinated were for work already completed for Pomeroy's build-out, the new work (covered by the receiver's certificates) would be for an entirely different tenant, the GSA, with which the lienholders were not involved. 2020 IL App (2d) 200193 at ¶35.

Ultimately, while the trial court had the power to issue such certificates, it abused its discretion in subordinating the mechanics liens as there was no basis in the record to conclude that issuing new debt in the amount of $12 million at 12-percent interest was in the lienholder's best interests or was necessary to protect the property. Accordingly, the Second District reversed and remanded the trial court's judgment. 2020 IL App (2d) 200193 at ¶44.

VI. SECTION 38.1 LIEN SUBSTITUTION BONDS

A. [2.55] Statutory Requirements

Owners, other lien claimants, condominium associations, and any person who may be liable to a lien claimant (including general contractors or subcontractors) are entitled to have a court-approved bond substitute for the property subject to a lien claim. 770 ILCS 60/38.1(a). The form of the bond is spelled out in 770 ILCS 60/38.1(a)(2). The penal sum of the bond must be 175 percent of the amount of the lien claim (excluding interest or attorneys' fees). 770 ILCS 60/38.1(a)(2)(C), 60/38.1(a)(3). If any party makes a payment to the lien claimant within five months of the filing "of a complaint under this Section," a request can be made to the court to approve a reduction in the amount of the bond. 770 ILCS 60/38.1(a)(5). In Cook County, and other judicial circuits that have lists of approved sureties, the bond must be issued by an approved surety. 770 ILCS 60/38.1(a)(2)(F).

To substitute a bond for the lien, a verified petition needs to be filed in court. The contents of the petition are set forth in 770 ILCS 60/38.1(c). If there is a pending lawsuit to enforce the lien claim, the petition for approval of the bond must be filed within five months after the lien foreclosure complaint or counterclaim is filed. *Id.* Notice of the petition must be served by personal delivery or certified mail, return receipt requested. The form of notice is set forth in 770 ILCS 60/38.1(d). If the bond is approved, the court order will substitute the bond for the property securing the lien. 770 ILCS 60/38.1(f). The court order and approved bond is then recorded. 770 ILCS 60/38.1(g). After the bond is approved, the only defendants to any lien enforcement count will be the surety and the person or entity who applied for approval of the bond (the bond principal). 770 ILCS 60/38.1(h).

B. [2.56] Statutory Substitution Bond Attorneys' Fees — "Prevailing Party"

The lien substitution bond statute creates a prevailing party test for the award of attorneys' fees and sets a cap on such awards. 770 ILCS 60/38.1. The statute defines a "prevailing party" for both a lien claimant and the bond principal. The lien claimant is "prevailing" if it is one who is awarded a judgment that is equal to at least 75 percent of the "amount of its lien claim." The bond principal is the "prevailing party" if the lien claimant is awarded a judgment equal to no less than 25 percent of the "amount of its lien claim." 770 ILCS 60/38.1(a)(5). In determining "the amount of the lien claim," however, the amount of the lien claim is reduced (1) by any payments received by the lien claimant from any source at any time before judgment is entered or (2) upon petition of the lien claimant, "but only for good cause shown." *Id.*

The cap on an attorneys' fees award to a lien claimant under §38.1 is the "amount remaining on the bond after the payment of the claim and interest." 770 ILCS 60/38.1(i). For the bond principal, the cap on attorneys' fees under §38.1 is 50 percent of the "amount of the lien claim." *Id.*

3 Subcontractor's Claim for Lien

JAMES T. ROHLFING
BRANDON R. CLARK
Saul Ewing LLP
Chicago

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I. [3.1] NATURE AND ENFORCEMENT: THE SUBCONTRACTOR'S LIEN RIGHTS

The laws of the State of Illinois give contractors, subcontractors, and material suppliers the right to a mechanics lien on real property they have improved equal to the value of their services, labor, and materials, which arises as of the time of furnishing them. Due to the nature of their services, labor, and materials, which cannot be repossessed in the event of failure of payment, the law grants this right in order to protect contractors, subcontractors, and material suppliers and provide them a means to satisfy a claim for money due and owing arising from their efforts to improve the real property of others. While Illinois law grants this right, it is narrowly construed because it is in derogation of the common law, and as such, it is absolutely essential that the requirements for perfecting a mechanics lien be strictly followed.

A. [3.2] Nature of a Subcontractor's Lien

Courts have repeatedly acknowledged that the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* "is a comprehensive statutory enactment that outlines the rights, responsibilities, and remedies of parties to construction contracts, including owners, contractors, subcontractors, and third parties." *MEP Construction, LLC v. Truco MP, LLC,* 2019 IL App (1st) 180539, ¶14, 125 N.E.3d 1130, 430 Ill.Dec. 112. The overall purpose of the Act is to ensure that a property owner pays for improvements to the owner's real property "induced by his or her own conduct." *Id*. This goal is achieved by granting the right to enforce "a lien on premises when the owner has received a benefit, and the furnishing of labor and materials have increased the value or improved the condition of the property." *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 834, 330 Ill.Dec. 808 (2009). *See also North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, ¶81, 20 N.E.3d 104, 386 Ill.Dec. 243 ("The purpose of the Act is to permit a lien upon premises where a benefit has been received by the owner and the value or condition of the property has been increased or improved by the furnishing of labor and materials."), quoting *Northwest Millwork Co. v. Komperda,* 338 Ill.App.3d 997, 788 N.E.2d 399, 401, 273 Ill.Dec. 90 (2003).

The Act is not solely concerned with the protection of contractors, subcontractors, and material suppliers, however. Rather, it seeks to balance their rights with those of owners. *Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, ¶18, 39 N.E.3d 8, 395 Ill.Dec. 541. Hence, for example, the Act protects owners from liens by unknown subcontractors. *Id.* Altogether, this results in a statutory framework that must be considered as a whole, as many sections of the Act overlap and interact to define the duties and rights of owners, contractors, subcontractors, and material suppliers. Some of the more impactful of those sections are as follows.

Section 5 of the Act, 770 ILCS 60/5, serves the purpose of protecting the owner by requiring that contractors provide owners with a written, sworn statement identifying, by name and address, each party furnishing labor, services, or materials to the owner and the amount due or to become due to each. In this way, owners should not be surprised by liens filed by subcontractors of whom they were not aware. Section 5 also makes it the duty of the owner to demand it be provided with a sworn statement before rendering payment. *GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App (1st) 133624, ¶37, 38 N.E.3d 60, 395 Ill.Dec. 183. If an owner fails to request and

obtain a sworn statement in accordance with §5, and as a result makes "any payments to the original contractor which are in violation of the rights of any subcontractor, then . . . such payments are wrongfully made, and the owner is not entitled, in his controversy with [the aggrieved subcontractor,] to any credit for those payments." *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 629, 167 Ill.Dec. 354 (4th Dist. 1992), quoting *Brady Brick & Supply Co. v. Lotito,* 43 Ill.App.3d 69, 356 N.E.2d 1126, 1130, 1 Ill.Dec. 844 (2d Dist. 1976). This duty and right dichotomy can provide significant protection to owners against liens by unknown subcontractors: "The owner has the right to rely and act upon the contractor's section 5 sworn affidavit unless the owner has any reason to suspect that it was false or knows that it was false. . . . The owner is protected against subcontractors that were not listed on the contractor's sworn affidavit unless the owner knows of omissions or has colluded in their omission." [Citations omitted.] *Pyramid Development, LLC v. Dukane Precast, Inc.,* 2014 IL App (2d) 131131, ¶¶26 – 27, 40 N.E.3d 1185, 397 Ill.Dec. 1.

Section 21 of the Act (770 ILCS 60/21) grants subcontractors lien rights, and §22 (770 ILCS 60/22) extends those rights to sub-subcontractors and lower tiers and provides that lower-tier subcontractors may enforce their rights in the same manner as a subcontractor. *GX Chicago, supra,* 2015 IL App (1st) 133624 at ¶39.

Perhaps in recognition of the pitfalls that the sworn statement requirement of §5 may pose for subcontractors, §24 provides that, at any time after contracting with the prime contractor, a subcontractor may send written notice to the owner of its claim and amounts due — essentially providing a parallel mechanism by which subcontractors may directly notify owners of their involvement in improvements to their property. For subcontractors who make use of this alternative method, they are protected from errors or omissions in the contractor's sworn statement. *GX Chicago, supra,* 2015 IL App (1st) 133624 at ¶40.

Section 27 of the Act, 770 ILCS 60/27, imposes a duty on owners that arises once an owner is informed of a claim by a subcontractor to retain the amount of the claim from any money due or to become due the contractor and further requires the owner to satisfy the claim directly. *GX Chicago, supra,* 2015 IL App (1st) 133624 at ¶41. These duties, however, are not absolute. While owners are obligated to pay subcontractor claims of which they are informed, §27 also reaffirms that owners are protected from claims by subcontractors who are unknown — due to a failure to adhere to the disclosure requirements of either §5 or §24. *Id*.

In *Weather-Tite, supra,* the Illinois Supreme Court described how these provisions of the Act should be followed:

1. "the owner and general contractor enter into a contract for the construction of work";

2. "as the work is completed, the general contractor submits a section 5 sworn affidavit that must list all subcontractors and the amount due, to become due, or advanced";

3. "when the section 5 sworn affidavit lists an amount due or to become due a subcontractor, section 24 requires the owner to retain sufficient funds to pay the subcontractor"; and

4. "section 27 requires the owner to make subcontractor payments upon receiving notice of a subcontractor claim pursuant to a section 5 sworn statement." 909 N.E.2d at 835.

Additionally, a lien waiver can be provided to the contractor when the subcontractor is paid, and the owner can require a lien waiver by every subcontractor when paying the contractor. Funds subject to a lien waiver are required to be held by the owner in trust for the subcontractor. *Id.;* 770 ILCS 60/21.02.

B. [3.3] "Subcontractor" Defined

Section 21(a) of the Mechanics Lien Act broadly defines a "subcontractor" as

> **every mechanic, worker or other person who shall furnish any labor, services, material, fixtures, apparatus or machinery, forms or form work for the contractor, or shall furnish any material to be employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed form or form work where concrete, cement or like material is used in whole or in part, shall be known under this Act as a sub-contractor.** 770 ILCS 60/21(a).

Section 21(a) also defines the extent of a subcontractor's lien rights as the right to lien the property at issue for the value of its labor, services, material, etc., with interest from the date it becomes due. *Id.* It further provides that the lien may be enforced against "creditors and assignees, and personal and legal representatives of the contractor" and on any money "due or to become due from the owner [to the contractor] under the original contract." *Id. See also GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App (1st) 133624, ¶39, 38 N.E.3d 60, 395 Ill.Dec. 183. Section 22 extends these rights to lower-tiered subcontractors who provide labor, services, materials, etc. to a higher-tiered subcontractor. 770 ILCS 60/22. *See also Onsite Engineering & Management, Inc. v. Illinois Tool Works, Inc.,* 319 Ill.App.3d 362, 744 N.E.2d 928, 931, 253 Ill.Dec. 195 (1st Dist. 2001).

The time limitations imposed by the Mechanics Lien Act are the same for subcontractors and suppliers or subcontractors who provide labor or material under an agreement with another subcontractor. Therefore, whether a subcontractor has made a contract with the general contractor or a subcontractor of the general contractor, each must observe the rules to preserve and perfect its mechanics lien rights.

C. [3.4] Who Is an Owner

Section 1 of the Mechanics Lien Act, 770 ILCS 60/1, broadly defines an "owner" as the holder of nearly any interest in real property, including "an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have" at the time of making the underlying contract — or any such right that the owner may subsequently acquire. *M. Ecker & Co. v. LaSalle National Bank,* 268 Ill.App.3d 874, 645 N.E.2d 335, 339, 206 Ill.Dec. 330 (1st Dist. 1994). "[T]he 'owner,' as used in the Act, means the owner of any interest in the land." *Id*. This broad definition of "owner" also extends to the holder of an equitable interest in the land, including a beneficiary interest under a land trust, but it does not extend to a mere mortgagee. *Id*. "An owner holds some interest in the land, either an equitable or a legal interest." *Ark Specialty Service Co. v. Letamendi,* 2014 IL App (3d) 130643-U, ¶26, citing *M. Ecker, supra.*

D. [3.5] Contracts with One Other than the Record Title Owner

In certain circumstances, the owner will retain the services of an individual or entity as a construction manager to serve as the owner's representative on a project. Typically, a construction manager will field bids from the trades, interview the trades, and make recommendations to the owner as to which contractor to retain per trade. Thereafter, the contractor executes and contracts directly with the owner. Under this scenario, the contractor is a general or prime contractor having direct privity of contract with the owner.

However, in certain instances, the construction manager will enter into the contract directly with the trade, which raises the issue of whether the trade contractor is a general contractor or a subcontractor, which in turn affects its requirements for perfecting and enforcing its lien rights.

Section 1(a) of the Mechanics Lien Act provides, in pertinent part:

> **Any person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land, or to manage a structure under construction thereon, is known under this Act as a contractor.** 770 ILCS 60/1(a).

Section 1(a), therefore, expressly provides that a construction manager is a contractor under the Act. Therefore, if a contractor enters into a contract with a construction manager, that contractor is deemed a subcontractor, even though the construction manager is the owner's agent for the project. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 498, 320 Ill.Dec. 330 (1st Dist. 2008).

E. [3.6] Contracts with One Who Is Knowingly Permitted

Section 1 of the Mechanics Lien Act, 770 ILCS 60/1, also protects contractors — and, subsequently, subcontractors — from an owner with whom they lack contractual privity in the event the contract is with one whom the owner knowingly permitted to contract for the improvements at issue. Pursuant to §1, an enforceable lien may be brought even if the contract at issue is with someone who is not the property owner if the contract was "authorized or knowingly permitted" by the owner. *M. Ecker & Co. v. LaSalle National Bank,* 268 Ill.App.3d 874, 645 N.E.2d 335, 340, 206 Ill.Dec. 330 (1st Dist. 1994). "The words 'knowingly permit' as contained in [770 ILCS 60/1] mean being aware of and consenting to the improvements." *Id.*

F. [3.7] Contract Terms Restricting Lien Rights

Section 21(b) of the Mechanics Lien Act, 770 ILCS 60/21(b), provides that a subcontractor's lien rights may be restricted by the contractual agreement between the owner and the contractor but only to the extent that the subcontractor has actual notice of such restriction before the subcontractor enters into a contract with the owner. This section makes reference to contractual terms to the effect that no lien or claim may be made by anyone or that a subcontractor's lien will be subordinate to another party. For a subcontractor's lien to be subordinate, such provision must be set forth in its entirety in writing in the subcontractor's contract.

Section 1(d) of the Act provides that "[a]n agreement to waive any right to enforce or claim any lien under this Act, or an agreement to subordinate the lien, where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, either express or implied, to perform work or supply materials for an improvement upon real property is against public policy and unenforceable." 770 ICLS 60/1(d).

G. [3.8] Perfecting a Subcontractor's Lien Claim

Because the right to a mechanics lien is statutory, a contractor must strictly comply with the Mechanics Lien Act to be eligible with relief. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 496 – 497, 320 Ill.Dec. 330 (1st Dist. 2008). The purpose of a lien foreclosure action is for the subcontractor to obtain a legal hold on the owner's property as security for the debt. *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.,* 119 Ill.App.3d 663, 456 N.E.2d 889, 900, 75 Ill.Dec. 68 (2d Dist. 1983). The burden is on the subcontractor to prove that he or she has satisfied the statutory conditions precedent to his or her right to enforce the lien. *Id*. As discussed in more detail in §3.10 below, the four prerequisites to a subcontractor's lien are

1. a valid contract between the owner and the contractor;

2. a valid contract between the contractor and the subcontractor;

3. the furnishing of lienable materials or service; and

4. performance of the contract by the subcontractor or the existence of a valid excuse for nonperformance.

Tefco Construction Co. v. Continental Community Bank & Trust Co., 357 Ill.App.3d 714, 829 N.E.2d 860, 864, 293 Ill.Dec. 935 (1st Dist. 2005).

H. [3.9] A Subcontractor's Right to Relief

As discussed in more detail in §§3.24 – 3.29 below, a subcontractor has five remedies to enforce its rights:

1. an action at law against the original contractor alone;

2. an action at law against the original contractor and the owner jointly;

3. an action at law on the original contractor's completion bond;

4. an action in equity to enforce the subcontractor's lien; and

5. intervention in a pending action of the original contractor against the owner.

J & K Cement Construction, Inc. v. Montalbano Builders, Inc., 119 Ill.App.3d 663, 456 N.E.2d 889, 899, 75 Ill.Dec. 68 (2d Dist. 1983).

II. [3.10] FOUR PREREQUISITES TO SUBCONTRACTOR'S LIEN

There are four prerequisites to a subcontractor's lien. The first is the existence of a valid contract between the owner and the contactor. 770 ILCS 60/21(a). *See also L.J. Keefe Co. v. Chicago & Northwestern Transportation Co.,* 287 Ill.App.3d 119, 678 N.E2d 41, 43, 222 Ill.Dec. 634 (1st Dist. 1997) (lack of contract to improve land was fatal to lien claim); *Von Platen & Dick v. Winterbotham,* 203 Ill. 198, 67 N.E. 843, 845 (1903) ("While the lien is not created by the contract of the parties, but by the statute, a contract is made essential to the lien."). If there is no contract between the owner and the contractor under the terms of which a lien may be established, then the person furnishing materials to a contractor or subcontractor cannot establish a lien for such material. *Douglas Lumber Co. v. Chicago Home for Incurables,* 380 Ill. 87, 43 N.E.2d 535, 539 (1942).

The owner "should not be required to pay more than he contracted for, absent notice of subcontractors' claims." *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, ¶76, 992 N.E.2d 27, 372 Ill.Dec. 488, *appeal denied,* No. 116438 (Sept. 25, 2013). However, there are exceptions, such as "if the owner makes any payments to the original contractor which are in violation of the rights of any subcontractor," in which case the owner may be compelled to pay more than the original contract price. *Brady Brick & Supply Co. v. Lotito,* 43 Ill.App.3d 69, 356 N.E.2d 1126, 1130, 1 Ill.Dec. 844 (2d Dist. 1976). See also §3.18 below.

The second prerequisite is that the subcontractor's work be performed pursuant to a contract with the contractor, whether express or implied. 770 ILCS 60/21(a).

The third prerequisite is that the subcontractor has furnished lienable material or services, which are those that have "enhanced the value of the land to be charged with the lien." *Inter-Rail Systems, Inc. v. Ravi Corp.,* 387 Ill.App.3d 510, 900 N.E.2d 407, 412, 326 Ill.Dec. 771 (1st Dist. 2008), quoting *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 1060, 160 Ill.Dec. 101 (1st Dist. 1991). In the context of what constitutes lienable work, §1(b) of the Mechanics Lien Act broadly defines "improve" to mean "to furnish labor, services, material, fixtures, apparatus or machinery, [or] forms . . . for the purpose of or in the building, altering, repairing or ornamenting any house or other building, walk or sidewalk, . . . driveway, fence or improvement" to real property. 770 ILCS 60/1(b). Further, for the work to have been deemed furnished, it must be delivered. *Luczak Bros. v. Generes,* 116 Ill.App.3d 286, 451 N.E.2d 1267, 1279 – 1280, 71 Ill.Dec. 900 (1st Dist. 1983). If materials have been delivered, it is not fatal to the material supplier's lien rights that they have not been put to use. *Id.*

The fourth prerequisite is that the subcontractor performs its work pursuant to the contract or has a legal excuse for nonperformance of the contract. Section 21 of the Mechanics Lien Act permits a subcontractor to abandon its work and enforce its lien when the contractor has defaulted under the subcontract or abandoned the project. See 770 ILCS 60/4, 60/21(d); *B & C Electric, Inc. v. Pullman Bank & Trust Co.,* 96 Ill.App.3d 321, 421 N.E.2d 206, 213, 51 Ill.Dec. 698 (1st Dist. 1981).

III. PRESERVING SUBCONTRACTOR'S LIEN

A. 90-Day Notice

1. [3.11] Serving 90-Day Notice

A subcontractor who has met the four prerequisites detailed in §3.10 above "has 'merely acquired an inchoate right to a lien which must then be perfected in accordance with the requirements prescribed in the [Mechanics Lien] Act.' " *Tefco Construction Co. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714, 829 N.E.2d 860, 864, 293 Ill.Dec. 935 (1st Dist. 2005), quoting *Delaney Electric Co. v. Schiessle,* 235 Ill.App.3d 258, 601 N.E.2d 978, 982, 176 Ill.Dec. 280 (1st Dist. 1992).

Section 24(a) of the Mechanics Lien Act sets forth the steps a subcontractor must undertake to preserve and perfect its lien claim. 770 ILCS 60/24(a). The first step is that within 90 days of the last substantial furnishing of lienable services or materials, the subcontractor shall deliver written notice of his or her claim, including the amount due or to become due, by registered or certified mail, with a return receipt requested and delivery limited to the addressee only, to the owner of record, the owner's agent or architect, or the superintendent in charge of the building and to the lending agency. *Id*.

Compliance with the notice requirement of §24 is critical, as courts have ruled it is a "condition precedent to the cause of action." *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 525, 320 Ill.Dec. 330 (1st Dist. 2008), quoting *Caruso v. Kafka,* 265 Ill.App.3d 310, 638 N.E.2d 663, 665, 202 Ill.Dec. 795 (1st Dist. 1994). Per §24, notice must be given "within 90 days after the completion" of furnishing lienable materials or services. 770 ILCS 60/24(a). However, "completion . . . does not refer to completion of the contract.'" *Cordeck, supra,* 887 N.E.2d at 526, quoting *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 401, 246 Ill.Dec. 866 (1st Dist. 2000). Rather, it refers to the last day on which substantive work was performed under the contract. Generally, "substantive work" excludes punch list work, work to correct defects in the contract work, and warranty work. *Cyclonaire Corp. v. ISG Riverdale, Inc.,* 378 Ill.App.3d 554, 882 N.E.2d 684, 690, 317 Ill.Dec. 804 (1st Dist. 2007), citing *Miller Bros. Industrial Sheet Metal Corp. v. LaSalle National Bank,* 119 Ill.App.2d 23, 255 N.E.2d 755, 759 (2d Dist. 1969). The same is true for "trivial work in the nature of repairs or minor changes [that] will not extend the time for filing a lien; substantial work done at the request or demand of the owner, however, will extend the date of completion." *M. Ecker & Co. v. LaSalle National Bank,* 268 Ill.App.3d 874, 645 N.E.2d 335, 340, 206 Ill.Dec. 330 (1st Dist. 1994).

Section 24 specifically mandates that notice be sent by registered or certified mail, with return receipt requested and delivery limited to the addressee only, to or personally served on the owner of record, his or her agent or architect, or the superintendent having charge of the building or improvement and to the lending agency, if known. 770 ILCS 60/24(a). *See also Cordeck Sales, supra,* 887 N.E.2d at 533. For the purpose of the 90-day notice window, the notice is deemed served at the time of its mailing. 770 ILCS 60/24(a). While the form of service is specified, Illinois courts have occasionally overlooked technical deficiencies in service of a §24 notice when there is no

dispute that the notice was actually received. *See, e.g., A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 627, 167 Ill.Dec. 354 (4th Dist. 1992). However, such decisions are not the norm, and the prudent subcontractor will strictly adhere to the requirements of the Act.

Once a 90-day notice has been served, if payment is not received within 10 days of service, the subcontractor may record a claim for lien. See 770 ILCS 60/28. Bookending the subcontractor's window for recording its lien, the Act requires that the claim for lien be recorded no more than four months after the last day work was performed on or materials were supplied to the project. See 770 ILCS 60/7(a).

2. [3.12] Form of 90-Day Notice

"The plain language of Section 24 [of the Mechanics Lien Act] requires a subcontractor to provide 'written notice of his or her *claim* and the amount due or to become due thereunder.' " [Emphasis added by court.] *Seasons-4, Inc. v. Hertz Corp.,* 338 Ill.App.3d 565, 788 N.E.2d 179, 186, 272 Ill.Dec. 875 (1st Dist. 2003), quoting 770 ILCS 60/24(a). The notice requirement is fundamental to the preservation of a subcontractor's lien rights as it "has been determined to be the very substance upon which a mechanics' lien may be predicated." 788 N.E.2d at 184, quoting *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 400, 246 Ill.Dec. 866 (1st Dist. 2000).

Despite its importance, the statute does not define what is intended by "claim." But courts' decisions have supplied a workable definition. Notice will adequately describe a claim when it contains:

a. the name of the owner of record (*Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 175, 115 Ill.Dec. 647 (1st Dist. 1987). A "beneficiary of a land trust is an 'owner' under the Act." *Matthews Roofing Co. v. Community Bank & Trust Company of Edgewater,* 194 Ill.App.3d 200, 550 N.E.2d 1189, 1192, 141 Ill.Dec. 143 (1st Dist. 1990). A holder of a 99-year lease is deemed an owner under the Mechanics Lien Act. *Matot v. Barnheisel,* 212 Ill.App. 489, 494 (1st Dist. 1918). With limited exceptions, it is necessary to serve all owners in a jointly owned property; thus, a husband and wife with joint ownership must both be named and served on the notice. *Liese v. Hentze,* 326 Ill. 633, 158 N.E. 428 (1927).);

b. the nature of the work to be performed under the contract with the contractor (*Seasons-4, supra,* 788 N.E.2d at 187); and

c. the description of the property subject to the lien. *Id.*

The common practice is to set forth the common address, property index number, and legal description. The common practice is not, however, mandatory. The requirement is that the property be able to be specifically identified. *Id*. Of course, deviation from the common practice, even if not strictly mandatory, brings risk with it. The prudent subcontractor will follow typical local practices.

Further, 770 ILCS 60/24(a) provides a form notice that may be used (note that this form is not mandatory but is suggested by the legislature in the Mechanics Lien Act):

> **To (name of owner): You are hereby notified that I have been employed by (the name of contractor) to (state here what was the contract or what was done, or to be done, or what the claim is for) under his or her contract with you, on your property at (here give substantial description of the property) and that there was due to me, or is to become due (as the case may be) therefor, the sum of $_____.**
>
> **Dated at _____ this _____ day of _____, _____**
>
> **Signature _____**

Note that while the Act itself suggests in its proposed form to name the contractor, this is not mandatory. *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 626, 167 Ill.Dec. 354 (4th Dist. 1992) (holding "section 24 makes no express provision requiring that the name of the contractor with whom the claimant subcontractor dealt be set forth in the notice"). It is a good practice, however, to name the contractor to avoid unnecessary litigation.

3. [3.13] Parties To Be Served with 90-Day Notice

The 90-day notice must be served on the owner of record of the property and any known lenders. See 770 ILCS 60/24(a). If the subcontractor does not serve a known lender with the §24 notice, the lien is unenforceable against the lender. *Parkway Bank & Trust Co. v. Meseljevic,* 406 Ill.App.3d 435, 940 N.E.2d 215, 227, 346 Ill.Dec. 215 (1st Dist. 2010). A known lender is any that is "discoverable by the subcontractor through searching title recording records." *Petroline Co. v. Advanced Environmental Contractors, Inc.,* 305 Ill.App.3d 234, 711 N.E.2d 1146, 1149, 238 Ill.Dec. 485 (1st Dist. 1999), quoting *Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 1069, 76 Ill.Dec. 931 (1st Dist. 1984). Put another way, "a subcontractor has constructive knowledge of a mortgagee whose interest is properly recorded." *Petroline,* 711 N.E.2d at 1149.

4. Method of Service of 90-Day Notice

a. [3.14] In General

"Service of notice under section 24 has been described as a precedent to the creation of a lien under the Act." *Caruso v. Kafka,* 265 Ill.App.3d 310, 638 N.E.2d 663, 665, 202 Ill.Dec. 795 (1st Dist. 1994). The Mechanics Lien Act prescribes two ways that a subcontractor may affect service of the 90-day notice: (1) registered or certified mail, with return receipt requested and delivery limited to the addressee only; and (2) personal service. 770 ILCS 60/24(a).

Courts have been reluctant to accept alternate forms of service, such as facsimile. *Seasons-4, Inc. v. Hertz Corp.,* 338 Ill.App.3d 565, 788 N.E.2d 179, 185, 272 Ill.Dec. 875 (1st Dist. 2003) (holding that "[p]laintiff did not follow the plain language of section 24, and we will not usurp the authority of the legislature by holding that transmission by fax constitutes a valid method of serving

a notice of mechanic's lien under section 24"). E-mail has yet to be considered by a reviewing court. However, the courts have occasionally, in fact-specific instances, accepted imperfect service. In *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 627, 167 Ill.Dec. 354 (4th Dist. 1992), actual service by regular mail was held to satisfy the notice requirement. In *Watson v. Auburn Iron Works, Inc.,* 23 Ill.App.3d 265, 318 N.E.2d 508, 514 (2d Dist. 1974), service by registered mail that was not limited to delivery to the addressee only was sufficient when it was actually delivered to the addressee.

"For purposes of [§24], notice by registered or certified mail is considered served at the time of its mailing." 770 ILCS 60/24(a). Further, "[t]he serving of notice pursuant to [§24(a)] shall not constitute an admission by the lien claimant that its status is that of subcontractor *if* it is later determined that the party with whom the lien claimant contracted was the owner or an agent of the owner." [Emphasis added.] 770 ILCS 60/24(b).

b. [3.15] Joint Ownership

Both or all owners must be served when serving a joint ownership. *Capital Plumbing & Heating Supply Co. v. Snyder,* 2 Ill.App.3d 660, 275 N.E.2d 663, 666 (4th Dist. 1971) (holding that, when serving joint owners, service on one owner is insufficient for service to be deemed affected on other owner). The holding in *Capital Plumbing* applies even when joint owners are a husband and wife. *Throgmorton v. Mosak,* 245 Ill.App. 330, 332 (4th Dist. 1925). However, when the joint owners (even as a husband and wife) have been deemed to undertake a joint venture, service on one may be sufficient for service on the other. Service of notice of lien on one of the two partners or joint venturers, as the case may be, has been held to be notice to both. *Capital Plumbing, supra,* 275 N.E.2d at 667.

5. Exception to Service of 90-Day Notice

a. [3.16] When the Sworn Contractor Statement Is Correct

The legislature carved out an exception to the 90-day notice "when the sworn statement of the contractor or subcontractor [as set forth in 770 ILCS 60/5] shall serve to give the owner notice of the amount due and to whom due." 770 ILCS 60/24(a). "A sub-contractor or material man is not required to give notice where the contractor has, in fact, given notice of the amount due or to become due." *Krack Corp. v. Sky Valley Foods, Inc.,* 133 Ill.App.2d 469, 273 N.E.2d 202, 203 – 204 (1st Dist. 1971). *See Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 1070, 76 Ill.Dec. 931 (1st Dist. 1984) (holding "that a subcontractor need not prove he served the 90-day notice *on the owner* if he proves that the owner had notice of his claim and of the amount due him in the contractor's sworn statement to the owner" [emphasis in original]). *See also Raymond Professional Group, Inc. v. William A. Pope Co. (In re Raymond Professional Group, Inc.),* 408 B.R. 711, 733, *amended & superseded in part,* 410 B.R. 813 (2009), *amended in part,* 2009 WL 3152040 (Bankr. N.D.Ill. Sept. 24, 2009), *aff'd,* 2011 WL 528551 (N.D.Ill. Feb. 8, 2011).

The subcontractor "shall be protected to the extent of the amount named therein." 770 ILCS 60/24(a). In other words, when the contractor has issued a sworn statement to the owner, identifying the subcontractor and the amount it is owed, the subcontractor does not need to issue a 90-day

notice pursuant to §24(a). *Castle Concrete Co. v. Fleetwood Associates, Inc.,* 131 Ill.App.2d 289, 268 N.E.2d 474 (1st Dist. 1971). However, the subcontractor's lien rights will be limited to the amount that was included in the original contractor's sworn statement, even if that amount is less than the amount owed the subcontractor. *Id*. This exception also alleviates the subcontractor's requirement to serve notice on the lender. *Hill Behan Lumber, supra,* 459 N.E.2d at 1070.

b. [3.17] When the Sworn Contractor Statement Is Incorrect

"An owner has the right to rely on a contractor's statements pertaining to subcontractors and the work those subcontractors perform." *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, ¶61, 992 N.E.2d 27, 372 Ill.Dec. 488, *appeal denied,* No. 116438 (Sept. 25, 2013). The purpose of the sworn statement is to protect the owners from potential claims of unknown subcontractors. *Id*. "[A]n owner is required to retain sufficient funds to pay the subcontractor when he 'receives notice of a *subcontractor claim* from a contractor's sworn statement under section 5.' " [Emphasis added by *Gerdau Ameristeel* court.] 2013 IL App (4th) 120547 at ¶60, quoting *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 835, 330 Ill.Dec. 808 (2009). Section 27 of the Mechanic Lien Act addresses this:

> [T]**he owner shall not be held liable to any laborer and sub-contractor or other person whose name is omitted from the statement provided for in Sections 5 and 22 of this Act, nor for any larger amount than the sum therein named as due such person (provided such omission is not made with the knowledge or collusion of the owner), unless previous thereto or to his payment to his contractor, he shall be notified, as herein provided, by such person of their claim and the true amount thereof.** 770 ILCS 60/27.

Thus, when a contractor's §5 notice to the owner fails to identify the subcontractor and the amount due it and/or the subcontractor fails to provide a §5 notice to the owner, the subcontractor shall be paid only the amount due its direct contractor from the owner, after the owner has received notice of the subcontractor's lien claim. *Gerdau Ameristeel, supra,* 2013 IL App (4th) 120547 at ¶63. Such is the case even when the subcontractor has complied with its 90-day notice under §24(a) of the Act, 770 ILCS 60/24(a). *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 749, 297 Ill.Dec. 12 (1st Dist. 2005) (holding that "[m]any cases have found that a secondary subcontractor seeking to enforce his mechanics' lien, even if in compliance with . . . section 24 of the Act, is limited to recovering only that amount which is owed to his immediate contractor at the time the notice of his lien is given").

In *GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App (1st) 133624, 38 N.E.3d 60, 395 Ill.Dec. 183, the appellate court had occasion to consider what was meant by the term "immediate contractor" as used in the preceding paragraph. In *GX Chicago,* certain sub-subcontractors argued that the owner's liability should be limited only by the amount due from the owner to the general contractor. In response, the owner and general contractor argued that the liability to the sub-subcontractors was limited to the amount owed by the general contractor to the sub-subcontractor's immediate contractor. Finding the reasoning in *Bricks, supra,* and *Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, 39 N.E.3d 8, 395 Ill.Dec. 541, to be instructive, the appellate court ruled that the sub-subcontractor's claims were limited to the amounts due to its *immediate* contractor.

c. [3.18] When No Sworn Statement Is Obtained by Owner

Section 32 of the Mechanics Lien Act states, in part: "No payments to the contractor . . . of any money . . . due or to become due to the contractor shall be regarded as rightfully made, as against the sub-contractor . . . if made by the owner without exercising and enforcing the rights and powers conferred upon him in Sections 5, 21 and 22 of this Act." 770 ILCS 60/32.

Under §32, if the owner pays the contractor without requiring a sworn statement of subcontractors' claims, the owner will not be released from any claims by the subcontractors. Thus, in a scenario in which the owner pays the contractor and the contractor fails to pay the subcontractor, the subcontractor, complying with 770 ILCS 60/5(b)(ii), 60/21(c), and 60/24(a), will have a claim against the owner and a right to a mechanics lien. *Stanley J. Gottschalk Construction Co. v. Carlson,* 253 Ill.App. 520 (1st Dist. 1929). The effect of this is that the owner may be forced to pay twice. "Where the owner pays the general contractor without obtaining an affidavit from him listing the subcontractors and amounts due or to be due them . . . those payments are at the owner's risk." *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, ¶37, 992 N.E.2d 27, 372 Ill.Dec. 488, *appeal denied,* No. 116438 (Sept. 25, 2013), quoting *Swansea Concrete Products, Inc. v. Distler,* 126 Ill.App.3d 927, 467 N.E.2d 388, 393, 81 Ill.Dec. 688 (5th Dist. 1984) (citing §§5 and 32 of Mechanics Lien Act, 770 ILCS 60/5 and 60/32). *See Barr & Collins v. Seiden,* 3 Ill.App.2d 115, 120 N.E.2d 380 (1st Dist. 1954).

In *GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App (1st) 133624, 38 N.E.3d 60, 395 Ill.Dec. 183, the appellate court distinguished the cases in which the owner failed to comply with the Act by obtaining a sworn statement pursuant to §5 with those cases in which §5 was complied with. In the event that the owner failed to comply with the Act, the owner's liability was not limited, and the owner was subject to paying twice for the same materials or labor. Similarly, a subcontractor's claim is not limited to the amount owed its immediate contractor if the owner fails to require a §5 sworn statement from the general contractor. *See A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 167 Ill.Dec. 354 (4th Dist. 1992).

B. 60-Day Notice

1. [3.19] Serving 60-Day Notice

In addition to serving a 90-day notice (see 770 ILCS 60/24(a)), the subcontractor must serve a 60-day notice when the work it is performing is for an owner-occupied, single-family residence. 770 ILCS 60/5(b), 60/21(c). Under §5(b)(i) of the Mechanics Lien Act, the contractor is required to notify the owner of each person or entity furnishing labor on the property. In addition, the subcontractor is also required to notify the owner, either personally or via certified mail, within 60 days from the first day it furnished lienable material or services of its agreement to do so. 770 ILCS 60/5(b)(ii).

In certain scenarios, the subcontractor's lien claim will not be invalid if it fails to notify the owner of its performance of lienable work within 60 days of beginning such work. Note that the failure to serve a 90-day notice will invalidate the subcontractor's lien claim. When a subcontractor fails to serve a 60-day notice, its lien claim will remain valid if the owner is not prejudiced by

payments made before receipt of the notice. 770 ILCS 60/5(b)(iii); *Crawford Supply Co. v. Schwartz,* 396 Ill.App.3d 111, 919 N.E.2d 5, 16, 335 Ill.Dec. 484 (1st Dist. 2009). The *Crawford Supply* court noted:

> **Considering that the purpose of the Act is to protect contractors and subcontractors providing labor and materials for the benefit of an owner's property, we cannot find that the legislature intended that a subcontractor's claim for mechanics lien is invalid as a matter of law when a subcontractor fails to provide notice of its agreement to provide materials or services as subcontractor within 60 days of its first furnishing of such materials or services as required by section 5(b)(ii) of the Act.** *Id.*

An owner will be prejudiced if, for example, it has paid the contractor, the contractor fails to pay the subcontractor, and the subcontractor makes a claim against the owner for those funds. Similarly, when the contractor notifies the owner pursuant to §5(b)(i) that the subcontractor will be performing lienable work and of the value of the work to be performed, the subcontractor's lien claim will be preserved to the extent of the value of the work disclosed by the contractor. However, if the owner has not been prejudiced, then the value of the subcontractor's lien claim will not be bound to the §5(b)(i) disclosure made by the contractor.

2. [3.20] Form of 60-Day Notice

The 60-day notice under 770 ILCS 60/5(b) shall include (a) the name and address of the subcontractor; (b) the date he or she started to work or to deliver materials; (c) the type of work done and to be done or the type of labor, services, material, fixtures, apparatus, machinery, forms, or form work delivered and to be delivered; and (d) the name of the contractor requesting the work. In addition, the notice shall contain the following warning:

NOTICE TO OWNER

> **The subcontractor providing this notice has performed work for or delivered material to your home improvement contractor. These services or materials are being used in the improvements to your residence and entitle the subcontractor to file a lien against your residence if the labor, services, material, fixtures, apparatus or machinery, forms or form work are not paid for by your home improvement contractor. A lien waiver will be provided to your contractor when the subcontractor is paid, and you are urged to request this waiver from your contractor when paying for your home improvements.** 770 ILCS 60/5(b)(ii).

C. [3.21] Notice to Persons Not Found in County or Not Residing Therein

> **In all cases where the owner of record, his or her agent, architect, or superintendent or lending agency, if known, cannot, upon reasonable diligence, be found in the county in which said improvement is made, or shall not reside therein, the sub-contractor . . . may give notice to such persons who cannot be found by filing within 90 days after the completion of his or her contract with the contractor [**a mechanics lien claim that is verified by the affidavit of the subcontractor**], which shall consist of a brief statement**

of his or her contract or demand, and the balance due after allowing all credits, and a sufficient correct description of the lot, lots or tract of land to identify the same. 770 ILCS 60/25(a).

The practitioner should be mindful of the law regarding what is deemed sufficient diligence. A subcontractor's search was not deemed reasonably diligent when it looked at the abstract books in the recorder's office but failed to look at the grantor-grantee index at the recorder's office. *Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 176, 115 Ill.Dec. 647 (1st Dist. 1987). Evidence disclosing that an employee of a subcontractor only called twice on the same day for the purpose of serving the owner with notice of claim, that the owner was performing her household duties during the time for service of notice, and that she was often outside in her yard where service could easily have been obtained did not establish reasonable diligence in the endeavor to secure personal service on the owner. *Western Plumbing Supply Co. v. Horn,* 269 Ill.App. 612, 613 (1st Dist. 1933).

D. [3.22] Time of Service of Notice

Section 24(a) of the Mechanics Lien Act requires notice of the claimant's mechanics lien claim within 90 days after completion of its work to be enforceable. 770 ILCS 60/24(a). *See Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 525, 320 Ill.Dec. 330 (1st Dist. 2008). "The term 'completion' as used in the Act 'does not refer to completion of the contract. It means completion of the work for which a contractor seeks to enforce his lien.' " 887 N.E.2d at 526, quoting *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 401, 246 Ill.Dec. 866 (1st Dist. 2000).

Under Illinois law, "[w]ork that is trivial and insubstantial, and not 'essential to the completion of the contract' does not extend the time to file a lien under the Mechanics Lien Act." *Braun-Skiba, Ltd. v. LaSalle National Bank,* 279 Ill.App.3d 912, 665 N.E.2d 485, 491, 216 Ill.Dec. 425 (1st Dist. 1996), quoting *Miller Bros. Industrial Sheet Metal Corp. v. LaSalle National Bank,* 119 Ill.App.2d 23, 255 N.E.2d 755, 758 (2d Dist. 1969).

"Various factors are cited by the courts in determining whether work is trivial. Singular among them is whether the work is needed to complete the contract." *Merchants Environmental Industries, supra,* 731 N.E.2d at 402. *See Capital Plumbing & Heating Supply Co. v. Snyder,* 2 Ill.App.3d 660, 275 N.E.2d 663, 667 (4th Dist. 1971) (finding that installation and painting of ornamental railing was not trivial because "it was done to complete the work so that the bill could be submitted to the general contractor"); *De Anguera v. Arreguin,* 92 Ill.App.2d 381, 234 N.E.2d 808, 810 (2d Dist. 1968) ("question is whether the work done by the plaintiff was trivial and inconsequential in character or was essential to the completion of the contract"). *Cf. Miller Bros. Industrial Sheet Metal, supra,* 255 N.E.2d at 759 (maintenance and corrective work needed to complete job, as opposed to work required to be performed under contract, will not extend time in which to file lien claim).

In assessing whether work is trivial, the courts also look to whether the work was done at the request of the owner. *See Alexander Hendry Co. v. Mooar,* 242 Ill.App. 516, 520 (1st Dist. 1926) (contractor's work was found to be trivial and inconsequential when it adjusted door and fixed lock because work was not requested by owner "as extra or additional work on the original contract"

but rather as "new and separate repair work"). "Part of the rationale underlying this request-of-owner factor appears to be that a contractor not be allowed to do work on his own initiative purely in order to revive a lien claim that was lost because of failure to comply with timeliness requirements." *Merchants Environmental Industries, supra,* 731 N.E.2d at 402. *See Alexander Hendry, supra,* 242 Ill.App. at 520 (work performed several months after project was substantially complete was found to be trivial and "unwarranted attempt to revive a lien"); *Schaller-Hoerr Co. v. Gentile,* 153 Ill.App. 458, 461 (1st Dist. 1910) (finding that when owner did not have knowledge or grant contractor permission to install wire window guard, it was attempt "to enforce a lien" and ineffective to revive lien). The courts also consider whether the work performed was substantial. *DuPage Bank & Trust Co. v. DuPage Bank & Trust Co.,* 122 Ill.App.3d 1015, 462 N.E.2d 25, 29, 78 Ill.Dec. 309 (2d Dist. 1984). "As already indicated, work that is in the nature of maintenance or correction of a completed job, or that is repair work, will not extend the time to file a mechanic's lien." *Merchants Environmental Industries, supra,* 731 N.E.2d at 402.

E. [3.23] Recording the Subcontractor's Claim for Lien — Time for Filing

To properly perfect a lien claim against an owner or a third party, a mechanics lien claimant must comply with the prerequisites of §7 of the Mechanics Lien Act, 770 ILCS 60/7. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 500, 320 Ill.Dec. 330 (1st Dist. 2008). "Section 7 requires a lien claimant seeking to assert a lien claim against a third party such as a 'creditor or incumbrancer or purchaser' to file a claim within four months of its completion date that contains 'a brief statement of the [claimant's] contract.' " *Id.,* quoting 770 ILCS 60/7(a). The "four-month timing requirement is to ensure that 'third persons dealing with the property may have notice of the existence, nature and character of the lien as well as the times when the material was furnished and labor performed, and thus be enabled to learn from the claim itself whether it was such and can be enforced.' " 887 N.E.2d at 532, quoting *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 409, 246 Ill.Dec. 866 (1st Dist. 2000).

Section 28 of the Act provides, in pertinent part:

> **If any money due to the laborers, materialmen, or sub-contractors be not paid within 10 days after his notice is served as provided in sections 5, 24, and 25, then such person may file a claim for lien or file a complaint and enforce such lien within the same limits as to time and in such other manner as hereinbefore provided for the contractor in section 7 and sections 9 to 20 inclusive, of this Act, or he may sue the owner and contractor jointly for the amount due in the circuit court, and a personal judgment may be rendered therein, as in other cases.** 770 ILCS 60/28.

See also Cordeck Sales, supra, 887 N.E.2d at 527 – 528.

The lien claim must contain a brief statement of the claimant's contract, the balance due after allowing all credits, and a sufficient, correct description of the lot, lots, or tract of land to identify the same. 770 ILCS 60/7. A lien claim that contains an incorrect description of the contract for which the lien is asserted is invalid. *Cordeck Sales, supra,* 887 N.E.2d at 501. However, the Act provides that a mechanics lien claim will not be defeated by the proper amount thereof because of an error or overcharging on the part of a person claiming a lien unless it shall be shown that such

an error was made with the intent to defraud. *Id*. When a lien claimant knowingly records a lien that contains a substantial overcharge, its claim will be defeated on the basis of constructive fraud. *Id*.

Even though §7 of the Act does not expressly require a lien claimant to provide a completion date in its recorded lien claim, the First District has held that the requirement must be inferred, reasoning that, without a completion date, a person examining the lien claim would not know whether the four-month filing requirement has been met. *Cordeck Sales, supra,* 887 N.E.2d at 532.

The lien claim must be recorded in the office of the recorder in the county in which the building, erection, or other improvement to be charged with the lien is situated.

A lien claim for materials will not be defeated because of lack of proof that the materials, after delivery, actually entered into the construction of the building or improvement, unless it is shown that the material was actually not used in the building or improvement. 770 ILCS 60/7. Proof of delivery of materials by the lien claimant to the owner or his or her agent or at the place of construction of the building or improvement constitutes prima facie evidence. *Moser Lumber, Inc. v. Morgan,* 106 Ill.App.2d 339, 245 N.E.2d 310, 312 (2d Dist. 1969). However, the owner may rebut by competent evidence the fact that the materials were delivered for use in the construction of the building or improvement. *Id*. As a rule, a lien claimant may not assert a lien for undelivered materials, and a party errs in asserting a lien for such material. *Cordeck Sales, supra,* 887 N.E.2d at 533.

The subcontractor should file its complaint to enforce the lien within two years of completion of its work. 770 ILCS 60/9, 60/28; *Builders Supply & Lumber Co. v. Calto,* 320 Ill.App. 1, 49 N.E.2d 876, 880 (1st Dist. 1943).

IV. SUBCONTRACTOR REMEDIES

A. [3.24] Subcontractor Remedies Are Cumulative

A subcontractor's mechanics lien, just like that of an original contractor, is dependent on a contract. Section 1(a) of the Mechanics Lien Act, 770 ILCS 60/1(a), provides that any person who furnishes labor or materials pursuant to "any contract" has a lien. The contract can be express (*i.e.,* in writing or oral) or implied. Accordingly, a subcontractor has not only the remedy of a mechanics lien as provided for by the Act but also a common-law remedy for breach of contract if not paid. A subcontractor's remedies are cumulative and can be asserted concurrently if so desired. As held in *M. Pugh Co. v. Wallace,* 198 Ill. 422, 64 N.E. 1005 (1902), a subcontractor's right to a lien is not dependent on the right of the original contractor to maintain its lien claim. Every claimant's lien is separate and distinct and will rise or fall on its own merits. The Illinois Supreme Court also commented in *M. Pugh* that a subcontractor's mechanics lien is a cumulative remedy, and if it is denied, it does not deprive the subcontractor of the right to recover under its contract. *See also H.G. Wolff Co. v. Gwynne,* 246 Ill.App. 86 (1st Dist. 1927); *Rockwood Sprinkler Co. v. Phillips Co.,* 265 Ill.App. 267 (1st Dist. 1932). However, it should be noted that today many general contractors' form subcontracts have a "pay-if-paid" provision, which makes a subcontractor's right to recover under the subcontract contingent on the owner paying the general contractor. In Illinois, this

contract limitation is enforceable if the contract language clearly provides that payment from the owner is a condition precedent to the contractor's obligation to pay the subcontractor. *See A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.,* 132 Ill.App.3d 325, 477 N.E.2d 30, 87 Ill.Dec. 429 (1st Dist. 1985). If, however, the contract provision merely ties the timing of payment to the subcontractor to the timing of the owner's payment to the contractor, often referred to as a "pay-when-paid" provision, it is not a defense to paying the subcontractor. *Beal Bank Nevada v. Northshore Center THC, LLC,* 2016 IL App (1st) 151697, ¶28, 64 N.E.3d 201, 407 Ill.Dec. 823. In any event, pursuant to §21(e) of the Act, 770 ILCS 60/21(e), neither a pay-when-paid nor a pay-if-paid contract provision in a subcontract will preclude a subcontractor from enforcing a mechanics lien, even if it would be prevented from recovering under a contract theory. In most situations, a subcontractor will bring a lawsuit that asserts both a mechanics lien foreclosure action and an action for breach of contract. Joinder of claims is allowed pursuant to §2-614 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq*.

B. [3.25] Unjust Enrichment

As stated in §3.24 above, a mechanics lien is dependent on a contract. Therefore, a subcontractor cannot recover under an unjust enrichment theory and a lien because recovery for unjust enrichment is precluded if a contract exists. *People ex rel. Hartigan v. E & E Hauling, Inc.,* 153 Ill.2d 473, 607 N.E.2d 165, 180 Ill.Dec. 271 (1992). *See also Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 211 Ill.Dec. 682 (1st Dist. 1995).

C. [3.26] Subcontractor's Lien Foreclosure Action

Section 28 of the Mechanics Lien Act, 770 ILCS 60/28, provides the procedure for a subcontractor to enforce its mechanics lien. Once the requisite 90-day notice is served (see 770 ILCS 60/24(a)), if payment is not made within 10 days, the subcontractor can proceed to file a claim for lien or institute a lawsuit to enforce its lien. 770 ILCS 60/28. In most cases, a subcontractor will record its lien and then bring a lawsuit to enforce its claim. Pursuant to §28, a subcontractor's lawsuit to enforce its lien is governed by the same provisions of the Act that apply to an original contractor's lien foreclosure suit. Sections 7 and 9 – 20 of the Act, 770 ILCS 60/7 and 60/9 – 60/20, govern.

Section 11 of the Act, 770 ILCS 60/11, sets forth the allegations necessary for a properly pleaded mechanics lien foreclosure action and should be consulted before the lawsuit is filed. This section of the Act also sets forth who are necessary parties to a mechanics lien foreclosure action. The general contractor to whom the subcontractor furnished labor and materials is a necessary party to a subcontractor's foreclosure lawsuit. If you are a material supplier, you must name not only the subcontractor to whom you supplied the material but also the general contractor on the project. *Capitol Plumbing & Heating Supply, Inc. v. Van's Plumbing & Heating,* 58 Ill.App.3d 173, 373 N.E.2d 1089, 15 Ill.Dec. 617 (4th Dist. 1978). However, if the general contractor has filed for bankruptcy, then the automatic stay in bankruptcy (11 U.S.C. §362(a)(1)) precludes naming the general contractor. In such situations, the time period for bringing the action is extended until the automatic stay is lifted or a discharge is obtained. The same is true for responding to a 770 ILCS 60/34 notice served by the owner to commence the foreclosure lawsuit. *See Chicago Whirly, Inc. v. Amp Rite Electric Co.,* 304 Ill.App.3d 641, 710 N.E.2d 45, 237 Ill.Dec. 622 (1st Dist. 1999). The same is true if the general contractor files for bankruptcy after the lawsuit is filed. In such situations,

the proceedings must be stayed until such time as the automatic stay is lifted. *See Concrete Products, Inc. v. Centex Homes,* 308 Ill.App.3d 957, 721 N.E.2d 802, 242 Ill.Dec. 523 (2d Dist. 1999). In addition, §11 also provides that "all persons who have asserted or may assert liens against the premises . . . and any other person against whose interest in the premises the claimant asserts a claim" have to be added to the lawsuit as necessary parties. 770 ILCS 60/11(b). This will require a search of the public records to determine if any mortgages exist, and, if so, the lender has to be made a party to the lawsuit. In addition, if there are tenants on the property, they should be added as parties to the foreclosure action.

The ultimate conclusion of a mechanics lien foreclosure lawsuit is the entry of an order of foreclosure and sale. If there are multiple claimants, then the provisions of §27 of the Act have to be followed. It must be determined what moneys remain in the possession of the owner, and this fund, as stated in §27, is used to pay the "claims of tradesmen, materialmen and sub-contractors, who are entitled to liens pro rata, in proportion to the amount due them respectively." 770 ILCS 60/27. Any funds that the owner wrongly paid to the general contractor are not credited for the owner's benefit. It is the owner's burden to show that payments made to the general contractor were rightfully made. This is not a subcontractor's obligation. *Nielsen v. Enchius,* 212 Ill.App. 409 (1st Dist. 1918).

If the owner asserts a §21 defense of not being made to pay a sum greater than the contract price in the original contract, then it is incumbent to determine if the contract price is unreasonably low or if payments were made in violation of the rights of subcontractors. See 770 ILCS 60/21. In *Edward Hines Lumber Co. v. Dell Corp.,* 49 Ill.App.3d 873, 364 N.E.2d 368, 7 Ill.Dec. 207 (1st Dist. 1977), an owner's §21 defense was unsuccessful because it was found that a builder's fee was unreasonably low and payments were made to the general contractor and other subcontractors after notice of the claimant's liens was received and the owner failed to withhold sufficient sums to pay these claims. In such situations, the difference between a reasonable contract price and the price set in the contract will be added to the funds available to pay liens, and the payments made after notice is received will not inure to the owner's benefit.

The decision in *Edward Hines Lumber* should also be consulted on the issue of when a final waiver form will not be construed as being a final waiver. If an ambiguity exists as to the intention of the parties, it is possible that what appears to be a final waiver will not be construed as such. The Illinois appellate court stated:

> **It has been held that in cases of ambiguity the doubt should be resolved against the waiver, since it should be presumed, in the absence of clear evidence to the contrary, that one has not disabled himself from the use of so valuable a privilege as that given by statute for the enforcement of builder's rights in the circumstances involved.** 364 N.E.2d at 376, quoting *Burgoyne v. Pyle,* 261 Ill.App. 356, 369 (1st Dist. 1931).

A mechanics lien foreclosure lawsuit has to be instituted within two years after the last date worked or the last date of delivery of materials. 770 ILCS 60/9. Failure to timely institute the lawsuit is fatal to the claim for lien. As held in *Well Done Heating & Sheet Metal Co. v. Ralph Schwartz & Associates,* 112 Ill.App.3d 438, 445 N.E.2d 451, 68 Ill.Dec. 3 (1st Dist. 1983), the filing of an answer to another claimant's lawsuit is not sufficient to preserve a lien claim. Pursuant to §9 of the

Act, a lawsuit must be filed or a counterclaim asserted to enforce a lien claim. However, in *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 176 Ill.2d 385, 680 N.E.2d 283, 288, 223 Ill.Dec. 550 (1997), the Illinois Supreme Court found that an answer that included the assertion of a lien claim and a request for affirmative relief was "the functional equivalent of a counterclaim." These types of pleading issues should be avoided, and the lien claim should be asserted by a lawsuit or counterclaim.

If another lien claimant has instituted a mechanics lien foreclosure lawsuit, it is incumbent on other lien claimants to intervene in those proceedings or run the risk of being foreclosed out. Section 9 of the Act specifically provides that "all lien claimants not made parties thereto may upon filing a petition to intervene become defendants and enforce their liens by counterclaim against all the parties to the suit." 770 ILCS 60/9. The petition to intervene should be filed pursuant to §2-408(a) of the Code of Civil Procedure, 735 ILCS 5/2-408(a), which provides that intervention shall be allowed as of right "when a statute confers an unconditional right to intervene" or "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant may be bound by . . . [a] judgment in the action." A subcontractor having a perfected lien claim satisfies these requirements.

It is good practice to provide, in the order granting the petition to intervene, that, pursuant to §9 of the Mechanics Lien Act, the various mechanics lien claimants need not answer each other's pleadings as no formal issue need be joined. In *Wasilevich Construction Co. v. LaSalle National Bank,* 222 Ill.App.3d 927, 584 N.E.2d 499, 165 Ill.Dec. 320 (1st Dist. 1991), it was held that the two-year limitations requirement was satisfied even though the hearing on a petition to intervene took place beyond two years. The petition to intervene and the counterclaim were filed within two years, and this was deemed sufficient. Pursuant to §9 of the Act, the claimant became a defendant upon the filing of the petition to intervene. However, *Wasilevich* was distinguished by the First District in *Bank of New York v. Jurado,* 2012 IL App (1st) 112116, ¶22, 977 N.E.2d 1202, 365 Ill.Dec. 103, which held that a counterclaim to foreclose a lien was untimely when it was filed more than two years after the last work was performed even though it was attached to a motion to vacate a default order that was filed within two years.

A recurring statement made in Illinois Supreme Court and appellate court decisions is that, to succeed on a lien claim, the claimant must show that the labor provided or the materials furnished made an improvement to the property or added value to the property. A typical statement is as follows by the Illinois appellate court in *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 1060, 160 Ill.Dec. 101 (1st Dist. 1991):

> **The focus of the inquiry to determine whether a mechanic's lien should be granted is whether the work performed has enhanced the value of the land to be charged with the lien. *D.M. Foley v. N.W. Fed. S & L Assn.* (1984), 122 Ill.App.3d 411, 77 Ill.Dec. 877, 461 N.E.2d 500.**

However, this is not true when the claimant is an architect or an engineer.

Architects can be subcontractors depending on with whom they contract. It is common in the industry for an architect who is hired by the owner to contract with an engineer for specific services, so many times engineers are subcontractors. It is not unusual for an architect or an engineer to

provide his or her services and then the project is halted or abandoned and the proposed improvement not built. Many times it is argued that, because there was no improvement to the property or no value added, the architect or the engineer has no lien. A strong argument in opposition can be made.

Section 1 of the Act, 770 ILCS 60/1, states that an architect, a structural engineer, or a professional engineer (*i.e.,* a civil engineer) who performs any services or incurs any expense in, for, or on a lot or tract of land for the purpose of improving the lot or tract of land is entitled to a mechanics lien for the amount due plus interest. There is no requirement in §1 that the services of an architect or an engineer improve or add value to the property. It is not the province of the courts to add requirements for obtaining a lien. As stated in *Wingler v. Niblack,* 58 Ill.App.3d 287, 374 N.E.2d 252, 253, 15 Ill.Dec. 817 (4th Dist. 1978): "Indeed, any deviation from this principle by the courts in expanding or contracting the literal provisions of the law places the courts in the position of impermissibly exercising a legislative function." In addition, once a lien claimant has complied with the statutory requirements of the Act, the court must give the statute a liberal construction to carry out its remedial purpose. *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983).

Nothing in §1 of the Act, which grants by very specific language a mechanics lien to architects and engineers, requires that, before they can have a lien, their services be for a physical improvement to the real estate. The Act states explicitly that an architect or an engineer has a lien if he or she provides any services or incurs any expense in rendering services for "improving" a lot or tract of land. 770 ILCS 60/1(a). By their very nature, architectural and engineering plans and studies do not constitute a physical improvement to the real estate for which they are provided. The Act recognizes this and states explicitly that all that is required for an architect or an engineer to have a lien is that he or she provide services or incur expenses for improving the real estate. To require that the services provided add value or improve the property will mean, in most situations, that an architect or an engineer will be precluded from asserting a mechanics lien claim. As a practical matter, most architect or engineer lien claims arise when a proposed development does not proceed. The language of §1 of the Act takes this into account and explicitly provides that all that is required is that the services be rendered for improving the property and not that an actual physical improvement be made.

D. [3.27] Section 28 Joint Action Against Owner and Contractor

If for some reason a subcontractor does not wish to pursue a mechanics lien foreclosure lawsuit, §28 of the Mechanics Lien Act, 770 ILCS 60/28, provides for an additional remedy of a joint action against the owner and the contractor for the amount owed. Section 28 specifically sets forth the requirements for such actions. A §28 joint action is an action for money damages. *D.E. Wright Electric, Inc. v. Henry Ross Construction Co.,* 183 Ill.App.3d 46, 538 N.E.2d 1182, 131 Ill.Dec. 626 (5th Dist. 1989). This type of action must be brought against the owner and the contractor jointly, and a personal judgment may be rendered against both. Accordingly, jurisdiction over the owner and the contractor must be obtained. A §28 action can be maintained against the owner only when the right to a lien is established. All judgments in which the lien is established shall be entered against both the owner and the contractor jointly. If the lien is defeated, a money judgment may still be obtained against the contractor. The owner can be held liable only to the extent that he or

she is liable under his or her contract. Accordingly, the subcontractor must show the pro rata amount to which he or she is entitled, and the same rules apply regarding wrongful or proper payments as to subcontractors. In *D.E. Wright Electric,* it was held that, if a settlement is obtained with the owner, the lawsuit may proceed, but it is no longer considered a §28 action. In *Garbe Iron Works, Inc. v. Priester,* 99 Ill.2d 84, 457 N.E.2d 422, 426, 75 Ill.Dec. 428 (1983), the Illinois Supreme Court held that because a §28 joint action is not an action to enforce a mechanics lien, it is not governed by the two-year limitations period provided for in 770 ILCS 60/9 to bring a lien foreclosure lawsuit but is governed by the five-year statute of limitations provided for at 735 ILCS 5/13-205. When a joint action is brought against the owner and the contractor pursuant to §28, all of the prerequisites of a lien need to be proven to prevail against the owner, and the judgment against the owner needs to recite the date the lien attached. However, as held in *Voightmann & Co. v. Cross-Conklin Co.,* 183 Ill.App. 312 (1st Dist. 1913), when no lien is proven against the owner, the subcontractor may still prevail as against the contractor. If you intend to hold the owner liable under a joint action, you need to plead a §28 action, not a foreclosure action, and prove all of the elements required by §28 of the Act. *Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 160 Ill.Dec. 101 (1st Dist. 1991).

E. [3.28] Subcontractor's Excuse of Performance

Section 21 of the Mechanics Lien Act, 770 ILCS 60/21, is the section that provides for a subcontractor's lien and states that a person who furnishes labor or materials for the contractor is a subcontractor. What happens if materials are manufactured for a job but the project is abandoned and the materials are not delivered? Section 21(d) of the Act provides for such situations and states, in pertinent part, as follows:

> **In case of default or abandonment by the contractor, the sub-contractor or party furnishing material, shall have and may enforce his lien to the same extent and in the same manner that the contractor may under conditions that arise as provided for in Section 4 of this Act, and shall have and may exercise the same rights as are therein provided for the contractor.** 770 ILCS 60/21(d).

Section 4 of the Act provides that, when a job is abandoned, "the contractor shall be entitled to enforce his lien for the value of what has been done, and the court shall adjust his claim and allow him a lien accordingly." 770 ILCS 60/4.

There is no requirement under §§21 and 4 of the Act that, when a job is abandoned, a subcontractor must complete its contract, *i.e.,* deliver and install the material. This is logical because, in such situations, it is likely that the subcontractor is not going to be paid, and to require completion of the contract when a job has been abandoned would be contrary to a claimant's obligation to mitigate its damages.

In *Luczak Bros. v. Generes,* 116 Ill.App.3d 286, 451 N.E.2d 1267, 1279 – 1280, 71 Ill.Dec. 900 (1st Dist. 1983), the appellate court noted that a contractor or a subcontractor who claims a lien must show material performance of the contract or an excuse for nonperformance. The appellate court also noted that, if an excuse for performance is shown, such as breach of contract or abandonment, then the claimant is entitled to cease performance of the work and enforce a lien for

the value of the work performed. In *Kupferschmid, Inc. v. Rodeghero,* 139 Ill.App.3d 975, 488 N.E.2d 305, 94 Ill.Dec. 479 (3d Dist. 1986), the mechanics lien claimant delivered the materials that were to be used in building a barn. After there was a fire at the property and the materials were exposed to the elements, the claimant removed the materials and resold them in their damaged condition. The claimant brought an action to foreclose a mechanics lien for the loss sustained. In reversing the trial court's decision to deny the claimant a mechanics lien, the appellate court stated:

> **If the items furnished by the claimant are characterized as "material", it is not necessary to prove that the items were actually incorporated into the project under construction in order to have a valid claim for lien against the real estate.** 488 N.E.2d at 306.

When a job is abandoned, a strong argument can be made that, under the provisions of the Mechanics Lien Act and the decisions of the Illinois appellate courts, a subcontractor does not have to complete its work (deliver and incorporate the materials into the job) to enforce its lien claim. A subcontractor in this type of situation should argue that it has a lien for the value of its work and is entitled to pursue its mechanics lien remedy.

F. [3.29] Miscellaneous Remedies

There are two sections of the Mechanics Lien Act that provide for criminal penalties in certain situations. These remedies are of little practical value because experience has shown that most state's attorneys are reluctant to prosecute for their violation.

Section 21.01 provides that if a contractor, with intent to defraud, obtains a waiver from a subcontractor for the purpose of obtaining payment and upon the representation that the contractor will make payment to the subcontractor from the funds received, but then willfully does not make payment within 30 days of receiving payment, the contractor is guilty of a Class A misdemeanor. 770 ILCS 60/21.01. It should be noted that this section provides that if the contractor is a corporation, then the penalty applies to any officer or employee who is guilty of the act.

Section 36 deals with materials that are purchased for a particular job. If an owner, a contractor, or a subcontractor purchases material on credit and represents at the time of purchase that they are to be used for a particular building or other improvement but then uses them somewhere else, or otherwise disposes of them without the written consent of the supplier and with the intent to defraud, such a person is guilty of a Class A misdemeanor. 770 ILCS 60/36.

It should be noted that, under both sections, intent to defraud would have to be proven. Intent to defraud is an easier allegation to make than to prove and is subject to numerous defenses.

4 Sub-Subcontractor's Lien: Requisites for and Perfection Of

DENNIS J. POWERS
DLA Piper LLP (US)
Chicago

I. DEFINITION OF THE "SUB-SUBCONTRACTOR" AND ITS RIGHTS

A. [4.1] Authority for the Sub-Subcontractor's Lien Rights

Sub-subcontractors are those contractors or material suppliers to which a portion of the work has been delegated by the subcontractor under its contract with the prime contractor. Caselaw in Illinois typically refers to sub-subcontractors as second- or third-tier subcontractors or secondary subcontractors. *Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 211 Ill.Dec. 682 (1st Dist. 1995). Although the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* does not use the term "sub-subcontractor," §22 of the Act, 770 ILCS 60/22, expressly confers mechanics lien rights on the sub-subcontractor by providing that the entity that performs labor for or furnishes material to the subcontractor shall have such rights.

Because §22 of the Mechanics Lien Act uses the terms "contractor" and "sub-contractor," the Act's definition of these terms is important. The term "contractor" is defined in §1 of the Act, 770 ILCS 60/1, as any person that is in privity of contract, express or implied, with the owner or one whom the owner has authorized or knowingly permitted to contract to improve the property or to manage a structure under construction. The term "improve" is defined to mean the furnishing of labor, services, material, fixtures, apparatuses, machinery, forms, or form work to the property and lists the type of work that constitutes an improvement for the Act. *Id*. Thus, a contractor is the entity that contracts directly with the owner, usually the general or prime contractor.

A subcontractor, under the Mechanics Lien Act, is any entity that furnishes materials for the improvement of property or performs services for the contractor. Section 21(a) of the Act states, in part:

> **Subject to the provisions of Section 5, every mechanic, worker or other person who shall furnish any labor, services, material, fixtures, apparatus or machinery, forms or form work for the contractor, or shall furnish any material to be employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed form or form work where concrete, cement or like material is used in whole or in part, shall be known under this Act as a sub-contractor, and shall have a lien for the value thereof with interest on such amount from the date the same is due, from the same time, on the same property as provided for the contractor.** 770 ILCS 60/21(a).

The sub-subcontractor's right to a mechanics lien is conferred by §22, which states, in part:

> **When the contractor shall sub-let his contract or a specific portion thereof to a sub-contractor, the party furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work for such sub-contractor shall have a lien therefor; and may enforce his lien in the same manner as is herein provided for the enforcement of liens by sub-contractors.** 770 ILCS 60/22.

Accordingly, the sub-subcontractor enforces its mechanics lien rights in the same manner as a subcontractor.

The §1 requirement that a contract exists for the purpose of improving the property is equally applicable to a sub-subcontractor's lien claim. The sub-subcontractor must demonstrate the existence of a contract between the owner and the contractor. *Douglas Lumber Co. v. Chicago Home for Incurables,* 380 Ill. 87, 43 N.E.2d 535 (1942); *L.J. Keefe Co. v. Chicago & Northwestern Transportation Co.,* 287 Ill.App.3d 119, 678 N.E.2d 41, 222 Ill.Dec. 634 (1st Dist. 1997); *B & C Electric, Inc. v. Pullman Bank & Trust Co.,* 96 Ill.App.3d 321, 421 N.E.2d 206, 51 Ill.Dec. 698 (1st Dist. 1981). Absent an enforceable contract, the lien is unenforceable. *Pascal P. Paddock, Inc. v. Glennon,* 32 Ill.2d 51, 203 N.E.2d 421 (1964). *See also G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.,* 355 Ill.App.3d 428, 822 N.E.2d 905, 291 Ill.Dec. 30 (3d Dist. 2005); *Mirar Development, Inc. v. Kroner,* 308 Ill.App.3d 483, 720 N.E.2d 270, 241 Ill.Dec. 815 (3d Dist. 1999). Moreover, the sub-subcontractor must demonstrate the existence of a contract between the subcontractor and the sub-subcontractor. The sub-subcontractor must contractually obligate itself to perform a portion of the work that the subcontractor contracted to perform. *Onsite Engineering & Management, Inc. v. Illinois Tool Works, Inc.,* 319 Ill.App.3d 362, 744 N.E.2d 928, 253 Ill.Dec. 195 (1st Dist. 2001); *Midwest Generation EME LLC v. Estes Group, Inc. (In re Estes Group, Inc.),* 299 B.R. 502 (Bankr. N.D.Ill. 2003).

An issue that often arises is to what extent a subcontractor on a tier below the sub-subcontractor is entitled to lien rights. Although some states grant lien rights to "any person," which has been construed to include entities no matter how far down the contractual chain, §22, on its face, does not expressly extend lien rights to entities lower than sub-subcontractor. However, §21 has been interpreted to provide lien rights to a material supplier, no matter how far removed.

In *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 167 Ill.Dec. 354 (4th Dist. 1992), the Fourth District held that a material supplier to a sub-subcontractor had lien rights. The court also stated that lien rights would probably extend to a material supplier further down the contractual chain. Unfortunately, the court did not reach the issue of whether a lower-tiered entity furnishing services or labor had lien rights. A literal reading of *A.Y. McDonald* seems to indicate that such an entity may not have lien rights. The court pointed out that §21 of the Mechanics Lien Act "provides for three distinct categories of potential lien claimants, each of whom is designated a 'sub-contractor': (1) persons furnishing material or machinery, (2) persons furnishing services or labor for the contractor, and (3) suppliers of materials used in concrete form work." 587 N.E.2d at 628. However, P.A. 94-627 (eff. Jan. 1, 2006) reworked this language, and §21 now provides that entities furnishing labor, services, material, fixtures, apparatuses, machinery, forms, or form work for the contractor are subcontractors and shall have lien rights. Because "contractor" is defined in §1 of the Act as any person in contractual privity with the owner, §21 seems to extend lien rights only to subcontractors. Of course, §22 expressly confers lien rights on the sub-subcontractor, whether a material supplier or an entity performing services or labor.

B. [4.2] Extent of the Sub-Subcontractor's Lien

An issue in lien litigation that often arises when the subcontractor defaults or files bankruptcy, leaving its sub-subcontractor unpaid, is whether the sub-subcontractor's lien rights are limited to the amount due its immediate contractor or subcontractor. In public projects, if the sub-subcontractor is entitled to a lien on funds pursuant to §23 of the Mechanics Lien Act, 770 ILCS 60/23, the answer is yes. *Koenig v. McCarthy Const. Co.,* 344 Ill.App. 93, 100 N.E.2d 338 (2d Dist.

1951). In *Koenig,* the court held that sub-subcontractors "are limited, in the assertion of liens, to the amount due their immediate contractors at the time notice of their liens is given." 100 N.E.2d at 343. However, the same may not always hold true for private projects. Courts have held that a sub-subcontractor's lien is not limited to the amount due its immediate contractor at the time the notice of claim for lien is given if the owner has not adhered to the requirements of the Act. *Struebing Construction Co. v. Golub-Lake Shore Place Corp.,* 281 Ill.App.3d 689, 666 N.E.2d 846, 217 Ill.Dec. 177 (1st Dist. 1996); *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 167 Ill.Dec. 354 (4th Dist. 1992).

It is important to note that, in both *Struebing* and *A.Y. McDonald,* the courts found that the sub-subcontractor's lien was not limited to the amount due to its immediate contractor because the owner had made payments in violation of the Mechanics Lien Act. In *Struebing,* the owner continued to make payments to the general contractor after receiving notice of the sub-subcontractor's lien claim. In *A.Y. McDonald,* the owner made payments to the general contractor in violation of §5 of the Act, 770 ILCS 60/5, by failing to require from the general contractor a sworn statement identifying parties that furnished materials and labor prior to making payments. *See also Brady Brick & Supply Co. v. Lotito,* 43 Ill.App.3d 69, 356 N.E.2d 1126, 1 Ill.Dec. 844 (2d Dist. 1976). The rulings in these cases are consistent with the Act's stated purpose to protect owners as long as they follow the requirements of the Act. The authority for this protection is §27, which provides, in part:

> **[T]he owner shall not be held liable to any laborer and sub-contractor or other person whose name is omitted from the statement provided for in Sections 5 and 22 of this Act, nor for any larger amount than the sum therein named as due such person (provided such omission is not made with the knowledge or collusion of the owner), unless previous thereto or to his payment to his contractor, he shall be notified, as herein provided, by such person of their claim and the true amount thereof.** 770 ILCS 60/27.

Further, §21(d) sets forth what is commonly referred to as the contract price defense, which essentially states that in no case shall the owner be compelled to pay a greater sum than the price set forth in its agreement with the contractor unless payment has been made to the contractor in violation of the Mechanics Lien Act. 770 ILCS 60/21(d).

In *Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 1070, 211 Ill.Dec. 682 (1st Dist. 1995), the First District came to a different conclusion than the courts in *Struebing, supra,* and *A.Y. McDonald, supra,* holding: "A secondary subcontractor, such as Season, is limited in the assertion of liens to the amounts due its immediate contractor at the time the notice of lien is given." The holding in *Season Comfort* was followed in *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005), in which the supplier to a subcontractor timely served its 90-day notice of claim for lien. However, sworn statements were submitted to the owner that did not disclose the supplier, and the owner made payments to the subcontractor in reliance on the sworn statements. By the time the supplier served its notice of claim for lien, all but $10,000 of the amount due to the supplier's immediate contractor had been paid by the owner. The court held that the supplier's mechanics lien claim was limited to the $10,000 due to its immediate contractor at the time the supplier's notice of claim for lien was served. *Season Comfort* and *Bricks* can be reconciled with *Struebing* and *A.Y. McDonald* as there

was no evidence in *Season Comfort* and *Bricks* that the owners had made any payments to the contractors in violation of the Act. As a result, the owners were entitled to the protection of the Act, and it was the sub-subcontractors that lost, even though they had complied with the requirements of the Act by timely sending notice of its lien notices.

Season Comfort and *Bricks* were supported by the holding in *GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App. (1st) 133624, 38 N.E.3d 60, 395 Ill.Dec. 183. There, the court expressly found that §30's phrase "the amount due from the owner to the contractor" (770 ILCS 60/30) refers to the amount owed to the claimants' *immediate* contractor, when the liens at issue are asserted by sub-subcontractors that lacked privity with either the owner or the owner's general contractor. 2015 IL App (1st) 133624 at ¶58. This further supports the theory that a sub-subcontractor's lien rights are limited to the amounts due to its immediate upstream contractor. *GX Chicago* also relied on §27, which provides that, "although an owner notified of a subcontractor's lien must retain funds sufficient to pay that lien, 'the owner shall not be held liable to any laborer and sub-contractor or other person whose name is omitted from the statement provided for in Sections 5 and 22 of this Act, *nor for any larger amount than the sum therein named as due such person.*' " [Emphasis added by *GX Chicago* court.] 2015 IL App (1st) 133624 at ¶59, quoting 770 ILCS 60/27. "These provisions illustrate the legislative intent that, when the owner has otherwise complied with the Act, the 'balance should be struck in favor of the owner.' " 2015 IL App (1st) 133624 at ¶59, quoting *Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, ¶18, 39 N.E.3d 8, 395 Ill.Dec. 541. Moreover, in *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, 992 N.E.2d 27, 372 Ill.Dec. 488, the court unequivocally stated that subcontractors are limited to the unpaid amount due to their immediate contractor as of the date they served notice of their liens.

If an owner complies with §5 of the Mechanics Lien Act by obtaining the proper sworn statements, by making payments in conformance with those sworn statements, and by retaining sufficient funds from the contractor to pay any amounts due to a subcontractor or sub-subcontractor after receiving notice of a claim for lien in compliance with §§24 and 27, the owner is protected:

> **The Act seeks to balance the rights of owners, contractors, and subcontractors; and thus, one purpose of a section 5 sworn statement is to protect owners from claims by unknown subcontractors. . . . Consistent with that purpose, the balance should be struck in favor of the owner when the owner properly relies on a section 5 sworn statement from a general contractor that a subcontractor has been paid and a lower-tier contractor is not listed, even if the lower-tier contractor later complies with the Act's requirements.** *Doors Acquisition, supra,* 2013 IL App (2d) 120052 at ¶18.

See also GX Chicago, supra, in which the court ruled that if an owner acts in good faith and in compliance with the Act, the balance is struck in favor of the owner so as not to hold the owner liable for amounts beyond what was contractually owed to the lienholder's immediate contractor. Even if a sub-subcontractor serves its notice of claim for lien in compliance with the Act, as in *Season Comfort, supra,* and *Bricks, supra,* the sub-subcontractor will have no lien rights if the owner has already made a payment in reliance on a §5 sworn statement that fails to disclose that sub-subcontractor. The sub-subcontractor loses when both it and the owner follow the Act's requirements. *Season Comfort, supra; Bricks, supra; Sanaghan v. Lawndale National Bank,* 90 Ill.App.2d 254, 232 N.E.2d 546 (1st Dist. 1967); *Alliance Steel, Inc. v. Piercy,* 277 Ill.App.3d 632, 660 N.E.2d 1341, 214 Ill.Dec. 392 (4th Dist. 1996); *Contractors' Ready-Mix, Inc. v. Earl Given*

Construction Co., 242 Ill.App.3d 448, 611 N.E.2d 529, 183 Ill.Dec. 266 (4th Dist.), *appeal denied,* 152 Ill.2d 556 (1993); *Swansea Concrete Products, Inc. v. Distler,* 126 Ill.App.3d 927, 467 N.E.2d 388, 81 Ill.Dec. 688 (5th Dist. 1984). Although the holding in *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 330 Ill.Dec. 808 (2009), has provided an element of protection for subcontractors by requiring that the owner retain sufficient funds to pay the subcontractors identified in the general contractor's §5 affidavit, it has not necessarily enhanced a sub-subcontractor's position because sub-subcontractors often are not identified in the general contractor's §5 affidavit provided to the owner. *See Doors Acquisition, supra,* 2013 IL App (2d) 120052 at ¶18.

The only way for a sub-subcontractor to avoid this situation is to serve a notice of claim for lien on the owner well in advance of the 90 days, perhaps immediately upon supplying the material or performing the services. See 770 ILCS 60/24(a). Section 24 of the Mechanics Lien Act permits service of the notice at any time after entering into a contract. The notice requires the owner to withhold the amount due the sub-subcontractor. If the owner pays the contractor without withholding the amount due the sub-subcontractor, the sub-subcontractor's lien rights are preserved.

Since the sub-subcontractor's lien is treated the same as the subcontractor's claim, under the relation-back doctrine, the sub-subcontractor's lien is considered to have attached as of the date of the contract between the contractor and the owner. *Petroline Co. v. Advanced Environmental Contractors, Inc.,* 305 Ill.App.3d 234, 711 N.E.2d 1146, 238 Ill.Dec. 485 (1st Dist. 1999).

Moreover, the construction trust fund protection included in the Mechanics Lien Act affords protection to sub-subcontractors. Section 21.02(a) requires a subcontractor to hold in trust moneys that it receives as a result of a waiver of lien that it receives from a sub-subcontractor. Funds subject to a lien waiver are also required to be held by the owner in trust for the subcontractor. *Weather-Tite, supra,* 909 N.E.2d at 835. Section 21.02(a) states:

> **Any owner, contractor, subcontractor, or supplier of any tier who requests or requires the execution and delivery of a waiver of mechanics lien by any person who furnishes labor, services, material, fixtures, apparatus or machinery, forms or form work for the improvement of a lot or a tract of land in exchange for payment or the promise of payment, shall hold in trust the sums received by such person as the result of the waiver of mechanics lien, as trustee for the person who furnished the labor, services, material, fixtures, apparatus or machinery, forms or form work or the person otherwise entitled to payment in exchange for such waiver.** 770 ILCS 60/21.02(a).

Section 1(d) of the Act declares against public policy and unenforceable an agreement to subordinate a lien when the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, whether express or implied, but a contractor or subcontractor can agree to subordinate a mechanics lien to a mortgage lien that secures a construction loan if that agreement is made after more than 50 percent of the loan has been disbursed to fund improvements to the property. Thus, a sub-subcontractor can agree to subordinate its lien rights to a mortgage only after more than 50 percent of the loan proceeds have been disbursed. Moreover, an agreement to waive lien rights in anticipation of and in consideration for entering into a contract is unenforceable. 770

ILCS 60/1(d). The prohibition on an advance waiver includes a contractual requirement that the sub-subcontractor provide lien waivers notwithstanding the sub-subcontractor's failure to receive payment. *Brown & Kerr, Inc. v. American Stores Properties, Inc.,* 306 Ill.App.3d 1023, 715 N.E.2d 804, 812, 240 Ill.Dec. 117 (1st Dist. 1999) (ruling based on former §1.1 of Act).

II. PERFECTING THE SUB-SUBCONTRACTOR'S LIEN RIGHTS

A. 90-Day Notice of Claim for Lien

1. [4.3] In General

It is important to keep in mind that because a mechanics lien is a statutory creation and in derogation of common law, its technical and procedural requirements are strictly construed. *Seasons-4, Inc. v. Hertz Corp.,* 338 Ill.App.3d 565, 788 N.E.2d 179, 272 Ill.Dec. 875 (1st Dist. 2003); *Wells Fargo Bank, N.A. v. Netemeyer,* 2016 IL App (5th) 150077-U; *Premier Electrical Construction Co. v. American National Bank of Chicago,* 276 Ill.App.3d 816, 658 N.E.2d 877, 213 Ill.Dec. 128 (1st Dist. 1995); *Tefco Construction Co. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714, 829 N.E.2d 860, 293 Ill.Dec. 935 (1st Dist. 2005). A mechanics lien is valid only if each of the lien requirements is scrupulously observed. *Teerling Landscaping, Inc. v. Chicago Title & Trust Co.,* 271 Ill.App.3d 858, 649 N.E.2d 538, 208 Ill.Dec. 482 (2d Dist. 1995).

Section 22 of the Mechanics Lien Act, 770 ILCS 60/22, serves as the authority for the sub-subcontractor's lien rights, providing that the sub-subcontractor shall perfect its rights in the same manner as the subcontractor. Accordingly, the same requirements set forth in the Act for the subcontractor must be followed by the sub-subcontractor to perfect its lien rights. Section 24 sets forth the requirement that the subcontractor may at any time after making its contract, and shall within 90 days after the completion thereof, send a written notice of its claim. 770 ILCS 60/24. The 90-day notice of claim for lien must be served within 90 days after completion of the sub-subcontractor's work to be enforceable. 770 ILCS 60/24(a). The 90-day notice of claim requirement is substantive and not merely a limitation on the remedy. *Cyclonaire Corp. v. ISG Riverdale, Inc.,* 378 Ill.App.3d 554, 882 N.E.2d 684, 317 Ill.Dec. 804 (1st Dist. 2007). Subsequent maintenance or correction of the completed work does not extend the notice period, nor does providing warranty services. *Id.; Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000). Work that is trivial and insubstantial and not essential to the completion of the contract does not extend the time to file a lien under the Act. *Braun-Skiba, Ltd. v. LaSalle National Bank,* 279 Ill.App.3d 912, 665 N.E.2d 485, 491, 216 Ill.Dec. 425 (1st Dist. 1996).

This notice of claim for lien must be sent to the owner of record or the owner's agent and, if known, to the lending agency by registered or certified mail, with return receipt requested and delivery limited to the addressee only, or it can be personally served. Failure to serve the §24 notice of claim on the owner as required by the Mechanics Lien Act will render it unenforceable, as service of the §24 notice is a condition precedent to the creation of a lien. *Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 76 Ill.Dec. 931 (1st Dist. 1984); *Rothers Construction, Inc. v. Centurion Industries, Inc.,* 337 Ill.App.3d 629, 786 N.E.2d 644, 272 Ill.Dec. 105 (4th Dist. 2003); *Gary L. Brown Painting & Decorating, Ltd. v. David E.*

Comeau, Ltd., 159 Ill.App.3d 746, 512 N.E.2d 795, 111 Ill.Dec. 406 (2d Dist. 1987). No lien attaches when the owner does not receive timely written notice as required by the Act. In fact, the owner's actual notice of the claim by some means other than that required by §24 does not create a lien, nor is the owner's actual knowledge that a subcontractor or sub-subcontractor is performing work sufficient. *Gary L. Brown, supra; Braun-Skiba, Ltd., supra; Salce, Inc. v. Downers Grove, IL (1149 Ogden), LLC,* 2019 IL App (2d) 180370-U. Service by facsimile, even if actually received by the owner, does not constitute adequate service under the Act. *Seasons-4, supra.* Nor does a "mailgram." *Three Way Drywall, Inc. v. Spoons Restaurant, Inc.,* No. 85 C 9664, 1987 WL 8158, *2 (N.D.Ill. Mar. 13, 1987). But in *National City Mortgage v. Hillside Lumber, Inc.,* 2012 IL App (2d) 101292, 966 N.E.2d 1076, 359 Ill.Dec. 388, in granting a lender's motion for summary judgment based on its claim that it did not receive a supplier's §24 notice of claim for lien, the court stated that once the lender asserted that it did not receive notice, the supplier had a duty to establish that the lender *received* notice.

The Act does provide a procedure for service if none of the entities designated for service of the notice is a resident of the county where the construction is located or when, upon reasonable diligence, none of the entities can be found therein. Section 25 of the Act, 770 ILCS 60/25, permits a subcontractor to give notice to the owner in such a situation by recording a claim for lien in the recorder's office. *See Rothers, supra.* Indeed, in *Rothers,* the court suggested that the better practice to avoid issues as to whether §25 governs is to use both §§24 and 25. 786 N.E.2d at 650.

Although the 90-day notice of claim for lien is not required to be verified by the Mechanics Lien Act, §25(a) requires that a 90-day notice recorded in this manner be verified by affidavit. Section 25(b) provides that the recording of the 90-day notice of claim for lien shall be deemed the claim for lien required by §7 of the Act. Thus, if the 90-day notice is recorded because the owner cannot be located, a subcontractor need not record another claim for lien within four months if the recorded notice meets the requirements of the §7 claim for lien. See 770 ILCS 60/7.

A lender is required to be served with the §24 notice of claim for lien "if known." 770 ILCS 60/24. The phrase "if known" is deemed to mean if discoverable by searching title records. A party is held to have constructive knowledge of a lender/mortgagee whose interest is properly recorded. *Petroline Co. v. Advanced Environmental Contractors, Inc.,* 305 Ill.App.3d 234, 711 N.E.2d 1146, 238 Ill.Dec. 485 (1st Dist. 1999). Failure to send the §24 notice of claim for lien to the lender will not affect the enforceability of the lien against the owner. It will make the lien unenforceable only as to the lender and thus will give the lender's mortgage complete priority over the sub-subcontractor's lien claim. *Id.*

Section 24 of the Mechanics Lien Act excuses the notice of claim for lien if the §5 sworn statement provided by the contractor or subcontractor gives the owner notice of the amount due the sub-subcontractor. See 770 ILCS 60/5. However, the sub-subcontractor's lien is limited to the amount set forth in the sworn statement as due or to become due to the sub-subcontractor. It is risky for a sub-subcontractor to rely on the sworn statement to protect its lien rights because it is unlikely that a sub-subcontractor will be identified in a sworn statement submitted to the owner, and if the sub-subcontractor is identified, the odds are poor that the amount set forth as due the sub-subcontractor will be correct. In *Weydert Homes, Inc. v. Kammes,* 395 Ill.App.3d 512, 917 N.E.2d 64, 334 Ill.Dec. 467 (2d Dist. 2009), the court held that the contractor could not recover on its mechanics lien claim because it did not comply with §5 of the Act by providing a sworn statement

that was under oath or accompanied by an affidavit. An argument could be made by the owner that if the sworn statement is defective, then any subcontractor or sub-subcontractor who relied on the sworn statement in lieu of a 90-day notice would not have an effective lien.

2. [4.4] Form

TO: [name and address of owner**]**
[name and address of lending agency, if known**]**

You are hereby notified that [name and address of sub-subcontractor**] has been engaged and employed by [**name and address of subcontractor**], a subcontractor performing work on your property pursuant to a contract with [**name and address of general contractor**], contractor, to [**describe nature of the work performed and to be performed or materials supplied and to be supplied**] under its contract with you, on your property at [**address, legal description, and, if possible, permanent identification number**], and that there was or is to become due the undersigned the sum of $_____.**

DATED at [city**], [**state**], this _____ day of _____, 20__.**

[name of sub-subcontractor**]**

By: _____
[Name**]**

Its: _____
[Title**]**

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

[Name of individual certifying mailing or personal service**], being first duly sworn on oath, deposes and says that on [**date noticed was served**], [**he**] [**she**] served this notice by [**sending a duplicate original thereof to (names and addresses of all addressees) by (registered) (certified) mail with return receipt requested and delivery limited to addressee only**] [**personally serving a duplicate original thereof on (name of individual on whom notice was served) at (location where individual was served)**].**

[signature and name of individual either mailing or serving the notice**]**

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

My commission expires [date**].**

B. 60-Day Notice for Owner-Occupied, Single-Family Residence

1. [4.5] In General

Sections 5 and 21 of the Mechanics Lien Act, 770 ILCS 60/5 and 60/21, require that the subcontractor furnishing materials or labor for an existing owner-occupied, single-family residence notify the occupant that it is supplying materials or labor. This notice must be served personally or by certified mail, with return receipt requested, within 60 days from the first furnishing of materials or labor. 770 ILCS 60/5(b), 60/21(c). Notice by certified mail is considered served at the time of its mailing. Section 5 of the Act requires that the 60-day notice be in at least ten-point, boldfaced type. Note that the operative start date for the 60 days is the first furnishing of materials or labor, not completion. This requirement is in addition to the 90-day notice of claim for lien required by §24, 770 ILCS 60/24. *Gary L. Brown Painting & Decorating, Ltd. v. David E. Comeau, Ltd.,* 159 Ill.App.3d 746, 512 N.E.2d 795, 111 Ill.Dec. 406 (2d Dist. 1987). However, in certain situations, failure to serve the 60-day notice will not be fatal to a sub-subcontractor's lien claim if the sub-subcontractor also serves a 90-day notice of claim. In *Crawford Supply Co. v. Schwartz,* 396 Ill.App.3d 111, 919 N.E.2d 5, 335 Ill.Dec. 484 (1st Dist. 2009), the subcontractor that performed work on an owner-occupied, single-family home failed to serve the 60-day notice but timely served the 90-day notice of claim for lien. The owner had not paid the general contractor for the subcontractor's work at the time the subcontractor served its 90-day notice of claim for lien, and enforcement of the subcontractor's lien claim would not have required the owner to pay twice for that work. The court held that, in this situation, failure to serve the 60-day notice would not render the lien invalid as there was no prejudice to the owner. Section 5 permits the 60-day notice to be sent after 60 days, but in that event the sub-subcontractor's lien rights exist only to the extent that the owner is not prejudiced by payments it made prior to receipt of the notice. Although the 90-day notice of claim for lien requirement may be satisfied by the §5 sworn statement, the 60-day notice is probably not.

2. [4.6] Form

TO: **[**name and address of owner-occupant**]**

You are hereby notified that [name and address of sub-subcontractor**] has been engaged and employed by [**name and address of subcontractor**], a subcontractor performing work on your property pursuant to a contract with [**name and address of general contractor**], contractor, on [**date of sub-subcontractor's contract**], to [**describe nature of the work performed and to be performed or materials supplied and to be supplied**] and did accordingly on [**date of first work or first delivery of materials by sub-subcontractor**], [**start the delivery of said materials and supplies**] [**start the labor and services**] and will continue [**to deliver said materials or supplies**] [**to perform services**] all for your premises, owned and occupied by you at [**address and, if possible, legal description and permanent identification number**], and that the total contract price for said materials and supplies is $_____. The undersigned claims a lien therefor against the above-described property, against your interest therein, and against any money due from you to said contractor.**

DATED at [city**], [**state**], this _____ day of _____, 20__.**

[name of sub-subcontractor**]**

By: _____
[Name**]**

Its: _____
[Title**]**

NOTICE TO OWNER

The subcontractor providing this notice has performed work for or delivered material to your home improvement contractor. These services or materials are being used in the improvements to your residence and entitle the subcontractor to file a lien against your residence if the labor, services, material, fixtures, apparatuses or machinery, and forms or form work are not paid for by your home improvement contractor. A lien waiver will be provided to your contractor when the subcontractor is paid, and you are urged to request this waiver from your contractor when paying for your home improvements.

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

[Name of individual certifying mailing or personal service**], being first duly sworn on oath, deposes and says that on [**date that notice was served**], [**he**] [**she**] served this notice by [**sending an original thereof to (names and addresses of addressees) by (registered) (certified) mail, return receipt requested and delivery limited to addressee only**] [**personally serving a duplicate original thereof on (name of individual on whom notice was served) at (location where individual was served)**].**

[signature and name of individual either mailing or serving the notice**]**

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

My commission expires [date**].**

C. Four-Month Recording Requirement

1. [4.7] In General

Section 7 of the Mechanics Lien Act, 770 ILCS 60/7, sets forth the mechanics lien recording requirements. To enforce a lien against, or to the prejudice of, any other creditor or purchaser, the

sub-subcontractor's mechanics lien claim must be recorded within four months of completion of its work or final delivery of materials. *Id*. The four-month recording requirement is intended to give third parties dealing with the property notice of the lien. *Stafford-Smith, Inc. v. Intercontinental River East, LLC,* 378 Ill.App.3d 236, 881 N.E.2d 534, 317 Ill.Dec. 366 (1st Dist. 2007). As to the owner, the claim for lien may be recorded from any time after the contract is made to two years after completion of the contract or the furnishing of the material, as the need for notice is less significant when a contractor seeks to enforce a lien against a party with an ownership interest in the property. *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 176 Ill.2d 385, 680 N.E.2d 283, 286, 223 Ill.Dec. 550 (1997). Because of the different time periods set forth in the Act, it is possible that a lien claim may be invalid against a third party but enforceable against an original owner.

Although the more advisable practice is to set forth in the lien claim all parties in the contractual chain, a sub-subcontractor's lien claim that failed to identify the subcontractor with whom the sub-subcontractor had contracted was enforced in *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.,* 225 Ill.App.3d 851, 587 N.E.2d 623, 167 Ill.Dec. 354 (4th Dist. 1992). But in *Bale v. Barnhart,* 343 Ill.App.3d 708, 798 N.E.2d 750, 754 – 755, 278 Ill.Dec. 366 (4th Dist. 2003), the court held that a subcontractor's failure to accurately describe the parties to the contract did not satisfy the §7 requirement for a "brief statement of the contract" and decided that the lien claim was defective. See 770 ILCS 60/7(a). However, in *Peter J. Hartmann Co. v. Capitol Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004), the court held that a misdescription of the parties' contract date by 13 days in the lien claim was not a failure to accurately identify the contract, and in *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, 20 N.E.3d 104, 386 Ill.Dec. 243, the court held that the incorrect date of completion of the work in the lien claim did not invalidate the lien claim.

A failure to accurately identify the property will also invalidate the lien claim. *Ehlers Construction, Inc. v. Timbers of Shorewood, L.P.,* No. 03 C 6966, 2004 WL 816748 (N.D.Ill. Mar. 11, 2004) (cons.). However, in *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 539, 334 Ill.Dec. 710 (1st Dist. 2009), the court, quoting 770 ILCS 60/7(a), held that a mechanics lien claim that fails to identify condominium units, even when the condominium declaration containing unit numbers and ownership percentages has been recorded, is "a sufficiently correct description of the lot, lots or tracts of land to identify the same" under §7 of the Act. Nor will a claimant's failure to provide a detailed description of its work in its pleadings invalidate the lien claim. *PNC Bank, National Ass'n v. 35th & Morgan,* No. 11 C 9255, 2012 WL 6605010 (N.D.Ill. Dec. 18, 2012).

Although §7 of the Mechanics Lien Act does not expressly require that the lien claimant specify the date of completion of work, the courts have imposed such a requirement. In *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000), the court invalidated a subcontractor's lien claim as against a third party because it failed to identify the completion date of the work. The court reasoned that the purpose of the §7 four-month recording requirement is to enable third parties to determine whether there is a lien claim on the property and that third parties should be able to determine from the lien claim itself whether it is enforceable. Without a completion date, the third party cannot determine whether the lien claim was timely filed and, thus, enforceable against that third party. In *Father & Sons Home Improvement II, Inc. v. Stuart,* 2016 IL App (1st) 143666, 52 N.E.3d 581, 402 Ill.Dec. 660, the court held that an incorrect completion date that the claimant knew to be false

was a reason (among others) to invalidate a lien claim. In *North Shore Community Bank & Trust, supra,* the court held that an incorrect completion date did not invalidate the lien claims because the lien claims were valid on their face with the correct dates or the incorrect dates. Either date would have communicated to a third party that the lien was timely filed and enforceable. In *National City Mortgage v. Bergman,* 405 Ill.App.3d 102, 939 N.E.2d 1, 345 Ill.Dec. 272 (2d Dist. 2010), the Second District declined to follow the First District's ruling in *Merchants, supra,* holding that failure to include a completion date was not a basis to invalidate a mechanics lien claim. The Second District relied on *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454(1983), in which the Illinois Supreme Court held that only the Act's statutory requirements need be included in a lien claim. *North Shore Community Bank & Trust, supra,* has been relied on to support the validity of lien claims that may contain minor errors by quoting the language that the description of the contract need not be "absolutely correct and perfect." *Otto Baum Co. v. Sud Family Limited Partnership,* 2016 IL App (3d) 140821-U, ¶43, quoting 2014 IL App (1st) 123784 at ¶141.

The §7 claim for lien must be verified by affidavit of the claimant or an agent or employee. Failure to verify a claim for lien under penalty of perjury is sufficient to invalidate the lien claim. *Tefco Construction Co. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714, 829 N.E.2d 860, 293 Ill.Dec. 935 (1st Dist. 2005). *See also Vancil Contracting, Inc. v. Tres Amigos Properties, LLC (In re Vancil Contracting, Inc.),* 381 B.R. 243 (Bankr. C.D.Ill. 2008) (mere notarization of lien claim is insufficient).

2. [4.8] Form

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The claimant, [name and address of sub-subcontractor**], hereby files a claim for lien against [**name and address of subcontractor**], [**name and address of general contractor**], and [**name of owner**] (Owner), of [**city, county, and state of owner**], and any persons claiming to be interested in the real estate described herein, and states:**

1. That on [date of general contractor's contract with owner**], Owner owned the following described land in the County of _____, State of Illinois, to wit: [**legal description of property and permanent identification number**], commonly known as [**common address**], and [**name of general contractor**] was Owner's contractor for the improvement thereof.**

2. That on [date that subcontractor made contract with contractor**], [**name of contractor**] made a contract with [**name of subcontractor**], and on [**date that sub-subcontractor made contract with subcontractor**], said subcontractor made a contract with the claimant to [**description of what sub-subcontractor was to do**] for the improvement of the above-described property for the sum of $_____.**

3. That at the special instance and request of the subcontractor, the claimant furnished extra and additional materials and additional labor on said premises with a value of $_____, and the claimant completed all that was required by said contract and requests for extras on [date of completion**].**

4. That the subcontractor is entitled to credits in the amount of $_____, leaving due, unpaid, and owing to the claimant, after allowing all credits, the sum of $_____, for which, with interest, the claimant claims a lien on said land and improvements and on the money or other consideration due or to become due from Owner against all persons interested.

DATED at [city**], [**state**], this _____ day of _____, 20__.**

[name of sub-subcontractor]

By: _____
[name]

Its: _____
[title]

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The affiant, [name or person with knowledge of claim amount**], being first duly sworn on oath, deposes and says under penalty of perjury, that [**he**] [**she**] is [**title of affiant**] of the claimant, that [**he**] [**she**] has read the foregoing claim for lien and knows the contents thereof, and that all statements therein are true and correct.**

_____
[name]
[title]

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
Notary Public

My commission expires [date**].**

[Note that the Cook County Clerk's Office requires that all documents to be recorded have a 3″ × 5″ space in the upper right-hand corner of the document.]

D. [4.9] Sworn Statements

The Mechanics Lien Act expressly provides for the sub-subcontractor to be identified in a sworn statement provided by the subcontractor. Section 22 of the Act provides, in part:

> **Any sub-contractor shall, as often as requested in writing by the owner, or contractor, or the agent of either, make out and give to such owner, contractor or agent, a**

> **statement of the persons furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work, giving their names and how much, if anything, is due or to become due to each of them, and which statement shall be made under oath if required.** 770 ILCS 60/22.

If the subcontractor provides such a sworn statement to the owner properly identifying the sub-subcontractor and the amount due the sub-subcontractor, the sub-subcontractor need not send the 90-day notice required by §24(a), 770 ILCS 60/24(a).

Additionally, §5(a) of the Mechanics Lien Act, 770 ILCS 60/5(a), states that merchants and dealers in materials shall not be required to make §5 sworn statements. However, the §22 requirement that the subcontractor submit a sworn statement upon the request of the owner or contractor makes no such distinction between a material supplier and a subcontractor. These two sections can be reconciled if the §5 exclusion for merchants and dealers is limited to those in privity with the owner, while §22 relates solely to subcontractors. *Gilbert v. Croshaw,* 178 Ill.App. 10 (1st Dist. 1913).

A sworn statement that is not accompanied by an affidavit or is not under oath does not satisfy the §5 requirement that a contractor, if requested by the owner, supply a sworn statement to the owner. Supplying a sworn statement that is not verified or under oath will preclude the contractor from recovering on its mechanics lien claim. *Weydert Homes, Inc. v. Kammes,* 395 Ill.App.3d 512, 917 N.E.2d 64, 334 Ill.Dec. 467 (2d Dist. 2009). Thus, if a sub-subcontractor is relying on the subcontractor's or contractor's sworn statement in lieu of serving its 90-day notice of claim for lien, the sub-subcontractor's lien claim may be unenforceable if the sworn statement is found to be invalid due to a failure to verify the sworn statement.

III. PROBLEMS UNIQUE TO THE SUB-SUBCONTRACTOR

A. [4.10] Information for the Lien Claim

Section 22 of the Mechanics Lien Act, 770 ILCS 60/22, requires the sub-subcontractor to enforce its lien in the same manner as the subcontractor. The §24 notice of claim for lien must be sent to the owner of record and to any lending agencies that have recorded a mortgage against the property. See 770 ILCS 60/24. Since sub-subcontractors are often material suppliers that are both physically and contractually removed from a construction project, a common problem is the correct identification of the property, the owner of record, and the lending agency, all of which are required for the 90-day notice of claim for lien. *Id*.

The form notice of claim for lien set forth in §24 requests a "substantial description of the property." 770 ILCS 60/24(a). Although perhaps not required, practitioners often use a legal description, a property index number (PIN), and a common address. Certainly, a legal description is required for the lien claim that is recorded with the county recorder's office (or the County Clerk's Office in Cook County). A failure to adequately describe the property or a misdescription of the property will render the lien unenforceable. *Steinberg v. Chicago Title & Trust Co.,* 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 (1st Dist. 1986); *Ehlers Construction, Inc. v. Timbers of Shorewood, L.P.,* No. 03 C 6966, 2004 WL 816748 (N.D.Ill. Mar. 11, 2004) (cons.).

Liening a condominium project can be a tricky process. One of the more difficult issues is whether a lien claimant needs to identify each condominium unit and allocate the lien amount among the units. However, in *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 334 Ill.Dec. 710 (1st Dist. 2009), the court held, in that situation, that it was not necessary to identify individual condominium units and unit ownership percentages in the mechanics lien claim, even if the condominium declaration containing unit numbers and ownership percentages had been recorded as of the filing of the lien claim.

The easiest way to obtain the legal description, PIN number, owner of record, and lending agency for a notice of claim for lien is to provide the common address of the property (or the PIN number, if known) to a title company that can perform a tract search or produce minutes of foreclosure with this information. It should be kept in mind that errors in information not required by the Mechanics Lien Act will not invalidate the lien. *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990). Additionally, failure to serve the §24 notice of claim for lien on the lender is not fatal to the lien as against the owner. Failure to serve the lender will invalidate the lien only as to the lender and put the lender in a position ahead of the sub-subcontractor. *Petroline Co. v. Advanced Environmental Contractors, Inc.,* 305 Ill.App.3d 234, 711 N.E.2d 1146, 238 Ill.Dec. 485 (1st Dist. 1999).

B. [4.11] Apportionment and Delivery

If the sub-subcontractor is a material supplier that is contractually and physically removed from a construction project and delivers material to be incorporated into a project that may consist of several different pieces of property with different legal descriptions or delivers its materials to an off-site location, the sub-subcontractor is presented with unique problems.

The material need not be physically delivered to the subject property for a material supplier to be entitled to lien rights. Section 7 of the Mechanics Lien Act, 770 ILCS 60/7, grants lien rights whether the material is delivered to the building into which it is going to be incorporated or to the owner. Thus, delivery of materials to an off-site storage location maintained by the owner should be adequate to confer lien rights. Section 7 provides, in part:

> [N]**or shall any such lien for material be defeated because of lack of proof that the material after the delivery thereof, actually entered into the construction of such building or improvement, although it be shown that such material was not actually used in the construction of such building or improvement; provided, that it is shown that such material was delivered either to the owner or his or her agent for that building or improvement, to be used in that building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction or for the purpose of being employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed forms or form work where concrete, cement or like material is used, in whole or in part.** 770 ILCS 60/7(a).

Proof of delivery of materials to the owner or to the site constitutes prima facie evidence that the materials were used in the construction of the building. The supplier need not prove that the materials were incorporated into the building but need demonstrate only that the material was

delivered for the purpose of being used in the construction. *Moser Lumber, Inc. v. Morgan,* 106 Ill.App.2d 339, 245 N.E.2d 310 (2d Dist. 1969); *Hinkle v. Creek,* 113 Ill.App.2d 454, 251 N.E.2d 111 (4th Dist. 1969). However, a supplier of "fixtures, apparatus or machinery" is not entitled to the same presumption. *Kupferschmid, Inc. v. Rodeghero,* 139 Ill.App.3d 975, 488 N.E.2d 305, 306 – 307, 94 Ill.Dec. 479 (3d Dist. 1986), quoting Ill.Rev.Stat. (1983), c. 82, ¶1. For such items, the claimant must establish that they are so attached to the building or the improvement as to become part of the real estate. *R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co.,* 236 Ill. 452, 86 N.E. 248 (1908). The hauling of debris from a construction site and the hauling of sand and stone to the site are lienable activities. *Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 269 Ill.Dec. 556 (1st Dist. 2002).

If the material delivered by a sub-subcontractor has been incorporated into several parcels, it is permissible for a sub-subcontractor to record a blanket lien. A blanket lien is a lien that attaches to each of the several parcels even though the sub-subcontractor's material may have been incorporated into less than all of the parcels. Section 7 of the Mechanics Lien Act provides, in part:

> **In case of the construction of a number of buildings under contract between the same parties, it shall be sufficient in order to establish such lien for material, if it be shown that such material was in good faith delivered at one of these buildings for the purpose of being used in the construction of any one or all of such buildings, or delivered to the owner or his or her agent for such buildings, to be used therein; and such lien for such material shall attach to all of said buildings, together with the land upon which the same are being constructed, the same as in a single building or improvement. In the event the contract relates to 2 or more buildings on 2 or more lots or tracts of land, then all of these buildings and lots or tracts of land may be included in one statement of claims for a lien.** 770 ILCS 60/7(b).

Although §7 permits a claimant to lump together materials supplied or work performed on several parcels under a single contract into a single lien claim, this provision cannot be used to extend the four-month period for recording a mechanics lien claim. See 770 ILCS 60/7(a). If such a multi-parcel lien claim is recorded, it must be recorded within four months of the completion of the earliest work performed or the first materials supplied. *Barker-Lubin Co. v. Unknown Heirs or Devisees of Barker,* 106 Ill.App.3d 89, 435 N.E.2d 493, 61 Ill.Dec. 796 (4th Dist. 1982); *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291 (1911). If the work has been completed or the materials have been furnished on one or more of those parcels more than four months before the claimant is to record its lien, then separate liens apportioning the amounts among the parcels that are still within the four-month limitations period must be recorded. If no such apportionment is possible, then the entire lien will fail. *First Federal Savings & Loan Association of Chicago v. Connelly,* 97 Ill.2d 242, 454 N.E.2d 314, 73 Ill.Dec. 454 (1983).

Certainly, when work is performed on or materials are supplied to multiple parcels, a mechanics lien claim should not be recorded on each parcel for the full amount of the work. The court in *Lohmann Golf Designs, Inc. v. Keisler,* 260 Ill.App.3d 886, 632 N.E.2d 121, 198 Ill.Dec. 62 (1st Dist. 1994), held that the recording of a mechanics lien against each of three properties, with each lien alleging the full sum owed, constituted constructive fraud pursuant to §7 and warranted the invalidation of the liens. The court also affirmed the entry of sanctions against the claimant for wrongly encumbering the property. The courts, however, seem to have retreated somewhat from

the holding in *Lohmann Golf Designs* and later made it more difficult to invalidate a lien claim as fraudulently overstated. In *Peter J. Hartmann Co. v. Capitol Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004), the subcontractor recorded lien claims that totaled $279,824 despite the amount due being only $9,700. However, the court held that there was no fraudulent overstatement because there was no extrinsic evidence of an intent to defraud. Similar results were reached in *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive at Oakwood, LLC,* 387 Ill.App.3d 906, 901 N.E.2d 978, 327 Ill.Dec. 245 (1st Dist. 2009), and *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008). In these cases, the courts held that, to invalidate a lien claim as overstated, there must exist some other evidence of record from which intent can be inferred, in addition to the lien claim overstatement.

Although it may not be necessary to allocate work performed on different parcels, lienable work must be separated from non-lienable work performed on the same parcel. If the claimant cannot allocate lienable work from non-lienable work, the entire lien will fail. *Flader Plumbing & Heating Co. v. Callas,* 171 Ill.App.3d 74, 524 N.E.2d 1097, 121 Ill.Dec. 49 (1st Dist. 1988); *BRL Carpenters, Ltd. v. American National Bank & Trust Co.,* 126 Ill.App.3d 137, 466 N.E.2d 1166, 81 Ill.Dec. 364 (1st Dist. 1984). However, a rather benevolent position was taken by the Second District in *Abbott Electrical Construction Co. v. Ladin,* 144 Ill.App.3d 974, 494 N.E.2d 1251, 98 Ill.Dec. 924 (2d Dist. 1986). Although the evidence at trial demonstrated that the claimant's lien included work on neighboring property that did not belong to the defendants, and the claimant did not separate the off-site work from the properly lienable work at trial, the evidence indicated that such an apportionment could be made. The court fell back on §39 of the Mechanics Lien Act, now codified at 770 ILCS 60/39, which provides that the Act "shall be liberally construed as a remedial act," and held that the claimant should have been given an additional opportunity to apportion the work.

C. [4.12] Open Accounts

The apportionment discussion in §4.11 above covers situations in which the supplier has entered into a single contract that covers several parcels of lienable and non-lienable work. If a material supplier uses an open account with a subcontractor or contractor, the subcontractor or contractor simply orders materials on a continuous basis and is billed as each order is shipped. If each of the orders constitutes an independent contract, a separate lien may be required for each, as the blanket lien provision of §7(b) of the Mechanics Lien Act, 770 ILCS 60/7(b), refers to "buildings under contract," apparently referring to a single contract. Indeed, each of the cases discussed in §4.11 above relates to a single contract. The prudent approach is to treat each order as a separate contract for which a separate notice of claim for lien and recorded lien claim is required within the time periods applicable to each order.

D. [4.13] Sub-Subcontractor's Right to Self-Help

Section 4 of the Mechanics Lien Act permits the sub-subcontractor to remove its materials from a project under certain circumstances:

> **When the owner of the land shall fail to pay the contractor moneys justly due him under the contract at the time when the same should be paid, or fails to perform his**

> **part of the contract in any other manner, the contractor may discontinue work, and the contractor shall not be held liable for any delay on his part during the period of, or caused by, such breach of contract on the part of the owner; and if after such breach for the period of ten days the owner shall fail to comply with his contract, the contractor may abandon the work, and in such a case the contractor shall be entitled to enforce his lien for the value of what has been done, and the court shall adjust his claim and allow him a lien accordingly. In such cases all persons furnishing material which has not been incorporated in the improvement shall have the right to take possession of and remove the same if he so elects.** 770 ILCS 60/4.

The right to remove materials must be exercised with caution as authority exists for the proposition that the supplier loses its right to a lien for those materials. *R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co.,* 236 Ill. 452, 86 N.E. 248 (1908). However, in *Kupferschmid, Inc. v. Rodeghero,* 139 Ill.App.3d 975, 488 N.E.2d 305, 308, 94 Ill.Dec. 479 (3d Dist. 1986), the court held that the material that the lien claimant had removed from the construction site was not the same material furnished to the site because "[t]he fire and subsequent exposure to the elements which resulted in damage to the material delivered by the plaintiff constituted a partial incorporation of the material into the structure. Paragraph 4 of the Act allows the contractor to enforce his lien for the value of what has been done, and the court shall adjust his claim and allow a lien accordingly." The court reasoned that, "[i]n keeping with the principles of equity and the purpose of the Act, we hold the language in paragraph 4 allows the plaintiff to recover the material furnished without forfeiting his mechanic lien remedies." *Id.*

Although there are no cases directly addressing this issue, it appears from the language of §4 that the right of a material supplier to recover materials from the project accrues only after the contractor discontinues work or abandons the work after nonpayment by the owner.

Section 7 of the Mechanics Lien Act, 770 ILCS 60/7, imposes no duty on a claimant to recover its materials. Obviously, such self-help must be accomplished without a breach of the peace or damage to the building or improvement.

IV. ENFORCEMENT OF THE SUB-SUBCONTRACTOR'S RIGHTS

A. [4.14] Foreclosure

To enforce its mechanics lien rights, the sub-subcontractor must file a foreclosure action pursuant to §§9 and 28 of the Mechanics Lien Act, 770 ILCS 60/9 and 60/28. Section 9 requires that suit be brought in the circuit court in the county where the improvement is located and, similar to the blanket lien provision of §7, 770 ILCS 60/7, permits the action to include more than one building or parcel of property when the contract relates to two or more buildings or parcels of property. This action must be commenced within two years after completion of the sub-subcontractor's contract or the furnishing of its material. 770 ILCS 60/7(a). Section 28 requires that a foreclosure suit be against both the contractor and the owner jointly and that no judgment can be entered until both are brought before the court. Accordingly, a contractor is a necessary party to an action by a sub-subcontractor to foreclose a mechanics lien. *Capitol Plumbing & Heating Supply, Inc. v. Van's Plumbing & Heating,* 58 Ill.App.3d 173, 373 N.E.2d 1089, 15 Ill.Dec. 617 (4th Dist.

1978); *Pittman v. Manion,* 212 Ill.App.3d 342, 570 N.E.2d 1169, 156 Ill.Dec. 447 (5th Dist.), *appeal denied,* 141 Ill.2d 558 (1991). Also, the subcontractor is a necessary party in a material supplier's mechanics lien foreclosure action. *Joesph T. Ryerson & Son, Inc. v. Manulife Real Estate Co.,* 207 Ill.App.3d 622, 566 N.E.2d 297, 152 Ill.Dec. 610 (1st Dist. 1990). Section 11(a) of the Act, 770 ILCS 60/11(a), identifies what a foreclosure complaint must allege.

Section 11(b) of the Mechanics Lien Act also requires that

> **[**e**]ach claimant shall make as parties to its pleading (hereinafter called "necessary parties") the owner of the premises, the contractor, all persons in the chain of contracts between the claimant and the owner, all persons who have asserted or may assert liens against the premises under this Act, and any other person against whose interest in the premises the claimant asserts a claim.** 770 ILCS 60/11(b).

This is to ensure that all parties interested in the property are joined in a single action so that all equities can be adjusted and that the order properly distributing all the proceeds of the sale can be entered. *Anderson v. Gousset,* 60 Ill.App.2d 309, 208 N.E.2d 37 (3d Dist. 1965). P.A. 94-627 (eff. Jan. 1, 2006) used the defined term "necessary parties" in lieu of the term "parties interested" in its amendment of §11. Failure to join a necessary party warrants dismissal of the foreclosure action. *Joseph T. Ryerson & Son, Inc. v. Manulife Real Estate Co.,* 238 Ill.App.3d 550, 606 N.E.2d 463, 179 Ill.Dec. 631 (1st Dist. 1992), *appeal denied,* 149 Ill.2d 650 (1993).

Because a party seeking foreclosure is required to name all "necessary parties" as defined by §11(b) of the Mechanics Lien Act as defendants, if the sub-subcontractor has recorded a lien, it will be named in a foreclosure proceeding initiated by another party. In that event, the sub-subcontractor should file a counterclaim alleging foreclosure of its lien claim against all of the parties to the existing action and alleging whatever other causes of action it wishes to assert. A lien claimant that is named as a defendant in such an action need not answer the plaintiff's complaint, as §9 provides that "[t]he plaintiff and all defendants to such complaint may contest each other's right without any formal issue of record made up between them other than that shown upon the original complaint, as well with respect to the amount due as to the right to the benefit of the lien claimed." 770 ILCS 60/9.

Although the filing of a counterclaim to foreclose the mechanics lien is a sure way to foreclose the sub-subcontractor's lien claim, the Illinois Supreme Court has permitted the filing of an answer to satisfy the counterclaim requirement. The court relied on the fact that the answer alleged the elements necessary to state a claim under the Mechanics Lien Act and that, in its prayer for relief, the contractor sought foreclosure. However, the court made it clear that a counterclaim is required by the Act. *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 176 Ill.2d 385, 680 N.E.2d 283, 223 Ill.Dec. 550 (1997).

If the sub-subcontractor has not been named as a defendant in foreclosure proceedings, perhaps because it has not yet recorded its mechanics lien claim, the sub-subcontractor should file a petition to intervene in the existing foreclosure proceedings pursuant to §9 of the Mechanics Lien Act.

B. [4.15] Common-Law Claims

In addition to its mechanics lien rights, the sub-subcontractor has other common-law claims available to it, such as breach of contract against the subcontractor for whom it provided services or to whom it supplied materials. However, common-law remedies do not provide the same assurance of collection of a judgment that a mechanics lien foreclosure action does.

Entities further down the contractual chain often attempt to include common-law claims against the owner and others if their mechanics lien claim is potentially weak and often simply to exert additional pressure on the owner. Obviously, the sub-subcontractor cannot maintain a breach-of-contract action against the owner, as there exists no privity. *Capitol Plumbing & Heating Supply, Inc. v. Van's Plumbing & Heating,* 58 Ill.App.3d 173, 373 N.E.2d 1089, 15 Ill.Dec. 617 (4th Dist. 1978). However, subcontractors down the contractual chain often attempt to allege unjust enrichment or that they are third-party beneficiaries of the contract between the owner and the general contractor.

1. [4.16] Unjust Enrichment

The prevailing theory is that a sub-subcontractor has no unjust-enrichment claim against an owner, but the sole remedy of the subcontractor or sub-subcontractor against the owner is under the Mechanics Lien Act. *Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 211 Ill.Dec. 682 (1st Dist. 1995); *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970); *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451 (2d Dist. 1971); *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602 (2d Dist. 1967); *Hayes Mechanical, Inc. v. First Industrial, L.P.,* 351 Ill.App.3d 1, 812 N.E.2d 419, 285 Ill.Dec. 599 (1st Dist. 2004); *C. Szabo Contracting, Inc. v. Lorig Construction Co.,* 2014 Ill App (2d) 131328, 19 N.E.3d 638, 385 Ill.Dec. 706.

In *Season Comfort, supra,* and *Hill Behan Lumber, supra,* the courts readily rejected the claimants' arguments that they were entitled to equitable liens premised on an unjust-enrichment theory. Other cases have rejected unjust-enrichment theories on the theory that, when an owner has employed a general contractor, the owner has the right to presume that the work being performed by the subcontractor is on behalf of the general contractor. *Premier Electrical Construction Co. v. LaSalle National Bank,* 132 Ill.App.3d 485, 477 N.E.2d 1249, 87 Ill.Dec. 721 (1st Dist. 1984); *Vanderlaan, supra.* These courts hold that the contractor receives the benefit of the subcontractor's work, not the owner.

2. [4.17] Third-Party Beneficiary

The cases that state that the Mechanics Lien Act is the subcontractor's or sub-subcontractor's sole remedy against the owner can also be cited in support of the argument that the sub-subcontractor is not a third-party beneficiary of the contract between its immediate subcontractor and the general contractor or between the general contractor and the owner. *See Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970); *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451 (2d Dist. 1971). However, the Seventh Circuit in *Avco Delta Corporation Canada Ltd. v. United States,* 484 F.2d 692 (7th Cir. 1973), held that material suppliers and subcontractors seeking recovery from a retainage fund that had been

interpleaded with the court were third-party beneficiaries of the contract between the owner and the general contractor, entitling them to recover from the fund. The Seventh Circuit distinguished the cases holding that the subcontractor's sole remedy is under the Act because, in the case at bar, there was a retainage fund specifically set aside to protect the subcontractors. Moreover, in *East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.,* 235 Ill.App.3d 756, 601 N.E.2d 972, 176 Ill.Dec. 274 (3d Dist. 1992), the appellate court held that the subcontractors could be third-party beneficiaries of the requirement in the Public Construction Bond Act (Bond Act), 30 ILCS 550/0.01, *et seq.,* that governmental entities procure payment bonds for certain public construction work. The court used a third-party beneficiary theory because, under Illinois law, statutory provisions applicable to construction contracts are considered part of the contract. Accordingly, under this case, the Bond Act could be considered part of the contract between the owner and the general contractor and intended to benefit third parties, such as subcontractors. *East Peoria Community High School* was distinguished in *City of Yorkville v. Ocean Atlantic Service Corp.,* No. 10-cv-1261, 2010 WL 3385461 (N.D.Ill. Aug. 24, 2010), in which the court held that subcontractors were not third-party beneficiaries to the bonds at issue there because there was no language in the subject bonds regarding payment of subcontractors and the bonds were not Bond Act bonds.

5 Mechanics Liens on Funds for City, County, and State Projects

ERIC A. BERG
LORI CHEN
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Chicago

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I. [5.1] INTRODUCTION

The first Illinois law dealing with lien rights on public improvements projects was enacted in 1903. It has been amended numerous times, and the most recent amendment, by P.A. 95-274, effective August 17, 2007, rewrote portions of the law, added to the law, and deleted some portions of it.

The lien law for public projects is located in §23 of the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.* 770 ILCS 60/23. Even though §23 is located in and is surrounded by sections of the Act related to private property mechanics liens, it is far different in concept and structure than its private property lien counterparts.

Because mechanics liens are not permitted on public property (*Alexander Lumber Co. v. Coberg,* 356 Ill. 49, 190 N.E. 99 (1934)), the lien must instead attach only to the public funds allocated for a particular construction project. This distinction means that the public works lien law benefits and protects the interests of differing classes of persons and companies than are benefited and protected under the private property lien law. Section 23 benefits only contractors and workers having no direct contract with the public entity. The methods of perfecting and enforcing the lien are different from those for private property liens. Because there is no need to protect third parties who may be or become interested in the land, the timing requirements under §23 do not run from the end of the project as they do in private lien law. Instead, the primary durational limitation is the remaining availability of unpaid funds due to the prime contractor. As long as funds remain available — even years after construction is complete — a public funds lien can be timely if the other notice, filing, and service requirements are met.

All of the statutory law in respect of public works liens is contained in §23. The purpose of §23 is to provide a remedy to persons, other than general contractors, who furnish labor, services, material, fixtures, apparatus, machinery, forms, or form work to any contractor having a contract for public improvements with any county, township, school district, municipality, municipal corporation, or unit of local government in Illinois or the State of Illinois as defined in §§23(a) and 23(a-5). General contractors have no remedy under §23, as any claims asserted under §23 are against the moneys or other forms of payment due the general contractor involved in the job for which the claim arises. Therefore the general contractor's remedy essentially is an action for breach of contract, which provides the same relief as a lien against the funds.

Section 23 consists of seven sections and twelve subsections. Sections 23(a) and 23(a-5) are definitional; §23(b) sets forth the requirements to perfect and enforce liens on construction projects for any county, township, school district, city, municipality, municipal corporation, or other unit of local government; §23(c) sets forth the requirements to perfect and enforce liens on State of Illinois construction projects; §23(d) provides remedies to the claimant for violations by officers of the public body and also provides that there shall be no preferences among claimants, but all shall be paid pro rata in proportion to the amount due under their respective contracts; §23(e) provides what happens to a suit to enforce a claim based on a notice of claim for lien that is dismissed without adjudication; and §23(f) provides for criteria as to whether a lien exists for material that is delivered for construction of a building or improvement under a contract with a state, county, township, school district, city, municipality, or municipal corporation or any other unit of local government.

Generally, the provisions of the Mechanics Lien Act for liens against real property or its improvements do not apply to public improvements. *Alexander Lumber, supra.* If, however, as of the date of the contract between the general contractor and a public body, the property being improved was owned by a private owner (a nonpublic body), then all lien claims should be perfected as if the property were privately owned, and the lien should not be perfected under the provisions of §23 of the Act. *See City of Salem v. Lane & Bodley Co.,* 189 Ill. 593, 60 N.E. 37 (1901), in which a mechanics lien attached while the property was privately owned and the subsequent conveyance to a public body did not prevent perfection and enforcement of the lien; the public body acquired title to the property subject to the lien.

Private-public partnerships, private leasehold improvements to public property (such as airports), and other hybrid property ownership and operating strategies (such as public housing projects) can blur significantly the line between private and public projects. Because Illinois courts have yet to provide definitive guidance in these types of arrangements, practitioners may want to attempt to comply with both lien laws.

A number of cases have refused to apply to public works mechanics lien law principles from the private property lien sections of the Mechanics Lien Act. *Speedy Gonzalez Landscaping, Inc. v. O.C.A. Construction, Inc.,* 385 Ill.App.3d 699, 896 N.E.2d 494, 498, 324 Ill.Dec. 708 (1st Dist. 2008) (applying strict construction rule, but then stating: "The other sections of that act have no application to public fund liens."); *Struebing Construction Co. v. Golub-Lake Shore Place Corp.,* 281 Ill.App.3d 689, 666 N.E.2d 846, 217 Ill.Dec. 177 (1st Dist. 1996); *Anderson "Safeway" Guard Rail Corp. v. Champaign Asphalt Corp.,* 131 Ill.App.2d 924, 266 N.E.2d 414, 418 (4th Dist. 1971) (holding that sworn statement requirements of §§5, 21, 22, and 27 of the Mechanics Lien Act do not apply to §23 claims).

However, the court in *Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 359 – 361, 269 Ill.Dec. 556 (1st Dist. 2002), reviewed the historic expansion of what constitutes lienable work under private property lien law and concluded that such expansion supported expanding the lienable work definition under §23. Similarly, the court in *LB Steel, LLC v. Carlo Steel Corp.,* 2018 IL App (1st) 153501, ¶42, 122 N.E.3d 274, 428 Ill.Dec. 265, borrowed the substantial performance requirement from private property mechanics lien jurisprudence and applied it to §23 claims.

A public works mechanics lien claim is not the exclusive remedy for an unpaid subcontractor or supplier that may also assert its contract rights and bond rights pursuant to the Public Construction Bond Act, 30 ILCS 550/0.01, *et seq.*

II. [5.2] PREREQUISITES TO A PUBLIC WORKS LIEN

Each public funds lien claimant must show (a) that it had a valid enforceable contract; (b) that it substantially performed its work under that contract; (c) that it provided lienable work; and (d), if the lien is for materials, that the materials were delivered to the jobsite.

A. [5.3] Valid Enforceable Contract

The right to a lien on funds for a public project begins with the existence of a contract with the public entity. Section 23(b) of the Mechanics Lien Act provides that any person "who shall furnish labor, services, material, fixtures, apparatus or machinery, forms or form work to any contractor [either an original contractor or a subcontractor] having a contract for public improvement" for any of the types of public bodies described in §23(b) shall have lien rights. 770 ILCS 60/23(b). Therefore, a claimant must establish that it had a contract with the contractor or a subcontractor of the contractor that has the contract with the public entity and that, pursuant to this contract, the claimant furnished labor, services, material, fixtures, apparatus, machinery, forms, or form work to a contractor for a public improvement.

The contract need not be with the contractor having a contract with the public body. *County of Coles v. Haynes & Lyons,* 134 Ill.App. 320 (3d Dist. 1907), *aff'd,* 234 Ill. 137 (1908); *Granite City Lime & Cement Co. v. Board of Education of School District No. 126,* 203 Ill.App. 134 (4th Dist. 1916). An account stated contract for the supply of materials would appear to be sufficient. *Granite City Lime, supra.* Thus, the lien is not limited to first-tier subcontractors.

B. [5.4] Substantial Performance

The First District Appellate Court held in 2018 that a public works mechanics lien claimant must show that it substantially performed its work under its contract in order to recover on a public works mechanics lien. *LB Steel, LLC v. Carlo Steel Corp.,* 2018 IL App (1st) 153501, ¶42, 122 N.E.3d 274, 428 Ill.Dec. 265 (reversing judgment on public works lien when second-tier subcontractor claimant failed to substantially perform its subcontract). In so holding, the appellate court borrowed law from private property mechanics lien jurisprudence and applied it to §23 claims. *Id.,* citing *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 59 – 60, 243 Ill.Dec. 740 (1st Dist. 1999).

C. [5.5] Lienable Work

Section 23 of the Mechanics Lien Act grants lien rights to anyone who "furnish[es] labor, services, material, fixtures, apparatus or machinery, forms or form work to any contractor having a contract for public improvement." 770 ILCS 60/23(b). This broad definition has been held to include the hauling and disposal of materials related to the construction of a storm sewer system. *Luise, Inc. v. Village of Skokie,* 335 Ill.App.3d 672, 781 N.E.2d 353, 269 Ill.Dec. 556 (1st Dist. 2002). The definition has been held to include claims for things consumed in the process of construction such as a water pump and shoring lumber (*Alexander Lumber Co. v. Farmer City,* 272 Ill. 264, 111 N.E. 1012 (1916)); feed for work animals and coal for engines furnished to the original contractor (*Siemer Milling Co. v. Moritz,* 227 Ill.App. 459 (4th Dist. 1923)); gasoline, grease, and oil (*Standard Oil Co. of Indiana v. Vanderboom,* 326 Ill. 418, 158 N.E. 151 (1927); *Acker v. Vanderboom,* 235 Ill.App. 417 (2d Dist. 1925), *aff'd,* 327 Ill. 267 (1927)); crane rental (*New Erie Coal Co. v. H. McMullen & Sons,* 247 Ill.App. 515 (2d Dist. 1928)); and aluminum beams and other construction equipment (*Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990)).

However, the definition of "lienable work" is not without limits. Illinois courts have refused to allow public funds liens for printing, stationery, telephone services, and medical services furnished to a contractor's employees in the construction of a municipal water system (*City of Staunton v. Cole & Fauber,* 254 Ill.App. 377 (3d Dist. 1929)), as well as advances made by a bank used to pay labor and contract expenses (*Manhattan State Bank v. C.J. Moritz, Inc.,* 238 Ill.App. 103 (2d Dist. 1925)).

D. [5.6] Incorporation of Materials into the Work

Prior to the 2007 amendment to the Mechanics Lien Act by P.A. 95-274 (eff. Aug. 17, 2007), there was ambiguity in the statute as to whether a claimant had to prove that the furnished material, to be lienable, was incorporated into the construction. Section 23(f), as amended in 2007, expressly states that incorporation of the materials is not a prerequisite

> **so long as it is shown that the material was delivered either (i) to the owner or its agent for that building or improvement, to be used in that building or improvement or (ii) pursuant to the contract, at the place where the building or improvement was being constructed or some other designated place, for the purpose of being used in construction or for the purpose of being employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed forms or form work where concrete, cement, or like material is used, in whole or in part.** 770 ILCS 60/23(f).

III. PERFECTION OF THE LIEN

A. [5.7] Introduction: Two Statutes — One for Local Government Projects and One for State Projects

Section 23 of the Mechanics Lien Act, 770 ILCS 60/23, alone is controlling and recognizes two classes of liens in public improvements: (1) liens in cases of public improvements for local bodies; and (2) liens in cases of state improvements. Section 23 contains separate provisions for perfection of the lien depending on the type of public body involved.

Section 23(b) provides that any person who furnishes labor, services, material, fixtures, apparatus, machinery, forms, or form work to any contractor having a contract for a public improvement for any county, township, school district, city, municipality, municipal corporation, or other local governmental unit in the State of Illinois shall have a right to a lien only to the portion of such money, bonds, or warrants against which no voucher or other evidence of indebtedness has been issued and delivered to the contractor who contracted with the local public body.

When the lien is that of a subcontractor for a public improvement for the state, perfection is covered by §23(c) of the Act. The requirements for jobs for local public bodies also apply to state jobs except as specifically differentiated in §§5.8 and 5.9 below.

B. [5.8] Notice of Claim

To perfect a §23 lien against a local public body, the claimant must notify the clerk or secretary, as the case may be, of the county, township, school district, city, municipality, municipal corporation, or other unit of local government. The claimant on a public improvement for the state perfects a §23 lien by notifying the director or other official whose duty it is to let the contract with written notice of a claim for lien containing a sworn statement of the claim, identifying the contractor's contract, describing the work done by the claimant, and stating the total amount unpaid for the work as of the date of the notice. For both job types, the lien notification is to be in written form and to contain a sworn statement identifying the claimant's contract, describing the work done by the claimant, and stating the total amount due and unpaid for the work as of the date of the notice. For local public jobs, a copy of the notice is to be furnished at once to the contractor who has the contract with the local public body and any other subcontractor or material supplier that may be involved. 770 ILCS 60/23(b)(1). For state jobs, a copy of the notice must be furnished at once to the contractor who contracted with the state, and a copy of the notice should be given to any subcontractor who contracted with that contractor and who contracted with the claimant. 770 ILCS 60/23(c)(1).

For both lien types, the written notice may be given either by sending it by registered or certified mail, return receipt requested, with delivery limited to the addressee only, or by personal service to the non-state clerk or secretary of the public body. The notice shall be deemed effective when received or refused by the clerk or secretary (local), as the case may be, or director or other official (state), of the state, county, township, school district, city, municipality, municipal corporation, or other local governmental unit. 770 ILCS 60/23(b)(1), 60/23(c)(1).

The Mechanics Lien Act provides that before a lien has been asserted by a potential lien claimant, the contractor who contracted with the local public body or the state may, upon written demand with service by certified mail (return receipt requested), serve a written demand on the potential lien claimant with a copy to the clerk or secretary (local) or director or other official (state), requiring the potential lien claimant to assert the lien within 30 days or it will be forfeited. 770 ILCS 60/23(b)(2), 23(c)(2).

The information to be conveyed in the lien claim notice (for both state and local public projects) should include (1) the name of the claimant; (2) identification of the contract, including identification of the contractor who has the contract with the public entity; (3) identification of the project; (4) the type of work performed; and (5) the amount that is owed under the contract.

A number of cases hold that the question whether the notice asserting a lien was proper or whether it was properly served on the appropriate officials can be raised only by the party on whom the notice is to be served; these issues cannot be raised by the original contractor. *See, e.g., Backs v. Nelson Construction Co.,* 271 Ill.App. 137, 153 (3d Dist. 1933); *Chicago Wood Piling Co. v. Anderson,* 313 Ill.App. 242, 39 N.E.2d 702 (2d Dist. 1942). *But see Mass Transfer Inc. v. Vincent Construction Co.,* 223 Ill.App.3d 746, 585 N.E.2d 1286, 1288, 166 Ill.Dec. 264 (5th Dist. 1992) (general contractor had standing to argue that, because initial notice was improper, subsequent notice that was sent via certified mail was void).

However, in *Moseman Construction Co. v. Shappert Engineering Co.,* 780 F.Supp. 1218 (C.D.Ill. 1992), the district court said that the contractor who contracted with the public body had standing to question whether the claimant had complied with the statute. *See also Exterior Designing, Inc. v. Loucks Excavating, Inc.,* No. 95 C 2491, 1997 WL 534479, *4 (N.D.Ill. Aug. 23, 1997) (following *Moseman*).

After receiving the notice from the clerk or secretary (local) or director or other official (state), the public body or state is required to withhold a sufficient amount to pay the claim until

1. the claim is adjusted by the agreement of the parties;

2. the time limit has expired for the filing of a suit or the filing of an appeal if the suit had been dismissed per §23(e); or

3. there has been an adjudication thereof in a court of competent jurisdiction if a suit has been instituted. 770 ILCS 60/23(b)(6), 60/23(c)(6).

Payment of the money or delivery of the bonds or warrants before the happening of one of the events listed above would subject the state or local public body official to a claim on his or her official bond or a claim against the public body for the money wrongfully paid. 770 ILCS 60/23(d). When the notice is served, the public official is compelled to retain a sufficient sum to pay the liens or pay the amount to the clerk of the court as described above, provided there is still money due to the contractor. Because the lien rights do not extend to municipal, county, or state property but attach only to that portion of money, bonds, or warrants due to the contractor, it is imperative that at the time of service of the notice there are still funds due to the contractor.

After notice is given, the claimant must file suit within 90 days after serving notice of lien, or the lien shall terminate. 770 ILCS 23(b)(5), 60/23(c)(5). No subsequent notice of lien may be given for the same claim, and that claim may not be asserted in any proceedings pursuant to the Mechanics Lien Act. However, failure to file the complaint after notice of the claim for lien shall not preclude a subsequent notice or action for an amount or amounts becoming due to the lien claimant on a date after the prior notice or notices. *Id.* Also, no successive notices may be served to continue the 90-day period and preserve the lien. *See Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990); *Mass Transfer, supra.* In *Aluma Systems* and *Mass Transfer,* the courts dealt with the question of subsequent notices.

C. [5.9] File Suit and Serve Public Body Within 10 and 90 Days

For a local public project lien, a copy of any complaint filed pursuant to a lien claim must be delivered to the local body within ten days of filing a suit. Section 23(b)(4) of the Mechanics Lien Act states:

> **The person so claiming a lien shall, within 90 days after serving such notice commence proceedings by complaint for an accounting, making the contractor having a contract with the county, township, school district, city, municipality, municipal corporation, or any other unit of local government and the contractor to whom such labor, services, material, fixtures, apparatus or machinery, forms or form work was**

> **furnished, parties defendant, and shall within 10 days after filing the complaint notify the clerk or secretary, as the case may be, of the county, township, school district, city, municipality, municipal corporation, or any other unit of local government of the commencement of such suit by delivering to him or them a copy of the complaint filed.** 770 ILCS 60/23(b)(4).

For a state project lien, the delivery requirement differs slightly:

> **The person so claiming a lien shall, within 90 days after serving such notice, commence proceedings by complaint for an accounting, making the contractor having a contract with the State and the contractor to whom such labor, services, material, fixtures, apparatus or machinery, forms or form work was furnished, parties defendant, and shall, within 10 days after filing the suit notify the Director of the commencement of such suit by delivering to him a copy of the complaint filed; provided, if money appropriated by the General Assembly is to be used in connection with the construction of such public improvement, that suit shall be commenced and a copy of the complaint delivered to the Director not less than 15 days before the date when the appropriation from which such money is to be paid, will lapse.** 770 ILCS 60/23(c)(4).

The bonds referred to in §23 of the Mechanics Lien Act are the bonds that are issued to anticipate installments of a special assessment levied to pay for the improvement. Notably, if the bonds have been sold in disregard of the subcontractor's lien, the lien may be enforced against the bonds held by the purchaser. *See N.A. Williams Co. v. McCarthy,* 284 Ill. 604, 120 N.E. 485 (1918); *Northern Trust Co. v. Village of Wilmette,* 220 Ill. 417, 77 N.E. 169 (1906); *National Bank of La Crosse v. Petterson,* 200 Ill. 215, 65 N.E. 687 (1902). Similarly, if the general contractor assigns to a third person a portion of the money due from the non-state public body and subsequently a subcontractor establishes a lien against that fund by serving its notice before the payment of money to the assignee, the subcontractor's lien takes precedence over the rights of the assignee. The assignee can have no better right than its assignor, the contractor, and since the subcontractor's lien is good against the unpaid contractor, it is good against the latter's assignee. The assignment by the general contractor does not operate to destroy the subcontractor's lien right. *See County of Coles v. Haynes & Lyons,* 134 Ill.App. 320 (3d Dist. 1907), *aff'd,* 234 Ill. 137 (1908). As between lien claimants on state or local jobs, however, the last sentence of §23(d) expressly provides that there shall be no preference among the persons serving such notice and that all shall be paid pro rata in proportion to the amounts due under their respective contracts.

IV. THE LAWSUIT

A. [5.10] Parties

Section 23 of the Mechanics Lien Act sets forth only a few specific requirements for litigating a lien against a public body. Section 23 permits a lien on funds, essentially, which, after notice has been properly given (see §5.8 above), requires the claimant to file suit against two entities: "the contractor having a contract with the county, township, school district, city, municipality, municipal corporation, or any other unit of local government" (or "the State"), *i.e.,* the "general contractor"

and "the contractor to whom such labor, services, material, fixtures, apparatus or machinery, forms or form work was furnished," *i.e.,* the contractor who hired the claimant (if different from the general contractor). 770 ILCS 60/23(b)(4), 60/23(c)(4). *See Speedy Gonzalez Landscaping, Inc. v. O.C.A. Construction, Inc.,* 385 Ill.App.3d 699, 896 N.E.2d 494, 496, 324 Ill.Dec. 708 (1st Dist. 2008) (requiring contractor as party defendant). So, under the Act, at least one and potentially two specific parties are required to be named as defendants in litigation to enforce the lien.

The claimant need not name the public body as a defendant (*Board of Library Trustees of Village of Westmont ex rel. Ozinga Bros., Inc. v. Cinco Construction, Inc.,* 276 Ill.App.3d 417, 658 N.E.2d 473, 213 Ill.Dec. 3 (1st Dist. 1995)) and may do so only if it is a non-state job; the state cannot be named as a defendant. *See National Concrete Pipe Co. v. Guerra Construction Co. (In re Guerra Construction Co.),* 142 B.R. 826, 830 (Bankr. N.D.Ill. 1992); *Korte & Luitjohan Contractors, Inc. v. Thiems Construction Co.,* 381 Ill.App.3d 1110, 887 N.E.2d 904, 320 Ill.Dec. 760 (5th Dist. 2008).

However, the governmental body that is having the work performed must be involved in the lawsuit. The claimant must deliver a copy of its complaint to the clerk or secretary of the local body (or, in the case of the state, the director) within ten days of filing suit. 770 ILCS 60/23(b)(4), 60/23(c)(4). Additionally, if money appropriated by the General Assembly is to be used in connection with the construction of the public improvement, the copy of the complaint must be delivered to the director "not less than 15 days before the date when the appropriation from which such money is to be paid, will lapse." 770 ILSC 60/23(c)(4).

Delivery of a copy of the complaint to the appropriate governmental entity is key; failure to do so is fatal. In *Speedy Gonzalez, supra,* the primary issue on appeal was whether the plaintiff's lien claim on public funds terminated because the plaintiff failed to timely deliver to the Public Building Commission (PBC) a copy of its complaint in accordance with §23(b) of the Act then in effect. 896 N.E.2d at 495. Because the plaintiff did so fail to deliver a copy of its complaint to the relevant public entity, the appellate court held that the plaintiff's lien claim terminated and affirmed the order dismissing the lien-on-funds count of its complaint. "[T]he failure of a party to both commence proceedings and deliver a copy of the complaint within the 90-day period effectively terminates the lien claim. The rule of strict construction applies, as here, 'to requirements upon which the right to a lien depends.' " 896 N.E.2d at 498, quoting *Matthews Roofing Co. v. Community Bank & Trust Company of Edgewater,* 194 Ill.App.3d 200, 550 N.E.2d 1189, 1193, 141 Ill.Dec. 143 (1st Dist. 1990), quoting in turn *Watson v. Auburn Iron Works, Inc.,* 23 Ill.App.3d 265, 318 N.E.2d 508, 514 (2d Dist. 1974). "Accordingly, plaintiff's failure here to deliver to the PBC a copy of the complaint within the 90-day period is fatal to its cause of action." *Speedy Gonzalez, supra,* 896 N.E.2d at 498.

B. [5.11] Venue

The question of the appropriate venue for a suit brought under §23 of the Mechanics Lien Act, 770 ILCS 60/23, has been considered in *Board of Library Trustees of Village of Westmont ex rel. Ozinga Bros., Inc. v. Cinco Construction, Inc.,* 276 Ill.App.3d 417, 658 N.E.2d 473, 213 Ill.Dec. 3 (1st Dist. 1995), and *Superior Structures Co. v. City of Sesser,* 277 Ill.App.3d 653, 660 N.E.2d 1362, 214 Ill.Dec. 413 (5th Dist. 1996).

In the former case, Ozinga brought a mechanics lien suit to recover money from the public library board of Westmont when no funds were available to pay Ozinga for its claim, based on a claim of a fiduciary obligation of the public body to set aside funds for the benefit of the complaining subcontractor before the subcontractor had perfected its mechanics lien. The construction project and the library board were located in DuPage County. Ozinga filed suit in Cook County and named the library board as a "use plaintiff" and not as a defendant.

The library board filed a motion to transfer venue from Cook County to DuPage County pursuant to §2-103(a) of the Code of Civil Procedure, 735 ILCS 5/2-103(a), which provides that actions brought "against" a public municipal, quasi-municipal, or other governmental corporation, such as the library board, must be brought in the county in which the governmental entity's principal office is located or in the county in which the transaction at issue, or some principal part thereof, occurred. Ozinga opposed the transfer motion, arguing that the library board was not a defendant in the cause of action but merely a use plaintiff. The trial court denied the library board's motion to transfer venue and entered summary judgment in favor of Ozinga. The library board appealed. The First District Appellate Court reviewed Ozinga's complaint and held that the fact that Ozinga did not explicitly name the library board as a defendant did not change the fact that Ozinga sought an order that would subject the library board to the court's control. Therefore, the court held that Ozinga had brought its action "against" the library board. 658 N.E.2d at 478. The appellate court determined that Cook County was an improper venue in the case but that remanding the case for further proceedings in DuPage County would be inefficient and a waste of judicial resources based on the nature of the remaining unresolved issues.

It is also noteworthy that the *Ozinga* court discussed the fact that a public body need not be named as a defendant in a subcontractor's complaint brought under §23 of the Mechanics Lien Act for the court to enter an order for an accounting and disburse funds held pursuant to a lien. The court stated that the statute requires only that written notice be furnished to the public body. 658 N.E.2d at 477, citing *Northwest Water Commission v. Carlo V. Santucci, Inc.,* 162 Ill.App.3d 877, 516 N.E.2d 287, 114 Ill.Dec. 132 (1st Dist. 1987).

In *Superior Structures, supra,* the plaintiff filed a two-count complaint in Williamson County against the City of Sesser for work performed in Franklin County. The contracts were signed in Franklin and Williamson Counties. The first count sought damages resulting from breach of contract, and the second sought to recover interest pursuant to the Local Government Prompt Payment Act, 50 ILCS 505/1, *et seq.*

The trial took place in Williamson County. The trial court found in favor of Superior and awarded interest at an annual rate of five percent. Sesser appealed, and Superior cross-appealed. Sesser appealed on the basis that the trial court had initially erred in denying Sesser's motion to transfer the case to Franklin County. After that initial error, Sesser argued that the trial court erred again in denying Sesser's argument in its motion for reconsideration that venue in Williamson County had never been proper. The *Superior Structures* court held that Williamson County was an appropriate venue for the trial because execution of the contract had partly taken place there. The court then considered the issue of forum non conveniens, which requires an assessment of both public and private interests in determining the appropriateness of a given venue. The court held that Sesser had made no argument that Franklin County was more convenient and appropriate than Williamson County; thus, the trial court had not abused its discretion in denying Sesser's motion to transfer.

C. [5.12] Accounting — Theories and Allegations

Section 23(b)(4) of the Mechanics Lien Act provides a mechanism for a party to file a lien against public funds. 770 ILCS 60/23(b)(4). *See also Korte & Luitjohan Contractors, Inc. v. Thiems Construction Co.,* 381 Ill.App.3d 1110, 887 N.E.2d 904, 906 – 907, 320 Ill.Dec. 760 (5th Dist. 2008); *Speedy Gonzalez Landscaping, Inc. v. O.C.A. Construction, Inc.,* 385 Ill.App.3d 699, 896 N.E.2d 494, 496, 324 Ill.Dec. 708 (1st Dist. 2008) (interpreting §23(b) then in effect in recognizing complaint for accounting).

The Act is silent as to other potential causes of action. Because liens all are predicated on a breach-of-contract claim, the claimant should also take this opportunity to name the party with whom it has a contract as a defendant in a count for breach of contract. (If that entity has filed for bankruptcy protection, the claimant should proceed with caution and in accordance with the federal bankruptcy court's automatic stay.) The claimant may also plead in the alternative a quantum meruit claim, if the underlying contract is deemed invalid at some point. The elements of a quantum meruit claim in this context were recited in *Maryott Group, Inc. v. De Kalb County Public Building, Commission,* 2013 IL App (2d) 120771-U, ¶79 (affirming trial court's denial of recovery under quantum meruit theory, finding parties had established pattern of securing work via contract or signed change orders, not verbal orders):

> ***Quantum meruit* is an equitable remedy to provide restitution for unjust enrichment. *Wydert Homes v. Kammes,* 395 Ill.App.3d 512, 522 (2009). It is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff may recover even if the contract is unenforceable or there is no contract. *Id.* A defendant is unjustly enriched when it retains a benefit to the plaintiff's detriment, and the defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience. *Decaro v. M. Felix, Inc.,* 371 Ill.App.3d 1103, 1109 (2007). We will reverse a trial court's denial of a *quantum meruit* claim only if it was an abuse of discretion. *Anderson v. Anchor Organization for Health Maintenance,* 274 Ill.App.3d 1001, 1007 (1995).**

D. [5.13] Verified

The Mechanics Lien Act does not explicitly require that the complaint be verified. If one of the counts is for breach of contract, however, and there is some doubt as to the solvency of the breach-of-contract defendant, it is always advisable to file a verified complaint. With a verified complaint on file, it is easier to proceed to a default judgment if the defendant is broke and fails to appear and answer the complaint.

E. [5.14] Service of the Complaint

The complaint for an accounting is to be filed as with any other complaint. Section 23 of the Mechanics Lien Act is silent as to how the complaint is to be filed. Because §23 is clear as to how the notice is to be served (see §5.8 above), the optimal course of action would be to serve a copy of the complaint on the governmental entity in the same fashion. 770 ILCS 60/23(b)(1), 60/23(c)(1) (notice may be given either by sending it by registered or certified mail, return receipt requested, with delivery limited to addressee only, or by personal service to non-state clerk or secretary of the public body).

The authors must caution the reader against drawing too heavily from other statutes or even other portions of the Act in seeking guidance on meeting §23's requirements. For example, in *Speedy Gonzalez Landscaping, Inc. v. O.C.A. Construction, Inc.,* 385 Ill.App.3d 699, 896 N.E.2d 494, 498, 324 Ill.Dec. 708 (1st Dist. 2008), the plaintiff cited cases construing other sections of the Mechanics Lien Act. The court found those cases to be inapposite as "the language of section 23 of the Mechanics' Liens Act . . . is clear that only that section of the act governs liens on public improvements. The other sections of that act have no application to public fund liens." *Id.,* quoting *Anderson "Safeway" Guard Rail Corp. v. Champaign Asphalt Corp.,* 131 Ill.App.2d 924, 266 N.E.2d 414, 418 (4th Dist. 1971). Likewise, in *Korte & Luitjohan Contractors, Inc. v. Thiems Construction Co.,* 381 Ill.App.3d 1110, 887 N.E.2d 904, 907, 320 Ill.Dec. 760 (5th Dist. 2008), the cases cited by the plaintiff concerned the liability of municipalities, not the State of Illinois, and were thus rejected by the appellate court.

V. LITIGATION CONSIDERATIONS

A. [5.15] Multiple Claimants — Insufficient Recovery

One area in which there is a great departure from the standard Illinois Mechanics Lien Act arises when there are multiple claimants on a public job. On a private job, the lien claimants secure their interest in the real estate and collect their debt upon foreclosing their lien and ordering the property to a sheriff's sale. If the privately owned parcel sells for a total amount sufficient to satisfy all of the liens, then each party is made whole. If the parcel does not sell for an amount large enough to cover all debts, then the lien claimants still have a right to seek recovery from the property owner. Although this is not completely comforting — after all, the owner's questionable solvency is what gave rise to the notion of mechanics liens in the first place — this is still a right nonetheless, which the lien claimants may pursue.

Not so with public jobs. Because property owned by the government is not lienable, the only res that the unpaid subcontractor may attach as security is the total amount of money appropriated by the government that has not already been paid out to the general contractor and its subs. If the total amount of money left to be disbursed on the job is insufficient to pay all of the liening parties, then the parties will not be made whole. They will receive their share pro rata. Such a situation incentivizes lien claimants to issue their notices early, to alert the governmental entity and contractor to the unpaid invoices. Once the government has notice of the debt, it must set aside the moneys to cover it until it is resolved. Of course, once the claimant issues its notice, the 90-day clock starts running on filing a lawsuit, always a sure-fire method of impairing healthy working relationships.

B. [5.16] Asserting the General Contractor's Extras To Increase the Pot of Available Money

Liens on public projects are on the appropriated funds, inherently limiting the amount of money from which the subcontractors can make their recovery. It is possible, therefore, for a subcontractor to attempt to increase that figure by asserting the general contractor's extras claims as part of its lien on funds. If the general contractor incurred additional costs to complete the construction — say, due to additional work requested by the governmental owner or delays due to the owner's

failure to timely fulfill its contractual obligations — those additional costs often arise from additional labor and materials expended by the general contractor's subcontractors. *See Stahelin v. Board of Education, School District No. 4, DuPage County, Illinois,* 87 Ill.App.2d 28, 230 N.E.2d 465, 472 (2d Dist. 1967), cited in *Kenny Construction Co. v. Metropolitan Sanitary District of Greater Chicago,* 52 Ill.2d 187, 288 N.E.2d 1, 8 (1971) (estopping municipal entity from denying obligation to pay for extras it ordered and benefits of which it enjoyed).

Subcontractors can find themselves in no-win situations regarding hybrid public-private jobs. For instance, bonds are required on publicly funded jobs (because of the principle that government-owned property is not subject to mechanics liens). However, if there is no public funding on a job being performed on government-owned land, the subcontractor may find itself in a situation in which it cannot lien the land and it has no payment and performance bond to access. If the project is, for example, for a professional sports team, and funded entirely by that team's owner, but the project is located at a sports stadium situated on publicly owned land, then the subcontractor is largely without remedy. The project is not publicly funded, so there is no bond, but there is no right to lien the land. In such situations, a lien claimant may have to get creative. A mechanics lien on the leasehold interest in the property (a real estate right) could be an avenue to the owner's pocketbook but still avoid the bar on suing the government on such disputes.

C. [5.17] Addressing the Owner's Back Charges Against the General Contractor

Though the Mechanics Lien Act does not address the interplay between a lien claimant and back charges asserted by the owner, a 2018 case directly dealt with such circumstances. In *LB Steel, LLC v. Carlo Steel Corp.,* 2018 IL App (1st) 153501, ¶¶1 – 3, 122 N.E.3d 274, 428 Ill.Dec. 265, the City of Chicago entered into a prime contract with Walsh Construction Company, as general contractor, for the construction of a steel canopy above several terminals at O'Hare International Airport. Walsh entered a subcontract with Carlo Steel Corporation, which entered a sub-subcontract with steel fabricator LB Steel. 2018 IL App (1st) 153501 at ¶¶1, 4. When the city discovered welding defects in the canopy, some of which LB Steel performed, the city withheld payment from Walsh, Walsh withheld payment from Carlo Steel, and Carlo Steel withheld payment from LB Steel. 2018 IL App (1st) 153501 at ¶¶5, 33. In 2005, LB Steel filed suit against the city, Walsh, and Carlo Steel alleging, inter alia, a lien against public funds and breach of the sub-subcontract. 2018 IL App (1st) 153501 at ¶6. Walsh filed a counterclaim against Carlo Steel, and Carlo Steel filed a counterclaim against LB Steel. 2018 IL App (1st) 153501 at ¶8. In 2007, the city later filed a separate action against Walsh, and Walsh impleaded LB Steel. 2018 IL App (1st) 153501 at ¶9. LB Steel filed a counterclaim against Walsh alleging claims similar to those in its 2005 complaint. *Id*. In 2013, the city deposited funds with the clerk of the circuit court, and the court entered an order releasing the lien as to the city. 2018 IL App (1st) 153501 at ¶12.

In 2015, the consolidated case (comprising claims from the 2005 and 2007 suits) proceeded to trial. 2018 IL App (1st) 153501 at ¶13. The trial judge found that LB Steel performed defective work. 2018 IL App (1st) 153501 at ¶17. The court entered judgment for Walsh for $27.5 million as well as judgments in favor of LB Steel on its lien, breach-of-contract, and public-construction-bond claims totaling $8 million. 2018 IL App (1st) 153501 at ¶¶17 – 20. The appellate court reversed both judgments. 2018 IL App (1st) 153501 at ¶¶34 – 35. The appellate court held that Carlo Steel's withholding from LB Steel was proper, which caused LB Steel's breach-of-contract claim to fail. 2018 IL App (1st) 153501 at ¶34. With respect to LB Steel's lien on public funds, the

appellate court ruled that it was unenforceable because "LB Steel did not substantially perform under the Sub-Subcontract." 2018 IL App (1st) 153501 at ¶42, citing 770 ILCS 60/23(b) and *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 59, 243 Ill.Dec. 740 (1st Dist. 1999) (notwithstanding general rule that contractor must completely perform contract to enforce its lien, it may still enforce lien by proving that it substantially performed contract in workmanlike manner). Consequently, because LB Steel did not substantially perform, the judgments in its favor on its breach-of-contract and bond claims were also reversed. 2018 IL App (1st) 153501 at ¶¶34 – 35, 38.

It is important to understand that the public body is required to withhold the amount of any claim for lien (770 ILCS 60/23(b)(6), 60/23(c)(6)) and may not use that money, if due, to complete the project. In *Northwest Water Commission v. Carlo V. Santucci, Inc.,* 162 Ill.App.3d 877, 516 N.E.2d 287, 289 – 290, 114 Ill.Dec. 132 (1st Dist. 1987), the public body, the Northwest Water Commission, withheld payment on a pipeline construction project upon receipt of two subcontractor 90-day notices as a result of the latter not receiving payment from the general contractor. After terminating the prime contract, the commission used some of the withheld funds to complete the remaining work. 516 N.E.2d at 291. The trial court ultimately ordered the commission to satisfy the two subcontractors' liens. 516 N.E.2d at 293 – 294. The appellate court upheld the trial court's ruling, stating that while the public body may utilize retainage to complete the work, there was no dispute as to the amounts approved but unpaid to the general contractor (which were clearly delineated in four payment applications), and that money should have remained sequestered. 516 N.E.2d at 299 – 300. The court ultimately concluded that the commission "was prohibited from using the withheld funds for any purpose other than to pay the subcontractors." 516 N.E.2d at 299.

D. [5.18] Interest

Because a public body is not liable for interest on its indebtedness in the absence of an express agreement to pay interest, a claimant may not recover interest when to do so would operate to compel the municipality to pay interest. *South Park Commissioners v. Dunlevy,* 91 Ill. 49, 54 (1878); *Hawthorne Park Dist. v. Seipp, Princell & Co.,* 286 Ill.App. 599, 4 N.E.2d 117, 118 (1st Dist. 1936); *Housing Authority of County of Franklin, Illinois ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873 (5th Dist. 1970).

A contrary rule prevails, however, when the sum still admittedly due from the public body to the original contractor is sufficient to pay interest to the claimant, particularly when the municipal corporation has earned more interest on withheld funds than was awarded to the claimant. In that situation, it is not the public body but the original contractor that is paying interest. *West Chicago Park Com'rs v. Western Granite Co.,* 200 Ill. 527, 66 N.E. 37 (1902); *Northwest Water Commission v. Carlo V. Santucci, Inc.,* 162 Ill.App.3d 877, 516 N.E.2d 287, 114 Ill.Dec. 132 (1st Dist. 1987). No allowance of interest is justified if there is an honest difference of opinion and an absence of unreasonable delay in payment, unless there is proof as to when the obligation matured so that the court may fix a day from which interest is to run. *Central Lime & Cement Co. v. Leyden-Ortseifen Co.,* 245 Ill.App. 48 (1st Dist. 1927); *Housing Authority of County of Franklin, supra. See also Superior Structures Co. v. City of Sesser,* 277 Ill.App.3d 653, 660 N.E.2d 1362, 214 Ill.Dec. 413 (5th Dist. 1996).

The State Prompt Payment Act, 30 ILCS 540/0.01, *et seq.,* governs payments by the state to contractors, subcontractors, and material suppliers under construction contracts with the state or state agency. If the state or state agency does not make payment within the 90-day period following receipt or a proper bill or invoice, the state or its agency shall be liable for an interest penalty of one percent of any amount approved and unpaid per month. 30 ILCS 540/3-2(1.05). The state or state agency "may not request any vendor or contractor to waive his rights, under this Act, to recover a penalty for late payment as a condition of, or inducement to enter into, any contract for goods or services." 30 ILCS 540/6. When the state or state agency makes payment to a contractor that is less than the full payment due under the prime contract, the contractor must disburse that payment to the applicable subcontractors and/or material suppliers on a pro rata basis, plus interest received under the State Prompt Payment Act. 30 ILCS 540/7(a-5). If the contractor, "without reasonable cause, fails to make full payment of amounts due under subsection (a) to its subcontractors and material suppliers within 10 business days or 15 calendar days, whichever occurs earlier, after receipt of payment from the State official or agency, the contractor shall pay to its subcontractors and material suppliers, in addition to the payment due them, interest in the amount of 2% per month, calculated from the expiration of the 10-business-day period or the 15-calendar-day period until fully paid." 30 ILCS 540/7(b). The subcontractor or material supplier may request a hearing before the state or state agency by complying with the written notice requirement. 30 ILCS 540/7(b)(2).

The Local Government Prompt Payment Act governs payments by any local public body other than the state or a state agency. 50 ILCS 505/2. Any bill approved for payment shall be paid within 30 days from the date of approval; if not timely paid, an interest penalty of one percent per month shall apply. 50 ILCS 505/4. If the body fails to approve a payment within 60 days of receipt of the bill (or the goods or services to which the bill pertains), the interest penalty shall apply. 50 ILCS 505/5. Like the State Prompt Payment Act, the Local Government Prompt Payment Act provides for payments to subcontractors and material suppliers in the same operative manner. 50 ILCS 505/9.

While the prompt payment acts probably do not grant rights under §23 of the Mechanics Lien Act, 770 ILCS 60/23, they may provide an independent basis on which to assert an interest claim against a contractor or a public entity.

E. [5.19] Depositing Funds with the Clerk

When a lawsuit is filed, the state or local public body may deposit the money with the clerk of the court where the suit is pending. 770 ILCS 60/23(b)(6), 60/23(c)(6). The clerk is to abide by the result of the suit, and the money is to be distributed in accordance with a judgment rendered or any other court order. 735 ILCS 5/2-1011. Any payment so made to the claimant or to the clerk of the court shall be a credit on the contract price to be paid to the contractor. 770 ILCS 60/23(b)(6), 60/23(c)(6).

F. [5.20] Limitation on Amount Recoverable

When a claim is asserted under §23 of the Mechanics Lien Act, 770 ILCS 60/23, by a material supplier or a sub-subcontractor (defined as a contractor who contracts with a subcontractor who contracted with the general contractor who was employed by the local body or the state), the amount

recoverable is limited to the amount due, if any, from the general contractor to the subcontractor who employed the sub-subcontractor or contracted with the material supplier at the time the notice of lien was given. *Koenig v. McCarthy Const. Co.,* 344 Ill.App. 93, 100 N.E.2d 338 (2d Dist. 1951); *Anderson "Safeway" Guard Rail Corp. v. Champaign Asphalt Corp.,* 131 Ill.App.2d 924, 266 N.E.2d 414 (4th Dist. 1971); *Housing Authority of County of Franklin, Illinois ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873 (5th Dist. 1970).

VI. [5.21] IF THE PUBLIC BODY FAILS TO WITHHOLD PAYMENT AS REQUIRED: CLAIM AGAINST THE PUBLIC OFFICIAL'S BOND

An official who disregards the subcontractor's public fund lien rights is subject to suit on his or her official bond. Section 23(d) of the Mechanics Lien Act states that "[a]ny officer of the State, county, township, school district, city, municipality, municipal corporation, or any other unit of local government violating the duty hereby imposed upon him shall be liable on his official bond to the claimant giving notice . . . for the damages resulting from such violation, which may be recovered in a civil action in the circuit court." 770 ILCS 60/23(d). This sentence applies to any official on any public improvement covered by §23 and therefore protects any subcontractor on any public improvement within the scope of that section.

In suing on the official bond, however, the subcontractor is not enforcing its lien rights and will not be prevented from enforcing its lien; *i.e.,* the subcontractor may sue in equity to enforce its lien right despite the existence of the cause of action on the bond. *West Chicago Park Com'rs v. Western Granite Co.,* 200 Ill. 527, 66 N.E. 37, 38 (1902); *National Bank of La Crosse v. Petterson,* 200 Ill. 215, 65 N.E. 687 (1902).

In *Standard Oil Co. v. Kapschull, Davis Co.,* 276 Ill.App. 281 (2d Dist. 1934), the court held that if it appears that a sub-subcontractor on a state improvement is not entitled to a lien, the court should dismiss the sub-subcontractor's complaint rather than retain jurisdiction for the purpose of allowing it to obtain judgment on the completion bond given by the original contractor to the state for the benefit of subcontractors. The *Kapschull* court said that unless a lien is established, a court of equity has no authority to proceed with the suit. *See Edwin Pratt's Sons' Co. v. Schafer,* 290 Ill.App. 80, 7 N.E.2d 901 (2d Dist. 1937). However, under the present Code of Civil Procedure, it is quite likely that the sub-subcontractor could, in a similar situation, file an amended complaint setting out the legal cause of action on the bond and successfully maintain that action.

Even if the local body or the state has paid out the moneys or distributed the bonds, it still may be liable for them. Thus, if the local body or the state has wrongfully diverted from the special assessment fund some money rightfully due the subcontractor, the subcontractor may have a claim against the local body or the state for the amount of the diversion. *See People ex rel. Anderson v. Village of Bradley,* 367 Ill. 301, 11 N.E.2d 415 (1937); *J&W Allen Construction Co. v. Kramer,* 41 Ill.Ct.Cl. 133 (1989); *Northwest Water Commission v. Carlo V. Santucci, Inc.,* 162 Ill.App.3d 877, 516 N.E.2d 287, 114 Ill.Dec. 132 (1st Dist. 1987); *Reinforced Concrete Pipe Co. v. City of Momence,* 208 Ill.App. 423 (2d Dist. 1917) (abst.).

6 Construction Bond Claims

STEVEN D. MROCZKOWSKI
Ice Miller LLP
Chicago

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G. Forms
   1. [6.30] Affidavit To Support Request for Certified Copy of Miller Act Bond
   2. [6.31] Transmittal Letter To Obtain Certified Copy of Miller Act Bond
   3. [6.32] Sample Miller Act Notice

I. RECOVERY ON BONDS FOR STATE AND LOCAL JOBS

A. Background

1. [6.1] Purpose of the Public Construction Bond Act

The Public Construction Bond Act (Bond Act), 30 ILCS 550/0.01, *et seq.,* gives subcontractors and material suppliers a remedy separate from the lien on public funds provided in 770 ILCS 60/23.

The statutory bond required on any public works job is both a performance bond and a payment bond. As a performance bond, it protects the public body from spending money on unfinished projects. *See Housing Authority of County of Franklin, Illinois ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873 (5th Dist. 1970). *See also State ex rel. United States Fidelity & Guaranty Co. v. Mehan,* 581 S.W.2d 837 (Mo.App. 1979). Its primary purpose is a payment bond to protect subcontractors and material suppliers. *East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.,* 235 Ill.App.3d 756, 601 N.E.2d 972, 176 Ill.Dec. 274 (3d Dist. 1992); *City of Chicago ex rel. Charles Equipment Co. v. United States Fidelity & Guaranty Co.,* 142 Ill.App.3d 621, 491 N.E.2d 1269, 96 Ill.Dec. 809 (1st Dist. 1986); *Chicago Housing Authority ex rel. General Bronze Corp. v. United States Fidelity & Guaranty Co.,* 49 Ill.App.2d 407, 199 N.E.2d 217 (1st Dist. 1964); *Board of Education, Decatur School District No. 61, Macon County, Illinois ex rel. United States Electric Co. v. Swam,* 5 Ill.App.2d 124, 124 N.E.2d 554 (3d Dist. 1955); *Carroll Seating Company J.J.L. Inc. v. Verdico,* 369 Ill.App.3d 724, 861 N.E.2d 1045, 308 Ill.Dec. 480 (1st Dist. 2006).

The statutory bond provides a remedy for subcontractors and material suppliers where none previously existed. The remedy is limited to public work that enhances the value of a structure and does not cover repairs or maintenance. *Safari Circuits Inc. v. Chicago School Reform Board of Trustees,* 474 F.Supp.2d 993 (N.D.Ill. 2007). The Bond Act was intended only for the benefit of subcontractors and material suppliers and not for the public body that contracts with a general contractor. The public body does not have standing under the Bond Act to compel the surety to pay lien claims. *Northwest Water Commission v. Carlo V. Santucci, Inc.,* 162 Ill.App.3d 877, 516 N.E.2d 287, 114 Ill.Dec. 132 (1st Dist. 1987), *appeal denied,* 119 Ill.2d 559 (1988).

Before the Bond Act was passed in 1931, subcontractors and material suppliers were not considered third-party beneficiaries of the prime contractor's bond to the state or municipality and were not entitled to recover under it. *Searles v. City of Flora ex rel. A.L. Ide & Sons,* 225 Ill. 167, 80 N.E. 98 (1906); *City of Sterling v. Wolf,* 163 Ill. 467, 45 N.E. 218 (1896). The only exception occurred when the bond explicitly guaranteed payment to subcontractors. *Board of Education of City of Chicago ex rel. Chandler Lumber Co. v. Aetna Indemnity Co.,* 159 Ill.App. 319 (1st Dist. 1911). Even when rights to a lien against public funds exist under the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* the claimant's recovery is limited to the amount of money still due to its immediate subcontractor at the time notice of the lien was served. *Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 211 Ill.Dec. 682 (1st Dist. 1995); *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990). *See Decatur Housing Authority ex rel. Harlan E. Moore & Co. v. Christy-Foltz, Inc.,*

117 Ill.App.3d 1077, 454 N.E.2d 379, 73 Ill.Dec. 519 (4th Dist. 1983); *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005). Thus, if a subcontractor was entirely paid off by the prime contractor, unpaid suppliers to the subcontractor had no lien on remaining funds.

Under the Bond Act, suppliers can claim against the full amount of the bond as long as notice and time requirements are met. *Walker Process Equipment, Division of McNish Corp. v. Advance Mechanical Systems, Inc.,* 282 Ill.App.3d 452, 668 N.E.2d 132, 217 Ill.Dec. 947 (1st Dist. 1996); *Aluma Systems, supra.* The primary purpose of the Bond Act is remedial, and Illinois courts have construed it liberally. *Chicago Housing Authority, supra,* 199 N.E.2d at 219; *Aluma Systems, supra.*

The Bond Act was amended by P.A. 102-968 (eff. Jan. 1, 2023). Notably, a provision was added allowing the Illinois Department of Transportation (IDOT) to deviate from other portions of the Bond Act's requirements to encourage small and diverse business participation in bidding or IDOT contract work. The addition to §1 is below:

> **In order to reduce barriers to entry for diverse and small businesses, the Department of Transportation may implement a 5-year pilot program to allow a contractor to provide a non-diminishing irrevocable bank letter of credit in lieu of the bond required by this Section on contracts under $500,000. Projects selected by the Department of Transportation for this pilot program must be classified by the Department as low-risk scope of work contracts. The Department shall adopt rules to define the criteria for pilot project selection and implementation of the pilot program.** 30 ILCS 550/1.

As of the date of this update, the pilot program has not been rolled out. Subsequent updates, in addition to IDOT available contract data, will help shed light on whether this amendment and the pilot program are able to achieve the stated purpose.

2. [6.2] Separate Remedy

The Public Construction Bond Act provides a separate alternative remedy from a lien against public funds afforded by the Mechanics Lien Act. *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990). Dismissal of a Mechanics Lien Act case does not bar by res judicata or collateral estoppel an action filed against a public works bond. *See Decatur Housing Authority ex rel. Harlan E. Moore & Co. v. Christy-Foltz, Inc.,* 117 Ill.App.3d 1077, 454 N.E.2d 379, 73 Ill.Dec. 519 (4th Dist. 1983). Yet, if a subcontractor or material supplier generally waives its lien against public funds, it is also deprived recovery against the bond. See §6.11 below.

3. [6.3] Terms of the Bond

The Illinois Supreme Court in *Lake County Grading Co. v. Village of Antioch,* 2014 IL 115805, 19 N.E.3d 615, 385 Ill.Dec. 683, held that the Public Construction Bond Act incorporates completion and payment provisions in all surety bonds for public construction in Illinois *even if the bonds themselves do not expressly include such provisions.* The court concluded that regardless of

actual language contained in a public construction bond procured in accordance with the Public Construction Bond Act, all such bonds are deemed to contain both completion and payment provisions as a matter of law. These terms apply in spite of contrary terms in bonds provided.

Following *Lake County Grading,* an Illinois appellate court ruled that "all performance bonds issued on public projects are deemed to include language permitting recovery." *Valley View School District 365-U ex rel. IBEW Local 176 Health, Welfare, Pension, Vacation & Training Trust Fund Trustees v. Hartford Fire Insurance Co.,* 2018 IL App (3d) 150477-U, ¶23. Each such bond is deemed to contain the following provisions whether such provisions are inserted in such bond or not:

> **The principal and sureties on this bond agree that all the undertakings, covenants, terms, conditions and agreements of the contract or contracts entered into between the principal and the State or any political subdivision thereof will be performed and fulfilled and to pay all persons, firms and corporations having contracts with the principal or with subcontractors, all just claims due them under the provisions of such contracts for labor performed or materials furnished in the performance of the contract on account of which this bond is given, when such claims are not satisfied out of the contract price of the contract on account of which this bond is given, after final settlement between the officer, board, commission or agent of the State or of any political subdivision thereof and the principal has been made.** 2018 IL App (3d) 150477-U at ¶23, quoting 30 ILCS 550/1.

B. To Whom the Public Construction Bond Act Applies

1. [6.4] State or Political Subdivision

The Public Construction Bond Act covers public works for the state "or a political subdivision thereof." 30 ILCS 550/2. The court in *Laclede Steele Co. v. Hecker-Moon Co.,* 279 Ill.App. 295 (3d Dist. 1935), held that cities organized under the predecessor to the Illinois Municipal Code are "political subdivisions" of the state within the meaning of the statute. The Bond Act has also been held to apply to housing authorities. *Housing Authority of County of Franklin, Illinois ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873 (5th Dist. 1970). *See also Fox Construction, Inc. v. Galesburg Housing Development Corp. (In re Swanson Gentlemen Alger, Inc.),* 140 B.R. 725 (Bankr. C.D.Ill. 1992). The Bond Act's application to school districts and other units of local government has never been challenged.

If a city, and presumably any other public body, fails to procure a bond from the contractor, neither the city nor its officials are liable under a theory of ordinary negligence to an unpaid subcontractor. *Emulsicoat, Inc. v. City of Hoopeston,* 99 Ill.App.3d 835, 425 N.E.2d 1349, 55 Ill.Dec. 176 (4th Dist. 1981). *See also Stratford Homes v. State of Illinois,* 37 Ill.Ct.Cl. 190 (1984). The decision in *Emulsicoat, supra,* suggests that if the failure to require the bond was a direct act of a public official rather than of a subordinate or agent and the direct act was willful and wanton, the public official could be liable. 425 N.E.2d at 1353 – 1354. The same analysis presumably could be used to determine the liability of a public body or its officials for failing to require a bond in a sufficiently large amount to pay all the claims. Interest on an unpaid claim of a subcontractor is separate from a bond claim. *Panel Built, Inc. v. DeKalb County,* 2016 IL App (2d) 150574-U.

The Bond Act does not require that the bond be in the full amount of the contract. It leaves the amount to the discretion of the government body. However, in *Western Waterproofing Co. v. Springfield Housing Authority,* 669 F.Supp. 901 (C.D.Ill. 1987), the court held that a third-party beneficiary contract action may be asserted by an unpaid subcontractor against a public entity when the public entity failed to procure a payment bond from the general contractor as required by the Bond Act. Notwithstanding the absence of any clear language in the contract requiring procurement of a bond, the court read the bond procurement requirements of the Bond Act into the contract between the public entity and the general contractor and explicitly held that the subcontractor was a third-party beneficiary of the contract provision requiring procurement of a payment bond. 669 F.Supp. at 904 – 905. *See also East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.,* 235 Ill.App.3d 756, 601 N.E.2d 972, 176 Ill.Dec. 274 (3d Dist. 1992), *appeal denied,* 148 Ill.2d 641 (1993); *Shaw Industries, Inc. v. Community College District No. 515,* 318 Ill.App.3d 661, 741 N.E.2d 642, 251 Ill.Dec. 755 (1st Dist. 2000), *appeal denied,* 195 Ill.2d 572 (2001); *Ardon Electric Co. v. Winterset Construction, Inc.,* 354 Ill.App.3d 28, 820 N.E.2d 21, 289 Ill.Dec. 513 (1st Dist. 2004).

The *Shaw Industries* court held that the six-month limitations period provided in §2 of the Bond Act was applicable to a third-party beneficiary contract action for failure to procure a payment bond. The court in *A.E.I. Music Network, Inc. v. Business Computers, Inc.,* 290 F.3d 952 (7th Cir. 2002), disagreed with the *Shaw Industries* court, holding that because the bond is required by §1 of the Bond Act, a third-party beneficiary action for failure to procure a payment bond is a suit for breach of a construction contract to which the general four-year statute of limitations applies. The court in *Ardon Electric, supra,* followed the Seventh Circuit in *A.E.I. Music Network.* In *Ardon Electric,* the Village of Merrionette Park failed to require the general contractor to provide a payment bond. Ardon Electric and several other subcontractors brought third-party beneficiary actions under the general contract. The court reasoned that where the public body fails to procure a bond, a party's remedy cannot be a suit on the nonexistent bond. The court held that the 180-day statute of limitations set forth in the Bond Act did not apply. Therefore, it is unclear in Illinois whether the shorter limitations period of 180 days as provided in §2 of the Bond Act applies in third-party beneficiary actions for failure to procure a payment bond.

In December 2008, the Illinois legislature revised the Bond Act, differentiating between public works for the state or for a political subdivision. The Bond Act applies to public works for the state only if the cost of the project is over $50,000. 30 ILCS 550/1. With regard to public works for a political subdivision, the Bond Act was amended August 9, 2013, to a $50,000 threshold. *Id.*

2. [6.5] Who Provides the Bond

The prime contractor provides the bond. Even when contracts are initially let to several contractors and each contractor procures a bond, the prime contractor must also procure a bond for the entire job. The Public Construction Bond Act does not suggest that a prime contractor could be liable for failing to provide a bond when one was not required or for providing one in an insufficient amount.

Subcontractors have no obligation to pay the prime contractor for any part of the cost of the bond. *Hammen v. Hansen & Werhane, Inc.,* 44 Ill.2d 76, 254 N.E.2d 464 (1969). In addition, the Bond Act does not give the prime contractor a right of contribution from the subcontractors or the public body.

"[S]ubject to the right of reasonable approval or disapproval" by the public body, the Bond Act gives the contractor the right to choose the surety who, under the reasoning of *Emulsicoat, Inc. v. City of Hoopeston,* 99 Ill.App.3d 835, 425 N.E.2d 1349, 55 Ill.Dec. 176 (4th Dist. 1981), cannot be held liable in most circumstances. 30 ILCS 550/1. The Bond Act is unclear on whether the prime contractor may be liable for negligently choosing a surety that subsequently does not make good on the bond.

3. [6.6] Who Can Recover

The Public Construction Bond Act requires that public works bonds guarantee payment to everyone providing labor or materials under contract "with the principal or with subcontractors." 30 ILCS 550/1. *See also City of Chicago ex rel. Charles Equipment Co. v. United States Fidelity & Guaranty Co.,* 142 Ill.App.3d 621, 491 N.E.2d 1269, 96 Ill.Dec. 809 (1st Dist. 1986). Sub-subcontractors and suppliers to subcontractors are therefore statutorily permitted to recover regardless of the bond's language. *Lake County Grading Co. v. Village of Antioch,* 2014 IL 115805, 19 N.E.3d 615, 385 Ill.Dec. 683; *Valley View School District 365-U ex rel. IBEW Local 176 Health, Welfare, Pension, Vacation & Training Trust Fund Trustees v. Hartford Fire Insurance Co.,* 2018 IL App (3d) 150477-U; *Housing Authority of County of Franklin, Illinois ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873 (5th Dist. 1970). *See also Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 151 Ill.Dec. 618 (1st Dist. 1990). However, a supplier cannot recover when the material supplied was not for use on a public work. *State of Illinois ex rel. Chemco Industries, Inc. v. Employers Mutual Casualty Co.,* 303 Ill.App.3d 898, 708 N.E.2d 1224, 237 Ill.Dec. 184 (4th Dist. 1999) (contract between material supplier and state for supply of traffic marking paint was not one for public work).

Since the bond is also a performance bond "conditioned for the completion of the contract" (30 ILCS 550/1), the public body may also recover under the bond for nonperformance if the prime contractor is unable to complete the job. *See, e.g., Hartford Accident & Indemnity Co. v. Village of Milan,* 176 F.Supp. 84 (S.D.Ill. 1959). *See also State ex rel. United States Fidelity & Guaranty Co. v. Mehan,* 581 S.W.2d 837 (Mo.App. 1979).

The Bond Act itself does not permit other parties to recover under the bond even if their claims arise out of the negligence of the prime contractor. Other parties may recover from the surety if the bond explicitly makes the surety liable for their damages. *Sanitary Dist. of Chicago v. United States Fidelity & Guaranty Co.,* 392 Ill. 602, 65 N.E.2d 364 (1946). In *Board of Education of Community High School District No. 99, DuPage County, Illinois v. Hartford Accident & Indemnity Co.,* 152 Ill.App.3d 745, 504 N.E.2d 1000, 105 Ill.Dec. 715 (2d Dist. 1987), the court held that a public entity, although not named as a party to the bond, could maintain a cause of action as a third-party beneficiary if the execution of the bond was intended directly to confer a benefit on the plaintiff. The court stated that this intent would be gleaned from the contract as well as from the circumstances surrounding the parties at the time of its execution.

C. What Claims Can Be Recovered

1. [6.7] Types of Recoverable Expenses

The Public Construction Bond Act provides that payment shall be made for "material used in the work and for all labor performed" in connection with the project or for "all just claims" due under contracts "for labor performed or materials furnished in the performance of the contract on account of which this bond is given." 30 ILCS 550/1 (2014).

Section 1 of the Bond Act was amended in 2020 to marry its language to that in the Mechanics Lien Act. The amendment added the terms "apparatus, fixtures, and machinery" and also clarified that those, in addition to the already present terms of "material" and "labor" "include those rented items that are on the construction site and those rented tools that are used or consumed on the construction site in the performance of the contract on account of which the bond is given." 30 ILCS 550/1. Rental fees may be recoverable, as long as they pertain to items consumed to perform the bonded contract.

The Bond Act may, however, exclude claims for parts and labor used in major equipment repairs occasioned by accident or negligence. *See Arrow Contractors Equipment Co. v. Siegel,* 68 Ill.App.2d 447, 216 N.E.2d 181 (1st Dist. 1966) (construing equivalent language in 770 ILCS 60/23 that gives subcontractors and material suppliers lien on public funds for furnished materials and labor to include only repair of minor items necessarily consumed in project).

2. [6.8] Bond Can Exceed Statutory Requirements

A bond that exceeds the statutory requirements will be enforced by the courts as written. *Illinois State Toll Highway Commission ex rel. Patten Tractor & Equipment Co. v. M.J. Boyle & Co.,* 38 Ill.App.2d 38, 186 N.E.2d 390 (1st Dist. 1962). *See also William J. Templeman Co. v. United States Fidelity & Guaranty Co.,* 317 Ill.App.3d 764, 739 N.E.2d 883, 250 Ill.Dec. 886 (1st Dist. 2000); *Carroll Seating Company J.J.L. Inc. v. Verdico,* 369 Ill.App.3d 724, 861 N.E.2d 1045, 308 Ill.Dec. 480 (1st Dist. 2006). Any ambiguities in the bond are construed against the surety company. *Lesher v. United States Fidelity & Guaranty Co.,* 239 Ill. 502, 88 N.E. 208 (1909). *See also People of State of Illinois ex rel. National Cast Iron Pipe Co. v. Merkle,* 269 Ill.App. 449 (2d Dist. 1933).

In *Illinois State Toll Highway Commission, supra,* the court interpreted a bond as covering a claim for breach of contract when machinery was conditionally sold and then repossessed for nonpayment. The decision did not address whether such a claim would have been allowed had the bond not exceeded the statutory coverage. *Board of Local Improvements South Palos Township Sanitary District ex rel. North Side Tractor Sales Co. v. St. Paul Fire & Marine Insurance,* 39 Ill.App.3d 255, 350 N.E.2d 36 (1st Dist. 1976); *Arrow Contractors Equipment Co. v. Siegel,* 68 Ill.App.2d 447, 216 N.E.2d 181 (1st Dist. 1966). It would be unjust for a surety on one job to absorb the cost of equipment that could be used in future jobs. The same bond was construed to allow a claim against the same subcontractor for unpaid rent on heavy equipment, labor used in servicing and repairing the equipment, the rental value of parts supplied for the equipment, and transportation costs. *Illinois Contractors' Machinery, Inc. v. M.J. Boyle & Co.,* 43 Ill.App.2d 213, 193 N.E.2d 205 (1st Dist. 1963) (abst.); *Illinois State Toll Highway Commission, supra.*

3. [6.9] Amount of Recovery

The total amount recoverable from the general contractor or surety on the bond is limited to the penal sum of the bond. The surety is not released from liability on the bond just because the prime contractor paid underlying obligations that exceed the penal sum. *Griffin Wellpoint Corp. v. Engelhardt, Inc.,* 92 Ill.App.3d 252, 414 N.E.2d 941, 46 Ill.Dec. 888 (2d Dist. 1980). The prime contractor still may be liable to a subcontractor's material supplier who has not been paid.

A subcontractor's material supplier's recovery is not limited to the amount due to the subcontractor. *Housing Authority of County of Franklin, Illinois ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873 (5th Dist. 1970). However, the court in *Housing Authority of County of Franklin* recognized that under its ruling a prime contractor or surety theoretically could be held liable up to the amount of its bond because of a subcontractor's excessive and irresponsible indebtedness.

Interest on recoveries has been allowed only from the date of commencement of the suit. *Griffin Wellpoint, supra,* 414 N.E.2d at 950 – 951, quoting *Reserve Insurance Co. v. General Insurance Company of America,* 77 Ill.App.3d 272, 395 N.E.2d 933, 940, 32 Ill.Dec. 552 (1st Dist. 1979). *See also State of Illinois Capital Development Board ex rel. P.J. Gallas Electrical Contractors, Inc. v. G.A. Rafel & Co.,* 143 Ill.App.3d 553, 493 N.E.2d 348, 97 Ill.Dec. 685 (2d Dist. 1986); *State of Illinois, Department of Transportation ex rel. Moline Consumers Co. v. American Insurance Co.,* 199 Ill.App.3d 1068, 557 N.E.2d 932, 145 Ill.Dec. 953 (3d Dist. 1990). The court allowed no interest when it found no "unreasonable and vexatious delay" in payment by the contractor and surety but rather an honest difference of opinion on whether the plaintiff had a right of recovery. *Housing Authority of County of Franklin, supra,* 256 N.E.2d at 881.

4. [6.10] Subcontractor Working on Multiple Jobs

There are special problems when a subcontractor is working for the same prime contractor on several jobs that are not all bonded. The subcontractor in this situation may be tempted to apply the contractor's payments to the nonbonded jobs first. Being aware of this temptation, the courts have evolved a payment allocation.

Courts begin their payment allocation analysis with the general principle that if a debtor has several open accounts, it may choose which account is to be credited. *Griffin Wellpoint Corp. v. Engelhardt, Inc.,* 92 Ill.App.3d 252, 414 N.E.2d 941, 46 Ill.Dec. 888 (2d Dist. 1980). Thus, if a debtor specifies that the payment is being made on the bonded project, the creditor must apply it to that account. *See Village of Winfield ex rel. Harry W. Kuhn, Inc. v. Reliance Insurance Co.,* 64 Ill.App.2d 253, 212 N.E.2d 10 (2d Dist. 1965). If the debtor does not specify which account should be credited, the creditor can then select the account. If the creditor does not do so, courts apply the first-in, first-out principle; payment is credited to the account first due. *Id. See also Griffin Wellpoint, supra,* 414 N.E.2d at 949.

These general rules on allocation of payments are not applied when the rules would work an injustice. *Alexander Lumber Co. v. Aetna Accident & Liability Co.,* 296 Ill. 500, 129 N.E. 871 (1921). *See also Village of Winfield, supra,* 212 N.E.2d at 12; *Herget National Bank of Pekin v.*

USLife Title Insurance Company of New York, 809 F.2d 413 (7th Cir. 1987). Thus, if the debtor fails to select the account to be credited, the creditor cannot do so when a third party would be liable for the debt. The surety, having a "special equity" in funds paid out to a creditor on a bonded job, has the right to apply the payments to a specific job in this situation. *Alexander Lumber, supra,* 129 N.E. at 873.

NOTE: *Alexander Lumber*'s payment application rule does not apply to multiple projects in a single job. *Airtite, Division of Airtex Corp. v. DPR Limited Partnership,* 265 Ill.App.3d 214, 638 N.E.2d 241, 202 Ill.Dec. 595 (4th Dist. 1994). The decision in *Airtite* limits the application of *Alexander Lumber, supra,* to multiple-job situations. The defendant in *Airtite* relied on *Alexander Lumber* to invoke a more equitable application of payments. However, the court refused to apply *Alexander Lumber* because the case involved multiple projects on a single job. The plaintiff was entitled to apply payments to any project within the job to maintain a legal recourse of foreclosure on the mechanics lien. 638 N.E.2d at 245 – 246.

5. [6.11] When Subcontractor Executes Waiver of Lien

When a subcontractor or supplier executes a waiver of lien against public funds, the subcontractor is not entitled to recover against the bond. *Board of Education of Bourbonnais School District No. 53, Kankakee County, Illinois ex rel. Anning-Johnson Co. v. Hartford Accident & Indemnity Co.,* 60 Ill.App.2d 320, 208 N.E.2d 51 (3d Dist. 1965). A waiver of lien on property before payment also may bar recovery against the bond. For example, a supplier to a subcontractor on a bonded public job issued a waiver referring only to a lien on property before payment and not to a lien on funds. The supplier was nonetheless barred from seeking recovery against the bond. The court explained that the construction of a waiver of lien depends on the intention of the parties. The court found that the supplier intended the waiver to apply to any and all liens and that the only one actually available to be waived was a lien on funds. *Northbrook Supply Co. v. Thumm Construction Co.,* 39 Ill.App.2d 267, 188 N.E.2d 388 (2d Dist. 1963).

The rule that a waiver of lien deprives a supplier or subcontractor of recovery against the bond is relaxed in *Chicago Bridge & Iron Co. v. Reliance Insurance Co.,* 46 Ill.2d 522, 264 N.E.2d 134 (1970). The Illinois Supreme Court reversed the dismissal of a bond claim by a subcontractor who had waived a lien on funds before payment from the prime contractor. The court held that if the plaintiff subcontractor could prove that the issuance by subcontractors of lien waivers before payment by the prime contractor was the custom in the industry and the surety knew of the custom, the general rule that a subcontractor cannot recover if the subcontractor waives a lien against public funds before payment would not bar a claim against the bond. *See also R.W. Dunteman Co. v. C/G Enterprises, Inc.,* 181 Ill.2d 153, 692 N.E.2d 306, 313, 229 Ill.Dec. 533 (1998).

In *State of Illinois Capital Development Board ex rel. P.J. Gallas Electrical Contractors, Inc. v. G.A. Rafel & Co.,* 143 Ill.App.3d 553, 493 N.E.2d 348, 97 Ill.Dec. 685 (2d Dist. 1986), the appellate court held that the trial evidence was sufficient to support the jury's conclusion that final waiver of mechanics liens by a subcontractor before receiving payment was customary in the construction industry and that the subcontractor did not waive the right to proceed against the surety on a payment bond by waiving a mechanics lien. The case is instructive on the types of custom and practice evidence admitted at trial.

6. [6.12] Instances When Surety Is Released from Liability

Generally a surety is released from its obligations when its rights are prejudiced. *State of Illinois, Department of Transportation ex rel. Moline Consumers Co. v. American Insurance Co.,* 199 Ill.App.3d 1068, 557 N.E.2d 932, 935, 145 Ill.Dec. 953 (3d Dist. 1990). "All that a surety has a right to require of his creditor . . . is that no affirmative act shall be done that will operate to his prejudice." *People v. Whittemore,* 253 Ill. 378, 97 N.E. 683, 685 (1912). Thus, the surety may be released from its obligation on the bond if a creditor extends the time for the principal to perform a bonded obligation and the extension is granted without the surety's consent. If there was an express reservation of rights against the surety, however, the surety may remain liable. *Griffin Wellpoint Corp. v. Engelhardt, Inc.,* 92 Ill.App.3d 252, 414 N.E.2d 941, 46 Ill.Dec. 888 (2d Dist. 1980).

The surety may also be released by material departures from a contract that work a hardship on the surety, such as early payments made to the prime contractor without the surety's approval. *See City of Chicago v. Agnew,* 264 Ill. 288, 106 N.E. 252 (1914). Immaterial or technical departures not injuring the surety are insufficient. *Id.*

Sureties and general contractors are not released from bond liability to suppliers of a subcontractor simply because of the subcontractor's default and bankruptcy. *Bigelow-Liptak Corp. v. Mazzucco Construction Co.,* 4 Ill.App.3d 90, 280 N.E.2d 276 (3d Dist. 1972). When a bond covers damages done in connection with the job, a judgment against the public body is binding against the surety as indemnitor if the surety had proper notice of the suit but declined to assume the defense.

D. Procedural Considerations in Bringing Suit on the Bond

1. [6.13] Notice Requirements

The Public Construction Bond Act requires that to preserve a right of action on a contractor's bond, the claimant for labor or material furnished to the state must file a verified notice of claim within 180 days of the claimant's last furnishing of labor or materials. 30 ILCS 550/2. The same notice must be filed with the officer, board, bureau, or department awarding the contract. When the claim is for labor or materials furnished to a political subdivision of the state, notice is to be provided to the clerk or secretary of the political subdivision awarding the contract. When it is unclear which department awarded the contract, the claimant should file the notice with each department. Notice given to the bonding company must also be filed with the general contractor within 10 days after the filing of the state notice. 30 ILCS 550/2. The statutory definition of the word "file" is "by using personal service or by depositing the verified notice in the United States Mail, postage prepaid, certified or restricted delivery return receipt requested limited to addressee only. The verified notice shall be deemed filed on the date personal service occurs or the date when the verified notice is mailed." *Id.* See P.A. 99-623 (eff. Jan. 1, 2017).

The Bond Act sets forth the contents of the required notice:

a. the name and address of the claimant and the business address of the claimant in Illinois (if the claimant is a partnership, the names and addresses of all partners must also be given);

b. the name of the prime contractor;

c. the name of the contractor or subcontractor to whom the claimant furnished labor or materials;

d. the total amount due and unpaid as of the date of verified notice; and

e. a brief description of the contract describing the contractor's work.

A notice form is included in §6.17 below.

Courts have construed the 180-day notice period strictly as beginning when the claimant subcontractor or supplier last furnished labor or materials. The suit will be dismissed if notice was filed later than 180 days despite arguments that notice was filed within 180 days of the claimant's discovery of the prime contractor's alleged breach of contract and given at a time when the subcontract was still in effect and the claimant was still ready, willing, and able to perform. *Village of Crainville, Illinois ex rel. Pipe & Valve Supply Co. v. Argonaut Insurance Co.,* 469 F.Supp. 11 (E.D.Ill. 1976). Courts also have rejected the argument that the 180-day notice period begins when work ends on the entire project and not when the claimant's work ends. *Board of Education, Northfield Township High School, District No. 225, Cook County, Illinois ex rel. Palumbo v. Pacific National Fire Insurance Co.,* 19 Ill.App.2d 290, 153 N.E.2d 498 (1st Dist. 1958).

Technical defects in a timely filed notice will not defeat the claim unless they prejudice an interested party that is asserting rights. *Palumbo, supra.* A complaint failing to allege compliance with the notice requirements of 30 ILCS 550/2 will be dismissed. *McWane Cast Iron Pipe Co. v. Aetna Casualty & Surety Co.,* 3 Ill.App.2d 399, 122 N.E.2d 435 (3d Dist. 1954).

While one notice covering the Mechanics Lien Act and the Bond Act is acceptable, two separate notices are appropriate because the Acts contain different remedies. The court will look to the subcontractor's intent when determining which notice corresponds to which Act.

Walker Process Equipment, Division of McNish Corp. v. Advance Mechanical Systems, Inc., 282 Ill.App.3d 452, 668 N.E.2d 132, 217 Ill.Dec. 947 (1st Dist. 1996), involved notice requirements of the Mechanics Lien Act and the Bond Act. There is discussion of the interplay of the two Acts' notice requirements. Walker filed a complaint against Advance alleging three counts. The first count sought relief under the Mechanics Lien Act, while the second count sought relief under the Bond Act. Walker served a notice entitled "Affidavit of Claim." Months later, Walker personally served a notice entitled "Notice of Mechanic's Lien Claim Pursuant to 770 ILCS 60/23." 668 N.E.2d at 133. Advance filed a motion to dismiss the first count on procedural grounds that the first notice substantially complied with the Mechanics Lien Act and that Walker's failure to commence a proceeding within 90 days terminated the lien. Also, it was argued that the second notice was improper as a "subsequent notice" pursuant to the Mechanics Lien Act, 770 ILCS 60/23(b). 668 N.E.2d at 136.

Walker claimed that the affidavit was not drawn to provide notice under the Mechanics Lien Act but was drawn for complying with the Bond Act. The lower court granted the motion. The appellate court reversed, holding that notice requirements for the Bond Act can satisfy the notice

requirements under the Mechanics Lien Act. However, the Bond Act provides an alternative remedy to that afforded by the Mechanics Lien Act. Therefore, separate notices can be appropriate. The court concluded that the subcontractor's intent to serve notice under one or both of the Acts should control. The court held that the second notice was not "improper subsequent notice" under the Mechanics Lien Act. *Id.*

2. [6.14] When Suit May Be Brought

Once proper notice is given, suit can be brought within one year after the last furnishing of labor, material, apparatus, fixtures, or machinery. 30 ILCS 550/2. Prior to amendment of the Public Construction Bond Act by P.A. 97-487 (eff. Jan. 1, 2012), there were confusing and complex issues defining "final settlement" and "acceptance." These problems should be resolved by the simple one-year requirement for filing suit.

3. [6.15] Where Suit Can Be Brought

Section 2 of the Public Construction Bond Act states that suit can be brought "only in the circuit court of this State in the judicial circuit in which the contract is to be performed." 30 ILCS 550/2. "Judicial circuit" refers to circuit court districts, not appellate court districts. *Village of Crainville, Illinois ex rel. Pipe & Valve Supply Co. v. Argonaut Insurance Co.,* 469 F.Supp. 11 (E.D.Ill. 1976).

4. [6.16] The Complaint and Copy of the Bond

The complaint should allege compliance with the notice requirements and should have a certified copy of the bond attached as an exhibit. This probably best satisfies the statutory requirement that a certified copy of the bond be "filed" in any bond suit. 30 ILCS 550/2.

E. [6.17] Sample Public Construction Bond Act Notice

The following notice form covers a bond claim by a subcontractor. If the claimant is a supplier to a subcontractor, the notice also should be directed to the subcontractor, and the text should be amplified to indicate that the claimant furnished materials to the subcontractor "as subcontractor to (the prime contractor)." If the claimant is a partnership, the notice must state the names and residences of each of the partners.

NOTICE OF CLAIM UNDER CONTRACTOR'S BOND

To: [names of clerk and secretary
name of public body
street
city, state

name of surety company
street
city, state

name of contractor
street
city, state**]**

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that the undersigned [name of subcontractor**], a corporation duly organized and existing under and by virtue of the laws of the State of _____, with its principal place of business at [**address**], entered into a subcontract with [**name and address of contractor**], the prime contractor, to furnish [**description of labor and materials**] for a certain public improvement known as [**description of project**] for [**name of public body**].**

YOU ARE FURTHER NOTIFIED that [name of subcontractor**] did furnish and deliver to [**name of contractor**], at the place of that improvement, labor and materials consisting of [**description of labor and materials**], which were used therein, and that the furnishing of this labor and materials was completed on the ____ day of _____, 20__.**

YOU ARE FURTHER NOTIFIED that after allowing all just credits, deductions, and setoffs, there is now due and owing to [name of subcontractor**] for furnishing this labor and materials consisting of [**description of labor and materials**], for use in and that were used and incorporated into the improvement, a balance in the sum of $_____.**

YOU ARE FURTHER NOTIFIED that [name of subcontractor**] makes claim for the sum of $_____ still due and owing to it against [**name of surety company**], on the surety bond furnished, signed, and delivered by [**name of contractor**], with [**name of surety company**] as surety, all in accordance with the statutes and laws of the State of Illinois in such cases made and provided.**

[name of subcontractor**]**

By: _____

AFFIDAVIT

_____, being first duly sworn on oath, deposes and says that [he**] [**she**] is [**title**] of [**name of subcontractor**], above-mentioned claimant; that [**he**] [**she**] is duly authorized to make this affidavit on its behalf; and that [**he**] [**she**] has read the foregoing Notice of Claim Under Contractor's Bond and knows the contents thereof and that the statements therein contained are true.**

Subscribed and Sworn to before me
this ____ day of _____, 20__.

_____
NOTARY PUBLIC

II. [6.18] RECOVERY ON BONDS FOR PRIVATE JOBS

Although no statute requires a bond on a private job, the owner often requires one. The bond is typically conditioned on the completion of construction in compliance with the contract within a specified time. It often is conditioned also on payment of all subcontractors for materials and labor, delivery of the work free of mechanics liens, or some other similar condition.

A. [6.19] Recovery of Subcontractors or Material Suppliers

A subcontractor or material supplier may recover on a contractor's bond to the owner if the bond's language and surrounding circumstances show an intent to benefit the subcontractor or material supplier. *Neenah Foundry Co. v. National Surety Corp.,* 47 Ill.App.2d 427, 197 N.E.2d 744 (1st Dist. 1964). *Carson Pirie Scott & Co. v. Parrett,* 346 Ill. 252, 178 N.E. 498, 501 (1931), states the rule as follows:

> **The rule is settled in this state that, if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct, he may sue on the contract; if incidental he has no right of recovery thereon.**

Whether a contract is entered into for the "direct benefit" of a third party depends on "the intention of the parties as that intention is to be gleaned from a consideration of all of the contract and the circumstances surrounding the parties at the time of its execution." *Id.*

There is no settled position on how specific the bond's language must be to show the required intent to benefit the subcontractor or material supplier. The court's analysis in *Neenah Foundry, supra,* provides a guide for determining language that is sufficiently specific and which is not. In *Neenah Foundry,* a bond incorporated, by reference, language from a construction contract that stated: "The contractor shall furnish owner with a surety performance bond for the work contracted for and for the payment of claims for labor performed and materials furnished." [Emphasis

omitted.] 197 N.E.2d at 747. The court acknowledged that in *People of State of Illinois ex rel. National Cast Iron Pipe Co. v. Merkle,* 269 Ill.App. 449, 451 (2d Dist. 1933), similar contractual language guaranteeing "payment of all obligations" was held not specific enough to show the required intent. In *Neenah Foundry, supra,* the court nevertheless allowed a material supplier to recover on the bond. The court explained that the contractual provision in *Neenah Foundry* was more explicit than the one in *Merkle,* and it provided a benefit to subcontractors directly enough to allow recovery under the *Carson Pirie Scott* rule. 197 N.E.2d at 748.

Language obligating a surety to "completely pay for said building [upon default of the prime contractor] in the manner and within the time provided for" in an owner's lease with a contractor has also been held specific enough to allow recovery to subcontractors when read along with the rest of a bond. *Phillips Co. v. Constitution Indemnity Co. of Philadelphia,* 68 F.2d 304, 306 (7th Cir. 1933). For other language permitting the subcontractor to recover, *see Board of Education of City of Chicago ex rel. Weil v. Chicago Bonding & Surety Co.,* 218 Ill.App. 20 (1st Dist. 1920); *Board of Education of City of Chicago ex rel. Chandler Lumber Co. v. Aetna Indemnity Co.,* 159 Ill.App. 319 (1st Dist. 1911).

When the bond at issue stated that "[n]o right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors of Owner," the language indicated that the bond was not entered into directly and primarily for the benefit of the third-party plaintiff. *Young v. General Insurance Company of America,* 33 Ill.App.3d 119, 337 N.E.2d 739, 741 (1st Dist. 1975).

For language failing to show the requisite intent to benefit subcontractors or material suppliers, *see City of Herrin ex rel. Bradbury v. Stein,* 206 Ill.App. 339 (4th Dist. 1917); *Searles v. City of Flora ex rel. A.L. Ide & Sons,* 225 Ill. 167, 80 N.E. 98 (1906). *See also Spalding Lumber Co. v. Brown,* 171 Ill. 487, 49 N.E. 725 (1898); *City of Sterling v. Wolf,* 163 Ill. 467, 45 N.E. 218 (1896); *Merkle, supra; City of Yorkville ex rel. Aurora Blacktop Inc. v. American Southern Insurance Co.,* 654 F.3d 713 (7th Cir. 2011).

Since there is not yet a settled position as to the language specificity required for recovery, bonds should state explicitly whether the bond guarantees payment to subcontractors or material suppliers. Since owners who exact bonds from prime contractors are understandably interested in keeping their buildings free from mechanics liens, owners would be well advised to require separate performance and payment bonds. The bond premium for a combination performance-payment bond or separate performance and payment bonds is often the same as the premium for a performance bond.

B. [6.20] Other Considerations

A subcontractor's waiver of a mechanics lien has been held to estop any recovery against a private bond. *William Aupperle & Sons, Inc. v. American Indemnity Co.,* 75 Ill.App.3d 722, 394 N.E.2d 725, 31 Ill.Dec. 523 (3d Dist. 1979). Such waiver also estops recovery against a bond on a public work. See §6.11 above.

III. RECOVERY ON BONDS FOR FEDERAL JOBS

A. [6.21] The Statute

40 U.S.C. §§3131 – 3134, commonly known as the Miller Act (formerly 40 U.S.C. §§270a – 270f), requires a bond on all federal construction contracts over $100,000 and gives subcontractors a right to recover on the bond. Because a lien cannot attach to government property, recovery on the bond is the only security available to subcontractors and material suppliers on federal jobs.

A detailed discussion of the caselaw interpreting the Miller Act is beyond the scope of this chapter. Sections 6.22 – 6.29 below discuss the procedural requirements of the statute.

B. [6.22] Obtaining a Copy of the Bond

40 U.S.C. §3133(a) gives subcontractors and material suppliers the right to obtain a certified copy of the bond on any federal job on which they worked or supplied materials. The provider of the certified copy of the bond is the "department secretary or agency head of the contracting agency." *Id.* The request to the department or agency must include an affidavit stating that the person requesting the copy has supplied labor or materials for a federal project and has not been paid. An affidavit form and a transmittal letter requesting a copy of the bond are included in §§6.30 and 6.31 below.

C. [6.23] Accrual of Action on the Bond

40 U.S.C. §3133(b)(1) provides that the right to sue arises 90 days from the claimant's last furnishing of labor or materials "for which the claim is made."

40 U.S.C. §3133(b)(4) provides that a claim for nonpayment must be brought no later than one year after the last day on which labor or material was furnished by the claimant. There is some confusion as to whether the one-year limitations period begins from the date the claimant supplied the last material or labor for use in the project or from the date the claimant supplied the last material or labor for which the claim was made. In *General Electric Co. v. Southern Construction Co.,* 383 F.2d 135, 139 (5th Cir. 1967), *cert. denied,* 88 S.Ct. 1049 (1968), the court held that the one-year limitations period began to run from the date that the last material or labor was supplied to the project. *See also United States ex rel. JB Systems/Atlanta v. Federal Insurance Co.,* 8 F.Supp.2d 1320, 1327 (M.D.Ala. 1998); *United States ex rel. American Civil Construction, LLC v. Hirani Engineering & Land Surveying, P.C.,* 345 F.Supp.3d 11 (D.D.C. 2018), *notice of appeal filed* (D.C.Cir. Feb. 14, 2019). By contrast, the 90-day notice requirement under 40 U.S.C. §3133(b)(2) begins on the date that the claimant last furnished materials or labor for the project on which it is making a claim. *United States v. Elkins Contractors, Inc.,* 255 F.Supp.3d 351 (D.S.C. 2016).

Post-completion repair work does not stay the one-year statute of limitations period pursuant to §3133(b)(4). Therefore, suit must be brought within one year of the last day that the contractor furnished labor or supplied materials to the project to fulfill the terms of the original contract. Any subsequent repair work does not reset the clock. *United States ex rel. Automatic Elevator Co. v. Lori Construction,* 912 F.Supp. 398, 400 (N.D.Ill. 1996). The *Automatic Elevator* court held that

the Miller Act's one-year limitations period begins to run on the last date on which the subcontractor performed labor or supplied materials to fulfill the terms of the original subcontract, not from the later date on which the subcontractor performed labor or supplied materials pursuant to contractual post-completion warranty work. 912 F.Supp. at 401.

In *United States ex rel. Magna Masonry, Inc. v. R.T. Woodfield, Inc.,* 709 F.2d 249 (4th Cir. 1983), a general contractor's surety appealed a lower court judgment in favor of a subcontractor under the Miller Act. The surety asserted that the suit was time-barred. The subcontractor finished work on July 23, 1979. Inspectors thereafter found deficiencies, and the subcontractor made repairs at no cost until February 22, 1980. The subcontractor filed suit on July 24, 1980, for payments due under the subcontract. The subcontractor argued that either July 24 was included in the one-year period under §3133(b)(4) or the time period began on the last day repair work was performed. The trial court relied on *United States ex rel. Altman v. Young Lumber Co.,* 376 F.Supp. 1290 (D.S.C. 1974), and adopted the subcontractor's first argument, reasoning that July 24, 1980, was within the one-year period after July 23, 1979. *Altman* had calculated the limitations period by applying Federal Rule of Civil Procedure 6(a) and found that the one-year limitations period included August 31, 1973, when August 30, 1972, was the last date for which the claim was asserted. In *Woodfield, supra,* the Fourth Circuit rejected the application of Rule 6(a) to the Miller Act's limitations period and, therefore, found that July 24, 1980, was beyond the one-year limitations period. The *Woodfield* court also rejected the subcontractor's alternative argument that the date should run from the date the subcontractor completed the repair work. The court adopted the majority rule that

> **[t]he applicable legal test . . . is "whether the work was performed and the material supplied as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.' "** 709 F.2d at 251, quoting *United States ex rel. Noland Co. v. Andrews,* 406 F.2d 790, 792 (4th Cir. 1969).

The *Woodfield* court found that the subcontractor's work after July 23, 1979, was repair work rather than work done as a part of the subcontract and, therefore, it did not stay the one-year limitations period. *Id.* Some courts have applied a stricter "substantial completion" test in which the one-year limitations period begins to run when the contract work is substantially completed. *See United States ex rel. Hussman Corp. v. Fidelity & Deposit Company of Maryland,* 999 F.Supp. 734, 744 – 745 (D.N.J. 1998) (citing *Southern Steel Co. v. United Pacific Insurance Co.,* 935 F.2d 1201, 1205 (11th Cir. 1991), and *Johnson Service Co. v. Transamerica Insurance Co.,* 485 F.2d 164, 172 – 173 (5th Cir. 1973)). In making this determination, some courts also consider the value of the materials, the original contract specifications, any unexpected nature of the work, and the importance of the materials to the operation of the system in which they are used. *United States ex rel. Georgia Electric Supply Co. v. United States Fidelity & Guaranty Co.,* 656 F.2d 993, 996 (5th Cir. 1981). Furnishing of replacement parts used for repairs and not for the accomplishment of the original contract does not toll the running of the 90 days. *United States ex rel. State Electric Supply Co. v. Hesselden Construction Co.,* 404 F.2d 774 (10th Cir. 1968).

D. [6.24] Procedural Steps for Recovery on the Bond

40 U.S.C. §§3131 and 3133 protect the interests of prime contractors who generally do not have the means to monitor payments to sub-subcontractors and material suppliers. It also protects

suppliers and laborers who may be harmed by a subcontractor's failure to make timely payments. *United States ex rel. Robert DeFilippis Crane Service, Inc. v. William L. Crow Construction Co.,* 826 F.Supp. 647 (E.D.N.Y. 1993).

40 U.S.C. §3133 provides procedural requirements for bringing a Miller Act suit. When a payment bond has been furnished to secure payment under a contract, a person who has furnished labor or material under the contract can bring a claim if full payment has not been made within 90 days of the last day that the labor or materials were furnished. However, if the person does not have a direct contractual relationship with the contractor who furnished the payment bond (but rather with a subcontractor to the prime contractor), the person must give written notice of the claim to the contractor within 90 days after furnishing the last of the labor or material for which the claim is made. The notice provision protects the prime contractor by requiring material suppliers or sub-subcontractors to give timely notice of a first-tier subcontractor's nonpayment so that the prime contractor can increase retainage or make checks copayable to the first-tier subcontractor and supplier. *DeFilippis Crane Service, supra,* 826 F.Supp. at 651, 654. Third tier and higher cannot recover under the bond. See §6.25 below.

The notice must state the amount claimed and the name of the first-tier subcontractor to whom the labor or material was furnished. The Miller Act requires that the notice shall be served "by any means that provides written, third-party verification of delivery" or "in any manner in which the United States marshal . . . by law may serve summons." 40 U.S.C. §§3133(b)(2)(A), 3133(b)(2)(B). *But see United States ex rel. Moody v. American Insurance Co.,* 835 F.2d 745, 748 (10th Cir. 1987), citing *Fleisher Engineering & Construction Co. v. United States ex rel. Hallenbeck,* 311 U.S. 15, 85 L.Ed. 12, 61 S.Ct. 81, 83 (1940), for the proposition that, although not sent by registered mail, written notice was sufficient when evidence indicated that the contractor had actual notice. Although not statutorily required, it is suggested that a copy of the notice letter be sent to the subcontractor and the surety company. A draft notice letter is included in §6.32 below.

Courts have disagreed about whether the notice must be sent within 90 days or received within 90 days. The court in *Pepper Burns Insulation, Inc. v. Artco Corp.,* 970 F.2d 1340, 1343 (4th Cir. 1992), *cert. denied,* 113 S.Ct. 976 (1993), held that the phrase "giving written notice" within the meaning of the Miller Act requires actual receipt of the notice by the contractor. The court therefore concluded that the mere mailing of the notice within the 90-day period contemplated by the Miller Act was insufficient. *Id. See also United States ex rel. B & R, Inc. v. Donald Lane Construction,* 19 F.Supp.2d 217 (D.Del. 1998). *But see United States ex rel. Lincoln Electric Products Co. v. Greene Electrical Service of Long Island, Inc.,* 252 F.Supp. 324, 327 (E.D.N.Y. 1966), *aff'd,* 379 F.2d 207 (2d Cir. 1967); *United States ex rel. Crowe v. Continental Casualty Co.,* 245 F.Supp. 871, 873 (E.D.La. 1965); *CTI/DC, Inc. v. Selective Insurance Company of America,* 392 F.3d 114 (4th Cir. 2004).

Courts disagree regarding the notice requirements when a claim is based on an open account or series of contracts. Several district courts have held that the Miller Act notice requirement applies separately for each order on an open account. *DeFilippis Crane Service, supra,* 826 F.Supp. at 655 ("Where claims are based on a series of contracts, a claim must be made within 90 days from the date on which the supplier 'furnished or supplied the last of the material' for each underlying contract."). *See also United States ex rel. I. Burack, Inc. v. Sovereign Construction Co.,* 338 F.Supp.

657, 661 (S.D.N.Y. 1972). This rule would apply when claims are based on a series of contracts and would require the supplier to make a separate claim within 90 days from the date on which the supplier furnished the last of the labor or material for each underlying contract. *DeFilippis Crane Service, supra,* 826 F.Supp. at 655.

The majority follows the rule that notice on an open account runs from the date of the last delivery of materials, not from each separate delivery. *United States ex rel. Water Works Supply Corp. v. George Hyman Construction Co.,* 131 F.3d 28, 34 – 35 (1st Cir. 1997), citing *United States ex rel. A & M Petroleum, Inc. v. Santa Fe Engineers, Inc.,* 822 F.2d 547 (5th Cir. 1987) (citing cases from Second, Fourth, and Tenth Circuits). It has been held that if all goods in a series of deliveries by a supplier on open book account are used on the same government project, 90-day notice is timely as to all deliveries if given within 90 days of the last delivery. *Ramona Equipment Rental, Inc. ex rel. United States v. Carolina Casualty Insurance Co.,* 755 F.3d 1063 (9th Cir. 2014).

In *Noland Co. v. Allied Contractors, Inc.,* 273 F.2d 917, 920 – 921 (4th Cir. 1959), the Fourth Circuit reasoned that, although a strict reading might fulfill the purpose of the notice provision by offering more protection to the general contractor, the goal of a specific statutory provision must take a backseat to the purpose of the overall statute, which under the Miller Act is to provide recovery for suppliers who have provided materials but not received compensation.

The suit must be brought "in the name of the United States for the use of the person" suing in the federal district court "for any district in which the contract was to be performed and executed." 40 U.S.C. §§3133(b)(3)(A), 3133(b)(3)(B). Recovery may be limited by the availability of bond proceeds because the Miller Act does not require a bond to cover 100 percent of the cost of improvements. Suit must be brought within one year of the last date on which the contractor performed labor and services. *United States ex rel. American Civil Construction, LLC v. Hirani Engineering & Land Surveying, P.C.,* 345 F.Supp.3d 11 (D.D.C. 2018), *aff'd and remanded,* 26 F.4th 952 (D.C.Cir. 2022).

A Miller Act venue selection clause is valid in a contract. In *United States ex rel. Pittsburgh Tank & Tower, Inc. v. G & C Enterprises, Inc.,* 62 F.3d 35 (1st Cir. 1995), the court stated that a Miller Act venue clause was subject to a valid forum selection provision in a construction subcontract. Likewise, in *United States ex rel. Tech Coatings v. Miller-Stauch Construction Co.,* 904 F.Supp. 1209 (D.Kan. 1995), the court held that, like any other conventional venue provision, the venue requirement under the Miller Act can be contractually waived by a valid forum selection clause.

A surety is bound by an arbitrator's award in a Miller Act dispute when the surety has constructive or actual notice. In *United States ex rel. Skip Kirchdorfer, Inc. v. M.J. Kelley Corp.,* 995 F.2d 656 (6th Cir. 1993), the court held that sureties on a Miller Act subcontract were personally bound by an arbitration proceeding they did not attend but about which they had constructive, if not actual, notice. *See also United States ex rel. MPA Construction, Inc. v. XL Specialty Insurance Co.,* 349 F.Supp.2d 934 (D.Md. 2004). *But see United States ex rel. Frontier Construction, Inc. v. Tri-State Management Co.,* 262 F.Supp.2d 893 (N.D.Ill. 2003), holding that an arbitration award was not binding against a surety because the award was essentially a default

judgment and the surety had not had the opportunity to present defenses in the arbitration proceeding. A subcontractor is entitled to question merit recovery against the security including costs attributable to delays. *United States ex rel. Metric Electric, Inc. v. Enviroserve, Inc.,* 301 F.Supp.2d 56 (D.Mass. 2003).

E. [6.25] Who May Recover

Under the Miller Act, a subcontractor may bring an action against the project's general contractor and against the surety. *United States ex rel. Virginia Beach Mechanical Services, Inc. v. SAMCO Construction Co.,* 39 F.Supp.2d 661 (E.D.Va. 1999). 40 U.S.C. §3133 permits recovery to any person who furnished labor or material under a direct contractual relationship with either the prime contractor or a subcontractor. Thus, the material suppliers of first-tier subcontractors may also recover. *United States ex rel. Hardwood Products Corp. v. John A. Johnson & Sons, Inc.,* 137 F.Supp. 562 (W.D.Pa. 1955). *See also United States ex rel. S.C.I. Construction Co. v. Gajic,* 684 F.Supp. 190 (N.D.Ill. 1988) (sub-subcontractor may recover).

On the other hand, recovery has been denied to the supplier of materials to the supplier of a prime contractor. *Brown & Root, Inc. v. Gifford-Hill & Co.,* 319 F.2d 65 (5th Cir. 1963); *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.,* 322 U.S. 102, 88 L.Ed. 1163, 64 S.Ct. 890 (1944). Similarly, a third-level subcontractor, such as a subcontractor to a subcontractor to a subcontractor to the prime contractor, cannot recover. *United States ex rel. Powers Regulator Co. v. Hartford Accident & Indemnity Co.,* 376 F.2d 811 (1st Cir. 1967). A subcontractor is one who "takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." *Clifford F. MacEvoy, supra,* 64 S.Ct. at 894. *See also United States ex rel. Wellman Engineering Co. v. MSI Corp.,* 350 F.2d 285 (2d Cir. 1965). Thus, a supplier of materials to the subsidiary of a subcontractor, which in turn sold the materials to the subcontractor at a loss, could not recover under the prime contractor's Miller Act payment bond even though the materials were shipped directly to the subcontractor. *United States ex rel. Gold Bond Building Products, Division of National Gypsum Co. v. Blake Construction Co.,* 820 F.2d 139 (5th Cir. 1987). *See also United States ex rel. Metal Manufacturing, Inc. v. Federal Insurance Co.,* 656 F.Supp. 1194 (D.Ariz. 1987); *United States, Department of Navy, Wholesale Revitalization ex rel. Torres Drywall Services, Inc. v. Norden Enterprises, LLC,* No. 01 C 8968, 2004 WL 42318 (N.D.Ill. Jan. 6, 2004).

F. What Claims Can Be Recovered

1. [6.26] Claims for Materials Intended To Be Used

To recover under the Miller Act, a material supplier need not "prove that his materials were actually used in the prosecution of the work of the prime contract, but only that in good faith he reasonably believed that the materials were so intended." *Boyd Callan, Inc. v. United States ex rel. Steves Industries, Inc.,* 328 F.2d 505, 511 (5th Cir. 1964), quoting *United States ex rel. Westinghouse Electric Supply Co. v. Endebrock-White Co.,* 275 F.2d 57, 60 (4th Cir. 1960). Thus, a material supplier may recover for materials that were not actually used but that were placed in inventory by the contractor or subcontractor to replace identical materials used in the prosecution of the job. *Fourt v. United States ex rel. Westinghouse Electric Supply Co.,* 235 F.2d 433 (10th Cir. 1956); *Commercial Standard Insurance Co. v. United States ex rel. Crane Co.,* 213 F.2d 106 (10th

Cir. 1954). If the material supplier reasonably believed that the materials were intended for use under the prime contract, a material supplier may also recover for materials that were supplied to a subcontractor but were never delivered to the site of the federal job. *United States ex rel. Color Craft Corp. v. Dickstein,* 157 F.Supp. 126 (E.D.N.C. 1957). *See also United States ex rel. Balzer Pacific Equipment Co. v. Fidelity & Deposit Company of Maryland,* 895 F.2d 546 (9th Cir. 1990). A distinction has been made between "material," which is expected to be consumed, and "capital equipment," which remains reusable. Thus, pipe sold for use in performing dredging remained reusable and was therefore not material within the meaning of the Miller Act but rather capital equipment. *United States ex rel. Sunbelt Pipe Corp. v. United States Fidelity & Guaranty Co.,* 785 F.2d 468 (4th Cir. 1986). In distinguishing between "material" and "capital equipment," the court must approach the issue from the perspective of the reasonable expectation of the supplier. *United States ex rel. Brothers Builders Supply Co. v. Old World Artisans, Inc.,* 702 F.Supp. 1561 (N.D.Ga. 1988).

2. [6.27] Subcontractors Working on Multiple Jobs

Courts begin the payment allocation analysis by looking to the language of the contract. If the contract language specifies a method of payment allocation, the supplier is obligated to apply the payments in accordance with the agreement. The court will then look to the knowledge of the supplier. If the supplier knows or has reason to know the source of the payment, the supplier must apply payments to the debt created by that source. If the supplier does not know or have reason to know the source of the payment, the supplier may apply the payment based on its payment application custom.

In *United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Insurance Co.,* 86 F.3d 332 (4th Cir. 1996), the court first looked to the contractual language and found that the parties agreed that the supplier would have discretion in applying payments unless otherwise directed. The court held that the payment in dispute was made without instruction. Then, the court considered whether the supplier knew or had reason to know the source of the payment and concluded that the supplier did not. Finally, the court considered whether the payment was applied in the customary payment application method of the company. The supplier had a custom of applying payments to the oldest outstanding invoice and followed that custom in this case. The court held that the contractor and surety were liable for the amount reported as outstanding.

3. [6.28] Rentals, Repairs, and Replacement Parts

Rental costs for equipment used to perform work provided for in the contract and costs of current repairs that compensate only for ordinary wear and tear and do not substantially add to the value of the equipment may be recovered against a Miller Act bond. *Continental Casualty Co. v. Clarence L. Boyd Co.,* 140 F.2d 115 (10th Cir. 1944). Costs of replacement parts may also be recovered against the bond, regardless of whether the parts were used, if both the supplier and the purchaser reasonably believe that the work of the contract would substantially use up existing parts and thus require part replacements. *United States ex rel. J.P. Byrne & Co. v. Fire Association of Philadelphia,* 260 F.2d 541, 544 – 545 (2d Cir. 1958).

4. [6.29] Interest and Attorneys' Fees

The availability of prejudgment interest is determined by the applicable state law. *United States ex rel. Groisser & Shlager Iron Works, Inc. v. Walsh,* 240 F.Supp. 1019 (N.D.N.Y. 1965); *Charles R. Shepherd, Inc. v. United States ex rel. Sullivan, Long & Hagerty, Inc.,* 292 F.2d 146 (5th Cir. 1961). The amount of prejudgment interest is a question of federal law. Because the Miller Act is silent on this point, state law is "an appropriate source of guidance." *United States ex rel. Canion v. Randall & Blake,* 817 F.2d 1188, 1193 (5th Cir. 1987). *See also United States ex rel. Yonker Construction Co. v. Western Contracting Corp.,* 935 F.2d 936 (8th Cir. 1991).

The Miller Act does not, by its own terms, provide for attorneys' fees or interest. However, interest and attorneys' fees are recoverable if they are part of the contract between the subcontractor and the supplier. In *United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Insurance Co.,* 86 F.3d 332 (4th Cir. 1996), the court held the contractor and the surety liable to the supplier for interest on past due amounts and attorneys' fees incurred in the supplier's collection efforts because the contract between the parties obligated the subcontractor to pay such amounts. In the absence of a federal statute establishing the judgment interest rate, the district courts look to state law to establish the rate on damages on a Miller Act claim. *United States ex rel. Metric Electric, Inc. v. Enviroserve, Inc.,* 301 F.Supp.2d 56 (D.Mass. 2003).

Attorneys' fees can be awarded when bad faith is found. *See, e.g., Tacon Mechanical Contractors, Inc. v. Aetna Casualty & Surety Co.,* 65 F.3d 486 (5th Cir. 1995). Bad faith may be found in actions that led to the lawsuit and in the conduct of litigation. Bad faith exists when a claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons. In *United States ex rel. Balf Co. v. Casle Corp.,* 895 F.Supp. 420 (D.Conn. 1995), the court considered a claim for attorneys' fees in a Miller Act suit. The court concluded that bad faith is required to collect fees, pointing to *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 40 L.Ed.2d 703, 94 S.Ct. 2157 (1974). The *Balf* court concluded that raising complex issues does not constitute bad faith. In *United States ex rel. Cool Temp, Inc. v. All American Building Systems, Inc.,* 857 F.Supp. 69 (N.D.Ga. 1994), the court concluded that the Supreme Court's decision in *F.D. Rich* barred recovery of attorneys' fees under state law. The court found that the party's claim based in Georgia law was without merit because the collection of attorneys' fees under the Miller Act is available only when bad faith is found.

G. Forms

1. [6.30] Affidavit To Support Request for Certified Copy of Miller Act Bond

AFFIDAVIT

STATE OF _____)
) ss.
COUNTY OF _____)

_____, being first duly sworn on oath, deposes and says that [he**] [**she**] is [**title**] of [**name of supplier**], a corporation duly organized under the laws of the State of _____ with its principal place of business at _____.**

Affiant further states that pursuant to orders received from [name of subcontractor**], subcontractor under [**name and address of prime contractor**], prime contractor under a contract covering work described as [**project description**], Contract No. _____, [**name of supplier**] furnished [**description of labor or materials**] to [**name of subcontractor**], subcontractor under [**name of prime contractor**], prime contractor, for use in the completion of the contract.**

Affiant further states that there is due to [name of supplier**] for these materials furnished as above set forth the sum of $_____.**

Affiant further states that this Affidavit is made for the purpose of securing from [name of department secretary or agency head**] a copy of the contract of [**prime contractor**] and a copy of the surety bond furnished by [**prime contractor**] in connection with the performance of its prime contract with reference to the above-described project.**

Subscribed and Sworn to before me
this _____ day of _____, 20__.

_____
NOTARY PUBLIC

2. [6.31] Transmittal Letter To Obtain Certified Copy of Miller Act Bond

[name of department secretary or agency head
name of department or agency
street
city, state**]**

Attention: Contracting Official
Re: Contract No. _____
[name of prime contractor**],**
Prime Contractor
[name of subcontractor**],**
Subcontractor

[name of department secretary or agency head**]:**

There is enclosed an Affidavit pursuant to the provisions of the Miller Act in connection with an unpaid account for materials furnished to [name of subcontractor**], subcontractor under [**name of prime contractor**], prime contractor, under Contract No. _____, [**description of project**].**

Please furnish to us a certified copy of the above contract and a certified copy of the bond of [prime contractor**] furnished in connection with that contract. If you will also enclose your statement for the reproduction cost of these documents, we will immediately send you a check in payment.**

Thank you very much for your assistance.

Very truly yours,

[name of claimant**]**

By: _____

Enclosure: Affidavit

3. [6.32] Sample Miller Act Notice

NOTE: Letter to be sent on claimant's letterhead.

[prime contractor
street
city, state**]**

Re: [description of project**]**

To Whom It May Concern:

You are hereby notified that we have furnished [description of labor and materials**] to [**subcontractor**] for use in the construction of the public improvement designated as [**description of project**].**

You are further notified that the amount of $_____ is presently due to us from [subcontractor**] for the labor and materials.**

You are further notified that this Notice is given pursuant to the provisions of the Miller Act to protect our rights under the payment bond furnished on this project.

Very truly yours,

[name of claimant**]**

By: _____

cc. [subcontractor
surety company**]**

Registered Mail
Return Receipt Requested

7 Mechanics Liens in Bankruptcy

CAROLINA Y. SALES
KENNETH A. MICHAELS JR.
Bauch & Michaels, LLC
Chicago

IICLE® gratefully acknowledges Julia Jensen Smolka, who provided this chapter for previous editions and on whose material this edition is based.

VII. Preferences

VIII. [7.32] Nondischargeability Claims by Lien Claimants

I. [7.1] INTRODUCTION

Representing a creditor in bankruptcy is tricky; counsel must zealously represent the client and recover as much as possible. However, there are limitations on what can be done without running afoul of the automatic stay under §362 of the Bankruptcy Code, 11 U.S.C. §101, *et seq.,* and incurring sanctions. This chapter is intended to give the mechanics lien practitioner a concise overview of the bankruptcy law and provide a primer on what steps should be taken to safeguard a client's claim once a party files for bankruptcy protection. The chapter is not intended to provide a comprehensive education on the entire Bankruptcy Code — that would take volumes. Rather, it is designed to explain the basics on how bankruptcy works, supply information on the parties that will be encountered, touch on terms with which the attorney will need to be familiar, and explain relevant sections of the Bankruptcy Code. For a full overview and a more in-depth analysis, please see two excellent treatises, Henry J. Sommer and Richard Levin eds., COLLIER ON BANKRUPTCY (multivolume set, year and edition vary by volume), and William L. Norton III, NORTON BANKRUPTCY LAW AND PRACTICE (3d ed.) (multivolume set, year varies by volume), both of which are updated on a regular basis and found in most law libraries. See also BUSINESS BANKRUPTCY PRACTICE (IICLE®, 2022); CONSUMER BANKRUPTCY PRACTICE (IICLE®, 2022).

II. BRIEF OVERVIEW OF BANKRUPTCY

A. [7.2] The Courts and Jurisdiction

Bankruptcy courts are federal legislative courts of limited jurisdiction. Their jurisdiction is established by Title 28 of the U.S. Code. See 28 U.S.C. §1334. Bankruptcy judges are appointed to 14-year terms, which can be renewed. 28 U.S.C. §152. The jurisdiction of bankruptcy courts is limited by both the U.S. Constitution and the statutory grant of power. Bankruptcy courts do not function as Article III courts because bankruptcy judges do not have life tenure and salary protection. Therefore, the jurisdiction of a bankruptcy court is limited to the powers that can be validly exercised by a federal legislatively created court.

Appeals taken from bankruptcy court orders typically are first assigned to the federal district court in which the bankruptcy court is located and then, if a further appeal is necessary, to the circuit court of appeals. 28 U.S.C. §§158(a), 1291; Federal Rule of Bankruptcy Procedure 8004. In limited circumstances, a bankruptcy judge can certify a case as one appropriate for direct appeal to the circuit court of appeals under 28 U.S.C. §158(d)(2)(A).

In years past, the bankruptcy court's jurisdiction was construed to be extremely broad, with the court having jurisdiction to hear and decide every legal matter that could affect a debtor or its estate.

28 U.S.C. §§157(a) – 157(c) establish and divide the bankruptcy jurisdiction into matters that are either "core" or "non-core." Section 157(b)(1) allows bankruptcy judges to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11," and to enter judgments in these matters. Section 157(b)(2) gives a nonexclusive list of matters deemed by Congress to be core proceedings in bankruptcy. Typically, the matters concern the

administration of the estate and allowance of claims. Section 157(c) allows the bankruptcy judge to hear matters that are non-core but "otherwise related to" the bankruptcy case and submit proposed findings of fact and conclusions of law to the district court, which then has the responsibility to enter the final judgment. Section 157(d) allows the district court to withdraw any case or proceeding from the bankruptcy court and remove the matter to the district court at any time.

However, in 2011 the United States Supreme Court decided *Stern v. Marshall,* 564 U.S. 462, 180 L.Ed.2d 475, 131 S.Ct. 2594 (2011), which curtailed the power of the bankruptcy court to enter final judgments on matters that were related to a bankruptcy but were non-core. The case is interesting because Marshall was Vickie Lynn Marshall, a.k.a. Anna Nicole Smith. She had filed a bankruptcy, during which her stepson filed a proof of claim based on defamation. She filed a counterclaim, and eventually the bankruptcy court granted Vickie's motion for summary judgment on her stepson's defamation claim; the court then conducted a bench trial on her counterclaim for tortious interference. Vickie won, and the stepson appealed. The Supreme Court ruled that even though Vickie's counterclaim was compulsory, it was rooted in a state law claim; therefore, the entering of the final judgment by the bankruptcy court was unconstitutional because it infringed on the power granted to Article III courts. The decision has restricted a bankruptcy court's ability to try and resolve compulsory counterclaims, which impose additional costs and delays in cases. *See also In re Chellino,* No. 18bk25452, 2022 WL 1180621, **2 – 4 (Bankr. N.D.Ill. Apr. 13, 2022) (explaining determination of bankruptcy court's "related to" jurisdiction).

B. [7.3] The Bankruptcy Chapters

There are five different types of cases that can be filed under the Bankruptcy Code. They are

1. liquidation for an individual or corporation (Chapter 7);

2. reorganization for a municipality (Chapter 9);

3. reorganization for a business or individual over debt limits in Chapter 13 (Chapter 11);

4. reorganization for a family farmer (Chapter 12); and

5. reorganization for an individual with regular income and noncontingent, liquidated debts of less than $2.75 million (see 11 U.S.C. §109(e); these amounts are adjusted on a regular basis for inflation) (Chapter 13).

Regardless of the type of bankruptcy, a mechanics lien creditor's rights and responsibilities are the same.

C. [7.4] The Players

Debtor. The debtor is the person or entity in bankruptcy. Married couples can file individually or jointly in one petition. If the debtor is an individual and he or she owns a separate company, only

the individual is the debtor; the company is not. The corporation would have to file its own petition. *See In re Capital Equity Land Trust No. 2140215,* 646 B.R. 463 (Bankr. N.D.Ill. Nov. 17, 2022) (explaining eligibility under 11 U.S.C. §109). A person or entity can be put into bankruptcy by creditors in what is termed an "involuntary bankruptcy."

Debtor-in-possession. The debtor-in-possession is the debtor in a Chapter 11 case. The debtor controls the case and the assets of the estate. The debtor-in-possession has certain responsibilities, which include safeguarding the assets of the estate and making certain financial disclosures. The debtor is automatically allowed to be the debtor-in-possession, but the debtor can be stripped of that title, and a trustee can be appointed for cause by the judge. Typically, a creditor brings such a motion if the creditor feels the debtor-in-possession is not fulfilling its duties.

Subchapter V trustees. If a small business debtor elects to proceed under Subchapter V of Chapter 11, a Subchapter V trustee is appointed to administer the case. See Executive Office for United States Trustees, U.S. Department of Justice, *Handbook for Small Business Chapter 11 Subchapter V Trustees* (Feb. 2020), www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/download.

U.S. trustee. The U.S. trustee is the appointed person who oversees the bankruptcy cases in a particular jurisdiction. Individual attorneys are assigned and monitor Chapter 11 proceedings. The U.S. Trustee's Office also oversees Chapter 7 cases and Chapter 7 trustees.

Trustee. In Chapter 7 cases, the trustee is typically a bankruptcy attorney who, in addition to his or her usual practice, is appointed to the Chapter 7 trustee panel. The trustee is appointed at random to cases. The trustee's job is to conduct the 11 U.S.C. §341, or "meeting of creditors," examination, collect any nonexempt assets for sale, and distribute proceeds pro rata to creditors. The trustee is paid a small, flat fee for all cases assigned to him or her. Then, if the trustee recovers assets to distribute to creditors, he or she receives a percentage of that amount per statute. See 11 U.S.C. §326(a).

Chapter 13 trustees. In Chapter 13 cases, the trustee and his or her office represent all unsecured creditors. The Chapter 13 trustee collects and distributes payments pro rata over the term of the repayment plan. He or she also verifies that the plan is put forth in good faith and is proper under the Bankruptcy Code.

Judge. The bankruptcy judge will be seen only with motion practice or if there is a need to otherwise obtain an order or to file an adversary case. The judge does not participate in the meeting of creditors.

Creditors' committee. In larger reorganization cases, the court can create a committee of unsecured creditors to weigh in on the debtor's plan and most other major decisions of the case that affect unsecured creditors. The creditors' committee can hire counsel, whose fees will be paid from the bankruptcy estate.

Estate. While it is not a person, the estate is a player. The bankruptcy estate consists of the debtor's nonexempt assets. Anything from real property and equipment to customer lists and causes of action are assets. The trustee in a Chapter 7 case is charged with liquidating the estate. In a Chapter 13 or 11 case, the debtor retains the estate assets by paying their value over the term of the plan to the creditors.

III. [7.5] THE AUTOMATIC STAY

Debtors file for bankruptcy to obtain the protection of the automatic stay found in 11 U.S.C. §362. It functions as "one of the fundamental protections afforded to debtors by the bankruptcy laws." *In re Grede Foundries, Inc.,* 651 F.3d 786, 790 (7th Cir. 2011), quoting *In re 229 Main Street Limited Partnership,* 262 F.3d 1, 3 (1st Cir. 2001). The stay arises immediately upon the filing of a bankruptcy petition and blocks a wide variety of creditor activity listed in §362(a) unless a creditor obtains relief of the stay under §362(d). *In re Radcliffe,* 563 F.3d 627, 630 (7th Cir. 2009).

Cases typically are filed to end collection activities or on the eve of judgment in lawsuits. Consumer bankruptcy cases allow the debtor to address multiple debts and disputes in one forum before one judge, which is invaluable. The automatic stay prohibits (a) the commencement or continuation of legal process; (b) the enforcement of judgments against the debtor or its property; (c) any act to collect, assess, or recover a claim that arose before commencement of the case; (d) the setoff of any debt; and (e) any act to create, perfect, or enforce any lien against property of the estate. See 11 U.S.C. §362(a). Any willful violation of the automatic stay by creditors can be punished severely. See 11 U.S.C. §362(k). Addressing the willfulness standard under §362(k), the court in *In re Thompson,* 426 B.R. 759, 763 (Bankr. N.D.Ill. 2010), found that a creditor is liable under §362(k) if it has actual knowledge of the pending bankruptcy case and deliberately commits the act complained of, despite its knowledge of the stay. A creditor can also receive constructive notice of the automatic stay by a "properly filed public record." *AP Siding & Roofing Co. v. Bank of New York Mellon,* 548 B.R. 473, 481 (N.D.Ill. 2016).

The filing of a bankruptcy petition by an owner or a necessary party to a mechanics lien foreclosure action operates as a stay of any efforts to enforce a debt, including

> **(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;**
>
> **(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;**
>
> **(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;**

(4) any act to create, perfect, or enforce any lien against property of the estate; [and**]**

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title. 11 U.S.C. §362(a).

A. [7.6] Recording the Mechanics Lien — An Exception to the Automatic Stay

Section 546 of the Bankruptcy Code creates an exception to the Code's automatic stay applicable to a lien claimant's right to perfect its lien claim and makes the trustee powers subject to the lien claimant's rights. 11 U.S.C. §546. Specifically, the rights and powers of a trustee are subject to any generally applicable law that (1) "permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection" or (2) "provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation." 11 U.S.C. §546(b)(1). Therefore, as long as a lien claimant complies with the timing requirements of the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* the claimant may perfect the lien by recording the lien claim without violating the automatic stay.

If

(A) a law described in 11 U.S.C. §546(b)(1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement. 11 U.S.C. §546(b)(2).

B. [7.7] Perfecting the Mechanics Lien

The laws of the State of Illinois give to (original and general) contractors, subcontractors, and material suppliers a right to lien real property for the value of the material, fixtures, labor, or services that have been used to improve private property. Due to the nature of the items supplied, such as material, fixtures, labor, or services, possession of which cannot be retained, the law gives a lien claimant a powerful right to satisfy its money claim out of the property that was improved. However, because the rights granted a lien claimant under the Mechanics Lien Act are in derogation of the common law, it is absolutely essential that certain requirements of the Act be met to preserve and perfect one's mechanics lien rights. While the Act is to be liberally construed, the requirements of the Act for perfection of one's lien rights are strictly construed. *Parkway Bank & Trust Co. v. Meseljevic,* 406 Ill.App.3d 435, 940 N.E.2d 215, 227, 346 Ill.Dec. 215 (1st Dist. 2010). The failure to comply with the statutory requirements can be fatal to the preservation and perfection of one's mechanics lien rights.

The Mechanics Lien Act is a comprehensive statutory enactment that outlines the rights, responsibilities, and remedies of parties to construction contracts, including owners, contractors, subcontractors, and third parties. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 496, 320 Ill.Dec. 330 (1st Dist. 2008) (holding that where lien claimant knowingly records lien with substantial overcharge, its claim will be defeated as constructive fraud). The Act's "overall purpose is 'to require a person with an interest in real property to pay for improvements or benefits which have been induced or encouraged by his or her own conduct.' " *Id.,* quoting *Stafford-Smith, Inc. v. Intercontinental River East, LLC,* 378 Ill.App.3d 236, 881 N.E.2d 534, 539, 317 Ill.Dec. 366 (1st Dist. 2007). Because the right to a mechanics lien is statutory, however, "a contractor must strictly comply with the Act to be eligible for relief." 887 N.E.2d at 496 – 497, quoting *Matanky Realty Group, Inc. v. Katris,* 367 Ill.App.3d 839, 856 N.E.2d 579, 582, 305 Ill.Dec. 774 (1st Dist. 2006).

In *Golfview Developmental Center, Inc. v. All-Tech Decorating Co. (In re Golfview Developmental Center, Inc.),* 309 B.R.758, 768 (Bankr. N.D.Ill. 2004), the bankruptcy court summarized Illinois caselaw to require that four elements be satisfied for a contractor to be entitled to a mechanics lien: (1) the claimant had a valid contract; (2) the claimant's contract was with the property owner or someone knowingly permitted by the owner; (3) the claimant furnished certain lienable materials or labor; and (4) the claimant performed under its contract. Although *Golfview* does not discuss the requirement, not every contract pertaining to land serves as a basis for a mechanics lien. The contract must involve an improvement to land or delivery of certain services such as those of an architect, engineer, or surveyor. 770 ILCS 60/1(b). If these elements are satisfied, then the claimant has an inchoate lien and must perfect its lien.

To properly perfect a lien claim against either an owner or a third party, a mechanics lien claimant must comply with the prerequisites of §7 of the Act, 770 ILCS 60/7. *Cordeck Sales, supra,* 887 N.E.2d at 500. Section 7 requires a lien claimant seeking to assert a lien claim against a third party, such as a creditor or encumbrancer or purchaser, to file within four months of its completion date a claim that contains a brief statement of the claimant's contract. *Id.* It is important to note that different procedural requirements apply for subcontractor claimants (770 ILCS 60/21 and 60/24) or may be applicable as to residential property (770 ILCS 60/5) or improvements involving public property (770 ILCS 60/23).

In addition to setting forth the substantive requirements of a valid mechanics lien claim, §7 also details strict procedural requirements that a lien claimant must abide by to assert a valid lien claim. These requirements vary depending on the type of party against which the lien claimant seeks to assert its lien. *Cordeck Sales, supra,* 887 N.E.2d at 501. With respect to third parties, such as creditors, encumbrances, or purchasers of the property, a lien claimant must record its claim within four months after completion of the work. 887 N.E.2d at 501 – 502. In contrast, when a lien claimant seeks to enforce a mechanics lien against an owner, the claimant has two years following the completion of work to record its lien. 887 N.E.2d at 502.

In addition to the recording requirements of §7 of the Act, a subcontractor or material supplier must also comply with the procedural requirements of §24 of the Act. To perfect a mechanics lien claim, §24 requires a subcontractor to file a notice of lien claim within 90 days after completion of work for the claim to be enforceable. 887 N.E.2d at 525. Compliance with §24's notice requirement is a condition precedent to a cause of action under the Act. *Id.* Section 24(a) specifically provides:

> **Sub-contractors, or parties furnishing labor, materials, fixtures, apparatus, machinery, or services, may at any time after making his or her contract with the contractor, and shall within 90 days after the completion thereof, or, if extra or additional work or material is delivered thereafter, within 90 days after the date of completion of such extra or additional work or final delivery of such extra or additional material, cause a written notice of his or her claim and the amount due or to become due thereunder, to be sent by registered or certified mail, with return receipt requested, and delivery limited to addressee only, to or personally served on the owner of record or his agent or architect, or the superintendent having charge of the building or improvement and to the lending agency, if known.** 770 ILCS 60/24(a).

Section 28 provides in pertinent part:

> **If any money due to the laborers, materialmen, or sub-contractors be not paid within 10 days after his notice is served as provided in sections 5, 24, and 25, then such person may file a claim for lien or file a complaint and enforce such lien within the same limits as to time and in such other manner as hereinbefore provided for the contractor in section 7 and sections 9 to 20 inclusive, of this Act, or he may sue the owner and contractor jointly for the amount due in the circuit court, and a personal judgment may be rendered therein, as in other cases.** 770 ILCS 60/28.

C. [7.8] Notice Requirements To Perfect Liens Against Owner-Occupied, Single-Family Residence

Section 5 of the Mechanics Lien Act describes a notice that each subcontractor must provide to a homeowner of an owner-occupied, single-family residence to preserve its lien claim:

> **Each subcontractor who has furnished, or is furnishing, labor, services, material, fixtures, apparatus or machinery, forms or form work in order to preserve his lien, shall notify the occupant either personally or by certified mail, return receipt requested, addressed to the occupant or his agent at the residence within 60 days from his first furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work, of his agreement to do so.**
>
> **The notice shall contain the name and address of the subcontractor or material man, the date he started to work or to deliver materials, the type of work done and to be done or the type of labor, services, material, fixtures, apparatus or machinery, forms or form work delivered and to be delivered, and the name of the contractor requesting the work.** 770 ILCS 60/5(b)(ii).

See MD Electrical Contractors, Inc. v. Abrams, 228 Ill.2d 281, 888 N.E.2d 54, 62, 320 Ill.Dec. 837 (2008) (holding that Home Repair and Remodeling Act, 815 ILCS 513/1, *et seq.,* does not apply to subcontractors).

The Mechanics Lien Act also requires a subcontractor to give a specific warning to a homeowner when it provides the notice of rendering services. This warning reads:

NOTICE TO OWNER

The subcontractor providing this notice has performed work for or delivered material to your home improvement contractor. These services or materials are being used in the improvements to your residence and entitle the subcontractor to file a lien against your residence if the labor, services, material, fixtures, apparatus or machinery, forms or form work are not paid for by your home improvement contractor. A lien waiver will be provided to your contractor when the subcontractor is paid, and you are urged to request this waiver from your contractor when paying for your home improvements. 770 ILCS 60/5(b)(ii).

D. [7.9] Tolling and Necessary Party

As noted in §7.7 above, the Bankruptcy Code allows a lien claimant the right to properly perfect its lien claim. This includes service of the required notice from a subcontractor or material supplier and the required recording of the mechanics lien claim with the recorder of the county where the property is located within four months of the last day worked by any lien claimant. However, the Bankruptcy Code does not allow a lien claimant to bring suit to foreclose its lien claim while the bankruptcy stay is in effect. Pursuant to §7 of the Mechanics Lien Act, a lien claimant that has properly perfected its lien claim must file a suit to foreclose on such a lien claim within two years of the last day worked or the lien claim becomes unenforceable. 770 ILCS 60/7.

Section 108(c) of the Bankruptcy Code provides:

Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of —

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim. 11 U.S.C. §108(c).

Accordingly, the two-year limitation for filing suit to foreclose on a mechanics lien is extended during the period in which the stay is in place, or 30 days after the stay is lifted, whichever is later.

E. [7.10] 770 ILCS 60/34 Demand and the Automatic Stay

Section 34 of the Mechanics Lien Act provides a method for an owner to challenge a claim for lien recorded against its property and clear title to the property. Specifically, §34(a) provides:

> **Upon written demand of the owner, lienor, a recorder under Section 3-5010.8 of the Counties Code, or any person interested in the real estate, or their agent or attorney, served on the person claiming the lien, or his agent or attorney, requiring suit to be commenced to enforce the lien or answer to be filed in a pending suit, suit shall be commenced or answer filed within 30 days thereafter, or the lien shall be forfeited. Such service may be by registered or certified mail, return receipt requested, or by personal service.** 770 ILCS 60/34(a).

This raises the question of what a lien claimant is to do if a necessary party to the foreclosure action has filed for bankruptcy protection, imposing an automatic stay, and the lien claimant receives a §34 notice.

One example of the conflict between §34 of the Act and the automatic stay arises when a subcontractor records a claim for lien, the general contractor has filed for bankruptcy protection, and the owner serves a §34 notice on the subcontractor. Section 28 of the Act provides that the general contractor is a necessary party to the foreclosure action. 770 ILCS 60/28. If the subcontractor files suit within the 30-day period prescribed by §34, the subcontractor will need to name the general contractor, thereby violating the automatic stay. If the subcontractor does not file suit within the 30-day period, §34 provides that the lien shall be forfeited.

In *Chicago Whirly, Inc. v. Amp Rite Electric Co.,* 304 Ill.App.3d 641, 710 N.E.2d 45, 237 Ill.Dec. 622 (1st Dist. 1999), the First District addressed such a situation. The general contractor had filed for bankruptcy protection, and the subcontractor did not file an action to foreclose its lien claim within 30 days of receiving a §34 notice. The subcontractor claimed the bankruptcy stay prevented it from naming a necessary party, the general contractor. The court held that the limitations period of §34 was indeed tolled during the period the stay was in effect. In addition, the court held that the subcontractor was not obligated to seek relief from the automatic stay in the bankruptcy court to file suit within the 30-day limitations period.

F. [7.11] Modification of the Automatic Stay

Contractors must be cognizant of their rights and obligations if a necessary party to the contractor's mechanics lien foreclosure lawsuit files a bankruptcy petition. The automatic stay precludes any entity from taking any action that seeks to recover from the debtor or from property of the bankruptcy estate. However, as stated in §7.6 above, 11 U.S.C. §546 provides an exception to the automatic stay.

Therefore, depending on where the contractor is in the process of perfecting its lien claim, it may need to seek an order from the bankruptcy court modifying or annulling the automatic stay before the contractor proceeds.

The filing and perfecting of a contractor's claim for lien does not constitute a violation of the automatic stay as long as the contractor meets the timing requirements of the Mechanics Lien Act. Therefore, the contractor or subcontractor can serve its 90-day notice and record its lien within four months of the last date of work without violating the stay.

The following table illustrates this principle:

Bankruptcy Filed	Notice of Lien Claim Timely Sent	Subcontractor Listed on Sworn Statement	Action Taken	Violation of Stay
Prior to 90 days from last date worked	N/A	N/A	Issue notice of lien claim and record lien	No
More than 90 days after last date worked, but less than 4 months	Yes	N/A	Record lien	No
More than 90 days after last date worked, but less than 4 months	No	Yes	Record lien	No
More than 90 days after last date worked, but less than 4 months	No	No	Record lien	Yes
More than 4 months after last date worked	Yes	N/A	Record lien	No
More than 4 months after last date worked	No	Yes	Record lien	No
More than 4 months after last date worked	No	No	Record lien	Yes
After lien foreclosure suit is initiated	N/A	N/A	Continuing with lawsuit	Yes

As illustrated above, there are also situations in which the recording of a lien would violate the automatic stay. Specifically, if the claimant fails to issue its notice within 90 days or record its lien after more than four months from the last date of work, a violation of the stay will have occurred. In that situation, under §546(b) of the Bankruptcy Code, a trustee could avoid the lien. Therefore, if the lien is ultimately avoidable, recording the lien would be a violation of the automatic stay because the lien is no longer within the exception to the automatic stay set forth at §§362(b)(3) and 546(a). In such a situation, the prudent lien claimant should seek a modification or annulment of the automatic stay from the bankruptcy court before proceeding further.

Finally, under any of the scenarios listed above, the lien claimant must seek relief from the automatic stay before seeking to enforce its lien claim by filing a lawsuit to foreclose the lien. The filing of any lawsuit against a bankruptcy debtor is not permissible under the Bankruptcy Code without first obtaining relief from the automatic stay.

1. [7.12] To Modify or Annul

A lien claimant should seek a modification of the automatic stay under 11 U.S.C. §362(d) when the lien claimant has yet to take an action that would constitute a violation of the automatic stay.

A lien claimant should seek to annul the automatic stay when the lien claimant was unaware of the bankruptcy case and the requirements of the automatic stay prior to taking an action that constituted a violation of the automatic stay. *See AP Siding & Roofing Co. v. Bank of N.Y. Mellon,* 548 B.R. 473, 479 – 482 (N.D.Ill. 2016) (explaining standards for cause for annulment of automatic stay).

2. [7.13] Procedure for Filing the Motion

Fed.R.Bankr.P. 4001 and 9014 govern requests for relief from the automatic stay and require that the movant file a motion. The rules also state the parties that should be provided notice of the motion. Notice of the motion should be served in the same manner provided for service of summons under Fed.R.Bankr.P. 7004. Fed.R.Bankr.P. 9014(b).

Counsel for the lien claimant should be a registered e-filer for the Case Management/Electronic Case Files (CM/ECF) system used by the bankruptcy court in which the bankruptcy case is pending. See https://pacer.uscourts.gov/file-case. The clerk of the court charges a fee for the filing of a motion to modify the automatic stay.

3. [7.14] Required Statement To Accompany All Motions for Relief from Stay

The movant for relief from the automatic stay must complete a "Required Statement To Accompany All Motions for Relief from Stay" and file it electronically with the motion itself. The statement can be obtained at each bankruptcy court's website. The form for the U.S. Bankruptcy Court for the Northern District of Illinois can be obtained at www.ilnb.uscourts.gov/sites/default/files/forms/FormG4.pdf (case sensitive).

4. Standards for Granting the Motion

a. [7.15] Necessary Party

It is not uncommon for a subcontractor lien claimant to seek relief from the Bankruptcy Code's automatic stay to file suit against a bankrupt debtor that was the party with which the subcontractor contracted to perform work on the project. Under §28 of the Mechanics Lien Act, the contractor is a necessary party to the foreclosure lawsuit to enforce the mechanics lien. 770 ILCS 60/28. If the contractor with which the subcontractor contracts files a bankruptcy petition, the subcontractor must move for relief from the automatic stay prior to filing suit. Counsel should state in the motion that the subcontractor seeks relief from the automatic stay against the bankrupt contractor only to the extent necessary to adjudicate the subcontractor's lien claim. The motion should also state that the subcontractor will not seek to enforce any judgment obtained against the contractor in the mechanics lien suit.

b. [7.16] Owner

If the property owner files a bankruptcy petition, the lien claimant must meet a higher burden in its motion to modify the automatic stay. The bankruptcy court must make a determination under §362(d) of the Bankruptcy Code that (1) the debtor does not have any equity in the liened property and (2) the liened property is not necessary to an effective reorganization by the debtor. 11 U.S.C. §362(d)(2). The other ground for modifying the stay requires that the court make a determination that there is no adequate protection for the lien claimant. 11 U.S.C. §362(d)(1).

Under §362(d)(2), both factors must be present to justify modification of the stay. To determine whether equity exists in the property, courts will compare evidence regarding the property's value against the value of all the liens recorded against the property. *Stewart v. Gurley,* 745 F.2d 1194, 1195 (9th Cir. 1984). "As a practical matter, proof of 'no equity' should also establish that the value of the Debtor's interests in the [property] is inconsequential and of little or no value to the estate." *In re Parsons,* No. 12-72023, 2013 WL 4790614, *8 (Bankr. C.D.Ill. Sept. 6, 2013). The second prong of the test is whether the property is a necessary component of the debtor's effective reorganization. *Sumitomo Trust & Banking Co. v. Holly's, Inc. (In re Holly's, Inc.),* 140 B.R. 643 (Bankr. W.D.Mich. 1992). This determination hinges on whether the debtor can establish a genuine need for the property, which is not as easy as it sounds. If the debtor can demonstrate a reasonable possibility of a successful reorganization within a reasonable period of time, a motion for modification of the automatic stay brought at an early stage of a Chapter 11 reorganization should be denied. *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626, 633 (1988). The debtor "need only show that there is a reasonable probability that it will be able to propose a plan that will result in a successful reorganization." *CMF Loudoun Limited Partnership v. Nattchase Associates Limited Partnership (In re Nattchase Associates Limited Partnership),* 178 B.R. 409, 417 (Bankr. E.D.Va. 1994) (holding that debtor failed to demonstrate reasonable possibility of reorganization so as to satisfy standard set forth in *Timbers*).

G. [7.17] Other Options

Instead of immediately seeking to modify the stay after a debtor files a Chapter 7 bankruptcy proceeding, a lien claimant may elect to see if the bankruptcy trustee "abandons" the liened property under 11 U.S.C. §554. Under §554, a trustee will abandon property if such property is either burdensome or of inconsequential value to the estate. Once property has been abandoned, it is no longer subject to the automatic stay.

This is a valid option for lien claimants because of the tolling provision contained in §108 of the Bankruptcy Code. 11 U.S.C. §108. Section 108 extends statutes of limitation that are running at the time a bankruptcy case commences. This includes the two-year time period for the filing of a complaint to enforce a mechanics lien pursuant to the Mechanics Lien Act. *See Garbe Iron Works, Inc. v. Priester,* 99 Ill.2d 84, 457 N.E.2d 422, 75 Ill.Dec. 428 (1983). In *Garbe,* the court held that the two-year statute was tolled when the contractor commenced a bankruptcy case (because, as stated in §7.15 above, the contractor was a necessary party to the lien foreclosure suit) and was tolled until the automatic stay was modified. *Garbe* is applicable to any situation in which the party filing the bankruptcy case is a necessary party to the foreclosure lawsuit. *See Steinberg v. National*

Survey Service Inc. (In re Chemisphere Partners), 90 B.R. 380 (Bankr. N.D.Ill. 1988) (dismissing bankruptcy trustee's complaint seeking declaration that surveyor's mechanics lien was unenforceable because time to file lawsuit had expired when debtor filed bankruptcy before two years had run); *Great American Insurance Co. v. Bailey (In re Cutty's-Gurnee, Inc.),* 133 B.R. 929 (Bankr. N.D.Ill. 1991) (holding in action brought by another secured creditor of debtor that mason's mechanics lien was still valid and superior to claims of property owner and unsecured creditors notwithstanding passage of time in which to file enforcement action when time to bring action was tolled and bankruptcy trustee had failed to avoid lien).

Garbe and its progeny have another critical impact, namely, that §108 of the Bankruptcy Code tolls the 30-day demand deadline to commence a lawsuit established by §34 of the Mechanics Lien Act, 770 ILCS 60/34. This determination was made in *Chicago Whirly, Inc. v. Amp Rite Electric Co.,* 304 Ill.App.3d 641, 710 N.E.2d 45, 237 Ill.Dec. 622 (1st Dist. 1999) (holding that general contractor's filing bankruptcy tolled time in which enforcement action could be filed by subcontractor notwithstanding 30-day demand under §34 filed by owner of property). The *Chicago Whirly* court held: "[W]e agree with defendant that the Illinois Supreme Court case *Garbe Iron Works, Inc. v. Priester,* 99 Ill.2d 84, 75 Ill.Dec. 428, 457 N.E.2d 422 (1983), addressing the effect that a bankruptcy stay has on the two-year statute of limitations under the Mechanics Lien Act, presents a similar situation and is determinative." 710 N.E.2d at 47.

Finally, it should be noted that *Garbe* applies only when the party that filed the bankruptcy case is a necessary party to the foreclosure suit as defined by the Mechanics Lien Act. *See Flader Plumbing & Heating Co. v. Callas,* 171 Ill.App.3d 74, 524 N.E.2d 1097, 121 Ill.Dec. 49 (1st Dist. 1988) (distinguishing *Garbe* when contractor's contract was with tenants and it was unclear what, if any, interest bankrupt party that listed contractor as creditor had in subject real property).

What is the result when the bankrupt person is not a necessary party, but the bankruptcy trustee may still have a right, along with others, to file a claim against a third party? Based on a 2020 Illinois case, the other parties should not wait for the trustee and need to file their action promptly. In *Ritchie Capital Management, LLC v. McGladrey & Pullen, LLP,* 2020 IL App (1st) 180806, 155 N.E.3d 597, 440 Ill.Dec. 827, the appellate court affirmed dismissal of the investors' malpractice action against a bankrupt hedge fund's accountants because the statute of limitations had run. The appellate court rejected the application of *Garbe* because the named defendants were not personally subject to bankruptcy proceedings and the bankrupt hedge fund was not a necessary party to the malpractice action. The fact that the trustee may have filed the same claim as the investors, and chose not to, did not toll the statute of limitations. 2020 IL App (1st) 180806 at ¶31.

IV. [7.18] SALE OF PROPERTY UNDER 11 U.S.C. §363

As a general rule, the validity of a perfected lien that is enforceable under state or other applicable nonbankruptcy law is unaffected by the filing of a bankruptcy case or the entry of a discharge that might be granted to a debtor unless the lien is avoided or modified during the course of the case. This maxim is applicable regardless of whether the debtor initiates its case under Chapter 7, 11, 12, or 13 of the Bankruptcy Code. A valid, perfected lien will remain as an in rem lien against the property to which it attached on the date the debtor filed its bankruptcy petition

even if the debtor's underlying in personam liability is discharged in the bankruptcy case. Unless an order is entered in the bankruptcy case modifying or avoiding a mechanics lien that is valid under state or other nonbankruptcy law, the lien remains valid as an in rem property interest that continues to attach to the subject property after the bankruptcy case concludes.

A mechanics lien can be affected in a bankruptcy case in three ways. First, in Chapter 11 or 13 cases, the court may confirm a plan that limits how and when the lien can be enforced post-confirmation and that alters the payment provisions of the underlying contract claim if the debtor is also the party responsible for payment to the lienholder. The manner in which the rights of the lienholder can be modified is governed by the specific provisions of the Bankruptcy Code relating to plans (*e.g.,* 11 U.S.C. §§1123, 1322). In Chapters 11 and 13, the lien claimant is the holder of a secured claim to the extent there is value in the subject property to support the claim, as determined by applying the provisions of §506(a) of the Bankruptcy Code. 11 U.S.C. §506(a). That claim can be classified and dealt with in a court-approved plan. For a plan to be confirmed under Chapter 11 or 13, the secured creditor must be permitted to obtain its lien, and it must be paid the value of its lien or given the right to seek recourse against the property to which the lien attaches. Second, a trustee can seek to avoid the lien that gives rise to the claimant's secured status by using his or her powers under §545. 11 U.S.C. §545. Third, a trustee can sell the property to which the lien attaches pursuant to §363 provided that the lien is adequately protected in the sale process. 11 U.S.C. §363.

When a debtor files a case under Chapter 7, only the trustee can initiate (a) an action to avoid a mechanics lien or (b) the sale of property of the estate. In cases under Chapter 11, the debtor has the sale and avoidance powers of a trustee unless a Chapter 11 trustee is appointed. In a case under Chapter 13, the debtor has the sale powers of a trustee, but not the trustee's avoidance powers. To this extent, references to the trustee in the Bankruptcy Code should be read to include the debtor in Chapters 11 and 13 cases.

A mechanics lien qualifies as a "statutory lien," which is defined in §101 of the Bankruptcy Code as a "lien arising solely by force of a statute on specified circumstances or conditions." 11 U.S.C. §101(53). Being a statutory lien, a mechanics lien cannot be avoided by a trustee as a preference under the authority of §547 of the Bankruptcy Code. Section 545 of the Bankruptcy Code is the sole statutory provision that allows a trustee to avoid statutory liens. See 11 U.S.C. §547(c)(6); *Spicer v. United States of America, Internal Revenue Service (In re Motion Marketing Solutions, Inc.),* 403 B.R. 403 (Bankr. N.D.Tex. 2009) (entering summary judgment for IRS because bankruptcy trustee did not have power to avoid statutory lien perfected by IRS before bankruptcy filing). A trustee can avoid a statutory mechanics lien only if it "is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case." 11 U.S.C. §545(2). Therefore, a valid mechanics lien that is properly perfected under nonbankruptcy law should not be subject to attack under §545.

A trustee in a Chapter 7, 11, or 13 case may sell property that is encumbered by liens under the authority of, and using the procedures found in, §363 of the Bankruptcy Code and Fed.R.Bankr.P. 6004. Only a trustee can initiate the §363 sale process. When a trustee initiates a proceeding to sell property pursuant to §363, the bankruptcy court will address the issues discussed in §§7.19 – 7.25 below.

A. [7.19] Is It Appropriate for the Trustee To Sell the Property?

Although the trustee has the burden to demonstrate that the requested sale is appropriate, the business-judgment rule provides the measure by which that burden is satisfied. The trustee need demonstrate only that there is some benefit to the estate by going through the sale process. Typically, the burden is met by demonstrating that the anticipated sales proceeds will be more than the amount needed to pay (1) existing liens and encumbrances and (2) the cost of the sale process. Alternatively, the benefit may be that the sale of the subject property facilitates future confirmation of a plan in a case under Chapter 11, 12, or 13. A mechanics lien claimant would be hard pressed to object to a sale of the subject property if the anticipated proceeds would be sufficient to satisfy its lien claim. The lienholder will get more judicial attention if the anticipated proceeds will not pay its lien in full and the claimant puts forth an alternative sale mechanism to the one requested by the trustee. Even then, as to the question of whether the property should be sold, the deference shown to a trustee's business judgment often renders opposition to the sale itself futile.

B. [7.20] How Will the Sale Be Conducted?

While the trustee generally has the ability to determine whether there will be a sale, all parties with an economic interest in the property to be sold can have input on how the sale will take place, a process generally referred to as "sale procedures." The most immediate question is whether the property subject to a mechanics lien claim will be (1) sold at a private sale without consideration of competing offers; (2) listed for private sale, but subject to competing offers after an initial purchaser is identified; or (3) subject to an open auction process, among qualified bidders, which involves advertising but not listing with a broker. Fed.R.Bankr.P. 6004 expressly permits either public or private sales but says little more about the sale process and sale procedures. Bankruptcy courts have great latitude in approving sale procedures. A mechanics lien claimant is a party in interest entitled to be heard on the issue of appropriate sale procedures. It is appropriate for a mechanics lien claimant to object to the proposed procedures and suggest alternative ones.

C. [7.21] What Constitutes Adequate Notice of the Proposed Sale?

A trustee must provide a minimum of 21 days' notice of a hearing on a motion to sell property outside the ordinary course of business unless the court authorizes a shorter notice period. Notice must include the time and place of a public sale and the terms and conditions of a private sale. It must also state a deadline for filing objections, which is ordinarily 7 days post-sale, unless the court sets a different date. The notice must be given to all creditors. These requirements are set forth in Fed.R.Bankr.P. 2002(a)(2), 2002(c)(1), 2002(i), and 2002(k).

D. [7.22] Will the Proposed Sale Be Free and Clear of All Liens and Other Interests in the Subject Property?

Subject to court approval, after notice and a hearing, §363(f) of the Bankruptcy Code expressly grants a trustee authority to sell property "free and clear of any interest in such property" on any of the following conditions:

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. 11 U.S.C. §363(f).

Conditions for a sale free and clear of liens and interests can be met even if a lienholder does not consent to the sale. If state law governing mechanics liens permits a foreclosure free and clear of liens and interests, §363(f)(1) will be satisfied. Therefore, the holder of a mechanics lien will have its lien attach to the proceeds of the sale. It is not uncommon for the sale to be conducted before there is a judicial determination of the validity and priority of liens on the subject property and priority of the lien claims on the net proceeds of the sale.

E. [7.23] Has the Interest of the Lienholder Been Adequately Protected?

Section 363(e) of the Bankruptcy Code provides a safe harbor for lien claimants when the sale process is initiated. It states, in relevant part, that "[n]otwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. §363(e).

This statutory provision gives the mechanics lien claimant authority to obtain from the bankruptcy court such orders as it believes may be necessary to protect its interest in the subject property throughout the sale process.

F. [7.24] Can the Lien Claimants Credit Bid an 11 U.S.C. §363 Sale?

Section 363(k) of the Bankruptcy Code expressly preserves to the holder of an allowed secured claim the right to credit bid at the sale unless the court, for cause, orders otherwise. 11 U.S.C. §363(k). However, the right to credit bid extends only to holders of an allowed secured claim. Allowance of a claim and the secured status of a claim are two separate concepts. A claim is deemed to be allowed if a timely proof of claim has been filed, provided no party with standing to do so has objected to the claim. 11 U.S.C. §502(a). If an objection is filed, the objection administration process will determine the extent to which the claim is allowed. 11 U.S.C. §502(b). An allowed claim that is secured by a valid, perfected mechanics lien under nonbankruptcy law is not necessarily an "allowed secured claim" as that term is used in the Bankruptcy Code. The status of an allowed claim as secured or unsecured is governed by §506(a) of the Bankruptcy Code. An

allowed claim will be considered a secured claim to the extent there is value to economically support the lien securing the allowed claim. It is an unsecured claim to the extent the value of the subject property is less than the amount of the allowed claim, giving effect to liens of a higher priority. 11 U.S.C. §506(a).

Section 506(b) provides that the holder of an allowed claim that is oversecured (meaning that the value of the property is sufficient to pay the claim in full) may recover its reasonable fees, costs, and expenses to the extent provided for in a state statute or under the agreement that gives rise to the claim. In determining whether the creditor is undersecured, fully secured, or oversecured, pursuant to §506(c), a trustee has the right to recover the "reasonable, necessary costs and expenses" incurred by the trustee in preserving or disposing of the property of the estate, to the extent of any benefit to the secured creditor. 11 U.S.C. §506(c). The expenses and costs incurred by the trustee that qualify for payment under §506(c) will be considered in determining whether a lien claimant is fully secured. Those expenses prime the lien and will be paid prior to payment to lienholders from the proceeds of the sale.

G. [7.25] How Will the Holder of a Mechanics Lien Be Made Aware of a Trustee's Intent To Sell Property Free and Clear of Its Lien?

The trustee may initiate the sale process free and clear of liens by using the contested motion procedures of Fed.R.Bankr.P. 9014. The trustee generally does not file an adversary complaint to obtain this relief. Fed.R.Bankr.P. 9014 incorporates most of the provisions of the Federal Rules of Civil Procedure. A motion seeking the relief must be served in accordance with Fed.R.Bankr.P. 7004, which permits service by first-class mail anywhere in the United States. Because the sale process is initiated by motion, rather than by a summons and complaint, a notice of motion and a motion may be served by first-class mail directly on the mechanics lien claimant. The party receiving the mail may not appreciate the importance of its contents and fail to contact its attorney. To avoid that occurring, the attorney for a mechanics lien claimant should file an appearance in the bankruptcy case and alert the client to send the attorney any notices or motions the client receives concerning the bankruptcy case.

V. [7.26] MOTION TO ABANDON VS. MODIFY STAY — WHICH TO CHOOSE?

In a Chapter 7 case, it may become apparent after the meeting of creditors and initial investigation by the trustee that the sum of all valid liens against the debtor's property exceeds the value of that property. Therefore, the trustee will not seek to sell the property because doing so will not enable the trustee to fulfill any of his or her statutory functions, primarily, creating an estate that can be distributed to the holders of allowed unsecured claims.

A mechanics lien foreclosure suit in which the debtor, the owner, the general contractor, and all subcontractors have already been joined as parties may already be pending in the circuit court. The continuation or commencement of a mechanics lien suit is stayed by operation of 11 U.S.C. §362(a). In this situation, there are two procedural remedies available to the parties in interest, both of which will remove property from the bankruptcy estate. The lienholder can seek relief from the

automatic stay. Alternatively, either the trustee or a party in interest may seek entry of an order authorizing abandonment pursuant to §554 of the Bankruptcy Code. 11 U.S.C. §554. A trustee need show only that the subject property is burdensome or of inconsequential value and benefit to the bankruptcy estate to satisfy the statutory requirements for abandonment. If a trustee does not move to abandon the subject property, the holder of the mechanics lien, as a party in interest, may seek entry of a court order authorizing or directing the trustee to abandon the property. The mechanics lien claimant (or other party in interest) must satisfy the same requirements as the trustee. The moving party must show that the property is burdensome to the estate or is of inconsequential value and benefit to the estate.

In most "no asset" Chapter 7 cases, the trustee will not take the initiative and seek abandonment pursuant to §554(a). Rather, the initiative will have to be taken by the holder of the lien either to obtain a modification of the automatic stay pursuant to §362(d) or to compel abandonment pursuant to §554(b). *But see In re Parsons,* No. 12-72023, 2013 WL 4790614, **8 – 9 (Bankr. C.D.Ill. Sept. 6, 2013) (denying motion to compel trustee to abandon property).

Seeking stay relief is usually a better alternative than abandonment. Fed.R.Bankr.P. 6007 requires that the party seeking abandonment give 14 days' notice of a hearing to consider the proposed abandonment. Some judges require that the notice of the hearing to consider abandonment be sent to all creditors and other parties in interest. There is no provision in the Bankruptcy Code or rules that requires an adjudication of a motion to abandon within any particular time frame.

By contrast, a motion made to modify the automatic stay may be adjudicated more quickly than a motion for abandonment. However, it also may impose additional burdens on the moving party. Procedurally, in a Chapter 7 case, a motion to modify stay is governed by Fed.R.Bankr.P. 4001(a). There is rarely a statutory committee elected pursuant to §705 of the Bankruptcy Code, 11 U.S.C. §705. Therefore, the motion need be served only on the debtor, other holders of secured claims, the trustee, and "such other entities as the court may direct." Fed.R.Bankr.P. 4001(a). To obtain stay relief to continue or commence a mechanics lien foreclosure proceeding, the stay will be modified if the debtor does not have equity in the property and the property is not needed for an effective reorganization. See 11 U.S.C. §362(d)(2). The party seeking stay relief (*i.e.,* the lienholder) has the burden of demonstrating that the debtor does not have equity in the subject property. The party opposing stay relief (which in Chapter 7 would be the trustee) has the burden of establishing that the property is necessary to an effective organization. In nearly all cases, the issue comes down to the resolution of the question of the value of the property and whether there is potential equity for the Chapter 7 trustee to administer. Unless all parties entitled to be heard stipulate that the value of the property is less than the sum of all lien claims, the party seeking stay relief will need competent evidence to meet its burden, usually in the form of an appraisal and expert testimony. If an appraisal is provided to support the motion for stay relief, a trustee often will not oppose the requested relief.

Another advantage of seeking stay relief rather than abandonment is the statutory mandate found in §362(e). Except in a case in which there is an individual debtor, the stay will terminate 30 days after the motion for stay relief is first presented unless, after conducting a preliminary hearing, the court orders the stay continued pending conclusion of a final hearing on the motion. Unless the parties consent to a longer time period, the final hearing must conclude not later than 30 days after the conclusion of the preliminary hearing.

VI. [7.27] PROOFS OF CLAIM

The content and procedures relating to proofs of claim are governed by Fed.R.Bankr.P. 3001 – 3008. The claim must substantially conform to the "appropriate Official Form," which is available on the bankruptcy courts' websites. Fed.R.Bankr.P. 3001(a). The specific content of the claim and the supporting documents or information that should be attached to the claim are set forth in Fed.R.Bankr.P. 3001(c). If the debtor is an individual, there are additional requirements that the creditor must fulfill in preparing the proof of claim. They are set forth in Fed.R.Bankr.P. 3001(c)(2). In all cases, a mechanics lien claimant must provide evidence of the perfection of its lien as part of its proof of claim.

In a Chapter 7 case, creditors are not required to file proofs of claim unless the Chapter 7 trustee gives notice that there are assets available for administration. That notice will advise the creditors of the claim filing deadline, which is at least 90 days from the date the notice is given. Fed.R.Bankr.P. 3002(c)(5). In a Chapter 13 case, creditors must file a proof of claim not later than 70 days after the order for relief. Fed.R.Bankr.P. 3002(c). In a Chapter 11 case, the court will set a deadline for the filing of claims. All creditors will be sent a notice of the claims bar date. Fed.R.Bankr.P. 3003.

In a case under Chapter 7 or 13, a creditor must file a proof of claim to participate in any distribution that may be made. In a Chapter 11 case, the debtor's schedules "constitute prima facie evidence of the validity and amount of the claims of creditors." Fed.R.Bankr.P. 3003(b)(1). Therefore, if the debtor has accurately identified the mechanics lien claimant on its Schedule D as the holder of a secured claim that is not disputed, contingent, or unliquitated, the lien claimant is not required to file a proof of claim. Fed. R. Bankr. P. 3003(c)(2). Rather, the claim will be deemed valid in the amount scheduled by the debtor. Notwithstanding this automatic allowance of the claim as scheduled by the debtor, all mechanics lien claimants should file proofs of claim in Chapter 11 cases. Even if a debtor accurately describes the claim as being secured by a statutory mechanics lien, the debtor rarely will accurately calculate the exact amount due or provide the interest and attorneys' fees that may have accrued prior to the petition date. If the debtor schedules a claim for less than the amount actually owed and the claimant does not file a proof of claim, the claim will be deemed allowed, but only to the amount scheduled by the debtor. In addition, at some point in time in a Chapter 11 case, a judicial determination will have to be made concerning the priority of the valid liens that attach to the debtor's property. The documents that are appended to a proof of claim will be the principal evidence to be considered by the court that determines the priority of valid liens.

The proof of claim filed by a mechanics lien claimant should have the following attachments:

a. the sworn statement of the representative of the claimant to authenticate various claim documents (*e.g.,* contract, change orders) and a calculation of the amount of the claim as of the petition date, including interest and attorneys' fees;

b. a reservation of rights under 11 U.S.C. §506(b) to cover interest, fees, and costs provided for under the agreement between the lien claimant and the debtor and under the Mechanics Lien Act; and

c. the underlying contract, including approved change orders and all notices given and filings made to perfect the lien under the Mechanics Lien Act.

In filing a proof of claim, the mechanics lien claimant is submitting to the jurisdiction of the bankruptcy court for determining the amount of the claim and the validity of the claim. The jurisdiction of bankruptcy courts is limited by both the U.S. Constitution and 28 U.S.C. §§157 and 1334. Bankruptcy courts are not Article III tribunals because the judges are not appointed for life tenure and do not enjoy salary protection. Therefore, bankruptcy courts cannot exercise the judicial power of the United States. As noted by the U.S. Supreme Court in *Stern v. Marshall,* 564 U.S. 462, 180 L.Ed.2d 475, 131 S.Ct. 2594 (2011), and subsequently reaffirmed by the Seventh Circuit in *In re Ortiz,* 665 F.3d 906 (7th Cir. 2011), and *Wellness International Network, Ltd. v. Sharif,* 727 F.3d 751 (7th Cir. 2013), there are both constitutional and statutory limitations on the ability of a bankruptcy judge to enter a judgment binding on a third party on a claim that does not arise under the Bankruptcy Code, unless the parties knowingly and voluntarily agree. *Wellness International Network, Ltd. v. Sharif,* 575 U.S. 665 191 L.Ed.2d 911, 135 S.Ct. 1932 (2015). However, no judicial decision has yet questioned either the constitutional or statutory authority of a bankruptcy judge to determine the validity or priority of liens in property of the bankruptcy estate or the amount of the claim that will be allowed under §502 of the Bankruptcy Code, 11 U.S.C. §502.

As noted in §7.24 above, §502 provides that once a proof of claim is filed, it is deemed allowed unless a party in interest files an objection to the claim pursuant to Fed.R.Bankr.P. 3007. If the objection seeks the avoidance of the lien or the determination of the validity, priority, and extent of the lien, the objection must be made in an adversary proceeding governed by Part VII of the Federal Rules of Bankruptcy Procedure. In claim objection proceedings and proceedings to determine the validity and priority of liens, the holder of a mechanics lien has the burden of establishing the amount of its claim, the validity of its lien, and the relative priority of its lien.

If it is apparent that the total of all liens exceeds the value of the subject property, the automatic stay will be lifted to permit lien claimants to commence or continue a mechanics lien foreclosure action. In those cases in which there is an apparent equity over and above lien claims, the property is either sold pursuant to §363 of the Bankruptcy Code, 11 U.S.C. §363, or retained under a confirmed plan of reorganization. If the property is sold or a plan is confirmed, there must be a determination of the validity and priority of all liens attached to the subject property. That determination can be made either by the bankruptcy court or, if a foreclosure case is pending, by the foreclosure court. The bankruptcy court may abstain in favor of an alternative nonbankruptcy forum. 28 U.S.C. §1334(c) provides for permissive and mandatory extension in such cases. The doctrine of permissive abstention applies when the bankruptcy court determines that abstention is warranted (a) in the interests of justice or (b) in the interests of comity with state courts or respect for state law. 28 U.S.C. §1334(c)(1). Mandatory abstention applies when the state law provides the law of decision, the underlying cause of action does not arise under the Bankruptcy Code, an action to resolve the controversy could not have been brought in a federal court absent the filing of a bankruptcy case, and a final adjudication can be made on a timely basis in a state court. 28 U.S.C. §1334(c)(2). Therefore, a bankruptcy judge may abstain from determining the validity and priority of liens and permit adjudication to be made in a mechanics lien foreclosure case. After that determination is made in the state court, the administration of property or the proceeds of the sale

of the property continues in the bankruptcy case. Therefore, a mechanics lien claimant that does not want a bankruptcy court to adjudicate its lien should move to modify the stay and seek permission for the adjudication to take place in state court.

VII. PREFERENCES

A. [7.28] Elements of an Avoidable Preference

The trustee has the power to avoid certain transfers of an interest of a debtor in property to unsecured creditors if the trustee can establish that the transfer fits within the definition of a "preference" set forth in §547(b) of the Bankruptcy Code, which states:

> **[T]he trustee may . . . avoid any transfer of an interest of the debtor in property —**
>
> **(1) to or for the benefit of a creditor;**
>
> **(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;**
>
> **(3) made while the debtor was insolvent;**
>
> **(4) made —**
>
> **(A) on or within 90 days before the date of the filing of the petition; or**
>
> **(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and**
>
> **(5) that enables such creditor to receive more than such creditor would receive if —**
>
> **(A) the case were a case under chapter 7 of this title;**
>
> **(B) the transfer had not been made; and**
>
> **(C) such creditor received payment of such debt to the extent provided by the provisions of this title.** 11 U.S.C. §547(b).

A transfer includes both a payment and the perfection of a lien. As noted in §§7.7 and 7.18 above, a mechanics lien is a statutory lien. As such, the fixing or perfection of the lien is not subject to avoidance as a preference pursuant to §547. As a statutory lien, the fixing of a mechanics lien can be avoided by a trustee only by using the powers given to the trustee under §545, 11 U.S.C. §545. A trustee can avoid a mechanics lien under the authority of §545(2) if the lien is not properly perfected under applicable state law. A mechanics lien properly perfected under nonbankruptcy law is not subject to avoidance as a preference.

A debtor is presumed to have been insolvent for 90 days immediately preceding the petition date. 11 U.S.C. §547(f). Therefore, any payment received on account of an antecedent debt within the 90 days prior to the petition date is potentially subject to avoidance as a preference unless the recipient can show that the transfer qualifies for one of the affirmative defenses set forth in §547(c) or that it held a fully secured claim that would have been paid in full in a hypothetical Chapter 7 case if the allegedly preferential transfer had not been made.

B. [7.29] Did the Recipient Receive a Preference? Is the Lien Claimant Fully Secured?

Even though the mechanics lien is protected, payments made to the holder of the mechanics lien may still be avoidable as a preference. If that occurs, the payment may be recovered even if the lien remains intact. The principles governing payments to holders of valid mechanics liens during the preference period were summarized in *Golfview Developmental Center, Inc. v. All-Tech Decorating Co. (In re Golfview Developmental Center, Inc.),* 309 B.R. 758 (Bankr. N.D.Ill. 2004). See §7.7 above. Payments to secured creditors are not ordinarily recoverable as a preference unless the payments exceed the value of the creditor's lien. 309 B.R. at 766 – 767. The starting point for the lien claimant is whether during the 90-day preference period it received payments that exceed the amount it would have received if the debtor had filed a Chapter 7 case and the payments had not been made. This situation arises if property to which the lien attaches has insufficient economic value to pay the lien clamant in full. If the lien is fully secured by the property value, then the payments made to the lienholder will not have enabled the lienholder to receive more than it would have received in a hypothetical Chapter 7 case. In Chapter 7, the lienholder would be paid in full by seeking recourse against the property to which the mechanics lien attaches.

It is the trustee's burden to establish all the elements of avoidability set forth in 11 U.S.C. §547(b), including that the payment to the mechanics lien claimant enabled the holder of the lien to receive more than it would have received if the case had been filed under Chapter 7. However, as to the affirmative defenses available to the recipient of an otherwise avoidable preference, the recipient of the payment has the burden of establishing that the payment qualifies for one of the statutory defenses. The two affirmative defenses most likely to be available to a mechanics lien claimant are the "ordinary course of business" defense and the "subsequent new value" defense, which are found in §§547(c)(2) and 547(c)(4). See §§7.30 and 7.31 below.

1. [7.30] Ordinary Course of Business Defense: 11 U.S.C. §547(c)(2)

The statutory provision relating the ordinary course of business affirmative defense provides that a trustee may not avoid a transfer as a preference to the extent that the payment was for a debt incurred in the ordinary course of business of both the debtor and the transferee and that the payment was made either in accordance with the ordinary course of business established between the debtor and the transferee or according to the ordinary course of business in the industry. 11 U.S.C. §547(c)(2). To fall within this safe harbor, the recipient of the transfer has to establish the elements of the affirmative defense. Usually there is no question that a transfer to a mechanics lien claimant was made for a debt incurred by the debtor in the ordinary course of business of both the debtor and the mechanics lien claimant. The focus of attention and the area of controversy will be the second prong: whether the payments were in accordance with the ordinary terms established either by the parties in their past dealings (*i.e.,* the subjective test) or by ordinary business terms in the industry (*i.e.,* the objective test).

To satisfy the subjective test, the recipient of the transfer or payment must establish that the payments were made in the ordinary course of business by looking at the actual past practices of the parties. The court in *NSC Creditor Trust v. BSI Alloys, Inc. (In re National Steel Corp.),* 351 B.R. 906, 912 (N.D.Ill. 2006) (affirming summary judgment for transferee when payment terms were changed within 90 days before bankruptcy filing and it was unclear whether transferee was exerting pressure on debtor to make payments), citing *Kleven v. Household Bank F.S.B.,* 334 F.3d 638, 642 (7th Cir. 2003), recognized factors that can be considered in determining what qualifies as the ordinary course of business between specific parties. These factors include but are not limited to

(1) the length of time the parties were engaged in the transaction at issue;

(2) whether the amount or form of tender differed from past practices;

(3) whether the debtor or creditor engaged in any unusual collection or payment activity; and

(4) whether the creditor took advantage of the debtor's deteriorating financial condition. 351 B.R. at 912.

The burden of showing the payment qualifies as the ordinary course of business under the objective test applicable to the industry is more daunting. The recipient of the transfer has to first define the applicable industry and then introduce evidence that establishes an ordinary course of business in that industry. The Seventh Circuit has found that "ordinary business terms" within an industry "refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of [the preference statute]." [Emphasis in original.] *In re Tolona Pizza Products Corp.,* 3 F.3d 1029, 1033 (7th Cir. 1993). The *Tolona* court recognized that late payments can be the ordinary course of business that has been established over a long-term relationship between a debtor and a creditor. *Id.* That means that a statement on an invoice setting a due date (such as "net 30 days") will not bar the introduction of evidence that the parties routinely considered payment after more than 30 days to be normal and acceptable.

2. [7.31] Subsequent New Value Defense: 11 U.S.C. §547(c)(4)

To qualify for the subsequent new value defense under 11 U.S.C. §547(c)(4), the recipient of a preferential payment must establish that after receiving the payment or transfer, it gave new value to the debtor that remained unpaid as of the date the bankruptcy petition was filed. For this defense to be applicable, the new value must be given after the otherwise preferential payment is received. Therefore, the lien claimant dealing with a financially distressed owner or contractor waiting for an overdue payment should not perform additional services or ship additional products until after receiving the delinquent payment. The new value extended by the recipient of the preference offsets the preference liability, but only to the extent of the new value.

In applying the subsequent new value defense, courts calculate the date of payment differently than when determining that a transfer was made for other purposes under the preference statute. Generally, when the debtor makes a payment by check, the transfer is deemed to have occurred when the check is honored by the bank. Therefore, it is always beneficial to the recipient of a payment from a financially stressed business to present the check for payment as soon as possible. However, for the subsequent new value defense, the payment is deemed to be made when the recipient receives a check (but not a postdated check). The date of receipt, not the date of honor, applies. The recipient is entitled to claim the benefit of the defense if it provides its new value after receiving a currently dated check.

VIII. [7.32] NONDISCHARGEABILITY ACTIONS BY LIEN CLAIMANTS

Although a mechanics lien in itself does not lend itself to any exception for discharge under the Bankruptcy Code, it may be possible that the relationships between the parties may create a situation in which a creditor may sue for nondischargeability of the debt. These actions are fact-intense, typically involving fraud, breaches of fiduciary relationships, or willful and malicious torts.

When the owner of a subcontractor had filed for Chapter 7 relief, a sub-subcontractor's nondischargeability action against the owner pursuant to §§523(a)(2)(A), 523(a)(4), and 523(a)(6) of the Bankruptcy Code, 11 U.S.C. §§523(a)(2)(A), 523(a)(4), and 523(a)(6), was dismissed for failure to state a cause of action. *Stair One, Inc. v. Hivon (In re Hivon),* Bankruptcy No. 14 B 26441, 2015 WL 687124 (Bank. N.D.Ill. Feb. 13, 2015). In what the court characterized as a "remarkably sparse" complaint, the subcontractor alleged that the debtor was the sole shareholder and president of the subcontractor that hired the plaintiff sub-subcontractor to perform approximately $190,000 in work for the subcontractor on a project. 2015 WL 687124 at *1. The sub-subcontractor and subcontractor signed and submitted to the general contractor an affidavit containing the false representation that $130,000 had been paid by the subcontractor to the sub-subcontractor and there was a balance due to the sub-subcontractor of $60,000. The agreement between these two was that when the subcontractor was paid, it would pay the sub-subcontractor, which did not occur. The sub-subcontractor recovered some of the money due to it from the general contractor and property owner and sued the owner of the subcontractor in his bankruptcy case for a determination that the owner's alleged indebtedness to the sub-subcontractor was nondischargeable.

The bankruptcy court dismissed the complaint for failure to state a cause of action. As to the first count, §523(a)(2)(A) excepts from discharge debts for money to the extent obtained by false pretenses, false representations, or actual fraud, other than statements as to the debtor's financial condition (which may be actionable under §523(a)(2)(B)). Under the facts alleged in *Stair One,* the sub-subcontractor failed to allege that the debtor-owner of the subcontractor owed a debt to the subcontractor resulting from his misrepresentation.

The second count alleged violation of §523(a)(4), which excepts from discharge debts for fraud or defalcation while acting as a fiduciary. Bankruptcy courts have construed this subsection to apply only to some fiduciary relationships, namely, those in which there is an express trust or in which there is an implied fiduciary relationship. The plaintiff alleged breach of a fiduciary relationship under §21.02(a) of the Illinois Mechanics Lien Act, 770 ILCS 60/21.02. This section of the Act

provides that a contractor holds funds in trust for a subcontractor when the contractor requires the subcontractor to sign a lien waiver and then receives funds as a result of the waiver. The bankruptcy court held that §21.02 did not create an express trust. Furthermore, the facts here did not involve a confidence underlying an implied fiduciary relationship. Therefore, §523(a)(4) of the Bankruptcy Code was inapplicable.

The third count alleged violation of §523(a)(6), which excepts from discharge debts resulting from the debtor causing an injury to another when the debtor's actions were both willful and malicious. The bankruptcy court held that the facts alleged in the complaint a breach of contract, not a willful, malicious tort.

In a 2021 case arising in Illinois, based on evidence presented at trial the bankruptcy court held that a roofing subcontractor failed to prove that the bankrupt contractor, who had been paid but refused to pay the subcontractor, arguing that it performed substandard work, committed fraud or defalcation while acting as a fiduciary. *Imperial Roofing, Inc. v. Schumacker (In re Schumacker),* Case No. 18bk33669, 2021 WL 3552333 (Bankr. N.D.Ill. July 15, 2021). As in *Stair One,* it was clear that there was no express trust involved, which left the only basis for recovery under §523(a)(4) of the Bankruptcy Code by showing an implied fiduciary relationship. The bankruptcy court expressly referenced *Stair One* in analyzing the facts and concluded that no implied fiduciary relationship existed. Notably, the subcontractor could not show that the bankrupt contractor was in a position to stop the subcontractor from accessing payment information or filing a mechanics lien. 2021 WL 3552333 at *5. The court also denied the subcontractor's motion at the conclusion of trial to add a claim for violation of §523(a)(6) for willful and malicious injury.

8 Trial Practice: Pleading Practice

PETER M. KING
WILLIAM NORMAN
King Holloway LLC
Chicago and Addison

I. Pleading Practice

II. Proof of Selected Issues

I. PLEADING PRACTICE

A. [8.1] Identifying "Necessary Parties"

Section 11(b) of the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* defines "necessary parties" as "the owner of the premises, the contractor, all persons in the chain of contracts between the claimant and the owner, all persons who have asserted or may assert liens . . . and any other person against whose interest in the premises the claimant asserts a claim." 770 ILCS 60/11(b).

To identify necessary parties, a title search is recommended. One useful tool in identifying necessary parties is a title abstract from a professional title abstractor or a title insurance company. A title abstract is a summary opinion of all grants, conveyances, wills, liens, encumbrances, judicial proceedings, and releases that have been recorded on the property. *Attebery v. Blair,* 244 Ill. 363, 91 N.E. 475, 478 (1910). Many county recorders' offices keep a list of approved title abstractors. The documents identified in the title abstract should be reviewed for possibly important information not apparent from the summary entry in the abstract.

Another useful tool in identifying necessary parties to a lien foreclosure action is a document called "minutes of foreclosure," if one exists. Minutes of foreclosure are prepared by a title insurance company at the request of a mortgagee or mortgagee's servicer that is preparing to foreclose on the mortgage. The title company guarantees that if the mortgagee or servicer names the parties that the title company's title search has identified, then the title company will insure the title as free and clear at judicial sale. *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.,* 355 Ill.App.3d 546, 823 N.E.2d 168, 182, 291 Ill.Dec. 158 (1st Dist. 2005). Minutes of foreclosure are created after a title company has obtained a title abstract, usually from a professional title abstractor. The minutes contain a "title commitment" from the title company, which describes the property and mortgage and possible title defects and claims that would be excluded from insurance coverage. *Id.* "The minutes of foreclosure . . . are not insurance but, rather, are a specialized or complete history of a particular parcel of land which includes some or all of the entries of record as to the property." *Id.*

In addition to reviewing minutes of foreclosure or a title abstract, the lien claimant may perform its own title search for necessary parties in its lien action. Unlike title insurance companies, attorneys do not guarantee the accuracy of their title search. Instead, an attorney who performs a title search and owes a duty to the person requesting the title search must exercise the reasonable degree of care and skill usually exerted by attorneys performing title searches. *Smiley v. Manchester Insurance & Indemnity Company of St. Louis,* 71 Ill.2d 306, 375 N.E.2d 118, 122, 16 Ill.Dec. 487 (1978). *See Chase v. Heaney,* 70 Ill. 268, 270 (1873) (requiring that attorneys performing title searches for purchasers must possess "the requisite knowledge and skill, and . . . use due and ordinary care in the performance of their duties"). Whether the attorney has performed the search with a reasonable degree of care and skill is highly fact-dependent. *Hermansen v. Reibandt,* 2020 IL App (1st) 191735, ¶99, 195 N.E.3d 615, 457 Ill.Dec. 479.

To perform a title search for necessary parties, the searcher should review the grantor-grantee index for the property. The searcher may also search any of the other types of indexes commonly kept by county recorders, including the tract index, which is an index of subdivision lots, blocks,

sections, and/or quarter sections. However, only the grantor-grantee index is the official index; the tract index is unofficial. *Landis v. Miles Homes Incorporated of Illinois,* 1 Ill.App.3d 331, 273 N.E.2d 153 (2d Dist. 1971). See 55 ILCS 5/3-5025 (permitting county boards to require county recorders to keep tract indexes). *See also Wells Fargo Bank, N.A. v. Simpson,* 2015 IL App (1st) 142925, 36 N.E.3d 266, 394 Ill.Dec. 333 (grantor-grantee index is legal record required to be maintained by recorder, but third party is not chargeable with notice from tract index).

The grantor-grantee index is located at the office of the recorder for the county in which the property is situated. 55 ILCS 5/2-5025. Many Illinois counties maintain an electronic grantor-grantee index that can be remotely accessed, sorted chronologically by date of recorded instrument, and used to view the recorded instrument. Whether in hard copy or electronic format, the searcher will need the property index number (PIN) for the property to look it up on the index. The lien claimant should also view the contents of each instrument identifying potential necessary parties. This is because there may be information affecting the lien claimant's rights that appears on the face of the instrument but is not included on the summary list of recorded documents for the property that the recorder's office keeps. Further, errors such as mislabeling or misdating may occur during the indexing process.

In reviewing the index's summary list of recorded documents for necessary parties, the first step is to identify the current owner and confirm whether the current owner is the person or entity with whom the lien claimant entered into the contract for improvements. Section 3 of the Mechanics Lien Act obligates husbands and wives to their spouses' contracts for improvements to real property held jointly by the couple. 770 ILCS 60/3. Therefore, in the case of joint ownership, both spouses should be named as defendants. However, it should be noted that for the purposes of that section of the statute, property is held jointly only if it is a joint tenancy or tenancy by the entirety, not if the property is held by tenancy in common. *Id.*

The next step is to identify the mortgagees on the property. See 770 ILCS 60/24(a) (requiring subcontractors to provide the owner and lending agency with written notice of their lien claim and the amount due, or to become due, within 90 days of completion). First mortgages, as well as second or third mortgages, must be identified and the mortgagees included as defendants. Identifying current mortgagees also requires reviewing former mortgages in the index and discounting them as no longer having an interest in the property. To identify the current mortgagee(s), the searcher should review the grantor-grantee index for mortgages and mortgage releases, starting with the most recently recorded mortgage and continuing with older mortgages. When a mortgage is identified, the mortgagee and date should be noted. When a release is identified corresponding with the mortgage, the searcher should cross out that mortgage in his or her notes. This simple process may also be used to identify and discount other possible title encumbrances. See IICLE® CLASSICS: WARD ON TITLE EXAMINATIONS 2005 Edition (Including 2009 Supplement) and WARD ON TITLE EXAMINATIONS: A COMPANION VOLUME (IICLE®, 2022) for more information on searching titles.

The search for necessary parties should extend as far back in the past as the instrument being searched for requires. For example, in a search for other mechanics liens of record, the lien claimant need search only 2 years in the past because the Mechanics Lien Act requires that a lien claimant foreclose within 2 years. 770 ILCS 60/7. See 770 ILCS 60/28 (2-year rule applies to both

contractors and subcontractors). Judgment liens should be searched 7 years in the past because judgment liens are enforceable for 7 years. 735 ILCS 5/12-101. Notices of state tax liens should be searched for 20 years in the past because state tax liens are good for 20 years. 35 ILCS 5/1104. There is also a 20-year statute of limitations for mortgage foreclosures. 735 ILCS5/13-116. However, that period begins after default, so if the searcher does not know the date the mortgagor defaulted, the recommended approach is to review all recorded mortgages.

B. [8.2] Defects in Claim for Lien

There is a split in Illinois appellate districts over whether a mechanics lien claim must include on its face the project's completion date to be enforceable. In 2000, the First District Appellate Court found that the requirement of including the completion date was necessarily implied into §7 of the Mechanics Lien Act, 770 ILCS 60/7. *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 409, 246 Ill.Dec. 866 (1st Dist. 2000). The court reasoned: "One of the primary purposes of that section's four-month requirement is that third parties be enabled to learn *from the claim* whether it is enforceable. Without a completion date, a person examining the lien claim would not know whether the four-month filing requirement had been met." [Emphasis in original.] *Id*. In a subsequent decision, the First District cited *Merchants Environmental* for the completion date requirement, although it held in that case that incorrect completion dates did not "materially effect defendants' right of notice under the Act." *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, ¶99, 20 N.E.3d 104, 386 Ill.Dec. 243.

In 2010, the Second District Appellate Court saw things differently. It construed §7 of the Mechanics Lien Act as not requiring that a completion date be included on the face of the lien claim for the claim to be enforceable. *National City Mortgage v. Bergman,* 405 Ill.App.3d 102, 939 N.E.2d 1, 8, 345 Ill.Dec. 272 (2d Dist. 2010). Noting that stare decisis does not bind one appellate district to following another appellate district, the court relied on principles of strict statutory construction and equity, reasoning: "To hold that a lien claim is unenforceable because it failed to set forth a completion date would be inequitable when the lien holder has complied with the statutory requirements of a lien claim, which do not include providing a completion date." *Id*. While there is still a dichotomy between the requirements as held by the First and Second Districts, prudent practice would dictate including the completion date on the claim of lien.

Another possible lien claim defect is lack of standing. For example, coventurers in a joint venture lack standing to assert mechanics lien claims against each other because they each own the property, and an owner of property cannot enforce a lien against its own property or the other owners. *Fitzgerald v. Van Buskirk,* 16 Ill.App.3d 348, 306 N.E.2d 76, 78 (2d Dist. 1974). Unlike coventurers, however, members of a limited liability company (LLC) do not own the property owned by the LLC; they own distributions from any income received from the property. See 805 ILCS 180/30-1(a) (no ownership interest is conferred), 180/30-20(a) (a distributional interest is all that is owned). Therefore, unlike a coventurer, an LLC member has standing to enforce a lien claim against other members. *Peabody-Waterside Development, LLC v. Islands of Waterside, LLC,* 2013 IL App (5th) 120490, ¶9, 995 N.E.2d 1021, 374 Ill.Dec. 524.

C. [8.3] Counterclaims

Lien claimants who find that the two-year limitations period of §9 of the Mechanics Lien Act, 770 ILCS 60/9, is approaching do not need leave to file their counterclaim. *Bank of New York v. Jurado,* 2012 IL App (1st) 112116, 977 N.E.2d 1202, 365 Ill.Dec. 103. In fact, moving for leave to file a counterclaim may cause unnecessary delay and result in the lienholder's lien being time-barred. In *Jurado,* the lender filed a mortgage foreclosure action. Two months prior to the expiration of §9's two-year period, a contractor filed a motion for leave to file a counterclaim to intervene and a motion to vacate a default judgment. The contractor attached its counterclaim as an exhibit to its motion for leave. Due in part to the court's busy docket and the lender's opposition to the motion to vacate, the contractor's motion for leave was not heard until after the two-year limitations period had passed for filing a lien foreclosure claim. In holding that the counterclaim was untimely filed and therefore barred, the court found that attaching the counterclaim to a motion did not constitute filing it under §9. Delay in hearing the motion for leave caused by the court's busy docket and the lender's protracted opposition to the motion to vacate did not excuse the contractor's untimeliness. *See also Wasilevich Construction Co. v. LaSalle National Bank,* 222 Ill.App.3d 927, 584 N.E.2d 499, 165 Ill.Dec. 320 (1st Dist. 1991) (interpreting §9 to mean that leave of court to intervene is not required as long as counterclaim was filed within two years of completion date).

D. [8.4] Private Lien Foreclosure Suits in Federal Court

A lien foreclosure complaint may be filed in either state court or federal court, assuming there exists diversity jurisdiction or supplemental jurisdiction. See 770 ILCS 60/7; 28 U.S.C. §§1332, 1367; *Commissioner v. Estate of Bosch,* 387 U.S. 456, 18 L.Ed.2d 886, 87 S.Ct. 1776 (1967). A lien foreclosure suit may be filed in, or removed to, federal court just like any other suit under state law. *Lakewood Prairie, LLC v. Ibarra Concrete Co.,* Civil Action No. 08 C 1200, 2008 WL 3982510, **1 – 2 (N.D.Ill. May 27, 2008). The decision whether to file in, or remove to, federal court should be guided by traditional considerations, including which forum is more likely to grant a potential dispositive motion given the facts of the case. In a diversity action, a federal court will apply state law to substantive mechanics lien issues. *Estate of Bosch, supra,* 87 S.Ct. at 1782 – 1783.

Generally, a federal court presiding over a suit involving a lien claim will require a mechanics lien claimant to establish the existence of its lien, that it perfected its lien, and that its mechanics lien has priority. *FLGC, LLC. v. Fyre Lake National LLC,* Case No. 4:12-cv-4014-SLD-JAG, 2013 WL 12170496 (C.D.Ill. Sept. 25, 2013). To establish its mechanics lien, the lien claimant must show (1) that the lien claimant had a valid contract, (2) that the contract was made with the property owner or the owner's agent, (3) that the lien claimant was contracted to furnish labor, services, or materials, and (4) that the lien claimant performed pursuant to the contract or had a valid excuse for its nonperformance. 2013 WL 12170496 at *1, citing *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.,* 403 Ill.App.3d 468, 932 N.E.2d 1073, 1088, 342 Ill.Dec. 612 (1st Dist. 2010). To show it perfected its mechanics lien, the lien claimant must (1) file a verified mechanics lien claim in the office of the county recorder within four months after completion of the work and (2) file a complaint to enforce its lien within two years after completion of the contract. 2013 WL 12170496 at *1, citing *Norman A. Koglin Associates v. Valenz Oro, Inc.,*

176 Ill.2d 385, 680 N.E.2d 283, 223 Ill.Dec. 550 (1997), 770 ILCS 60/7, and 60/9. Finally, to show the mechanics lien has priority, the lien claimant must demonstrate that the lien was recorded before the competing encumbrances or that the lien is entitled to priority under the Mechanics Lien Act. 2013 WL 12170496 at *2; 770 ILCS 60/16.

E. [8.5] Construction Trust Funds

Section 21.02 of the Mechanics Lien Act, 770 ILCS 60/21.02 ("Construction Trust Funds"), was enacted in response to the common construction industry practice of original contractors or subcontractors furnishing a lien waiver swearing they have been paid even though, in fact, they have not. *Raymond Professional Group, Inc. v. William A. Pope Co.,* No. 09 C 6037, 2011 WL 528551, *3 (N.D.Ill. Feb. 8, 2011). Accordingly, when a contractor provides a lien waiver in exchange for payment or the promise of payment, §21.02 imposes a constructive trust on payments received, or to be received, that are owed to the contractor who provided labor, materials, or other lienable items. 2011 WL 528551 at **3 – 4, citing 770 ILCS 60/21.02(a). The trust money need not be held separately from other funds; contractors are free to commingle construction trust money with their business funds. 770 ILCS 60/21.02(b). A construction trust is not created, however, unless a lien waiver is executed in exchange for payment or promise of payment. 770 ILCS 60/21.02(a); *Anchor Mechanical Inc. v. Steege (In re ICM, Inc.),* 502 B.R. 220 (Bankr. N.D.Ill. 2013).

Section 21.02 of the Mechanics Lien Act has been interpreted by bankruptcy courts tasked with deciding how to treat the money held in trust by the contractor when the contractor files bankruptcy. In *Raymond Professional Group,* the court recognized a construction trust as separate property from the general contractor-debtor's bankruptcy estate. 2011 WL 528551 at *5. The court held that the money in trust was not subject to distribution by the bankruptcy court and must be paid directly to the subcontractors. *Id.* On the other hand, if a bankrupt general contractor no longer has the money that it was supposed to hold in trust, the debt created is deemed part of the bankruptcy estate and is unsecured. *In re Louis Jones Enterprises, Inc.,* No. BR 10 B 11375, 2011 WL 2709176 (Bankr. N.D.Ill. July 7, 2011). When a subcontractor's fraudulent lien waiver causes the general contractor to pay liens, then in the subcontractor's bankruptcy proceeding the general contractor will be entitled to full reimbursement of those liens from the subcontractor. *Dancor Construction, Inc. v. Haskell (In re Haskell),* 475 B.R. 911 (Bankr. C.D.Ill. 2012). Finally, a subcontractor seeking to recover payment from a construction trust under 770 ILCS 60/21.02 must allege that the subcontractor's lien waiver resulted in payment being issued. *Steege, supra* (dismissing subcontractor's lien claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to allege that payment was issued).

F. [8.6] Secondary Subcontractors' Foreclosure Actions

A secondary subcontractor may recover payment over and above the amount withheld by the owner pursuant to the original contractor's lien waiver, but only from the primary subcontractor, and not from the owner or original contractor. *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, 992 N.E.2d 27, 372 Ill.Dec. 488. The amount the secondary subcontractor is entitled to from the primary subcontractor is limited to the secondary subcontractor's pro rata share of the primary subcontractor's contract with the general contractor.

See, e.g., id. (material and services provider as secondary subcontractor); *Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, 39 N.E.3d 8, 395 Ill.Dec. 541 (electrician union as secondary subcontractor), followed by *GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App (1st) 133624, 38 N.E.3d 60, 395 Ill.Dec. 183.

G. [8.7] Municipalities' Actions To Recover Lienable Improvements

Section 11-31-1 of the Illinois Municipal Code, 65 ILCS 5/1-1-1, *et seq.,* empowers municipalities in Illinois to demolish, repair, or enclose buildings in their territory that they deem unsafe, uncompleted, or abandoned. 65 ILCS 5/11-31-1. The section allows municipalities to recover the cost of lienable alterations to the property from the property's owner if due notice of the owner's ordinance violation is provided to the owner. *Id.* See Chapters 5 and 6 of this handbook for an extended discussion of lien actions involving municipalities and other public entities. Section 11-31-1 gives municipalities similar powers and imposes on them similar requirements as the Mechanics Lien Act. *City of Decatur, Illinois v. Ballinger,* 2013 IL App (4th) 120456, ¶¶32 – 35, 988 N.E.2d 737, 370 Ill.Dec. 539. Therefore, courts will utilize caselaw interpreting the Mechanics Lien Act to interpret §11-31-1. *See id.* (finding that "owner" in §11-31-1 action includes seller in land installment contract just as in action under Mechanics Lien Act).

H. [8.8] 735 ILCS 5/2-619 Motions To Dismiss

A lien claim that erroneously listed the property's current property index number in derogation of §7 of the Mechanics Lien Act, 770 ILCS 60/7, but that correctly listed the metes and bounds description for a previous, obsolete plot was held to survive a 735 ILCS 5/2-619 motion to dismiss because a question of fact existed as to whether the description was sufficiently correct to allow identification by a third-party purchaser. *Christopher B. Burke Engineering, Ltd. v. Harkins,* 2011 IL App (3d) 100949-U.

Dismissal pursuant to 735 ILCS 5/2-619 has been held proper when the plaintiff failed to join necessary parties — the mortgage lender and an assignee of rents. *CB Construction & Design, LLC v. Atlas Brookview, LLC,* 2021 IL App (1st) 200924, 196 N.E.3d 115, 458 Ill.Dec. 1. Dismissal was also held proper when the owners against whom a lien was asserted owned only an easement and not the underlying land. *Matanky Realty Group, Inc. v. Katris,* 367 Ill.App.3d 839, 856 N.E.2d 579, 305 Ill.Dec. 774 (1st Dist. 2006). Dismissal for failure to provide sworn a contractor's statement was held to be erroneous. *Northwest Millwork Co. v. Komperda,* 338 Ill.App.3d 997, 788 N.E.2d 399, 273 Ill.Dec. 90 (2d Dist. 2003). Failure to provide a 60-day notice required by the statute did not invalidate the mechanics lien and require dismissal. *Crawford Supply Co. v. Schwartz,* 396 Ill.App.3d 111, 919 N.E.2d 5, 335 Ill.Dec. 484 (1st Dist. 2009).

I. [8.9] Attorneys' Fees

An attorney or law firm may not recover on an attorney's lien for unpaid fees through a foreclosure action under the Mechanics Lien Act. *Pedersen & Houpt, P.C. v. Main Street Village West, Part 1, LLC,* 2012 IL App (1st) 112971, 4 N.E.2d 62, 378 Ill.Dec. 463. In *Pedersen & Houpt,* a law firm won specific performance of a real estate contract on behalf of its client. The client subsequently conveyed the property, and the law firm sought to foreclose on its attorney's lien by

filing a foreclosure claim on the property under the Mechanics Lien Act. The court affirmed the trial court's decision to grant the client's motion to dismiss for several reasons: (1) foreclosure was not permitted under the Attorneys Lien Act, 770 ILCS 5/0.01, *et seq.;* (2) the law firm did not perfect its judgment for attorneys' fees from its law division suit; (3) no lien notices were served on the defendants in the specific performance case prior to judgment in that matter; and (4) none of the entities involved in the foreclosure action could be considered a party against whom the client had a claim under the Attorneys Lien Act. 2012 IL App (1st) 112971 at ¶¶20 – 44.

II. PROOF OF SELECTED ISSUES

A. [8.10] Proof of Notice

A subcontractor must provide a single-family residential owner with notice of the improvements the subcontractor has been contracted to perform within 60 days of beginning work. 770 ILCS 60/5(b). Subcontractors must also provide the owner and lender with written notice of their lien claim and the amount due, or to become due, within 90 days of completion of the improvements. 770 ILCS 60/24(a). Sections 5(b) and 24(a) of the Mechanics Lien Act require that written notice be sent by registered or certified mail, with return receipt requested. 770 ILCS 60/5(b), 60/24(a). It is critical that all lienholders be able to produce the return receipt for mailing notice of their lien to enforce the lien.

In *National City Mortgage v. Hillside Lumber, Inc.,* 2012 IL App (2d) 101292, 966 N.E.2d 1076, 359 Ill.Dec. 388, a materials lienholder could not produce the certified mail return receipt evidencing that it mailed the lender notice of its lien. Instead, at summary judgment the lienholder produced an affidavit that it had sent the lien to the lender by certified mail, return receipt requested. In response, the lender filed a counteraffidavit attesting that its records did not reflect that the plaintiff had received notice of the lien. In granting the lender's summary judgment motion, the court found that the lienholder was required to prove the lender actually received written notice of lien, not merely that the lienholder sent it. The court found that the lienholder's affidavit was evidence that the lienholder sent the lien, but not that the lender received it. Therefore, the certified mail return receipt is critical to establishing that the owner and lender received notice of the lien from the subcontractor. Indeed, in light of *National City Mortgage,* the return mail receipt may be the only effective way at the summary judgment stage to prove notice was received.

B. [8.11] Burden of Proof of Extras

A contractor must prove extra work by clear and convincing evidence. *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.,* 403 Ill.App.3d 468, 932 N.E.2d 1073, 1088, 342 Ill.Dec. 612 (1st Dist. 2010). The *Schlenker* court articulated the lien claimant's burden in proving its case:

> **It is the burden of the party seeking to enforce a mechanic's lien to satisfy the elements necessary to establish the lien. . . . Specifically, the lien claimant must establish and show that: (1) the lien claimant had a valid contract; (2) with the property owner, the**

> **owner's agent, or somebody authorized by the owner to contract for property improvements; (3) to furnish labor services or materials; and (4) the lien claimant performed pursuant to the contract or had a valid excuse for its nonperformance.** **[**Citations omitted.**]** *Id*.

C. [8.12] Proof of Enhancement

In 2013, §16 of the Mechanics Lien Act, 770 ILCS 60/16, was amended in the wake of *LaSalle Bank National Ass'n v. Cypress Creek 1, LP,* 242 Ill.2d 231, 950 N.E.2d 1109, 351 Ill.Dec. 281 (2011), to resolve the issue of whether a lienholder may satisfy its lien only from the enhancement value of its own improvements or from the enhancement value of all improvements performed by other contractors as well.

In *Cypress Creek 1,* the lienholders were several contractors that sought payment from foreclosure proceeds for the value of the improvements they performed on the property. The mortgagee had paid for some improvements through construction loan disbursements under §16. The mortgagee argued that the lienholders were entitled to lien priority only as to the value of the improvements that each particular lienholder provided, not all the improvements provided by all lienholders. The lienholders argued that the plain language of §16 entitled them to priority over the value of enhancements for all improvements made after the mortgage. The Illinois Supreme Court sided with the mortgagee because it found the result to be more equitable: "Were the lien claimants to be preferred to the value of all improvements, the lien claimants would be unjustly enriched, to the detriment of an owner or mortgagee who funded improvements other than those that form the basis for the liens." 950 N.E.2d at 1116. The decision overruled the appellate court's decision and included a dissenting opinion by Justice Freeman.

In the wake of *Cypress Creek 1,* the lender lobby and the construction lobby attempted to have contradictory bills passed clarifying §16 of the Act. In 2013, the Illinois legislature effectively reversed the Illinois Supreme Court's decision in *Cypress Creek 1* by amending §16 of the Mechanics Lien Act to make clear that contractors' liens are preferred over prior encumbrancers for all improvements made to the land, regardless of whether the improvements were provided by the lien creditor. 770 ILCS 60/16. Section 16, as amended by P.A. 97-1165 (eff. Feb. 11, 2013), reads:

> **No incumbrance upon land, created before or after the making of the contract <u>for improvements</u> under the provisions of this act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished material <u>(hereinafter "lien creditor")</u> shall have been satisfied, and upon <u>any</u> questions arising between incumbrancers and lien creditors, all previous incumbrances shall be preferred <u>only</u> to the extent of the value of the land at the time of making of the contract <u>for improvements, but shall not be preferred to the value of any subsequent improvements</u>, and <u>each</u> lien creditor shall be preferred to the value of <u>all</u> the <u>subsequent</u> improvements erected on said premises, <u>whether or not provided by the lien creditor</u>, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest. All incumbrances, whether by mortgage, judgment or**

> **otherwise, charged and shown to be fraudulent, in respect to creditors, may be set aside by the court, and the premises freed and discharged from such fraudulent incumbrance. When the proceeds of a sale are insufficient to satisfy the claims of both previous incumbrancers and lien creditors, the proceeds of the sale shall be distributed as follows: (i) any previous incumbrancers shall have a paramount lien in the portion of the proceeds attributable to the value of the land at the time of making of the contract for improvements; and (ii) any lien creditors shall have a paramount lien in the portion of the proceeds attributable to the value of all subsequent improvements made to the property.** 770 ILCS 60/16 (2013 additions underlined).

One issue that remains from the fallout of the §16 amendment is when *Cypress Creek 1* can be applied and when the amendment controls. While the amendment is now ten years old, some mechanics lien claims remain involving perfected claims prior to the amendment. The amendment expressly provided that it was effective upon becoming law. There is no language in the statute that provides that it should be applied retroactively.

Traditionally, Illinois courts have applied one of two tests to determine whether a statute applied retroactively. *Commonwealth Edison Co. v. Will County Collector,* 196 Ill.2d 27, 749 N.E.2d 964, 255 Ill.Dec. 482 (2001). The two tests are known as the "legislative intent approach" and the "vested rights approach." 749 N.E.2d at 968 – 969. Under the "legislative intent approach," statutes were presumed to operate prospectively unless the statute expressly provided for retroactive application. 749 N.E.2d at 969. The "vested rights approach" mostly ignored the legislative intent behind the statute and considered a new statute to apply as it exists at the time of the litigation unless it would interfere with a vested right. *Id.*

In the event that a practitioner faces an issue in which the lien was perfected prior to the enactment of the amendment, the above referenced tests should be considered. There is no caselaw that directly addresses this issue, and therefore it will be up to the practitioner to convince the court one way or the other.

9 Trial Practice: Breach and Damages

JAMES M. DASH
Carlson Dash, LLC
Chicago

I. [9.1] TRIAL IN GENERAL

The Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* is a comprehensive statutory enactment that sets forth the rights, remedies, and responsibilities of the parties to contracts for "improvements" to real estate, including property owners, contractors, and subcontractors. *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.,* 403 Ill.App.3d 468, 932 N.E.2d 1073, 342 Ill.Dec. 612 (1st Dist. 2010). How the purpose of the Act is articulated depends on one's point of view. Claimants will argue that the purpose of the Act is to permit contractors and subcontractors that furnish labor and materials, thereby increasing the value or condition of a property, to assert a lien on that property and recover the monetary benefits the party has conferred on the property's owner. 932 N.E.2d at 1086. Those defending against lien claims will contend that the purpose of the Act is not merely to protect contractors but to fairly balance the interests of property owners, contractors, and subcontractors and other parties involved in the process. *E.g., Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, ¶27, 992 N.E.2d 27, 372 Ill.Dec. 488. Justice Cook very aptly put this in his opinion in *Contractors' Ready-Mix, Inc. v. Earl Given Construction Co.,* 242 Ill.App.3d 448, 611 N.E.2d 529, 536, 183 Ill.Dec. 266 (4th Dist. 1993) (Cook, J., specially concurring):

> **On some projects the parties are careful to fully exercise their rights under the Act; on other projects they are not. The Act seeks a fair result in each case. Losses are not always placed on owners, nor are they always placed on subcontractors. There are steps which an owner may take under the Act to protect itself, but an owner is not required to avail itself of every protection the Act affords. The same is true for subcontractors. The Act provides a minimal level of protection in those cases where neither the owner nor the subcontractor takes advantage of the discretionary protections available.**

A lien claimant must strictly comply with the technical requirements of the Act to be eligible for relief because the remedies provided for in the Act are statutory and in derogation of common law. *E.g., Doornbos, supra; Gerdau Ameristeel, supra.*

"[T]he rules of practice and proceedings in such [mechanics lien enforcement] cases shall be the same as in other civil cases, except as is otherwise provided in this act." 770 ILCS 60/12. Mechanics lien claims are generally tried at a bench trial. However, a party may be entitled to a jury trial if the claim also raises legal issues. *Rozema v. Quinn,* 51 Ill.App.2d 479, 201 N.E.2d 649, 653 – 654 (1st Dist. 1964). For example, a claim for money damages for breach of contract often is brought in conjunction with a claim for mechanics lien. When law and equity actions are joined but a proper demand for a jury in the law action is made, the latter cannot be tried with the chancery action. *Id.,* citing *Hunsberger v. Mitchell,* 333 Ill.App. 644, 78 N.E.2d 857 (1st Dist. 1943), and *Flynn v. Troesch,* 373 Ill. 275, 26 N.E.2d 91 (1940).

It stands to reason that a trial of a mechanics lien claim often involves issues related to the claimant's performance or breach of contract and damages. However, even a cursory review of the case annotations will show that the claimant's compliance with the technical perfection requirements of the Act is a frequent issue in litigation as well. Depending on your client's position in the suit, it may be strategically desirable, when legally possible, to resolve each claimant's

compliance with those perfection requirements in pretrial motion practice. The qualification in the previous sentence, "when legally possible," is its most important part. There frequently are issues of fact in such matters even in the technical perfection of the lien, and if ever followed (and the author has not yet found a case that has), *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, 20 N.E.3d 104, 386 Ill.Dec. 243, makes it possible to raise fact issues for the first time in response to a motion for summary judgment even when there are multiple prior sworn admissions by the claimant of facts that support summary judgment against it.

NOTE: The author has cited unpublished orders in this chapter. Pursuant to Illinois Supreme Court Rule 23(e)(1) in effect at the time of this writing, "An order entered under subpart (b) or (c) of this rule is not precedential except to support contentions of double jeopardy, res judicata, collateral estoppel, or law of the case. However, a nonprecedential order entered under subpart (b) of this rule on or after January 1, 2021, may be cited for persuasive purposes. When cited, a copy of the order shall be furnished to all other counsel and the court." The addition of the provision permitting citation for persuasive purposes is a welcome change, in the opinion of the author, as Rule 23 formerly prohibited any citation to an unpublished order except in the case in which the order was entered, and even then only for the purposes of double jeopardy, res judicata, collateral estoppel, or law of the case.

II. [9.2] BREACH

Mechanics liens may arise when the owner or other upstream party fails or refuses to pay the just claim of a downstream contractor or subcontractor for lienable improvements as that term is defined in §1 of the Mechanics Lien Act, 770 ILCS 60/1. In the absence of a prior material breach of the contract by a (sub)contractor, the failure to pay amounts due under a contract usually will constitute a material breach of contract by the party obligated to pay. *See, e.g., C.G. Caster Co. v. Regan,* 88 Ill.App.3d 280, 410 N.E.2d 422, 426, 43 Ill.Dec. 422 (1st Dist. 1980); *Williams Brothers Construction, Inc. v. Board of Trustees of Heartland Community College District 540,* 2018 IL App (4th) 170436-U, ¶18. However, a material breach by one party generally excuses further performance by the nonbreaching party. *PML Development LLC v. Village of Hawthorn Woods,* 2022 IL App (2d) 200779, ¶41, *appeal granted,* No. 128770 (Sept. 28, 2022). *See also Mohanty v. St. John Heart Clinic, S.C.,* 225 Ill.2d 52, 866 N.E.2d 85, 95, 310 Ill.Dec. 274 (2006); *Dragon Construction, Inc. v. Parkway Bank & Trust,* 287 Ill.App.3d 29, 678 N.E.2d 55, 58, 222 Ill.Dec. 648 (1st Dist. 1997). Thus, if the claimant was the first to breach its contract, it generally is not entitled to a lien. *See Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.,* 403 Ill.App.3d 468, 932 N.E.2d 1073, 1088, 342 Ill.Dec. 612 (1st Dist. 2010) (claimant generally must establish that it performed pursuant to contract or had valid excuse for its nonperformance); *J.R. Sinnott Carpentry, Inc. v. Phillips,* 110 Ill.App.3d 632, 443 N.E.2d 597, 603, 66 Ill.Dec. 671 (4th Dist. 1982) ("the purchasers' refusal to pay is not a breach of contract when the builder's work amounts to less than substantial performance").

Accordingly, it is vitally important to the claimant to meet its burden of proving full performance or a valid excuse for nonperformance (*Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131, 133 – 134 (5th Dist. 1973)) and that it was not the first to breach its contract. There are several justifications for the claimant's nonperformance, including

a. the owner's breach of a material term of the contract, such as a failure to make payments (770 ILCS 60/4);

b. the owner's abandonment of the enterprise (*Crowen v. Meyer,* 342 Ill. 46, 174 N.E. 55, 58 (1930) (mechanics lien for value of architect's design work was valid even though owner abandoned project and there was never improvement on land); *Christopher B. Burke Engineering, Ltd. v. Heritage Bank of Central Illinois,* 2015 IL 118955, ¶14, 43 N.E.3d 963, 398 Ill.Dec. 53 (physical improvement of premises not required for lien claims for professional services); *cf. Watson v. Watson,* 218 Ill.App.3d 397, 578 N.E.2d 275, 277 – 278, 161 Ill.Dec. 148 (3d Dist. 1991) (services performed under mechanics lien claim must constitute improvement to land or lien claim is not valid));

c. the owner's prevention of performance or completion of performance (*Miller, supra,* 302 N.E.2d at 133 – 134; *Gamm Construction Co. v. Townsend,* 32 Ill.App.3d 848, 336 N.E.2d 592, 594 – 595 (2d Dist. 1975); *Knowles v. Westbrook Builders, Ltd.,* 188 Ill.App.3d 343, 544 N.E.2d 121, 135 Ill.Dec. 764 (3d Dist. 1989); *Expert Painting, Inc. v. Perrin Corp.,* 93 Ill.App.3d 683, 417 N.E.2d 839, 842 – 843, 49 Ill.Dec. 149 (3d Dist. 1981); *see also J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.,* 162 Ill.2d 265, 642 N.E.2d 1215, 1223 – 1224, 205 Ill.Dec. 98 (1994); *Wilmette Partners v. Hamel,* 230 Ill.App.3d 248, 594 N.E.2d 1177, 1188, 171 Ill.Dec. 657 (1st Dist. 1992));

d. the failure of the owner or contractor to prepare the property for the subcontractor's work (*Cleveland Wrecking Co. v. Central National Bank in Chicago,* 216 Ill.App.3d 279, 576 N.E.2d 1055, 160 Ill.Dec. 101 (1st Dist. 1991));

e. the owner's substantial modification of the work to be performed while refusing to allow extra compensation (*id.*); and

f. employing another person to perform the work covered by the contractor's contract (*B & C Electric, Inc. v. Pullman Bank & Trust Co.,* 96 Ill.App.3d 321, 421 N.E.2d 206, 51 Ill.Dec. 698 (1st Dist. 1981)).

Of course, many modern contracts permit the upstream party to reduce the scope of the downstream party's work without the reduction constituting a breach. Presumably, such a reduction would not result in a viable lien against the property in question for unperformed work or constitute a material breach of the contract that would excuse further performance.

III. [9.3] MEASURE OF DAMAGES

A party is required to prove the amount of damages with reasonable certainty. *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 58 – 59, 243 Ill.Dec. 740 (1st Dist. 1999).

In cases involving anything less than full performance by the contractor, the measure of damages is inextricably tied to the sequence of events surrounding the breach and any justification for nonperformance. *B & C Electric, Inc. v. Pullman Bank & Trust Co.,* 96 Ill.App.3d 321, 421

N.E.2d 206, 51 Ill.Dec. 698 (1st Dist. 1981). Presumably, a lien claimant who has not fully performed on the contract must prove at trial that the owner committed one or more of the acts listed in §9.2 above, or some other qualifying act, before the lien claimant can claim justification for nonperformance.

A. [9.4] Full Performance

A lien claimant who proves full performance on the contract is entitled to full recovery of damages under the Mechanics Lien Act. Section 1(a) of the Act gives the original contractor a lien "for the amount due to him or her." 770 ILCS 60/1(a). Section 21 of the Act gives the subcontractor a lien for "the value" of the materials, apparatuses, machinery, or fixtures described in that section and furnished by the claimant. 770 ILCS 60/21.

It is sufficient prima facie evidence of value if the subcontractor proves the price that was agreed on between it and the contractor. *McKeown Bros. v. Ogden Kennel Club,* 269 Ill.App. 622, 634 (1st Dist. 1933); *Pascal & Associates, Inc. v. Punchinello's East, Inc.,* 9 Ill.App.3d 456, 292 N.E.2d 429, 430 – 431 (1st Dist. 1972). Put another way, the contract price establishes the value of the improvements on the property. *Moulding-Brownell Corp. v. E. C. Delfosse Const. Co.,* 304 Ill.App. 491, 26 N.E.2d 709, 712 (1st Dist. 1940). The contract price is presumed correct as between the parties to the contract. *Pascal & Associates, supra,* 292 N.E.2d at 430 – 431.

If the lienable work involves materials, a claimant may prove delivery of material through delivery receipts. *Moser Lumber, Inc. v. Morgan,* 106 Ill.App.2d 339, 245 N.E.2d 310, 312 – 313 (2d Dist. 1969). However, in the 2006 amendments to the Act, §1 was changed to provide that any contract made "for the purpose of improving" the land is lienable. Thus, there is a legitimate question of whether the claimant must prove that its materials were delivered to the site in order to claim a lien, as long as the original contract was made "for the purpose of improving" the land. As of this writing, the author is not aware of any appellate decision on this issue.

B. [9.5] Substantial Performance

Normally, a contractor must completely perform the contract to enforce its lien. *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 59, 243 Ill.Dec. 740 (1st Dist. 1999). However, the general rule regarding construction contracts under the doctrine of substantial compliance is that a builder is not required to perform perfectly but rather is only held to a duty of substantial performance in a workmanlike manner. *Behl v. Gingerich,* 396 Ill.App.3d 1078, 920 N.E.2d 665, 675 – 677, 336 Ill.Dec. 456 (4th Dist. 2009).

Illinois courts define "substantial performance" as "an honest and faithful performance of the contract in its material and substantial parts, with no willful departure from, or omission of, the essential elements of the contract." *Folk v. Central National Bank & Trust Company of Rockford,* 210 Ill.App.3d 43, 567 N.E.2d 1, 3, 153 Ill.Dec. 286 (2d Dist. 1990). *See Delta Construction, Inc. v. Dressler,* 64 Ill.App.3d 867, 381 N.E.2d 1023, 21 Ill.Dec. 576 (3d Dist. 1978); *A.W. Wendell & Sons, Inc. v. Qazi,* 254 Ill.App.3d 97, 626 N.E.2d 280, 289, 193 Ill.Dec. 247 (2d Dist. 1993). The question of what constitutes substantial performance is one of fact, as it depends on the relevant facts of each case. *Brewer v. Custom Builders Corp.,* 42 Ill.App.3d 668, 356 N.E.2d 565, 570, 1

Ill.Dec. 377 (5th Dist. 1976). In the author's experience, substantial performance may or may not be defeated by the claimant's delay in performance. Construction delays are complicated issues and are the subject of entire books, but among the issues are whether an alleged delay (1) was caused by the claimant, (2) was on the "critical path" of the project, (3) was material, or (4) was waived by the counterparty. Substantial performance is also discussed in §11.31 of this handbook.

The claimant bears the burden of establishing the elements of damages for his or her substantial performance. *Watson Lumber Co. v. Guennewig,* 79 Ill.App.2d 377, 226 N.E.2d 270, 279 – 280 (5th Dist. 1967). The measure of damages for a breach of the contract is the contract price minus the necessary expense of performing the work according to the requirements of the contract. *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC,* 391 Ill.App.3d 533, 909 N.E.2d 294, 298, 330 Ill.Dec. 581 (1st Dist. 2009), explicitly sets forth the measure of damages:

> **Ordinarily, when a subcontractor has substantially performed its contractual obligations but is prevented by the contractor or the owner from *fully* performing, the measure of damages is the difference between the unpaid portion of the contract price due to the subcontractor and the cost of completing the work under the terms of the contract. [**Emphasis in original.**]**

O'Connor Construction conflicts to some degree with *Expert Painting, Inc. v. Perrin Corp.,* 93 Ill.App.3d 683, 417 N.E.2d 839, 843, 49 Ill.Dec. 149 (3d Dist. 1981), and *Allstate Contractors, Inc. v. Marriott Corp.,* 273 Ill.App.3d 820, 652 N.E.2d 1113, 210 Ill.Dec. 137 (1st Dist. 1995). The latter cases hold that when a subcontractor has substantially performed and is prevented from completing its work by the contractor, the contractor (here, the upstream party) may not be able to set off the costs of completing the work, especially if the costs are excessive. In *Expert Painting, supra,* the defendant general contractor sought a credit for costs it incurred after unjustifiably terminating the plaintiff's contract. The appellate court disagreed.

In *Allstate Contractors,* the defendant assumed the obligation to pay the plaintiff's supplier to complete the project after the defendant wrongfully dismissed the contractor. 652 N.E.2d at 1119 – 1120. Thus, the court held that the defendant's payment to the plaintiff's supplier was part of its costs of completion after it wrongfully breached the plaintiff's contract. The court further reasoned that to pass the cost of completion of the project on to the subcontractor not only would work an injustice but also would virtually vitiate the judgment for the subcontractor.

Even in the face of some elements of illegality in the contractor's performance, a contractor may still be entitled to the contract price less reasonable costs for correcting/completing the work. In *Mani Electrical Contractors v. Kioutas,* 243 Ill.App.3d 662, 611 N.E.2d 1167, 183 Ill.Dec. 519 (1st Dist. 1993), judgment for the lien claimant was deemed proper even though there was a showing that a permit to perform the work was issued to a different electrical contractor and never applied for by the plaintiff and that the plaintiff was not a registered electrical contractor as required by the local municipal ordinance. The plaintiff's contract did not necessarily contemplate an illegal bargain, nor did it provide for or require the violation of any law, so it was not illegal. Therefore, regardless of any illegality in the manner of its performance, the plaintiff was entitled to recovery. Once the plaintiff established substantial performance, the measure of damages was calculated using the contract price minus the total reasonable costs for completing and correcting the work.

1. [9.6] Owner's Claim Against General Contractor for Lien Judgment

Although it should not be surprising, in an action in which the general contractor took money from the owners for work that it then subcontracted for and failed to pay the subcontractor, the court determined that the owners were entitled to damages following the subcontractor's lien foreclosure against them. *Sunrise Concrete, Inc. v. Hanna,* 2013 IL App (1st) 120496-U, ¶35. The court ruled that the owner was not seeking a credit from the general contractor for payments made in derogation of the subcontractor's rights, which is not allowed under Illinois law. Rather, it found that the contractor breached its contract with the owners by not performing the work it promised to perform and then hiring subcontractors to do the work. The owners proved damages against the general contractor for work done by the subcontractor and, as a result of the general contractor's breach for which the owner became liable, through a mechanic's lien judgment.

2. [9.7] Owner's Breach/No Substantial Performance by Contractor

Section 4 of the Mechanics Lien Act provides:

> **When the owner of the land shall fail to pay the contractor moneys justly due him under the contract at the time when the same should be paid, or fails to perform his part of the contract in any other manner, the contractor may discontinue work, and the contractor shall not be held liable for any delay on his part during the period of, or caused by, such breach of contract on the part of the owner; and if after such breach for the period of ten days the owner shall fail to comply with his contract, the contractor may abandon the work, and in such a case the contractor shall be entitled to enforce his lien for the value of what has been done, and the court shall adjust his claim and allow him a lien accordingly. In such cases all persons furnishing material which has not been incorporated in the improvement shall have the right to take possession of and remove the same if he so elects.** 770 ILCS 60/4.

In other words, the contractor's failure to render substantial performance due to non-completion may not prevent the contractor from recovering under the Act if the owner committed the first material breach by failing to pay. *See Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131, 133 – 134 (5th Dist. 1973).

Under these conditions, the measure of damages is dictated by RESTATEMENT (FIRST) OF CONTRACTS §346(2) (1932):

> **For a breach by one who has promised to pay for construction, if it is a partial breach the builder can get judgment for the instalment due . . . and if it is a total breach he can get judgment . . . for either**
>
> > **(a) the entire contract price and compensation for unavoidable special harm that the defendant had reason to foresee when the contract was made, less instalments already paid and the cost of completion that the builder can reasonably save by not completing the work; or**
> >
> > **(b) the amount of his expenditure in part for performance of the contract, subject to the limitations stated in §333.**

See also Watson v. Auburn Iron Works, Inc., 23 Ill.App.3d 265, 318 N.E.2d 508 (2d Dist. 1974); *B & C Electric, Inc. v. Pullman Bank & Trust Co.,* 96 Ill.App.3d 321, 421 N.E.2d 206, 51 Ill.Dec. 698 (1st Dist. 1981). Comment h to RESTATEMENT §346, quoted in *Auburn Iron Works, supra,* 318 N.E.2d at 512 – 513, states:

> **Damages, measured by the builder's actual expenditure to date of breach less the value of materials on hand, plus the profit that he can prove with reasonable certainty would have been realized from full performance. This is a correct rule and is in fact the equivalent of the rule stated in Clause (a) of this Subsection, provided that all the elements that justly enter into the determination of cost of completion are considered in determining expected profits. . . . If the builder cannot or does not prove the cost of completion or the profit that he would have made from full performance, he can get judgment for his expenditures in part performance, subject to the limitations stated in §333.**

See also Wilmette Partners v. Hamel, 230 Ill.App.3d 248, 594 N.E.2d 1177, 171 Ill.Dec. 657 (1st Dist. 1992).

It should be noted that many modern contract forms attempt to alter this equation by agreement, including an agreement by the contractor to waive any right to lost profits or overhead on uncompleted work. Contractors of all stripes should review their proposed contracts carefully and must weigh the risks and benefits of entering into contracts containing such agreements.

3. [9.8] Builder's Breach/No Substantial Performance by Contractor

A mechanics lien does not arise when there is a breach by the builder and no substantial performance. *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 59 – 60, 243 Ill.Dec. 740 (1st Dist. 1999). In that case, recovery is limited to quantum meruit (see §9.16 below). The builder's recovery in quantum meruit is limited to the value of the net benefits conferred on the owner. *Deerfield Electric Co. v. Herbert W. Jaeger & Associates, Inc.,* 74 Ill.App.3d 380, 392 N.E.2d 914, 30 Ill.Dec. 149 (2d Dist. 1979). The measure of damages is the reasonable value of what the owner received above and beyond the injuries suffered by reason of the builder's breach. *M.J. Oldenstedt Plumbing Co. v. K Mart Corp.,* 257 Ill.App.3d 759, 629 N.E.2d 214, 220 – 221, 195 Ill.Dec. 906 (3d Dist. 1994); *Folk v. Central National Bank & Trust Co.,* 210 Ill.App.3d 43, 567 N.E.2d 1, 153 Ill.Dec. 286 (2d Dist. 1990); *George Butkovich & Sons, Inc. v. State Bank of St. Charles,* 62 Ill.App.3d 810, 379 N.E.2d 837, 20 Ill.Dec. 4 (2d Dist. 1978).

C. [9.9] Effect of Statutory Violations on Mechanics Lien and Contract Claims

Contractors should always be urged to enter into written contracts and comply with all aspects of the law to avoid costly litigation. Notwithstanding these recommendations, a failure to strictly adhere to certain technical statutory requirements that are not prerequisites to the enforcement of a lien may not prohibit the enforcement of a lien.

1. [9.10] Breach of Mechanics Lien Act

Illinois courts seem to be uniform on the principle that the Mechanics Lien Act becomes a part of every construction contract between an owner and contractor for the erection or improvement of a building. *Deerfield Electric Co. v. Herbert W. Jaeger & Associates, Inc.,* 74 Ill.App.3d 380, 392 N.E.2d 914, 917, 30 Ill.Dec. 149 (2d Dist. 1979), citing *Robertson v. Huntley & Blazier Co.,* 351 Ill.App. 378, 115 N.E.2d 533, 536 (4th Dist. 1953), and *Schiro v. W. E. Gould & Co.,* 18 Ill.2d 538, 165 N.E.2d 286, 290 (1960). This includes the duty under §5 of the Act, 770 ILCS 60/5, for the owner to require and for a contractor to provide a sworn statement. *Deerfield Electric, supra.* However, modern courts seem to have ridden waves of differing opinions on whether a contractor's failure to tender a sworn contractor's statement pursuant to §5 precludes a claim for mechanics lien — or, worse for the claimant, may preclude a claim for breach of contract. In *Malesa v. Royal Harbour Management Corp.,* 187 Ill.App.3d 655, 543 N.E.2d 591, 595, 135 Ill.Dec. 208 (2d Dist. 1989), the court wrote:

> **Section 32 of the Act (Ill.Rev.Stat. 1987, ch. 82, par. 32) states that if an owner makes a payment to a contractor without first fully enforcing his rights under section 5, the payment will not be regarded as rightfully made as against any subcontractor, laborer, or party furnishing labor or materials. If the owner makes such a payment before receiving the contractor's sworn statement, the owner may be compelled to pay subcontractors even if he or she has paid the contractor in full. *Brady Brick & Supply Co. v. Lotito* (1976), 43 Ill.App.3d 69, 73, 1 Ill.Dec. 844, 356 N.E.2d 1126.**
>
> **Thus, the duty of an owner under section 5 is a duty to refrain from paying the contractor until the owner receives the contractor's sworn statement. This is a duty owed to the subcontractors, and a breach of the duty can result in liability to the subcontractors under section 32 of the Act. Section 5 does not explicitly require the owner to make an oral or written request for the contractor's statement, nor does it condition the contractor's duty to provide the statement on receiving such a request.**

See also Ambrose v. Biggs, 156 Ill.App.3d 515, 509 N.E.2d 614, 108 Ill.Dec. 918 (2d Dist. 1987). So, under *Malesa* and *Ambrose,* essentially, unless and until the contractor provides a sworn statement, no money is due the contractor.

The tide turned in the early 1990s. In *National Wrecking Co. v. Midwest Terminal Corp.,* 234 Ill.App.3d 750, 601 N.E.2d 999, 1007, 176 Ill.Dec. 301 (1st Dist. 1992), the court, citing its 1926 decision in *Hall v. Harris,* 242 Ill.App. 315 (1st Dist. 1926), wrote that "it is undisputed that the failure to provide a sworn statement does not bar a mechanics' lien claim," that nothing had changed since *Hall,* and, refusing to follow *Malesa* and *Ambrose,* that the plaintiff's failure to provide a sworn statement pursuant to §5 does not bar its recovery for breach of contract. *See also Prior v. First National Bank & Trust Co.,* 231 Ill.App.3d 331, 596 N.E.2d 891, 892, 173 Ill.Dec. 267 (5th Dist. 1992) ("Defendants never requested a sworn statement from plaintiff, consequently the duty to provide them with one never arose. They cannot now defeat plaintiff's claim merely on this basis alone.").

In *Northwest Millwork Co. v. Komperda,* 338 Ill.App.3d 997, 788 N.E.2d 399, 273 Ill.Dec. 90 (2d Dist. 2003), in which the court held that because the owner had not been served with any

subcontractors' "90-day" notices pursuant to §24 of the Act (770 ILCS 60/24), the contractor's failure/refusal to provide a §5 sworn statement could not prejudice the owner because there were no perfected subcontractor claims and the owner could not be compelled to pay any more money to subcontractors:

> **We conclude that *Ambrose* and *Malesa* are distinguishable and therefore do not control here. The *Ambrose* court noted that the owners' "refusal to make the final payment in the absence of a contractor's statement was justified in order to protect against potential subcontractors' lien claims." *Ambrose,* 156 Ill.App.3d at 518, 108 Ill.Dec. 918, 509 N.E.2d 614. Here, the facts developed thus far do not demonstrate that the Komperdas are subject to the risk of subcontractors' lien claims. . . .**
>
> *** * ***
>
> **Where there is no longer a potential for such claims, the concerns expressed in *Ambrose* and *Malesa* are not present, and it would be inequitable to hold that the failure to present a sworn statement permanently bars a breach of contract action.** 788 N.E.2d at 403 – 404.

In *Kasinecz v. Duffy,* 406 Ill.App.3d 1213, 998 N.E.2d 717, 376 Ill.Dec. 175 (2d Dist. 2011) (Rule 23), the court tried to make sense of the varying opinions, largely following *Komperda* in holding that an owner who does not expressly request that a contractor provide a sworn statement, but suffered no prejudice as a result of the lack of a sworn contractor's statement, cannot rely on the contractor's failure to provide the statement to prevent claims for a mechanics lien and breach of contract.

In *Cityline Construction Fire & Water Restoration, Inc. v. Roberts,* 2014 IL App (1st) 130730, 7 N.E.3d 235, 379 Ill.Dec. 809, the court held that a contractor's failure to produce a §5 sworn statement on demand by the owner bars a mechanics lien claim. The court distinguished *National Wrecking* on the ground that the issue in *National Wrecking* was whether the failure to produce a sworn statement barred a breach-of-contract claim, not a lien claim. 2014 IL App (1st) 130730 at ¶21. The court wrote that, "[u]nlike a breach of contract claim, the validity of a mechanic's lien is governed entirely by the Act and therefore the holding in *National Wrecking* has no bearing on the issue presented in this appeal."

Synthesizing these cases is difficult to say the least, but here is an effort:

a. If the owner timely demands a proper sworn statement from a contractor that the contractor refuses to provide, it is more likely than not that the contractor's claim for lien will be defeated — at least while the owner remains at risk of subcontractor claims. Whether the contractor's breach-of-contract claim will be defeated in this circumstance is more of a toss-up, but it seems highly inequitable to compel the owner to pay the contractor as long as the owner remains at risk of paying for the same work twice by reason of subcontractor liens.

b. If the owner does not timely demand a proper sworn statement, the risk of the contractor having a valid lien and a valid contract claim increase significantly.

Of course, if the owner pays the contractor without obtaining a proper sworn statement, the owner should not have any liability to the contractor but may have liability to any subcontractor who properly perfects a lien with a timely notice under §24.

2. [9.11] Breach of Home Repair and Remodeling Act by Contractor

A violation of the Home Repair and Remodeling Act, 815 ILCS 513/1, *et seq.,* does not automatically render a claim for mechanics lien unenforceable. In *K. Miller Construction Co. v. McGinnis,* 238 Ill.2d 284, 938 N.E.2d 471, 482, 345 Ill.Dec. 32 (2010), *abrogating Smith v. Bogard,* 377 Ill.App.3d 842, 879 N.E.2d 543, 546, 548, 316 Ill.Dec. 476 (4th Dist. 2007), the Illinois Supreme Court held that the Act does not bar contractors from seeking to enforce oral contracts for home repair or remodeling work over $1,000. Likewise, contractors may maintain an action to foreclose their mechanics liens under such oral contracts as well. An examination of the legislative intent of amendments to the Act revealed that the change was to make clear that, unless there are actual damages, a consumer cannot avoid paying the balance due to a home repair or remodeling contractor by using the technical provisions of the Act requiring that a pamphlet and a written contract for work on a project be given to the homeowner. *See also Universal Structures, Ltd. v. Buchman,* 402 Ill.App.3d 10, 937 N.E.2d 668, 344 Ill.Dec. 645 (1st Dist. 2010) (contractor had mechanics lien on homeowners' property even though there was no signed contract or work orders consistent with Home Repair and Remodeling Act); *Heartland Construction Group, Inc. v. Nelson,* No. 1-09-2564, 2011 WL 9753790 (1st Dist. Mar. 4, 2011) (Rule 23) (homeowners did not establish remodeling contractor defrauded or caused them actual damages; their allegations of technical violations of Act were insufficient to nullify parties' contract or contractor's mechanics lien).

D. [9.12] Other Types of Damages in Construction Cases; Incidental Expenses

S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc., 39 Ill.App.3d 353, 350 N.E.2d 321, 325 (5th Dist. 1976), held that the cost of performing tests on a product that does not meet specifications to determine if it, nonetheless, is adequate for the purpose intended by the purchaser is recoverable as an incidental expense under §2-715 of the Uniform Commercial Code (UCC), 810 ILCS 5/1-101, *et seq.:*

> **The measure of damages under paragraph 2-714 is the "loss resulting in the ordinary course of events" from the breach including incidental and consequential damages. . . . Plaintiff chose to conduct tests approved in the industry to determine if the slab could be used. We believe the cost of these tests to be a reasonable incidental expense under paragraph 2-715.**

1. [9.13] Lost Profits

Lost profits are among the most feared elements of damages because they can result in a highly inflated recovery. Profits are considered an element of a contract; therefore, they are presumed to have been within the contemplation of the breaching party at the time of entering into the contract and are recoverable if they are proved with reasonable certainty. *Rivenbark v. Finis P. Ernest, Inc.,* 37 Ill.App.3d 536, 346 N.E.2d 494, 497 (5th Dist. 1976). In *Rivenbark,* the court set forth the standard for awarding profits as damages:

> **Prospective profits recoverable are limited to those which might have been made pursuant to the performance of the particular contract sued on and during the period for which it was to run. The net profits lost by breach of contract are ascertained by deducting from the contract price those expenses necessary for full compliance on the plaintiff's part.** 346 N.E.2d at 497, citing *Sokoloff v. Highway Steel Products Co.,* 335 Ill.App. 573, 82 N.E.2d 509 (1st Dist. 1948).

The court denied recovery for lost profits because the

> [p]**laintiff presented no evidence of the projected cost of completion of the work. There was no testimony regarding anticipated direct costs (labor and material), indirect costs (overhead and other expenses) or how long it would have taken to complete the contract. Without such testimony the proper amount of lost net profit cannot be ascertained. It may be that plaintiff's cost of completion would have been greater than the contract price for the work remaining. In this instance, plaintiff would not be entitled to any lost profits. On the other hand, plaintiff's estimate may well approximate a fair amount of anticipated profits lost as a result of defendant's breach.** 346 N.E.2d at 498.

2. [9.14] Interest

A contractor or subcontractor may also recover interest at ten percent per annum from the time the amount is due under §1(a) of the Mechanics Lien Act. 770 ILCS 60/1(a). *See also Premier Electrical Construction Co. v. American National Bank of Chicago,* 276 Ill.App.3d 816, 658 N.E.2d 877, 888, 213 Ill.Dec. 128 (1st Dist. 1995).

Construction contracts often provide for interest on unpaid invoices that varies from the Mechanics Lien Act. In *Sunrise Concrete, Inc. v. Hanna,* 2013 IL App (1st) 120496-U, the subcontractor's agreement provided for a 30-percent monthly interest rate for unpaid bills. The owners argued that this rate was unconscionable and unenforceable because it violated the Interest Act, 815 ILCS 205/0.01, *et seq.* 2013 IL App (1st) 120496-U at ¶25. However, the court held that the Interest Act did not apply because the contract that was the subject of the litigation was between two corporations.

3. [9.15] Attorneys' Fees

The "prevailing party," under very limited circumstances, may also recover attorneys' fees under the Mechanics Lien Act. Section 17(b) of the Act provides:

> **If the court specifically finds that the owner who contracted to have the improvements made failed to pay any lien claimant the full contract price, including extras, without just cause or right, the court may tax that owner, but not any other party, the reasonable attorney's fees of the lien claimant who had perfected and proven his or her claim.** 770 ILCS 60/17(b).

The "mirror image" of §17(b) is contained in §17(c):

> **If the court specifically finds that a lien claimant has brought an action under this Act without just cause or right, the court may tax the claimant the reasonable attorney's fees of the owner who contracted to have the improvements made and defended the action, but not those of any other party.** 770 ILCS 60/17(c).

The phrase "without just cause or right" is defined by the Act as "a claim asserted by a lien claimant or a defense asserted by the owner who contracted to have the improvements made, which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." 770 ILCS 60/17(d). If this sounds familiar, it is nearly a verbatim reproduction of the language in Supreme Court Rule 137. Thus, in essence, other than when a bond is approved pursuant to §38.1 of the Act (which affords the "prevailing party," as defined therein, attorneys' fees to a capped amount), attorneys' fees are available only when the offending party commits sanctionable conduct in the litigation.

In *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC,* 391 Ill.App.3d 533, 909 N.E.2d 294, 299 – 300, 330 Ill.Dec. 581 (1st Dist. 2009), the court reversed the trial court's denial of attorneys' fees to the contractor, noting that the owner had acknowledged that it knew that the subcontractor was owed an undisputed amount of $47,562.19. *See also Walter Daniels Construction Co. v. Dundee Reger LLC,* 2016 IL App (1st) 151112-U, ¶10 (citing *O'Connor* to uphold trial court's award of fees). Thus, it generally is wise for counsel to advise a client not to hold money that is undisputedly due hostage to resolution of a dispute for additional money.

IV. [9.16] QUANTUM MERUIT AND UNJUST ENRICHMENT

As discussed in Chapter 12 of this handbook, the quasi-contractual claims of quantum meruit and unjust enrichment often should be included as alternate remedies when filing a lawsuit to foreclose a claim for mechanics lien. While a contractor may not subvert the requirements of the Mechanics Lien Act using these claims, there are limited circumstances under which recovery may be allowed. *See Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 211 Ill.Dec. 682 (1st Dist. 1995).

Even when no contract exists, implied contracts can be created as a result of the parties' actions. *Kohlenbrener v. North Suburban Clinic, Ltd.,* 356 Ill.App.3d 414, 826 N.E.2d 563, 567, 292 Ill.Dec. 422 (1st Dist. 2005). Illinois courts recognize two types of implied contracts: (a) contracts implied in fact; and (b) contracts implied in law. *Brody v. Finch University of Health Sciences/Chicago Medical School,* 298 Ill.App.3d 146, 698 N.E.2d 257, 265, 232 Ill.Dec. 419 (2d Dist. 1998). Implied-in-fact contracts stem from a promissory expression that may be inferred from the facts and circumstances that demonstrate the parties' intent to be bound. *Trapani Construction Co. v. Elliot Group, Inc.,* 2016 IL App (1st) 143734, ¶41, 64 N.E.3d 132, 407 Ill.Dec. 754, citing *Heavey v. Ehret,* 166 Ill.App.3d 347, 519 N.E.2d 996, 1001, 116 Ill.Dec. 781 (1st Dist. 1988). Contracts implied in law are equitable in nature and are based on the principle that no one should be unjustly enriched at another's expense. 2016 IL App (1st) 143734 at ¶41. Both implied-in-fact and implied-in-law contract claims repeatedly appear in construction disputes.

A. Contracts Implied in Fact

1. [9.17] Background

Illinois courts analyze express contracts and contracts implied in fact similarly. "The only difference between an express contract and an implied contract in the proper sense is that in [express contracts] the parties arrive at an agreement by words, either verbal or written, while in [implied contracts] the agreement is arrived at by a consideration of their acts and conduct." *Litow v. Aurora Beacon News,* 61 Ill.App.2d 127, 209 N.E.2d 668, 671 (2d Dist. 1965). Thus, a litigant asserting a contract implied in fact must plead and prove the elements of a contract: offer, acceptance, and consideration. *Brody v. Finch University of Health Sciences/Chicago Medical School,* 298 Ill.App.3d 146, 698 N.E.2d 257, 265, 232 Ill.Dec. 419 (2d Dist. 1998). Courts have also held that this requires a meeting of the minds. *See Rosin v. First Bank of Oak Park,* 126 Ill.App.3d 230, 466 N.E.2d 1245, 1249, 81 Ill.Dec. 443 (1st Dist. 1984) (to create valid contract, acceptance must be objectively manifested; without it there is no meeting of minds).

In the context of an express contract, proving meetings of the minds may be routine and quite simple. In contracts implied in fact (due to the nature of the remedy), it is rarely so. Courts look to facts that provide evidence as to the circumstances under which the alleged contract was formed. Mutual intent to contract can be established by the parties' conduct, by the common understandings between the parties, and by the ordinary course of dealing between the parties. *Schivarelli v. Chicago Transit Authority,* 355 Ill.App.3d 93, 823 N.E.2d 158, 166, 291 Ill.Dec. 148 (1st Dist. 2005). *See also People ex rel. Hartigan v. Knecht Services, Inc.,* 216 Ill.App.3d 843, 575 N.E.2d 1378, 159 Ill.Dec. 318 (2d Dist. 1991).

2. [9.18] Appellate Review

The existence of a contract implied in fact is a question of law subject to de novo review. *Wood v. Wabash County,* 309 Ill.App.3d 725, 722 N.E.2d 1176, 1179, 243 Ill.Dec. 107 (5th Dist. 1999). However, because the existence of an implied contract is often rooted in factual analysis, and the facts are often disputed, a manifest weight of the evidence standard may apply. *Quinlan v. Stouffe,* 355 Ill.App.3d 830, 823 N.E.2d 597, 602, 291 Ill.Dec. 305 (4th Dist. 2005). Given the vastly different level of deference given the trial court under the foregoing standards, creating a complete record and properly framing issues on appeal can make or break a claimant's appeal.

3. [9.19] Case Study: *Trapani Construction Co. v. Elliot Group, Inc.*

In *Trapani Construction Co. v. Elliot Group, Inc.,* 2016 IL App (1st) 143734, 64 N.E.3d 132, 407 Ill.Dec. 754, the plaintiff sent five draft contracts to the defendant for construction services to be provided to a construction project in Arlington Heights. The defendant was listed as owner of the project but never signed any draft of the contract. 2016 IL App (1st) 143734 at ¶3. In fact, the defendant was not the owner of the project but was allegedly acting as the owner's agent. 2016 IL App (1st) 143734 at ¶27. The defendant never corrected any of the draft contracts to reflect this fact. 2016 IL App (1st) 143734 at ¶45. The plaintiff also signed a construction escrow agreement for the project. 2016 IL App (1st) 143734 at ¶25. The plaintiff commenced work on the project and performed pursuant to the terms and specifications of the draft contract. 2016 IL App (1st) 143734

at ¶10. The plaintiff entered into subcontracts with various subcontractors and obtained certificates of insurance for subcontract work. 2016 IL App (1st) 143734 at ¶14. The plaintiff submitted eight payment requests to the defendant, which, according to the plaintiff, followed the procedures of the draft contract (providing a contract activity report, an application and certificate for payment, and then waivers). 2016 IL App (1st) 143734 at ¶11. The payments totaling $2,042,846.50 were approved and paid to the plaintiff. *Id.* The plaintiff also submitted 16 written change orders. 2016 IL App (1st) 143734 at ¶15.

The defendant claimed that e-mails containing riders properly identifying the owner of the project and stating that they "shall control and supersede" any draft contracts were sent to the plaintiff. 2016 IL App (1st) 143734 at ¶21. However, the defendant never produced copies of the e-mails. 2016 IL App (1st) 143734 at ¶30. The plaintiff was paid in excess of $18 million for work performed for the defendant on other projects under similar circumstances. 2016 IL App (1st) 143734 at ¶45.

The trial court's judgment in the plaintiff s favor in the amount of $257,764.70 was affirmed on appeal. The evidence demonstrated that both parties had performed consistently with their prior course of dealing (performance and payment without a signed contract). 2016 IL App (1st) 143734 at ¶¶45 – 48. The draft contracts each contained a clause requiring a signature to be binding. 2016 IL App (1st) 143734 at ¶54. However, the appellate court noted that "a signature is not always essential to the binding force of an agreement. . . . The object of a signature is to show mutuality or assent, but [mutuality or assent can be shown by the acts or conduct of the parties]." 2016 IL App (1st) 143734 at ¶56, citing *Lynge v. Kunstmann,* 94 Ill.App.3d 689, 418 N.E.2d 1140, 1144, 50 Ill.Dec. 146 (2d Dist. 1981). Finally, even though the draft contracts each incorrectly named the defendant as owner, the trial court's judgment entered personally against the defendant as an undisclosed agent acting for the owner-principal. 2016 IL App (1st) 143734 at ¶64.

B. Contracts Implied in Law

1. [9.20] Unjust Enrichment

Unjust enrichment is not an independent cause of action but instead a remedy based on, inter alia, a contract implied in law. *Chicago Title Insurance Co. v. Teachers' Retirement System of State of Illinois,* 2014 IL App (1st) 131452, 7 N.E.3d 19, 379 Ill.Dec. 593. It is based on the principle that one party should not be able to enrich itself at the expense of another. *Fleissner v. Fitzgerald,* 403 Ill.App.3d 355, 937 N.E.2d 1152, 1159, 344 Ill.Dec. 811 (2d Dist. 2010). A claimant must show that the defendant has voluntarily accepted a benefit that it would be inequitable for it to retain without paying for it. *Premier Electrical Construction Co. v. LaSalle National Bank,* 132 Ill.App.3d 485, 477 N.E.2d 1249, 1257, 87 Ill.Dec. 721 (1st Dist. 1984). The law implies a promise to pay when valuable materials and/or services are knowingly accepted. *Id.*

To establish a claim for unjust enrichment, a plaintiff must plead and prove the following elements: (a) an enrichment; (b) an impoverishment; (c) a relation between the enrichment and the impoverishment; (d) the absence of justification; and (e) the absence of a legal remedy. *Sherman v. Ryan,* 392 Ill.App.3d 712, 911 N.E.2d 378, 399, 331 Ill.Dec. 557 (1st Dist. 2009). If proved, the plaintiff may recover damages in the amount of the "benefit received and retained as a result of the improvement provided by the contractor." *Stark Excavating v. Carter Construction Services, Inc.,* 2012 IL App (4th) 110357, ¶37, 967 N.E.2d 465, 359 Ill.Dec. 735.

When an express contract governs the subject matter in dispute, there can be no quasi-contractual recovery. *Barry Mogul & Associates, Inc. v. Terrestris Development Co.,* 267 Ill.App.3d 742, 643 N.E.2d 245, 252, 205 Ill.Dec. 294 (2d Dist. 1994). This is the case even when work is performed for the benefit of a third party and the third party has knowledge of the performer's work. In such circumstances, unjust enrichment does not apply:

> [U]**njust enrichment does not apply where the entire work is contracted for and placed under a general contractor who has the power to employ whom he chooses, because in such circumstances the owner has the right to presume that work is being done for and on behalf of the contractor.** *Premier Electrical Construction, supra,* 477 N.E.2d at 1257 – 1258.

See also Archon Construction Co. v. U.S. Shelter, L.L.C., 2017 IL App (1st) 153409, 78 N.E.3d 1067, 413 Ill.Dec. 791 (discussed in more detail in §9.24 below). Unjust enrichment may apply, however, when services or material provided fall outside of the scope of any express agreement. *See Stark Excavating, Inc. v. Carter Construction Services, Inc.,* 2012 IL App (4th) 110357, ¶¶38 – 39, 967 N.E.2d 465, 359 Ill.Dec. 735 (plaintiff was allowed to maintain quasi-contractual claims for winter protection work related to concrete and paving work when parties' express contract specifically excluded such work). And at least one Illinois appellate district has held that a sub-subcontractor was able to recover against a general contractor on an unjust-enrichment claim despite the existence of an express contract covering the work at issue. *C. Szabo Construction, Inc. v. Lorig Construction Co.,* 2014 IL App (2d) 131328, ¶50, 19 N.E.3d 638, 385 Ill.Dec. 706 (discussed in more detail in §9.23 below).

2. [9.21] Quantum Meruit

To recover under quantum meruit, the plaintiff must plead and prove (a) that it performed a service that benefitted the defendant, (b) that it did not perform the service gratuitously, (c) that the defendant accepted the service, and (d) that no contract existed to prescribe payment for the service. *K. Miller Construction Co. v. McGinnis,* 394 Ill.App.3d 248, 913 N.E.2d 1147, 1153, 332 Ill.Dec. 857 (1st Dist. 2009), *aff'd in part, rev'd in part,* 238 Ill.2d 284 (2010). The party furnishing the service bears the burden of proving the value of the service, receipt by the defendant, and that the circumstances dictate that it would be unjust for the defendant to retain them without payment. *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.,* 402 Ill.App.3d 961, 931 N.E.2d 810, 826, 341 Ill.Dec. 913 (1st Dist. 2010), citing *Hayes Mechanical, Inc. v. First Industrial, L.P.,* 351 Ill.App.3d 1, 812 N.E.2d 419, 426, 285 Ill.Dec. 599 (1st Dist. 2004).

The measure of recovery in a quantum meruit action is the reasonable value of the work and material provided. *Hayes Mechanical, supra,* 812 N.E.2d at 426. As with unjust enrichment, when a contract covers the subject matter on which the quasi-contractual claim rests, there can be no recovery under quantum meruit. *Premier Electrical Construction Co. v. LaSalle National Bank,* 132 Ill.App.3d 485, 477 N.E.2d 1249, 1257 – 1258, 87 Ill.Dec. 721 (1st Dist. 1984). Extras that fall outside of the contract's scope may be recoverable under quantum meruit, provided that the claimant is able to prove the elements set forth in *Watson Lumber Co. v. Guennewig,* 79 Ill.App.2d 377, 226 N.E.2d 270 (5th Dist. 1967). *See Stark Excavating, Inc. v. Carter Construction Services, Inc.,* 2012 IL App (4th) 110357, ¶34, 967 N.E.2d 465, 359 Ill.Dec. 735 (summary judgment against subcontractor on quasi-contractual claim for extras was reversed when issues of fact existed pertaining to *Watson Lumber* elements).

3. [9.22] Appellate Review

As with contracts implied in fact, the standard of review for cases concerning contracts implied in law will vary depending the issues presented on appeal. Courts have applied a manifest weight of the evidence standard when factual issues are in dispute (*i.e.,* a court's judgment in a bench trial) and a de novo standard when legal issues were presented (contract interpretation and whether a trial court applied a correct legal standard to evidence at issue). *See C. Szabo Construction, Inc. v. Lorig Construction Co.,* 2014 IL App (2d) 131328, 19 N.E.3d 638, 385 Ill.Dec. 706; *Archon Construction Co. v. U.S. Shelter, L.L.C.,* 2017 IL App (1st) 153409, 78 N.E.3d 1067, 413 Ill.Dec. 791.

4. Case Studies

a. [9.23] Unjust Enrichment: C. Szabo Construction, Inc. v. Lorig Construction Co.

In *C. Szabo Construction, Inc. v. Lorig Construction Co.,* 2014 IL App (2d) 131328, 19 N.E.3d 638, 385 Ill.Dec. 706, the Illinois State Toll Highway Authority (Tollway) hired the defendant, Lorig Construction Co., to act as a general contractor on a construction project on Interstate 355 near the Des Plaines River. 2014 IL App (2d) 131328 at ¶1. The defendant subcontracted with JLA Construction, Inc., to install storm sewers and perform other work. *Id.* JLA sub-subcontracted with the plaintiff, C. Szabo Construction, Inc., to perform pipe-jacking work. *Id.* The plaintiff faxed Lorig a letter indicating that it had obtained necessary union workers and was "on the job continuing with the bore." 2014 IL App (2d) 131328 at ¶6. The defendant did not respond. *Id.* After completion, JLA and the plaintiff sent the defendant a lien waiver for completed work that identified the plaintiff as the sub-subcontractor that had completed the work. The plaintiff then faxed a payment request for the pipe-jacking, faxed a certified payroll related to the pipe-jacking, and, approximately one month later, sent another payment request for the pipe-jacking. 2014 IL App (2d) 131328 at ¶7. Again, the defendant did not respond. *Id*. The plaintiff sought to recover against Lorig under a theory of unjust enrichment.

At trial, the plaintiff provided testimony that one of the defendant's senior project engineers discussed the timing and substance of the pipe-jacking work with it and encouraged the plaintiff to do the work. 2014 IL App (2d) 131328 at ¶9. The defendant provided testimony that the Tollway had paid it in full and that all work, including the pipe-jacking, was successfully completed. 2014 IL App (2d) 131328 at ¶16. The plaintiff claimed that neither it nor JLA was paid for the pipe-jacking work. 2014 IL App (2d) 131328 at ¶13. The defendant claimed that it paid JLA any remaining funds due to it (which would have included pipe-jacking work, per its contract) but could not produce evidence to support the testimony. 2014 IL App (2d) 131328 at ¶18. The trial court entered judgment against the defendant on the basis that "under the circumstances, it would violate the principles of justice, equity, and good conscience for [the defendant] to retain the benefit it received while paying no one for it." 2014 IL App (2d) 131328 at ¶19.

The appellate court affirmed the trial court's judgment. No case had, and no published case has since, addressed whether a party to a contract may pursue quasi-contractual relief against a nonparty to the contract on the basis that the nonparty requested, received, and did not pay for the work. 2014 IL App (2d) 131328 at ¶35. In a review focused on equity, the appellate court analyzed cases from other jurisdictions that contained similar fact patterns. 2014 IL App (2d) 131328 at ¶¶35 – 37. Ultimately, the appellate court held that the defendant's retention of the plaintiff's work constituted

unjust enrichment because evidence existed that the defendant had received payment for the work from the Tollway and had not paid anyone for said work. 2014 IL App (2d) 131328 at ¶50. There was no risk of double liability because JLA, the party with which the defendant directly contracted, had dismissed its claims and as of the date of the appeal and would be unable to obtain a judgment against it. 2014 IL App (2d) 131328 at ¶43. There was also no improper shifting of risk to the defendant from JLA because the defendant's liability was that which it had expressly contracted for; it simply had not paid anyone for the pipe-jacking work yet. 2014 IL App (2d) 131328 at ¶¶44 – 46.

NOTE: Since *Szabo,* there is an unpublished case, *D-B Cartage, Inc. v. Olympic Oil, Ltd.,* 2019 IL App (1st) 190343-U, ¶¶47 – 50, holding that a plaintiff may not obtain quasi-contractual relief from a nonparty to the contract at least when there is insufficient evidence that the nonparty "enticed" the plaintiff to perform. The author has found no case holding what level of "enticement," if any, would be sufficient to change this outcome.

b. [9.24] Quantum Meruit: Archon Construction v. U.S. Shelter, L.L.C.

In *Archon Construction Co. v. U.S. Shelter, L.L.C.,* 2017 IL App (1st) 153409, 78 N.E.3d 1067, 413 Ill.Dec. 791, the defendants contracted with the plaintiff to install a sanitary sewer system in a subdivision in the City of Elgin. 2017 IL App (1st) 153409 at ¶2. The contract required the plaintiff to conduct a videotaping of the interior of the completed system. *Id.* The city had to approve the final system, as it would own the system after completion. *Id.* The plaintiff performed its own videotaping of the system, as required by the contract and submitted it to the city. 2017 IL App (1st) 153409 at ¶19. The city, not satisfied with the plaintiff's videotaping, conducted its own. *Id.* The city's videotape revealed deficiencies in the sewer system that needed to be repaired before the city would accept the system. 2017 IL App (1st) 153409 at ¶20. The plaintiff made the repairs called for by the city and then demanded payment from the defendants. 2017 IL App (1st) 153409 ¶21. The defendants refused, and the plaintiff filed suit, eventually dismissing all claims based on its contract and going to trial solely on its quantum meruit claim for work allegedly outside the scope of the contract — *i.e.,* its claim for "extra work." 2017 IL App (1st) 153409 at ¶22.

The plaintiff's recovery and its ability to pursue quantum meruit rested squarely on whether its contract with the defendants governed the work for which it sought payment. 2017 IL App (1st) 153409 at ¶36. The trial and appellate courts held that it did. The plaintiff claimed that its contract with the defendants required it to install PVC pipe and that the contract was silent as to the city's repair demands prior to acceptance that required ductile iron pipe. 2017 IL App (1st) 153409 at ¶47. The court took a broader view. The plaintiff's contract was "the installation of an acceptable sanitary sewer system." *Id.* The plaintiff's claim sought payment for costs to repair and replace portions of the system in order to obtain the city's approval. "Archon [could] not avoid the effect of the general rule that the law will not imply a contract where an express contract already exists between the parties on the same subject matter." *Id.* The court's holding may seem harsh, but it also specifically points out that the plaintiff was not without a remedy. The plaintiff's contract provided that "[a]ny additional work items not listed will be completed on negotiated price or [time and materials]." 2017 IL App (1st) 153409 at ¶48. "This only underscores that if Archon had a remedy at all in this case, it was a claim for 'extra work' through the written contract, not a quantum meruit theory." *Id.* However, the plaintiff dismissed its contractual extras claim and only tried its quantum meruit claim, presumably, the court noted, because it lacked sufficient evidence to sustain

the contractual claim. 2017 IL App (1st) 153409 at ¶50. This did not change the fact that a contractual remedy was the only claim available to the plaintiff as a matter of law. 2017 IL App (1st) 153409 at ¶51. As such, the judgment against the plaintiff was affirmed.

10 Statutory Defenses of Mechanics Lien Claims

MICHAEL J. TORCHALSKI
Torch Legal
Cary

I. [10.1] INTRODUCTION

All parties involved in the construction or improvement of real estate — contractors, subcontractors, and material suppliers — are expected and legally required to comply with the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.* Although mechanics liens primarily benefit contractors, the law also protects property owners and third parties (purchasers and mortgagees) against contractors' liens. The law of construction liens is technical, with strict time limits and special notice requirements. The risks of noncompliance with the Mechanics Lien Act can be simply stated: Contractors risk going unpaid, and owners risk having to pay twice for the same work or material.

This chapter focuses only on statutory defenses to mechanics lien claims. This chapter is not an academic review of the Mechanics Lien Act and all of its evolved judicial interpretations. As in litigation, the focus of this chapter is current and direct, and its objective is result oriented.

Financial defalcation is not uncommon in the construction business. That is unfortunate but understandable given the myriad of independent, unlicensed, unregulated, and (some) unscrupulous contractors and subcontractors; the high costs of construction and large dollar amounts involved in construction finance; the universal unfamiliarity of property owners with mechanics lien risks; and the procedural and documentation requirements under the Mechanics Lien Act. For the foregoing reasons, construction and mechanics liens is an area where clients truly need legal representation and in which attorneys can well serve their clients with sound legal advice.

A. [10.2] Statutory Defenses — Generally

All statutory defenses to mechanics lien claims are based on noncompliance of the lien with applicable sections of the Mechanics Lien Act. Courts will grant dispositive motions to dismiss or for summary judgment due to the failure of a mechanics lien to comply with statutory requirements. In the experience of the author, such dispositions have been based on the failure of

1. a lien claimant to comply with applicable notice requirements;

2. a lien claimant to comply with applicable timing requirements;

3. a mechanics lien to include statutorily required information; and

4. a lien claimant to include all necessary parties in a mechanics lien foreclosure suit filed within the statutory limitations period.

Other statutory defenses include the requirements of a legally enforceable contract; lienable construction labor, services, or materials; the failure to complete construction within three years on residential property or five years on nonresidential property (770 ILCS 60/6); and the failure of a mechanics lien claimant to file suit within 30 days after the statutory demand of an owner (770 ILCS 60/34).

B. [10.3] Statutory Purpose

"The [Mechanics Lien] Act is a comprehensive statutory enactment that outlines the rights, responsibilities, and remedies of parties to construction contracts, including owners, contractors, subcontractors, and third parties. . . . [The Act's] overall purpose is 'to require a person with an interest in real property to pay for improvements or benefits which have been induced or encouraged by his or her own conduct.' " [Citations omitted.] *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 496, 320 Ill.Dec. 330 (1st Dist. 2008), quoting *Stafford-Smith, Inc. v. Intercontinental River East, LLC,* 378 Ill.App.3d 236, 881 N.E.2d 534, 539, 317 Ill.Dec. 366 (1st Dist. 2007).

C. [10.4] Intended Structure of Construction Transactions

The Illinois Supreme Court provided an excellent, integrated, summary analysis of the Mechanics Lien Act in *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 330 Ill.Dec. 808 (2009), which has been cited and followed by numerous courts. Construing §§5, 24, and 27 of the Mechanics Lien Act, 770 ILCS 60/5, 60/24, and 60/27, together, the court held:

> **What is clear from our reading of the Act is that the legislature intended the following orderly method of conducting construction transactions to protect subcontractor claims: (1) the owner and general contractor enter into a contract for the construction work; (2) as the work is completed, the general contractor submits a section 5 sworn affidavit that must list all subcontractors and the amount due, to become due, or advanced; (3) when the section 5 sworn affidavit lists an amount due or to become due a subcontractor, section 24 requires the owner retain sufficient funds to pay the subcontractor; and (4) section 27 requires the owner to make subcontractor payments upon receiving notice of a subcontractor claim pursuant to a section 5 sworn statement. Additionally, a lien waiver can be provided to the contractor when the subcontractor is paid, and the owner can require a lien waiver by every subcontractor when paying the contractor. Funds subject to a lien waiver are required to be held by the owner in trust for the subcontractor.** 909 N.E.2d at 835.

Parties who comply with the foregoing statutory requirements can be assured of protection under the Mechanics Lien Act. Parties who fail to comply jeopardize themselves to the risks described in §10.1 above: Contractors risk going unpaid, and owners risk having to pay twice for the same work or material.

D. [10.5] Strict Construction

Statutory defenses to mechanics liens are based on the doctrine of strict construction. Because the right to a mechanics lien is statutory, a contractor must strictly comply with the Mechanics Lien Act to be eligible for relief. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 497, 320 Ill.Dec. 330 (1st Dist. 2008).

> **Mechanics' lien statutes must be strictly construed with reference to those technical and procedural requirements upon which the right depends. . . . This is so because**

> **mechanics' liens were not recognized by the common law or in equity but exist only by virtue of the statutes creating them and providing a method for their enforcement. . . .**
>
> **. . . The supreme court concluded that strict construction requires the inclusion of only the statute's requirements. [**Citations omitted.**]** *National City Mortgage, Division of National City Bank of Indiana v. Bergman,* 405 Ill.App.3d 102, 939 N.E.2d 1, 6, 345 Ill.Dec. 272 (2d Dist. 2010).

"[O]nce a lien claimant has complied with the statutory prerequisites, the Act should be liberally construed in order to carry out its remedial purpose. . . . A lien claimant who has strictly complied with each of the statutory requirements has the right to expect that his lien will be completely enforceable." [Citation omitted.] 939 N.E.2d at 8.

As an example of strict construction applied under §5 of the Mechanics Lien Act, *see Weydert Homes, Inc. v. Kammes,* 395 Ill.App.3d 512, 917 N.E.2d 64, 334 Ill.Dec. 467 (2d Dist. 2009), in which a mechanics lien was defeated because the contractor's affidavit did not have a notary signature and seal, and therefore was not "under oath or verified by affidavit," as required by §5 of the Act, 770 ILCS 60/5. *Weydert* is further addressed in §10.12 below.

See also Cityline Construction Fire & Water Restoration, Inc. v. Roberts, 2014 IL App (1st) 130730, 7 N.E.3d 235, 379 Ill.Dec. 809. When an owner requests a contractor to provide a sworn statement identifying all subcontractors and suppliers, it is the duty of the contractor under the plain language of §5 of the Act to provide a sworn statement that complies with §5, even if all subcontractors have been paid. *Cityline* is further addressed in §10.14 below.

For strict construction applied under §7 of the Act, see §10.23 below, discussing two cases in which mechanics liens failed due to the absence of proper notarization.

II. CONTRACT REQUIREMENTS — SECTION 1 OF THE MECHANICS LIEN ACT

A. [10.6] Existence of a Contract

Section 1 of the Mechanics Lien Act, 770 ILCS 60/1, requires an actual contract, express or implied, as a prerequisite to a mechanics lien. As the indispensable basis for a lien, the statute requires a contract, and courts have construed §1 to require a valid or legal contract.

Although verbal construction contracts are legally enforceable, construction contracts are typically written, signed, and unmistakably titled. For residential construction, the Home Repair and Remodeling Act, 815 ILCS 513/1, *et seq.,* applicable to work on residential properties (other than new construction) requires contractors to obtain signed written contracts prior to initiating work on jobs in excess of $1,000. 815 ILCS 513/15. Thus, the existence of a contract is seldom an issue in mechanics lien litigation. Recognizing that a lease is also a contract, a lessee that provides labor and materials for the improvement of leased premises at the request of the lessor also has a right of a mechanics lien. *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust,* 274 Ill.App.3d 348, 653 N.E.2d 875, 878, 210 Ill.Dec. 680 (1st Dist. 1995).

Sometimes construction is undertaken by friends or relatives without a contract but who later claim a lien in an effort to extract payment or reimbursement for their consensual efforts. The express or implied contract requirement in §1 of the Mechanics Lien Act is not satisfied by a quasi-contractual claim. In *Housewright v. Vinyard,* 2013 IL App (3d) 120666-U, a mechanics lien was asserted by a fiancée of an owner, who constructed improvements on property jointly owned, without a contract. The lien was held to be invalid and unenforceable:

> **There are various prerequisites to successfully recover on a mechanics lien claim. Importantly, at a minimum, there must be a valid contract with the owner of the property for services or materials resulting in a debt to the contractor for completed work according to the contract. *Tefco Construction Co., Inc. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714 (2005); *Cox v. Keiser,* 15 Ill.App. 432 (1884). In the instant case, Housewright did not present evidence of a valid contract between the parties. Housewright's *quantum meruit* claim is an equitable remedy based on a quasi-contract whereby the measure of recovery is the reasonable value of the work and material provided. *Hayes Mechanical, Inc. v. First Industrial, L.P.,* 351 Ill.App.3d 1 (2004). Therefore, the trial court properly allowed Vinyard's motion for a directed finding with respect to the mechanics lien.** 2013 IL App (3d) 120666-U at ¶36.

Thus, persons who gratuitously construct improvements on real estate, without creation of a debt, or who do so out of friendship, love and affection, or other personal reasons, are not secured by the Mechanics Lien Act. Accordingly, mechanics lien claimants whose liens are not founded on written contracts should be required to produce evidence of debt and the amount thereof, *e.g.,* invoices, pay requests, accounts receivable journals, etc. The absence of evidence of debt would tend to negate the existence of a contract.

B. [10.7] Legally Enforceable Contract

A contract must be legally enforceable to support a mechanics lien. A contract that is void due to the violation of Illinois law and contrary to public policy cannot support a mechanics lien. In *G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.,* 355 Ill.App.3d 428, 822 N.E.2d 905, 291 Ill.Dec. 30 (3d Dist. 2005), an Indiana architectural firm, not registered in Illinois, was denied mechanics lien recovery. The court held that the contract of the unlicensed architect was void. Because the contract was void, the mechanics lien was not valid. As a result of the invalid mechanics lien, the claimant lacked the legal capacity to sue to foreclose the mechanics lien for architectural services.

Likewise, in *Power Dry of Chicago v. Bean,* 2022 IL App (2d) 210043, the mechanics lien of a fire and water restoration contractor was held to be unenforceable because the contract on which the lien was based was found to include performance of actions for which an Illinois public adjuster license is required. As part of its service, the contractor informed the owner that it would negotiate on behalf of the owner with the owner's insurance company to reach an agreed price for the work. Former §512.52(a) of the Illinois adjusters and firms statute defined adjusting insurance claims as

> **representing an insured with an insurer for compensation, and while representing that insured either negotiating values, damages, or depreciation, or applying the loss circumstances to insurance policy provisions.** 215 ILCS 5/512.52(a) (2018).

Since the mechanics lien claimant was not an Illinois licensed public adjuster, its negotiation of the owner's insurance claim with the owner's insurance company rendered its contract "void, invalid, and unenforceable" and resulted in dismissal of its mechanics lien claim. 2022 IL App (2d) 210043 at ¶42.

Although the definitions statute applied in *Power Dry,* 215 ILCS 5/512.52(a), was repealed by P.A. 102-135 (eff. July 23, 2021), §1510 of the Illinois Insurance Code defines "adjusting" and "public adjuster":

> **"Adjusting a claim for loss or damage covered by an insurance contract" means negotiating values, damages, or depreciation or applying the loss circumstances to insurance policy provisions.**
>
> * * *
>
> **"Public adjuster" means any person who, for compensation or any other thing of value on behalf of the insured:**
>
> > **(i) acts or aids, solely in relation to first party claims arising under insurance contracts that insure the real or personal property of the insured, on behalf of an insured in adjusting a claim for loss or damage covered by an insurance contract;**
> >
> > * * *
> >
> > **(iii) directly or indirectly solicits business, investigates or adjusts losses, or advises an insured about first party claims for losses or damages arising out of policies of insurance that insure real or personal property for another person engaged in the business of adjusting losses or damages covered by an insurance policy for the insured.** 215 ILCS 5/1510.

Accordingly, the result in *Power Dry* should stand under the definitions of adjusting and public adjuster contained in §1510 of the Illinois Insurance Code.

However, an unlicensed electrical contractor that performed work under a permit issued to another contractor successfully asserted a mechanics lien in *Mani Electrical Contractors v. Kioutas,* 243 Ill.App.3d 662, 611 N.E.2d 1167, 183 Ill.Dec. 519 (1st Dist. 1993). The court drew a distinction between illegal contracts and legal contracts, the performance of which involves some violation of law. The court held that a construction contract would be unenforceable only if there was no legal way for anyone to obtain a building permit.

Although the Home Repair and Remodeling Act generally requires written contracts, violation of the Act, as amended, does not render oral contracts unenforceable. *K. Miller Construction Co. v. McGinnis,* 238 Ill.2d 284, 938 N.E.2d 471, 345 Ill.Dec. 32 (2010). Accordingly, a home repair contractor without a signed written contract may assert a mechanics lien claim (albeit at the risk of a counterclaim for violation of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*).

When property was in a probate estate, and the estate representative failed to obtain probate court approval for a service contract, a court found that the estate was not bound by the contract because the representative did not have court authority to enter into the contract. *In re Estate of Lynn,* 2017 IL App (4th) 160766-U. The court dismissed the complaint to enforce two mechanics liens filed against the estate's property. The issue of existence of a valid contract was not preserved on appeal and was therefore waived by the contractor.

C. [10.8] Valid Contract — Essential Financial Terms

An agreement must state essential financial terms to be an enforceable contract. In *Sutton Siding & Remodeling, Inc. v. Baker,* 2017 IL App (4th) 150956-U, a property owner signed a written "Work Authorization and Agreement" with a contractor to provide all necessary labor and materials to repair the owner's fire-damaged house. The project specifications and price were to be in accordance with the owner's insurance, and the contractor was to be paid directly by the insurance company. The contractor completed the work, recorded a mechanics lien, and then filed a two-count complaint to foreclose the mechanics lien and for breach of contract.

The trial court dismissed the contractor's complaint because the written agreement failed to comply with the Home Repair and Remodeling Act. On appeal, the court held the trial court erred in dismissing the complaint on that basis, citing *K. Miller Construction Co. v. McGinnis,* 238 Ill.2d 284, 938 N.E.2d 471, 345 Ill.Dec. 32 (2010). The court went on to hold that the written agreement was not a contract because it did not contain any essential financial terms:

> **The problem is that the written agreement fails to set forth the terms of any financial obligations on the part of defendant. As noted, there are no cost figures referenced in the agreement. The only reference in the agreement to payment is contained in a paragraph where it is stated, "all work shall be in accordance with the specifications and/or estimates approved for payment by the Owner(s)'s insurance company." While "[a] contract may be enforced even though some contract terms may be missing or left to be agreed upon, . . . if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Academy Chicago Publishers v. Cheever,* 144 Ill.2d 24, 30, 578 N.E.2d 981, 984[**, 161 Ill.Dec. 335**] (1991). Here, the essential financial terms necessary to form a contract are missing from the written agreement. Thus, the written agreement does not constitute a contract upon which a breach-of-contract action may be based. Accordingly, we find the trial court's dismissal of plaintiff's breach-of-contract claims based on the written agreement was not error.** 2017 IL App (4th) 150956-U at ¶30.

Link Company Group LLC v. Cortes, 2018 IL App (1st) 171785-U, involved a $410,000 mechanics lien filed by a claimant without a written contract. The claimant alleged that there was a verbal contract formed though conversations with the owner, while the parties were on vacation. The claimant alleged that the owner would hire him to remodel an unidentified property sometime in the future, for an unspecified price, for an undefined duration. The claimant argued that *"contract formalities were naturally relaxed among family"* but cited no authority for that proposition. [Emphasis added.] 2018 IL App (1st) 171785-U at ¶19. The court found that the alleged verbal agreement lacked essential terms of an enforceable contract. Summary judgment in favor of the owner was affirmed.

D. [10.9] Lienable Improvements

Section 1 of the Mechanics Lien Act, 770 ILCS 60/1, contains a long recital of what is lienable under the Act. Generally, all labor, services, and material provided for the improvement of real estate are lienable, including leased construction equipment, which is lienable under §1.2 of the Act, 770 ILCS 60/1.2, for nonresidential construction. An extensive discussion and lists of recognized lienable and non-lienable construction services and material are contained in Chapter 2 of this handbook. Any mechanics lien that claims recovery for non-lienable services or material is subject to dismissal or summary judgment.

III. [10.10] GENERAL CONTRACTOR'S NOTICE REQUIREMENT — SECTION 5 OF THE MECHANICS LIEN ACT

Section 5 of the Mechanics Lien Act, 770 ILCS 60/5, sets forth the duties of the owner and the contractor. Section 5 serves the purpose of placing property owners on notice of any subcontractor claims. Section 5 provides, in relevant part:

> **It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner or his agent, architect, or superintendent shall pay or cause to be paid to the contractor or to his order any moneys or other consideration due or to become due to the contractor, or make or cause to be made to the contractor any advancement of any moneys or any other consideration, a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work and of the amounts due or to become due to each. Merchants and dealers in materials only shall not be required to make statements required in this Section.** 770 ILCS 60/5(a).

"[S]ection 5 does not require an owner to pay the general contractor upon receipt of a sworn statement listing the subcontractors. Rather, the plain language of section 5 explicitly states the owner has a duty to require the sworn statement '*before*' paying the contractor any moneys. This serves the purpose of putting the owner on notice of any subcontractor claims." [Emphasis in original.] *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 834, 330 Ill.Dec. 808 (2009).

Under the Mechanics Lien Act, a bona fide owner is protected from having to pay out twice as long as he or she follows the terms of the Act. "However, if an owner does not abide by the provisions of the Act, 'he acts at his peril.' " *Weather-Tite, Inc. v. University of St. Francis,* 383 Ill.App.3d 304, 892 N.E.2d 49, 53, 322 Ill.Dec. 802 (3d Dist. 2008), quoting *Capital Plumbing & Heating Supply Co. v. Snyder,* 2 Ill.App.3d 660, 275 N.E.2d 663, 668 (4th Dist. 1971). To protect himself or herself from paying twice for the same work, the owner must demand from his or her contractor, prior to payment, a sworn statement listing all subcontractors providing labor and materials to the contractor. *Lazar Brothers Trucking, Inc. v. A & B Excavating, Inc.,* 365 Ill.App.3d 559, 850 N.E.2d 215, 219 – 220, 302 Ill.Dec. 778 (1st Dist. 2006).

Thus, an owner who pays a contractor without first obtaining a sworn statement required by §5 of the Act is not protected against subcontractor liens. Without a contractor's sworn statement, owners are unpleasantly surprised upon receipt of a subcontractor's notice under §21 or §24 of the Act, 770 ILCS 60/21 or 60/24, asserting a lien against their property due to nonpayment by the general contractor, who may have been previously paid in full by the owner. Subcontractor notices are discussed in §§10.33 – 10.38 below.

A. [10.11] Form of Sworn Statement

Section 5 of the Mechanics Lien Act, 770 ILCS 60/5, does not specify any particular form for the contractor's sworn statement. It also does not require the form to be labeled in a specific manner. Title companies have forms of contractor's sworn statements that are routinely used for insuring new construction. Sworn statements submitted by a general contractor to Chicago Title and Trust Company administering a construction escrow were held to satisfy §5 of the Act; Chicago Title was found to be an agent of the owner. *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, 992 N.E.2d 27, 372 Ill.Dec. 488.

B. [10.12] Notary Requirement

Under §5 of the Mechanics Lien Act, the contractor's statement to the owner must be "under oath or verified by affidavit." 770 ILCS 60/5(a). Lack of a notary's signature and notary seal rendered a contractor's statement to an owner wholly ineffective in *Weydert Homes, Inc. v. Kammes,* 395 Ill.App.3d 512, 917 N.E.2d 64, 334 Ill.Dec. 467 (2d Dist. 2009), and resulted in the dismissal of a mechanics lien claim. Therein, a builder provided the owner with a written statement that included the phrase "being duly sworn on oath" at the top, and beneath the builder's signature was the phrase "Subscribed and Sworn to." 917 N.E.2d at 69. However, the document was not notarized. The court held that the document was not an affidavit and did not constitute an oath either, because it was not sworn to before anyone authorized by law to administer oaths. The appellate court rejected the "mere technicality" argument of the builder. 917 N.E.2d at 72.

C. [10.13] Sworn Statement Provided

An owner has the right to rely on a contractor's statements pertaining to subcontractors. When subcontractors are not disclosed in the contractor's sworn statement, the liability of the owner to the subcontractors is limited to unpaid amounts due to their immediate contractor as of the date the subcontractors serve notice of their liens. *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, 992 N.E.2d 27, 372 Ill.Dec. 488, citing and relying on *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 749 – 750, 297 Ill.Dec. 12 (1st Dist. 2005). Under the same reasoning, a mechanics lien asserted by a labor union for unpaid wages and benefits was denied enforcement when the union's immediate contractor had been paid in full based on a contractor's sworn statement that did not disclose any unpaid amounts for labor and benefits. *Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, 39 N.E.3d 8, 395 Ill.Dec. 541.

D. [10.14] Failure To Provide Contractor's Sworn Statement to Owner

Under §5 of the Mechanics Lien Act, 770 ILCS 60/5, a contractor is required to furnish a contractor's sworn statement if the owner requests one. A contractor's lien will be defeated by the contractor's failure to comply with §5 only if the owner has requested a sworn contractor's statement. *Abbott Electrical Construction Co. v. Ladin,* 144 Ill.App.3d 974, 494 N.E.2d 1251, 1254 – 1255, 98 Ill.Dec. 924 (2d Dist. 1986). A mechanics lien foreclosure is subject to dismissal in consequence of the contractor's failure to comply with §5 if the owner requested a sworn contractor's statement:

> **Our supreme court recently reaffirmed that the owner has a duty to require the sworn statement before paying the contractor any moneys. *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 393, 330 Ill.Dec. 808, 909 N.E.2d 830 (2009). We cannot write that duty out of the statute. Accordingly, the trial court did not err in dismissing count I of the complaint.** *Weydert Homes, Inc. v. Kammes,* 395 Ill.App.3d 512, 917 N.E.2d 64, 72, 334 Ill.Dec. 467 (2d Dist. 2009).

When an owner requests a contractor to provide a sworn statement identifying all subcontractors and suppliers, it is the duty of the contractor under the plain language of §5 of the Act to provide a sworn statement that complies with §5, even if all subcontractors have been paid. In *Cityline Construction Fire & Water Restoration, Inc. v. Roberts,* 2014 IL App (1st) 130730, 7 N.E.3d 235, 379 Ill.Dec. 809, the court applied the rule of strict construction under §5, and affirmed summary judgment in favor of an owner due to the general contractor's failure to provide a sworn statement:

> **[**W**]e conclude that Cityline failed to comply with section 5 of the Act and that the trial court's grant of summary judgment was proper. In this case, it is undisputed that the Owners requested a sworn contractor's statement and that Cityline did not provide one. The affidavit submitted by Cityline indicating that all subcontractors had been paid did not comply with section 5 because it not did not list or name the subcontractors and materialmen or state the total amounts due to each of them. See 770 ILCS 60/5 (West 2010); *Deerfield,* 74 Ill.App.3d at 385, 30 Ill.Dec. 149, 392 N.E.2d 914; *Weydert,* 395 Ill.App.3d at 519, 334 Ill.Dec. 467, 917 N.E.2d 64. Cityline is asking this court to excuse its failure to comply with section 5 on the asserted basis that the all of the subcontractors have been paid and that therefore the Owners were not prejudiced by the lack of a sworn contractor's statement. However, no such exception is contained in section 5 of the Act and, under the strict construction adopted above, we will not read any such exception into the plain language of the statute. See *Weydert,* 395 Ill.App.3d at 519. . . . We note that whether all of the subcontractors have actually been paid is an issue of fact that should not be resolved by this court. Regardless, it is not a *material* issue of fact because Cityline did not provide the required sworn contractor's statement. [**Emphasis in original.**]** 2014 IL App (1st) 130730 at ¶18.

In *Meridian Group v. Geppert,* 2018 IL App (1st) 171355-U, an owner demanded a contractor to provide a sworn statement in accordance with §5 of the Mechanics Lien Act. The contractor responded that it would provide waivers of lien upon final payment but did not respond to the owner's request for a sworn statement. The contractor proceeded to record a $73,368 claim for lien

and filed a mechanics lien foreclosure suit. The trial court dismissed the mechanics lien foreclosure count, finding that the contractor failed to strictly comply with §5 of the Act. On appeal, the court followed *Cityline* and affirmed dismissal of the mechanics lien claim.

Thus, the appropriate legal advice to an owner always is to request a general contractor to provide a sworn statement prior to making payment. In *Weydert, supra,* counsel for the owner requested the mechanics lien claimant to provide the contractor's sworn statement after the lien was recorded. General contractors are also advised to routinely provide sworn statements with pay requests so as to take the defense of noncompliance with §5 off the table.

E. [10.15] Contractor's Sworn Statement Provided to Owner Is False

Falsity of a contractor's sworn statement to the owner does not satisfy §5 of the Mechanics Lien Act, 770 ILCS 60/5. When an owner requests a sworn statement with each construction draw, it is the duty of the contractor to furnish sworn statements that complied with the technical requirements of §5. The contractor must provide the owner the names of all parties furnishing labor or materials and the amounts due each of them, or to become due to each of them, under oath or verified by affidavit.

In *Pyramid Development, LLC v. Dukane Precast, Inc.,* 2014 IL App (2d) 131131, 40 N.E.3d 1185, 397 Ill.Dec. 1, the lien claimant was a construction manager that owned no equipment, had no employees, and hired subcontractors to do all of the work. At trial, the manager admitted that the sworn contractor's affidavits he prepared and submitted were not accurate. The subcontractors' names listed were not accurate because "the names honestly change all the time." 2014 IL App (2d) 131131 at ¶11. The electrical subcontractor that actually did the work was not listed. And, although the construction manager himself did none of the work, the contractor's sworn affidavits listed the manager's company as having done various jobs. The manager testified that his company did not keep records of which subcontractors performed work on the project and that "none of the numbers [on the sworn affidavits] are exact numbers" but were only "estimates" that reflected "large cushions on every single line item." *Id.* Thus, essentially nothing contained in the sworn statements was true.

On appeal, the court held that the manager's company had not complied with §5 and that its mechanics lien was unenforceable. The court held:

> **Here, it is undisputed that Aldairi requested that plaintiff give him section 5 sworn affidavits with each draw. It then became plaintiff's duty to furnish sworn affidavits that complied with the technical requirements of section 5. . . . It is also undisputed that plaintiff's sworn affidavits were not only noncompliant, but false. The falsity was apparent on the face of the sworn affidavits where plaintiff was listed, when plaintiff clearly was not a subcontractor and did not itself furnish any labor or materials.**
>
> * * *
>
> **Accordingly, we agree with the trial court that plaintiff was not entitled to recover on its lien, but for the reason that plaintiff's failure to comply with section 5 defeated the lien. [**Citations omitted.**]** 2014 IL App (2d) 131131 at ¶¶28, 31.

The court also held that any knowledge of the falsities by the owner did not excuse the contractor's duty to provide a compliant sworn statement. "In other words, there is no correlation between the owner's acceptance of a sworn affidavit and the contractor's right to a lien." 2014 IL App (2d) 131131 at ¶29.

IV. TIMING AND CONTENTS OF MECHANICS LIEN CLAIMS — SECTION 7 OF THE MECHANICS LIEN ACT

A. [10.16] Section 7 of the Mechanics Lien Act

Section 7 of the Mechanics Lien Act prescribes both timing and content requirements for mechanics liens. Section 7 provides, in relevant part:

> **No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within 4 months after completion . . . he or she shall either bring an action to enforce his or her lien therefor or shall file in the office of the recorder of the county in which the building, erection or other improvement to be charged with the lien is situated, a claim for lien, verified by the affidavit of himself or herself, or his or her agent or employee, which shall consist of a brief statement of the claimant's contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same. Such claim for lien may be filed at any time after the claimant's contract is made, and as to the owner may be filed at any time after the contract is made and within 2 years after the completion of the contract.** 770 ILCS 60/7(a).

B. [10.17] Mechanics Lien Timing Requirements

Under §7(a) of the Mechanics Lien Act, 770 ILCS 60/7(a), to be enforceable against a creditor or encumbrancer (mortgagee), or against a subsequent purchaser, any mechanics lien must be filed in court or recorded within four months after completion. To be enforceable against an original owner, a claim for lien must be recorded within two years after completion. *Id.* Time periods established by the Mechanics Lien Act are jurisdictional, not merely affirmative defenses to an action. *JoJan Corp. v. Brent,* 307 Ill.App.3d 496, 718 N.E.2d 539, 240 Ill.Dec. 906 (1st Dist. 1999); *Anderson v. Gousset,* 60 Ill.App.2d 309, 208 N.E.2d 37 (3d Dist. 1965).

1. [10.18] Four-Month Rule

An architect's failure to record a mechanics lien within four months after completion of a project resulted in the lien being invalid and unenforceable against the new owner of the property. In *CLP II, Inc. v. Telkow Construction Co.,* 2014 IL App (1st) 133587-U, the evidence included the architect's invoice for 416.5 hours of work on the project from May 24, 2005, to April 16, 2008, with no charge for any work after April 17, 2008. The mechanics lien was recorded on August 18, 2008, four months and two days after the last day of invoiced work.

The court quoted §7 of the Mechanic Lien Act and interpretive caselaw:

> **"[T]he four-month period is 'not merely a statute of limitations . . . [but] a condition of liability itself and not just a limitation on the remedy.' " *D.M. Foley Co. v. North West Federal Savings & Loan Ass'n,* 122 Ill.App.3d 411, 418[**, 461 N.E.2d 500, 77 Ill.Dec. 877**] (1984), quoting *Waldbillig Woodworking, Inc. v. King Arthur's North, Ltd.,* 104 Ill.App.3d 417, 420[**, 432 N.E.2d 1048, 60 Ill.Dec. 149**] (1982). Just as the three-year period of section 6 starts when the contractor commences the work for which it seeks a lien, the four month period of section 7 starts when the contractor completes the work for which it seeks a lien. See *Miller Bros. Industrial Sheet Metal Corp. v. LaSalle National Bank,* 119 Ill.App.2d 23, 29 – 30, 255 N.E.2d 755 (1969). "Work that is trivial and insubstantial, and not 'essential to the completion of the contract' does not extend the time to file a lien under the Mechanics Lien Act." *Braun-Skiba,* 279 Ill.App.3d at 919, quoting *Miller Bros.,* 119 Ill.App.2d at 29.**
>
> **Illinois courts consider various factors to determine whether work extends the time for filing a mechanics lien. Most significantly, courts focus on "whether the work is needed to complete the contract." Courts also consider "whether [the work] was done at the request of the owner. . . . Other factors include whether the work . . . was needed to make the project suitable for its intended purpose. . . . [W]ork that is in the nature of maintenance or correction of a completed job, or that is repair work, will not extend the time to file a mechanic's lien." *Merchants Environmental Industries, Inc. v. SLT Limited Partnership,* 314 Ill.App.3d 848, 858 – 59[**, 731 N.E.2d 394, 246 Ill.Dec. 866**] (2000); *DuPage Bank & Trust Co. v. DuPage Bank & Trust Co. as Trustee,* 122 Ill.App.3d 1015, 1021[**, 462 N.E.2d 25, 78 Ill.Dec. 309**] (1984).** 2014 IL App (1st) 133587-U at ¶¶19 – 20.

The architect's testimony did not specify any lienable work done after April 17, 2008. The architect testified that he sent some documents to a realtor, which the court found did not form a necessary part of making the building suitable for its purpose and did not qualify as the kind of substantial work that can extend the time for filing a mechanics lien. The court held:

> **We hold that the manifest weight of the evidence contradicts the trial court's finding that Castro and Buchel performed sufficiently substantial work on the project after April 17, 2008, to extend the time for filing a mechanics lien to August 18, 2008. We find the lien claim recorded on August 18, 2008, invalid because the claimants did not meet the four month filing requirement stated in section 7 of the Act.** 2014 IL App (1st) 133587-U at ¶23.

The four-month rule also applies to existing mortgages and creditors. Section 7 of the Act does not distinguish between interests acquired before or after a construction contract. A mechanics lien claimant's failure to record its lien within four months of completion of its work resulted in the existing mortgage having priority over the mechanics lien. *ARK Specialty Service Co. v. Letamendi,* 2014 IL App (3d) 130643-U. The court followed long established precedent:

> **In *McDonald v. Rosengarten,* the Illinois Supreme Court held that no creditor can enforce a mechanic's lien against any other creditor or incumbrancer unless the lien**

was filed within four months; the court rejected the argument that this did not apply to preexisting liens. *McDonald,* 134 Ill. 126, 130 – 32[, 25 N.E. 429**] (1890) (citing *Schaeffer v. Weed,* 8 Ill. 511 (1846)). The legislature did not reject the judicial construction of the term "any other creditors or incumbrancer" when amending the statute in 1903. Therefore, the judicial construction of the term is part of section 7. *LaSalle Bank National Ass'n v. Cypress Creek 1, LP,* 242 Ill.2d 231, 243[**, 950 N.E.2d 1109, 351 Ill.Dec. 281**] (2011) (consistent judicial construction of a statute becomes part of the statute unless the legislature rejects the interpretation).** 2014 IL App (3d) 130643-U at ¶22.

The court went on to hold that the mortgagee did not hold any ownership interest in the property ("Mortgagees are lienholders, not owners.") and affirmed entry of summary judgment in favor of the mortgagee. 2014 IL App (3d) 130643-U at ¶28.

2. [10.19] Two-Year Requirement

The two-year recording period in §7(a) of the Mechanics Lien Act, 770 ILCS 60/7(a), is augmented by §9 of the Act, 770 ILCS 60/9, which requires that suit to foreclose a mechanics lien shall be commenced within two years after the completion of the contract. Under §9, a pleading must actually be filed within two years; a proposed filing is insufficient. *Bank of New York v. Jurado,* 2012 IL App (1st) 112116, 977 N.E.2d 1202, 365 Ill.Dec. 103, was a mortgage foreclosure case that included a mechanics lien. A default judgment of foreclosure and sale was entered in July 2007. In April 2008, the mechanics lien claimant appeared and filed a motion to vacate the default judgment and for leave to intervene and to file a counterclaim to foreclose the mechanics lien. The proposed counterclaim was attached to the motion as an exhibit. The motion to vacate was scheduled for an evidentiary hearing and was eventually granted. While that motion was pending, the two-year statute of limitations expired. The counterclaim to foreclose the mechanics lien was filed August 25, 2008, two years and two months after completion of the contract. The plaintiff mortgagee moved for summary judgment based on the two-year limitations period, which was granted and affirmed on appeal. The court held that merely attaching a counterclaim to a motion to intervene did not satisfy §9 of the Act — actual filing was required. That outcome could have been avoided had the mechanics lien claimant filed suit to foreclose its mechanics lien as a separate action, then moved to consolidate the mechanics lien foreclosure with the mortgage foreclosure case.

3. [10.20] Necessary Parties

It is not sufficient to merely commence a mechanics lien enforcement action within two years. See 770 ILCS 60/7(a), 60/9. Section 11(b) of the Mechanics Lien Act expressly requires that all "necessary parties" be named as defendants. 770 ILCS 60/11(b). Necessary parties include all owners of the premises, the contractor, all persons in the chain of contracts between the claimant and the owner, all persons who have asserted or may assert liens against the premises under the Act, and any other person against whose interest in the premises the claimant asserts a claim. A lien claimant's failure to include all necessary parties is grounds for judgment against the claimant on the merits. 770 ILCS 60/11(e). Illinois courts have consistently held that the failure of a lien claimant to amend its complaint to add a necessary party prior to the running of the applicable limitations period is fatal to the claim. *Muehlfelt v. Vlcek,* 112 Ill.App.2d 190, 250 N.E.2d 14 (2d Dist. 1969); *Anderson v. Gousset,* 60 Ill.App.2d 309, 208 N.E.2d 37 (3d Dist. 1965).

In *Anderson,* the trial court granted the defendant's motion to dismiss the plaintiff's complaint to foreclose a mechanics lien on the defendant's property on the grounds that the complaint could not be amended to add a necessary party, the defendant's wife, after the two-year statutory period had expired. In affirming the trial court's decision, the appellate court concluded that to allow the plaintiff to amend the complaint to add the spouse after the expiration of the statute of limitations would serve to defeat the public policy expressed in the Mechanics Lien Act favoring the expeditious disposition of all necessary parties' interests.

4. [10.21] Three-Year and Five-Year Completion Requirements

Section 6 of the Mechanics Lien Act provides:

> **In no event shall it be necessary to fix or stipulate in any contract a time for the completion or a time for payment in order to obtain a lien under this Act, provided, that the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material in the case of work done or material furnished as to residential property; and within 5 years from the commencement of said work or the commencement of furnishing said material in the case of work done or material furnished as to any other type of property. The changes made by Public Act 97-966 are operative from January 1, 2013 through December 31, 2024.** 770 ILCS 60/6.

The change made by P.A. 97-966 was to lengthen the completion period for nonresidential property from three years to five years. P.A. 97-966 became effective January 1, 2013, and the change will sunset on December 31, 2024. Then, the statutory completion period will again be three years for all types of property.

The three-year completion period under §6 applies to the work for which the mechanics lien is asserted, not the entire work under the contract:

> **Based on the plain language of section 6, "the 3-year period commences with the beginning of *work for which the mechanic's lien is asserted* and not with the date upon which the contract for such work was entered into." (Emphasis added.) *Robb v. Lindquist,* 23 Ill.App.3d 186, 188, 318 N.E.2d 301 (1974); see also *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 877, 334 Ill.Dec. 710, 917 N.E.2d 536 (2009) (*Cordeck Sales II*) (recognizing that " 'the work' to be completed in accordance with the time limits of section 6 is the work for which lien enforcement is sought"). Accordingly, if the work for which a lien claimant asserts a lien is completed within three years, section 6 does not preclude foreclosure of its mechanic's lien. See, *e.g., Cordeck Sales II,* 394 Ill.App.3d at 877, 334 Ill.Dec. 710, 917 N.E.2d 536; *Robb,* 23 Ill.App.3d at 188 – 89, 318 N.E.2d 301.** *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.,* 403 Ill.App.3d 468, 932 N.E.2d 1073, 1087, 342 Ill.Dec. 612 (1st Dist. 2010).

C. [10.22] Mechanics Lien Contents Requirements

Section 7 of the Mechanics Lien Act prescribes the following content requirements for mechanics liens: "a brief statement of the claimant's contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same." 770 ILCS 60/7(a). Strictly construed:

> **The plain language of section 7 instructs the lien claimant only to: (1) file the claim within four months after the completion of the work; (2) verify the lien by affidavit of the claimant or an agent or employee; (3) include a brief statement of the contract; (4) set forth the balance due; and (5) provide a sufficiently correct description of the lot, lots, or tracts of land to identify the same.** *National City Mortgage, Division of National City Bank of Indiana v. Bergman,* 405 Ill.App.3d 102, 939 N.E.2d 1, 6, 345 Ill.Dec. 272 (2d Dist. 2010).

1. [10.23] Verification of Claim for Lien

Section 7 of the Mechanics Lien Act, 770 ILCS 60/7, requires that mechanics liens be verified by affidavit. Failure to include a verification or sworn affidavit in a claim for lien is a fatal error. In *Tefco Construction Co. v. Continental Community Bank & Trust Co.,* 357 Ill.App.3d 714, 829 N.E.2d 860, 293 Ill.Dec. 935 (1st Dist. 2005), the court held that a claim for lien was invalid and unenforceable under §7 of the Act because it was not verified. The president of Tefco, using a preprinted legal form, prepared a claim for lien in the amount of $80,276.46. The contents of the claim for lien met the requirements of §7; however, the lien document was not verified or supported by affidavit as required by §7. The court held that Tefco's failure to verify the claim in accordance with §7 rendered the claim unenforceable. Tefco argued against a " 'hyper-technical' reading of the statute," which the court rejected on the basis that the lien verification requirement serves an important function under the Mechanics Lien Act: "By requiring verification of the claim for mechanic's lien, section 7 provides that the claimant must make statements in the recorded document under penalty of perjury which provides a much needed consequence should the claimant file a frivolous claim under the Act." 829 N.E.2d at 865 – 866. Summary judgment in favor of the owner was affirmed.

Likewise, a notarial acknowledgment, which consists of a notary positively identifying the signer of a document, does not satisfy the verification requirement of §7 of the Act. *Vancil Contracting, Inc. v. Tres Amigos Properties, LLC (In re Vancil Contracting, Inc.),* 381 B.R. 243 (Bankr. C.D.Ill. 2008).

2. [10.24] Brief Statement of the Contract

Section 7(a) of the Mechanics Lien Act, 770 ILCS 60/7(a), requires a "brief statement of the claimant's contract," which has been interpreted to mean that a claim for a mechanics lien must accurately identify the parties to the contract. Thus, in *Candice Co. v. Ricketts,* 281 Ill.App.3d 359, 666 N.E.2d 722, 217 Ill.Dec. 53 (1st Dist. 1996), an original contractor assigned its lien rights to a finance company, which filed a notice of lien naming itself as the claimant. However, the claimant was not the contractor and did not have any contract with the owner. The court held that the mechanics lien was unenforceable because it failed to describe the contract correctly.

Similarly, in *Bale v. Barnhart,* 343 Ill.App.3d 708, 798 N.E.2d 750, 278 Ill.Dec. 366 (4th Dist. 2003), a contractor's claim for lien was dismissed as a result of scriveners' errors on the face of the lien document. The preparer of a fill-in-the-blank mechanics lien form misidentified herself as the claimant (in two places) and also "signed the verification as 'the claimant.' " 798 N.E.2d at 754. The court stated that §7 of the Act requires an accurate description of the contract on which any claim for a mechanics lien is based. The lien preparer was not a party to the contract. The court held that, by failing to accurately describe the contract, the claimant violated §7. 798 N.E.2d at 755, citing *Ronning Engineering Co. v. Adams Pride Alfalfa Corp.,* 181 Ill.App.3d 753, 537 N.E.2d 1032, 130 Ill.Dec. 703 (4th Dist. 1989).

A slight misnomer (one word omission) in the name of an owner was held not to invalidate a mechanics lien in *Fe Demolition & Remediation, LLC v. New Mill Capital Holdings, LLC,* Case No. 21-3088, 2022 WL 1572728 (C.D.Ill. May 18, 2022). Therein, "New Mill Capital, LLC" was named in a claim for mechanics lien, but the full name of the owner was "New Mill Capital Holdings, LLC." The construction contract was signed by a manager of "New Mill Capital." The court distinguished *Candice, supra,* and *Ronning, supra,* and followed *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, ¶141, 20 N.E.3d 104, 386 Ill.Dec. 243, wherein an Illinois appellate court observed that "[n]either *Ronning* nor *Candice* states that a description of a contract must be absolutely correct and perfect to be enforceable. The court held that the mechanics lien contained a sufficiently correct description of the contact to be enforceable.

Thus, every claim for lien should be closely scrutinized for scriveners' errors, particularly with respect to the accurate identification of the parties to the construction contract.

3. [10.25] Balance Due — Mere Overstatement Found Not To Be Constructive Fraud

Section 7 of the Mechanics Lien Act, 770 ILCS 60/7, requires that mechanics liens set forth the balance due, *i.e.,* the lien amount claimed. Typically, mechanics liens include statements as to the total contract price, amounts previously paid, and the remaining balance due. Overstatement of the balance due generally will not invalidate a mechanics lien. Section 7 of the Act provides:

> **No [**mechanics**] lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud.** 770 ILCS 60/7(a).

Mere overstatement of a contractor's claim for lien is insufficient to prove an intent to defraud. Constructive fraud must be proved by additional evidence from which intent to deceive may be inferred. A mechanics lien that inadvertently failed to reflect a substantial payment on account was held not to be constructively fraudulent in *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008). The lien was recorded on April 18, 2003, and did not reflect a payment of $24,819.15, which was admittedly received two months prior to recording. The court held that, based on the affidavit of the lien claimant, it was reasonable to infer that the affiant was unaware of the overstatement, thereby negating any intent to defraud.

In *Peter J. Hartmann Co. v. Capitol Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004), a contractor recorded a claim for lien in the amount of $250,000 and, seven weeks later, recorded another claim for lien in the amount of $279,824.35. On appeal, the court found that both recorded liens stated a single contract date for the same described work on the same property with the same completion date. The second recorded claim for lien added necessary parties and clarified the amount owed. The court held that the subsequent filing was "amendatory in nature" and did not indicate fraud. 817 N.E.2d at 921. The court held that the contractor was entitled to recover the amount of the second recorded lien notice, $279,824.35, plus interest under the Mechanics Lien Act.

Likewise, overstatement of lien claims to include extra work was found not to be constructive fraud when the lien claimants reasonably believed that their change orders for extra work had been approved. In *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc.,* 2016 IL App (3d) 140946, 65 N.E.3d 340, 408 Ill.Dec. 118, a subcontractor discussed the need for extra work with the general contractor's representative, who then signed the change order. Another subcontractor submitted its change order to the general contractor's representative, who said it "would be approved." 2016 IL App (3d) 140946 at ¶19. However, each subcontract provided that any change orders must be approved in writing by the owner — and owner approval was not obtained. Accordingly, the trial court denied the subcontractors recovery for the extra work. The courts nonetheless found that there was no intent to defraud because the lien claimants reasonably believed that their change orders for extra work had been approved.

In *Jurkovic v. Boulder Developers, Inc.,* 2021 IL App (1st) 200940-U, an owner's claim for damages for a constructively fraudulent mechanics lien was denied after trial. On appeal, the court followed *Cordeck Sales, supra,* and *Peter J. Hartmann, supra,* finding that in Illinois, "courts have consistently based findings of constructive fraud upon the existence of such additional evidence." 2021 IL App (1st) 200940-U at ¶40. In *Jurkovic,* there was no trial transcript and the bystander's report of proceedings did not contain evidence as to how the mechanics lien was calculated. Since the owner presented no additional evidence in support of its claim of constructive fraud, the trial court's finding of no constructive fraud was affirmed on appeal.

4. [10.26] Balance Due — Overstatement with Evidence of Constructive Fraud

When a mechanics lien claim is for an excessive amount, an express showing of an intent to defraud must be established by evidence in addition to and apart from an overstatement included in the lien itself. *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive at Oakwood, LLC,* 387 Ill.App.3d 906, 901 N.E.2d 978, 327 Ill.Dec. 245 (1st Dist. 2009).

Such additional evidence may include a settlement agreement relating to a disputed claim for lien. In *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 334 Ill.Dec. 710 (1st Dist. 2009), a subcontractor filed a mechanics lien in excess of $1 million, comprised of a $416,000 unpaid balance on the original contract price and $588,000 in change orders. The subcontractor produced evidence of less than $100,000 of work performed pursuant to change orders and settled its claim against the general contractor and abandoned any claim for extras, thereby reducing its mechanics lien claim by more than half. The court held that the settlement agreement was potentially relevant on the issue of fraud: "To the extent that it

demonstrates acknowledgment that any portion of Cordeck's original claim was not asserted for a valid debt, it constitutes the additional evidence that would support [the morgagee]'s claim for constructive fraud." 917 N.E.2d at 544.

The court also held that abandonment of the claim for extras by the lien claimant would not cure a constructively fraudulent mechanics lien:

> **A finding of constructive fraud as a result of a lien claimant's intentional overstatement of the amount due invalidates the entire lien, not merely the claim for the overcharge. . . . Evidence of an intentional overstatement of Cordeck's original lien thus remains relevant to its pursuit of any amount claimed under that lien even after it has abandoned its attempts to recover additional amounts. [**Citations omitted.**]** 917 N.E.2d at 544 – 545.

The court remanded the case for further proceedings on the issue of constructive fraud.

When a mechanics lien claimant deliberately overstates the amount of a lien, then the lien is wholly invalid. In *Fedco Electric Co. v. Stunkel,* 77 Ill.App.3d 48, 395 N.E.2d 1116, 32 Ill.Dec. 735 (4th Dist. 1979), the president of the contractor admitted that the claimant had failed to credit the owner for payment of $19,220 and that $13,500 had been charged for work done for another party. Since the overstatement was not a mere mistake but was knowingly made, the court held that, because of the contractor's knowledge and the size of the overcharge, it amounted to constructive fraud as a matter of law. Thus, the contractor was denied any mechanics lien whatsoever.

In *William J. Templeman Co. v. W.E. O'Neil Construction Co.,* 282 Ill.App.3d 1112, 707 N.E.2d 300, 236 Ill.Dec. 455 (1st Dist. 1996) (Rule 23), a mechanics lien claiming additional amounts for interference and delay damages was found to be "baseless" and excessive by $1.2 million. Sanctions in the amount of $350,000 were imposed.

In "an egregious case of constructive fraud," summary judgment was entered in favor of homeowners and their mortgagee and against a contractor, whose mechanics lien was invalidated due to constructive fraud. *Father & Sons Home Improvement II, Inc. v. Stuart,* 2016 IL App (1st) 143666, ¶12, 52 N.E.3d 581, 402 Ill.Dec. 660.

The homeowners entered into a contract for construction of a deck, garage, and basement in their house for the contract price of $43,500. The construction contract was later modified to include a retail installment contract under which the contractor agreed to provide financing for the costs of construction. A building permit was issued on September 10, 2009. Seven days later, on September 17, 2009, the contractor recorded a mechanics lien stating that all work required by the contract amounting to $43,500 (full contract price) was completed on September 12, 2009, and that the additional sum of $2,700 for "extra and additional work" was completed, and that the total balance due was $46,200, not including interest. The mechanics lien was supported by an affidavit signed by the president of the contractor. In fact, construction began sometime after the mechanics lien was recorded and was not completed until June 2010, nine months later. The first installment payable under the parties' retail installment agreement was due November 1, 2009, such that the homeowners owed nothing at the time the mechanics lien was recorded.

The trial court entered summary judgment in favor of the owners and the mortgagee. In affirming the trial court's judgments against the contractor, the appellate court observed:

> **In the case at bar, we find that the record before us leaves no room for doubt over whether plaintiff, at the very least, committed constructive fraud. The allegations of fraud here, unlike the allegations of fraud discussed in *Cordeck Sales, Peter J. Hartmann Co.,* and *Sheffield Wellington,* are not merely based on overstatements or overcharges, but rather on patently false statements that plaintiff used to establish its right to a mechanic's lien in the first place. . . .**
>
> **First, plaintiff's mechanic's lien, recorded on September 17, 2009, falsely stated that all the work required under the construction agreement, including the construction of the garage, basement, and deck, was completed by September 12, 2009. This statement was proven false by plaintiff's own admission that "it completed work at the subject property in or about June, 2010." Plaintiff must have known that it had not completed all the work required under the construction agreement as the Department of Buildings only issued plaintiff a building permit on September 10, 2009. Likewise, the "completion certificates," which plaintiff had the Stuarts sign as the project progressed, clearly indicate that plaintiff knew that as of September 17, 2009, it had not constructed any of the land improvements (the garage, deck, and basement) required under the construction agreement.**
>
> **Beyond providing a fabricated completion date, plaintiff's mechanic's lien also stated falsely that the Stuarts owed plaintiff $46,200 as of September 12, 2009. This statement was proven false by the clear and unambiguous terms of the parties' retail installment contract, under which the Stuarts were not required to make the first installment payment until November 1, 2009.**
>
> **Finally, here, as in *Lohmann,* plaintiff attached to its mechanic's lien the signed and sworn affidavit of Nancy Martinez, president of plaintiff's company, falsely attesting to the truth of the overstatements and overcharges made in its mechanic's lien claim. See *Lohmann,* 260 Ill.App.3d at 892, 198 Ill.Dec. 62, 632 N.E.2d 121. The circuit court thus reasonably inferred that plaintiff knew that its mechanic's lien contained false statements. Indeed, even construing the pleadings, admissions, exhibits, and affidavits strictly against defendants and liberally in favor of plaintiff the circuit court here had no choice but to conclude that plaintiff's mechanic's lien, based on patently false statements, constituted constructive fraud. [**Citations omitted.**]** 2016 IL App (1st) 143666 at ¶¶36 – 39.

The court also awarded attorneys' fees to the owner and to the mortgagee. See §13.9 of this handbook for further discussion.

A 100 percent overstatement of a mechanics lien was found to be constructively fraudulent in *MEP Construction, LLC v. Truco MP, LLC,* 2019 IL App (1st) 180539, 125 N.E.3d 1130, 430 Ill.Dec. 112. In *MEP Construction,* a $250,000 mechanics lien was contradicted by the claimant's contractor's sworn statement to the owner. The sworn statement reported that the lien claimant had

performed $124,000 in work and that three other contractors (not subcontractors of the claimant's) had performed work valued at $128,735. So, in essence, the lien claimant falsely claimed that it was owed money that was actually owed to other contractors. On appeal, the court followed *Peter J. Hartmann Co. v. Capitol Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004), and *Cordeck Sales, supra,* and found, based on the contractor's sworn statement to the owner and sworn answers to interrogatories that the 100-percent overstatement of lien was knowingly made and was constructively fraudulent. Summary judgment in favor of the owner on the mechanics lien count was affirmed.

A mechanics lien claim was found to constitute construct fraud in *Bara Chicago, LLC vs. Big Cheese Wrigleyville, LLC,* 2022 IL App (1st) 201314-U. The case involved two invoices/proposals created by the lien claimant, the first of which was dated September 9, 2013. The owner created a spreadsheet of job charges and payments that "precisely tracked" the September 9, 2013, invoice/proposal and that showed final payment to the contractor on April 4, 2014. 2022 IL App (1st) 201314-U at ¶13. The restaurant opened for business on April 4, 2014, and the owner's representative testified that construction work was completed by the restaurant's opening day.

Soon after the restaurant opened, the Chicago Transit Authority (CTA) instituted an eminent domain case. The contractor prepared a second invoice/proposal, dated December 15, 2013, to "improve [the parties'] respective positions in obtaining compensation from the CTA's eminent domain taking." 2022 IL App (1st) 201314-U at ¶11. A mechanics lien, based on the amount of the December 2013 invoice/proposal, was recorded on August 15, 2014. At trial, there was no evidence that the contractor performed any construction work after April 4, 2014.

The trial court found that the contractor's filing of the mechanics lien claim constituted constructive fraud. Specifically, the court found that the first invoice proposal, dated September 9, 2013, controlled and that the contractor, with the intent to defraud, fabricated and backdated the December 2013 invoice/proposal with across-the-board inflated line cost item costs, shortly before recording the lien claim, for the sole purpose of posing evidence to extract an additional $98,640 payment from the owner, far in excess of the $169,210.80 actual contract price. The court entered judgment for the owner and against the contractor on all counts. The court also awarded attorneys' fees and costs to the owner under §17(c) of the Mechanics Lien Act, 770 ILCS 60/17(c).

5. [10.27] Description of the Property

Section 7(a) of the Mechanics Lien Act also requires a mechanics lien to include "a sufficiently correct description of the lot, lots or tracts of land to identify the same." 770 ILCS 60/7(a). Illinois decisions have generally interpreted the description requirement to require use of the platted legal description for the property.

The requirement to use a platted legal description in a mechanics lien was reiterated and satisfied in *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 334 Ill.Dec. 710 (1st Dist. 2009), involving a multiunit condominium project. A mechanics lien was recorded using the platted legal description of the underlying property but without referring to the condominium units established in the condominium plat recorded one month prior to the

recorded mechanics lien. The lien claimant presented evidence from an employee of the recorder's office that the mechanics lien would appear in a search of the chain of title for each of the condominium units. The court held that the property description was adequate and met the requirements of §7 of the Act.

When the legal description in a claim for lien is disputed, the issue is whether the lien was recorded against the right property. Accuracy of the legal description is an issue of fact, not law, and is not properly raised in a motion to dismiss under 735 ILCS 5/2-619. An attorney's affidavit as to a legal description that does not explain any basis for personal knowledge is properly subject to a motion to strike. *Evergreen Oak Electric Supply & Sales Co. v. First Chicago Bank of Ravenswood,* 276 Ill.App.3d 317, 657 N.E.2d 1149, 212 Ill.Dec. 804 (1st Dist. 1995).

Likewise, "a sufficiently correct description of" the property was held to be a question of fact in *Christopher B. Burke Engineering, Ltd. v. Harkins,* 2011 IL App (3d) 100949-U, ¶11, quoting 770 ILCS 60/7(a). A mechanics lien claimant recorded a claim for lien using the metes and bounds description for the previously un-platted property, the prior lot numbers, and the current property identification numbers (PINs). The owner filed a motion to dismiss, and the mortgagee filed a motion for summary judgment, asserting an inadequate legal description under §7 of the Act. The trial court granted the motions, finding that the prior metes and bounds description of the property had been completely superseded by the subdivision plat. The trial court was reversed on appeal. The appellate court held that, under the circumstances presented (use of prior metes and bounds description with current PINs), the sufficiency of the description of the property was a question of fact and reversed the decision in favor of the owner and mortgagee of the property.

Although adequacy of the description of property has been held to be a question of fact, if a mechanics lien is recorded against completely different property, without even reference to the correct PIN, or recorded against property located in another county, then a dispositive motion should succeed.

6. [10.28] Contractor or Subcontractor

Although not expressly required in §7 of the Mechanics Lien Act, 770 ILCS 60/7, the "brief statement of the claimant's contract" clause in §7(a) has been interpreted as implicitly requiring mechanics liens claimants to provide evidence of their status as a contractor or subcontractor. Whether a mechanics lien claimant is a contractor or subcontractor is significant because, under §24 of the Act, 770 ILCS 60/24 (discussed in §10.35 below), a subcontractor is required to serve the owner of record with a written notice of his or her lien claim within 90 days after the completion of work. A contractor is not subject to the 90-day notice requirement. Thus, subcontractors that fail to provide a 90-day notice may claim to be contractors instead to circumvent §24 of the Act.

Section 7 of the Act, strictly construed, requires a mechanics lien claimant to provide evidence of his or her status as a contractor or subcontractor. In *Carpenter Contractors of America, Inc. v. JP Morgan Chase Bank, NA,* 2013 IL App (3d) 120872-U, the subject property was owned by a limited liability company (LLC). The lien claimant was hired pursuant to a subcontract agreement, and the subcontract was signed by the LLC manager in its capacity as the contractor for the project. The claimant subsequently filed a "Subcontractor's Notice and Claim for Lien." 2013 IL App (3d) 120872-U at ¶7. The court found the lien claimant to be a subcontractor.

An entity that enters into a contract with an owner is a contractor under the Mechanics Lien Act. *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 937 – 938, 140 Ill.Dec. 282 (3d Dist. 1990). It is the status of the other party to the contract that is determinative. When an owner of the property enters into a contract and signs the contract as the owner, then the mechanics lien claimant is classified as a contractor, even if the claimant is referred to in the contract as a subcontractor. *Dirtwerks Excavating, Inc. v. Koritala,* 2013 IL App (2d) 130329-U.

7. [10.29] Completion Date

A completion date may or may not be required in a claim for mechanics lien.

In a departure from precedent, a Second District Appellate Court held that a mechanics lien need not include on its face a completion date to be enforceable: "In strictly construing the statute as required, we find nothing in section 7 requiring a claimant to state the date of the completion of the contract." *National City Mortgage, Division of National City Bank of Indiana v. Bergman,* 405 Ill.App.3d 102, 939 N.E.2d 1, 6, 345 Ill.Dec. 272 (2d Dist. 2010). Because §7 of the Mechanics Lien Act, 770 ILCS 60/7, does not require a completion date, strictly construed, failure to include a completion date in a claim for lien does not invalidate the lien.

The court in *National City Mortgage* disagreed with and declined to follow other appellate decisions holding that a completion date was required in a recorded notice of mechanics lien, so that third parties (purchasers and mortgagees) could determine by examination of the lien itself whether their interests were impacted and subject to the lien:

> **[**In *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 397, 246 Ill.Dec. 866 (1st Dist. 2000), t**]he court noted that, under section 7, a mechanic's lien is not enforceable unless, within four months after completion of the work, either a lien claim is recorded or an action is brought to enforce the lien. The court observed further that, "[w]hile section 7 itself does not expressly require inclusion of the completion date in the lien claim, nevertheless that requirement must be inferred." [**731 N.E.2d at 409.**] The court asserted that the primary purpose for requiring the lien claim to be filed within a specified time is so "third persons dealing with the property may have notice of the existence, nature and character of the lien as well as the times when the material was furnished and labor performed, and thus be enabled to learn *from the claim itself* whether it was such as can be enforced." [***Id.***] [**Emphasis in original.**] 939 N.E.2d at 5.

In *Federal Savings & Loan Insurance Corp. v. American National Bank & Trust Company of Chicago,* 115 Ill.App.3d 426, 450 N.E.2d 820, 822, 71 Ill.Dec. 132 (1st Dist. 1983), the court recognized that the purpose of the requirement of notice "is to give third parties dealing with the property notice of the existence, nature and character of a lien and thus enable third parties to determine *from the claim itself* whether the lien is enforceable." [Emphasis added.]

Thus, unless and until the Illinois Supreme Court addresses the split in appellate authority or until §7 of the Act is amended, a completion date may or may not be required in a claim for mechanics lien. This issue is significant in that the absence of a completion date requirement in a

recorded claim for mechanics lien takes away a recognized, statutory defense heretofore available to third-party purchasers and mortgagees. It will be interesting to see whether the balance is struck in favor of strict construction of §7 or in favor of the protection of third parties.

8. [10.30] Inaccurate Completion Date Stated in Mechanics Lien

Inaccuracy of a completion date in a mechanics lien may be immaterial or may render the lien unenforceable against third parties, depending on whether the mechanics lien is facially valid or invalid so as to not mislead third parties as to whether the property is thereby encumbered. In *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC,* 2014 IL App (1st) 123784, 20 N.E.3d 104, 386 Ill.Dec. 243, two facially valid mechanics liens with inaccurate completion dates were found to be valid on appeal.

The court in *North Shore* observed that the purposes of §§7 and 24 of the Mechanic Lien Act are the same: to provide third parties notice of the existence of a lien claim. The court relied on *United Cork Cos. v. Volland,* 365 Ill. 564, 7 N.E.2d 301 (1937), which held that even though significant work continued after the completion date stated in the mechanics lien, and that although the ultimate completion of the contract did not occur until well after the lien was filed, the lien was still valid and enforceable:

> ***United Cork*** **remains important to our analysis because it provides a framework to evaluate if the errors made by plaintiffs are material to defendants' rights. If the errors are not material,** ***United Cork*** **dictates that we construe the errors liberally to avoid subverting the Act's remedial purpose. As quoted above, the** ***United Cork*** **court reasoned that strict construction is only employed to preserve the rights of parties from whom relief is sought.**
>
> *** * ***
>
> **Accordingly, we must consider whether the plaintiffs' errors in this case infringed on defendants' right to know from the claim itself whether it was an enforceable lien. This is a right of notice.**
>
> **Defendants were able to learn from the claims themselves that the liens were facially enforceable even with the incorrect dates. Whether Bluewater completed work on January 4, 2009, or January 5, 2009, Bluewater sent notice to the Bank within 90 days of completion as required by section 24. Likewise, whether Premier listed February 27, 2009, or March 4, 2009, on its lien claim is of no consequence to defendants' right to know whether the claim was an enforceable lien because both dates are within the four months required by section 7. Either date would have communicated to a third party . . . that the lien was timely filed and enforceable.**
>
> **As a result, the incorrect dates of completion in plaintiffs' claims cannot be said to materially affect defendants' right of notice under the Act. Therefore, at least in regard to the completion dates on plaintiffs' lien claims, we construe the Act's requirements liberally to give effect to the Act's remedial purpose.** *North Shore, supra,* 2014 IL App (1st) 123784 at ¶¶95 – 99.

The court in *North Shore* readily distinguished two appellate decisions involving mechanics liens that were facially invalid because the stated completion dates were more than four months prior to the recording dates: *Mutual Services, Inc. v. Ballantrae Development Co.,* 159 Ill.App.3d 549, 510 N.E.2d 1219, 110 Ill.Dec. 188 (1st Dist. 1987), and *Braun-Skiba, Ltd. v. La Salle National Bank,* 279 Ill.App.3d 912, 665 N.E.2d 485, 216 Ill.Dec. 425 (1st Dist. 1996).

> **Defendants correctly note that the courts in *Mutual Services* and *Braun-Skiba* found that the plaintiffs in those cases were bound by the completion dates stated on their lien claims and that those plaintiffs could not contradict the dates with later evidence. See *Mutual Services,* 159 Ill.App.3d at 553–54, 110 Ill.Dec. 188, 510 N.E.2d 1219; *Braun-Skiba,* 279 Ill.App.3d at 917–18, 216 Ill.Dec. 425, 665 N.E.2d 485. However, unlike the claims in the present case, the lien claims in *Mutual Services* and *Braun-Skiba* were invalid on their face and, thus, are easily distinguished. See *Mutual Services,* 159 Ill.App.3d at 551, 110 Ill.Dec. 188, 510 N.E.2d 1219; *Braun-Skiba,* 279 Ill.App.3d at 918, 216 Ill.Dec. 425, 665 N.E.2d 485.**
>
> **In *Mutual Services,* the plaintiff filed a mechanics lien that stated a completion date more than four months prior to the filing of the claim. *Mutual Services,* 159 Ill.App.3d at 551, 110 Ill.Dec. 188, 510 N.E.2d 1219. In *Braun-Skiba,* the plaintiff mistakenly filed a lien with a typographical error, stating a completion date more than two years prior to filing. In both cases, "the lien[s] appeared to be invalid on [their] face, [and] the plaintiff[s] argued that [the liens] should be enforced because [they] misstated the required date on the lien and the actual date of completion was one within the mandatory filing period." *Braun-Skiba,* 279 Ill.App.3d at 917, 216 Ill.Dec. 425, 665 N.E.2d 485 (citing *Mutual Services,* 159 Ill.App.3d at 552, 110 Ill.Dec. 188, 510 N.E.2d 1219).**
>
> **These are not insignificant distinctions. As the court in Mutual Services noted, "The purpose of the requirement [to file within the statutory period] is to give third parties dealing with the property notice of the existence, nature and character of a lien and thus enable third parties to determine from the claim itself whether the lien is enforceable." *Mutual Services,* 159 Ill.App.3d at 553, 110 Ill.Dec. 188, 510 N.E.2d 1219. The lien claims in *Mutual Services* and *Braun-Skiba* could not have possibly informed third parties that the lienable work was actually completed within four months of the filing of the liens. On the contrary and on their face, the lien claims stated that the work was completed well outside the enforceable statutory period. Therefore, if the courts in *Mutual Services* and *Braun-Skiba* were to allow the plaintiffs in those cases to amend their lien claims to reflect later completion dates, it would have misled third parties to believe the claims were unenforceable. In *Braun-Skiba,* the court explicitly noted the difference between facially valid and invalid claims as they related to *United Cork* and *Mutual Services*[.]**
>
> *** * ***
>
> **However, in the present case, both claims *did* appear to be timely filed and enforceable. Since section 7 required the liens to be filed within four months of completing work that was done at the property, both liens were valid on their face.**

> **Additionally, based on the completion date stated on the face of Bluewater's lien clam, Bluewater timely notified the Bank within 90 days as required under section 24 of the Act. In fact, not only were the completion dates stated on plaintiffs' liens within the requisite statutory periods, the amendment plaintiffs requested would also be within the requisite statutory periods. As a result, third parties would not be misled to believe the liens were unenforceable, and the rights of third parties would not be compromised. [**Emphasis in original.**]** *North Shore, supra,* 2014 IL App (1st) 123784 at ¶¶108 – 111.

The court in *North Shore* concluded its analysis of judicial admissions and found that under the facts presented, the completion dates stated in the mechanics liens were not binding judicial admissions, noting that "any admissions *not the product of mistake or inadvertence* become binding judicial admissions" [emphasis added by *North Shore* court] (2014 IL App (1st) 123784 at ¶126, quoting *Rynn v. Owens,* 181 Ill.App.3d 232, 536 N.E.2d 959, 962, 129 Ill.Dec. 909 (1st Dist. 1989)) and, "finally, it is not at all certain that the dates were deliberate, clear, unequivocal statements about a concrete fact uniquely within plaintiffs' knowledge" (2014 IL App (1st) 123784 at ¶130).

9. [10.31] Amendment of Mechanics Lien

Section 7of the Mechanics Lien Act , 770 ILCS 60/7, generally permits amendment of a mechanics lien against an owner, but not as to third parties. *See Romspen Mortgage Limited Partnership v. SB Winnetka LLC,* Case No. 19 C 5610, 2021 WL 949979 (N.D.Ill. Mar. 13, 2021), wherein the court found that a mechanics lien recorded in 2018 was not an amendment of a 2017 mechanics lien that was previously released but, rather, was a new lien relating to a different aspect of the project.

V. [10.32] RECEIVERSHIP AND SUBORDINATION OF MECHANICS LIENS — SECTION 12 OF THE MECHANICS LIEN ACT

Section 12 of the Mechanics Lien Act provides:

> **The court shall have power to appoint receivers for property on which liens are sought to be enforced in the same manner for the same causes and for the same purposes as in cases of foreclosure of mortgages, as well as to complete any unfinished building where the same is deemed to be to the best interest of all the parties interested.** 770 ILCS 60/12.

In a case of first impression, a court held that §12 incorporates by reference §15-1704 of the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1704, governing appointment of receivers in mortgage foreclosure cases. In *REEF-PCG v. 747 Properties, LLC,* 2020 IL App (2d) 200193, 157 N.E.2d 1122, 441 Ill.Dec 765, the trial court authorized the issuance of $12 million in receiver certificates for construction of an office building, and to prioritize them over $15 million in recorded mechanics liens. The mechanics lienholders contended that §16 of the Mechanics Lien Act prohibited subordination of their liens. The appellate court found that the trial court had the implied power to subordinate mechanics liens to receiver certificates, contingent upon a factual determination that doing so was in the interest of all parties and necessary to preserve the property.

Since the record did not contain any appraisal evidence of the current and as completed values of the property, the trial court had to speculate that $12 million in new debt was in the lienholders' best interests, and that doing so was "apparently necessary to preserve the property." 2020 IL App (2d) 200193 at ¶43. The appellate court held those trial court findings to be an abuse of discretion and reversed and remanded for evidentiary hearing.

VI. [10.33] SUBCONTRACTOR'S REQUIRED NOTICES — SECTIONS 21 AND 24 OF THE MECHANICS LIEN ACT

Subcontractor notice requirements are governed by §§21 and 24 of the Mechanics Lien Act, 770 ILCS 60/21 and 60/24.

A. [10.34] Section 21 — Subcontractor's Required Notice (Owner Occupied, Single Family)

Section 21(c) of the Mechanics Lien Act requires that the subcontractor working on an owner-occupied, single-family home notify the homeowner that it is supplying materials or labor within 60 days from its first furnishing the materials or labor. 770 ILCS 60/21(c). Section 21, however, also states that any notice given after 60 days "shall preserve his lien, but only to the extent that the owner has not been prejudiced by payments made prior to receipt of the notice." *Id.* The notice shall warn the homeowner that he or she "should receive a waiver of lien executed by each subcontractor who has furnished labor, services, material, fixtures, apparatus or machinery, forms or form work" before making any payment to the contractor. *Id.*

Note that the notice period under §21 starts upon the commencement of the work, while the notice period under §24 of the Mechanics Lien Act, 770 ILCS 60/24, starts upon the completion of the work. Although some subcontractors include both notices in a single mailing, due to the very different notice periods, the better practice is to provide two separate notices. Indeed, for their own protection, subcontractors should serve notice to the owner under §21 as early as possible, *i.e.,* before the owner makes any substantial payments to the general contractor.

B. [10.35] Section 24 — Subcontractor's Required Notice

Section 24 of the Mechanics Lien Act provides:

> **§24. Written notice by sub-contractor; service; when notice not necessary; form of notice.**
>
> **(a) Sub-contractors, or parties furnishing labor, materials, fixtures, apparatus, machinery, or services, may at any time after making his or her contract with the contractor, and shall within 90 days after the completion thereof, or, if extra or additional work or material is delivered thereafter, within 90 days after the date of completion of such extra or additional work or final delivery of such extra or additional material, cause a written notice of his or her claim and the amount due or to become due thereunder, to be sent by registered or certified mail, with return**

> **receipt requested, and delivery limited to addressee only, to or personally served on the owner of record or his agent or architect, or the superintendent having charge of the building or improvement and to the lending agency, if known; and such notice shall not be necessary when the sworn statement of the contractor or subcontractor provided for herein shall serve to give the owner notice of the amount due and to whom due, but where such statement is incorrect as to the amount, the subcontractor or material man named shall be protected to the extent of the amount named therein as due or to become due to him or her. For purposes of this Section, notice by registered or certified mail is considered served at the time of its mailing.** 770 ILCS 60/24.

Section 24 of the Act generally applies to all subcontractors. To protect its right to a lien, each subcontractor must, within 90 days of the completion of the work, provide written notice to the owner and to the lending agency, if known, of the amount owed to the subcontractor for work on the project.

Notice is not required under §24 if, and to the extent that, a subcontractor is named in the general contractor's sworn statement to the owner under §5 of the Act, 770 ILCS 60/5. However, whether a general contractor actually provides a sworn statement to an owner and whether such a sworn statement identifies and accurately provides for any subcontractors are typically unknown to the subcontractors (unless they are requested or required to provide lien waivers). Accordingly, for their own protection, subcontractors should serve notice under §24 as early as possible, *i.e.,* before the owner makes any substantial payments to the general contractor.

A subcontractor's failure to provide a 90-day notice pursuant to §24 of the Act is fatal to its claim for a mechanics lien. The subcontractor's pleading assertion that it was a contractor was contrary to the lien itself wherein the lien claimant identified a limited liability company as the owner and stated that the claimant entered into a contract with an individual as an agent for the owner:

> **To perfect a mechanic's lien claim, section 24(a) of the Act requires a subcontractor to send or serve a notice of its lien claim within 90 days after "completion" of its work to any lending agency, "if known." 770 ILCS 60/24(a). . . . The phrase "if known" is deemed to mean "if discoverable by the subcontractor through searching title recording records." . . . A subcontractor is held to have constructive knowledge of a lender/mortgagee whose interest is properly recorded. . . . Compliance with this notice requirement is a condition precedent to the subcontractor's cause of action on the lien. . . . If the subcontractor does not provide a known lender with the mandated section 24 notice, the lien is unenforceable against the lender. . . . A contractor is not subject to this 90-day notice requirement. [**Citations omitted.**]** *Parkway Bank & Trust Co. v. Meseljevic,* 406 Ill.App.3d 435, 940 N.E.2d 215, 227, 346 Ill.Dec. 215 (1st Dist. 2010), quoting *Petroline Co. v. Advanced Environmental Contractors, Inc.,* 305 Ill.App.3d 234, 711 N.E.2d 1146, 1149, 238 Ill.Dec. 485 (1st Dist. 1999).

The filing dates in assorted exhibits show that the mortgage was recorded on May 11, 2006, two years before the subcontractor completed its work on the project on April 8, 2008. The mechanics lien was filed on August 5, 2008. The subcontractor's failure to notify the mortgagee was fatal to the lien.

Failure to send §24 notice of a lien claim to a property's mortgage lender renders the lien unenforceable against the lender. *Hill Behan Lumber Co. v. Irving Federal Savings & Loan Ass'n,* 121 Ill.App.3d 511, 459 N.E.2d 1066, 1072, 76 Ill.Dec. 931 (1984). However, failure to serve §24 notice on the lender will not render the lien unenforceable as to the property owner. *Petroline, supra,* 711 N.E.2d at 1150: "we hold that notice to the mortgagee is not a requirement upon which the right to a lien against the owner depends." Similarly, failure to serve §24 notice on the lender did not render a mechanics liens invalid against four subsequent purchasers of the properties. *Carpenter Contractors of America, Inc. v. JP Morgan Chase Bank, NA,* 2013 IL App (3d) 120872-U.

C. [10.36] Certified Mailing

A subcontractor has the burden of proof to establish that notice under §24 of the Mechanics Lien Act, 770 ILCS 60/24, was actually mailed in accordance with the statute. That requires actual evidence of certified mailing: a United States Postal Service Certificate of Mailing slip; a certified mail return card (green card); or a copy of the envelope that was mailed. In *National City Mortgage v. Hillside Lumber, Inc.,* 2012 IL App (2d) 101292, 966 N.E.2d 1076, 359 Ill.Dec. 388, a subcontractor alleged in an affidavit that notice was mailed in accordance with §24 but without exhibiting copies of any certified mail documentation. The mortgagee bank filed a counter affidavit of its manager stating that the bank's records did not disclose that the bank had received the notice of lien. The trial court held that the subcontractor's affidavit, in and of itself, was not sufficient evidence of mailing under §24 and entered summary judgment against the subcontractor and in favor of the mortgagee. Summary judgment was affirmed on appeal:

> **[**O**]nce plaintiff asserted its lack of notice at the summary judgment stage, Hillside had to prove that plaintiff actually received notice. Hillside admitted that it could not produce documentation that it even sent notice, let alone documentation that notice was received. Consequently, the trial court did not err in granting summary judgment in plaintiff's favor.** 2012 IL App (2d) 101292 at ¶10.

A subcontractor's failure to establish certified mailing in accordance with §24 of the Mechanics Lien Act resulted in the failure of a $185,000 mechanics lien in *Salce, Inc. v. Downers Grove, IL (1149 Ogden) LLC,* 2019 IL App (2d) 180370-U. The trial court found that the plaintiff subcontractor undisputedly sent a §24 notice to the mortgagee but did not send it to the owner as required by §24. No certified mailing green cards, envelopes, or certified numbers were introduced into evidence, and there was no testimony that the owner had received §24 notice. The court found that "CCs" to the owner at the end of the §24 notice to the mortgagee failed to establish that §24 notice was properly given to the owner. After trial, the court found that the contractor failed to present evidence establishing that notice was provided to the owner pursuant to §24 of the Act, and entered judgment in favor of the owner, which was affirmed on appeal.

D. [10.37] Section 24 — Service of Process Including Claim for Lien

Service of process that included a subcontractor's claim for mechanics lien was held to be sufficient and satisfy §24 of the Mechanics Lien Act, 770 ILCS 60/24, in *Matteo Construction Co. v. Teckler Blvd Development Site, LLC,* 2020 IL App (2d) 190766, 177 N.E.3d 747, 448 Ill.Dec.

691. The court found that §24 does not mandate a specific form of notice and that the subcontractor's claim for mechanics lien — which included all the information required by §24 and was served by certified mail as required by §24 — was sufficient. The court held that the claim for lien satisfied §24 statutory requirements.

E. [10.38] Section 28 — Timing of Subcontractor's Lien Recording or Enforcement

Section 28 of the Mechanics Lien Act is specific to subcontractors and provides:

> **If any money due to the laborers, materialmen, or sub-contractors be not paid within 10 days after his notice is served as provided in sections 5, 24, and 25, then such person may file a claim for lien or file a complaint and enforce such lien within the same limits as to time and in such other manner as hereinbefore provided for the contractor in section 7 and sections 9 to 20 inclusive, of this Act, or he may sue the owner and contractor jointly for the amount due in the circuit court, and a personal judgment may be rendered therein, as in other cases.** 770 ILCS 60/28.

Section 28 does not impose a ten-day waiting period on subcontractors, following notice prior to recording a mechanics lien. That novel, "creative defense" prevailed on a trial court that was reversed on appeal in *Matteo Construction Co. v. Teckler Blvd Development Site, LLC,* 2020 IL App (2d) 190766, 177 N.E.3d 747, 448 Ill.Dec. 691. On appeal, the court held that the plain language of §28, specifically its use of the term "or", is disjunctive, and permits a subcontractor to either file a claim for lien, or to file a complaint to enforce its lien ten days after notice, which the plaintiff in *Matteo* did.

VII. [10.39] STATUTORY LIMITS ON LIABILITY OF THE OWNER — SECTIONS 21, 27, AND 30 OF THE MECHANICS LIEN ACT

When owners comply with the Mechanics Lien Act, §§21(d) and 27 of the Act, 770 ILCS 60/21(d) and 60/27, expressly limit the owners' liability for unknown subcontractors' liens to the amounts remaining due to the lien claimants' immediate contractor. *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, 992 N.E.2d 27, 372 Ill.Dec. 488.

Likewise, sub-subcontractor's potential recovery from the owner on a mechanics lien is generally limited to the amount that remains due to the lienholder's immediate contractor. *Doors Acquisition, LLC v. Rockford Structures Construction Co.,* 2013 IL App (2d) 120052, 39 N.E.3d 8, 395 Ill.Dec. 541; *Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 749 – 750, 297 Ill.Dec. 12 (1st Dist. 2005).

In *GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App (1st) 133624, ¶8, 38 N.E.3d 60, 395 Ill.Dec. 183, a case of first impression interpreting §30 of the Mechanic Lien Act, the First District Appellate Court applied the same principle and limitation on owners' liability:

> **"If there are several liens . . . upon the same premises, and the owner or any person having such a lien shall fear that there is not a sufficient amount coming to the**

> **contractor to pay all such liens" the owner may file a complaint for the court to determine "the amount due from the owner to the contractor, and the amount due to each of the persons having liens." 770 ILCS 60/30.**

The court in *GX Chicago* also held:

> **As illustrated by *Bricks* and *Doors,* where an owner has acted in good faith and in compliance with the Act, the balance is struck in favor of the owner so as not to hold the owner liable for amounts beyond what was contractually owed to the lien holder's immediate contractor. In accord with the reasoning of those decisions, we agree that section 30's phrase "the amount due from the owner to the contractor" refers to the amount owed to the claimant's *immediate* contractor, when the liens at issue are asserted by sub-subcontractors that lacked privity with either the owner or the owner's general contractor. [**Emphasis in original.**]** 2015 IL App (1st) 133624 at ¶58.

In order to limit liability from unknown mechanics liens, the owner must have acted in good faith and in compliance with applicable sections of the Mechanics Lien Act. As summarized by the Illinois Supreme Court in *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 835, 330 Ill.Dec. 808 (2009):

> **What is clear from our reading of the Act is that the legislature intended the following orderly method of conducting construction transactions to protect subcontractor claims: (1) the owner and general contractor enter into a contract for the construction work; (2) as the work is completed, the general contractor submits a section 5 sworn affidavit that must list all subcontractors and the amount due, to become due, or advanced; (3) when the section 5 sworn affidavit lists an amount due or to become due a subcontractor, section 24 requires the owner retain sufficient funds to pay the subcontractor; and (4) section 27 requires the owner to make subcontractor payments upon receiving notice of a subcontractor claim pursuant to a section 5 sworn statement.**

VIII. [10.40] 30-DAY NOTICE TO COMMENCE SUIT — SECTION 34 OF THE MECHANICS LIEN ACT

Section 34 of the Mechanics Lien Act provides:

> **§34. Notice to commence suit.**
>
> **(a) Upon written demand of the owner, lienor, a recorder under Section 3-5010.8 of the Counties Code, or any person interested in the real estate, or their agent or attorney, served on the person claiming the lien, or his agent or attorney, requiring suit to be commenced to enforce the lien or answer to be filed in a pending suit, suit shall be commenced or answer filed within 30 days thereafter, or the lien shall be forfeited. Such service may be by registered or certified mail, return receipt requested, or by personal service.**

(b) A written demand under this Section must contain the following language in at least 10 point bold face type: "Failure to respond to this notice within 30 days after receipt, as required by Section 34 of the Mechanics Lien Act, shall result in the forfeiture of the referenced lien." 770 ILCS 60/34.

Section 34 is jurisdictional and has been construed as in the nature of a statute of limitations intended to force the issue as to the validity of mechanics lien claims recorded. *Pickus Construction & Equipment Co. v. Bank of Waukegan,* 158 Ill.App.3d 141, 511 N.E.2d 228, 110 Ill.Dec. 393 (2d Dist. 1987).

No particular form of notice is required under §34. In *Vernon Hills III Limited Partnership v. St. Paul Fire & Marine Insurance Co.,* 287 Ill.App.3d 303, 678 N.E.2d 374, 376, 222 Ill.Dec. 762 (2d Dist. 1997), an owner responded to a claim for lien with a certified letter that included a demand that the contractor "either immediately release [its] lien or bring suit to enforce it." The contractor failed to file suit within 30 days. Although the letter made no reference to §34 or to the requirement that a lien enforcement suit be commenced within 30 days, the letter was determined to be sufficient under the plain language of §34, and the court refused to impose additional notice requirements. The court held that the 30-day period was jurisdictional and was not subject to waiver or estoppel. Summary judgment for the owner was affirmed.

A. [10.41] Service of §34 Demand

Section 34(a) of the Mechanics Lien Act, 770 ILCS 60/34(a), permits service of a 30-day demand either by registered or certified mail, return receipt requested, or by personal service. Personal service was satisfied when a §34 demand was attached as an exhibit to a declaratory judgment complaint filed by an owner, to have a mechanics lien declared invalid and unenforceable. In *Hayden v. Adams,* 2020 IL App (1st) 191411-U, an owner discovered that a mechanics lien had been recorded without prior notice. The owner mailed a 30-day demand pursuant to §34 by certified mail; however, that mailing was not received. The owner attached a copy of the §34 demand as an exhibit to his declaratory judgment complaint, which was personally served on the contractor by special process server. The contractor did not respond to the owner's lawsuit until four months after service. The court found the notice provision in §34 to be jurisdictional, and that the contractor's failure to comply with the time limitations in §34 resulted in loss of the mechanics lien. Summary judgment was entered in favor of the owner, which was affirmed on appeal.

B. [10.42] Failure To Join Mortgagee as Defendant Within 30 Days After Demand

Section 11(b) of the Mechanics Lien Act, 770 ILCS 60/11(b), provides that all persons who have asserted or may assert liens against the premises are necessary parties to an action to enforce a mechanics lien. Accordingly, all lienholders are necessary parties. In *CB Construction & Design, LLC v. Atlas Brookview, LLC,* 2021 IL App (1st) 200924, 196 N.E.3d 115, 458 Ill.Dec. 1, an owner served a §34 demand to file suit on July 15, 2019, and the mechanics lien claimant filed a complaint on August 12, 2019. The complaint named the owner and others as defendants but did not name the mortgagee or the assignee of leases and rents as codefendants. The owner filed motions to dismiss pursuant to §§2-615 and 2-619 of the Code of Civil Procedure, 735 ILCS 5/2-615, 5/2-619,

based on the failure to join necessary parties and on other grounds, which were eventually granted. The lien claimant contended that, under §9 of the Mechanics Lien Act, 770 ILCS 60/9, it had two years after the completion date to commence suit. The appellate court recognized that §34 of the Mechanics Lien Act, 770 ILCS 60/34, permits the property owner to force the issue of the lien claim's validity by compelling the claimant to enforce the lien within 30 days of receiving the demand or forfeit its right to the lien. Citing *Garbe Iron Works, Inc. v. Priester,* 99 Ill.2d 84, 457 N.E.2d 422, 75 Ill.Dec. 428 (1983), the court held that the lien claimant's failure to join necessary parties within 30 days after the §34 demand resulted in forfeiture of its $1.4 million mechanics lien.

C. [10.43] Failure To File Suit Within 30 Days Pursuant to Owner's Demand

There is no leeway in the 30-day period prescribed in §34 of the Mechanics Lien Act, 770 ILCS 60/34. In *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC,* 356 Ill.App.3d 806, 826 N.E.2d 1051, 292 Ill.Dec. 615 (1st Dist. 2005), a mechanics lien foreclosure was dismissed because it was not filed within 30 days after receipt of the owner's written demand. Suit was filed 3 days too late. The owner served three copies of its §34 demand by certified mail addressed to the contractor's business office in Wisconsin, to its president and registered agent in Illinois, and to its attorney in Illinois. The three certified mail deliveries were effected on three different days. The contractor contended that the "30-day filing period should have begun each time one of its representatives received a copy of the notice because the notice as written gave [the contractor] 30 days from service of 'this notice' to file a complaint." 826 N.E.2d at 1053. The court construed §34 literally and held that notice was effective on the first certified mail delivery date:

> **In the instant case, defendant sent copies of the notice to each of the parties upon whom section 34 notices may be served. Each of these recipients was listed as an addressee on the face of the notice. Plaintiff first accepted service on March 12, 2004 and its agent and attorney accepted service within the next 6 days. The 30-day filing period began on March 12 since that service upon plaintiff was proper. Furthermore, as the *Matthews* court observed, each of the recipients had effective notice of the demand and the effective date of service well in advance of the filing deadline on April 12, 2004.** 826 N.E.2d at 1056.

The court rejected the contractor's claim that the owner created confusion as to the commencement of the 30-day period by the three mailings:

> **[**W**]e find that defendants were not responsible for educating plaintiff about the operation and effect of the Act and that plaintiff's confusion cannot excuse its failure to file a timely complaint when it was properly notified. . . .**
>
> *** * ***
>
> **. . . [**B**]ecause the section 34 filing deadline is jurisdictional, it must be complied with before plaintiff has a right to a remedy under the Act. [**Citation omitted.**]** *Id.*

However, an owner's §34 demand that predated the recording of a claim for lien was held to be premature and ineffective in *Krzyminski v. Dziadkowiec,* 296 Ill.App.3d 710, 695 N.E.2d 1275, 231 Ill.Dec. 156 (1st Dist.), *appeal denied,* 179 Ill.2d 586 (1998).

Finally, an owner's §34 demand is inoperative while a bankruptcy stay is in effect, and a subcontractor is not required to petition the bankruptcy court for relief from the automatic stay. *Chicago Whirly, Inc. v. Amp Rite Electric Co.,* 304 Ill.App.3d 641, 710 N.E.2d 45, 237 Ill.Dec. 622 (1st Dist. 1999).

D. [10.44] Failure To Answer Mortgage Foreclosure Complaint Within 30 Days

A mechanics lien claimant's failure to answer a mortgage foreclosure summons within 30 days resulted in forfeiture of its liens in *Wheaton Bank & Trust Co. v. Star Tech Glass, Inc.,* 2016 IL App (1st) 140797-U. The lien claimant filed its answer to the foreclosure complaint and a counterclaim to foreclose the mechanics lien some eight months after service of process. The bank filed a motion to dismiss the mechanics lien claims, based on the lien claimant's failure to answer within 30 days as required by §34 of the Mechanics Lien Act, 770 ILCS 60/34. The trial court granted the motion to dismiss, which was affirmed on appeal.

The court recognized that §34 is jurisdictional:

> **Illinois courts have consistently held that compliance with the notice requirement of section 34 of the Act is jurisdictional and not subject to waiver or estoppel. *Vernon Hills III Limited Partnership v. St. Paul Fire & Marine Insurance Co.,* 287 Ill.App.3d 303, 308 – 09 (1997); *Gateway Concrete Forming Systems, Inc.,* 356 Ill.App.3d at 809; *Pickus Construction & Equipment Co.,* 158 Ill.App.3d 141, 144, 146 (1987) (section 34 is jurisdictional, and the failure to file suit upon written notice pursuant to section 34 of the Act operates to forfeit and remove the mechanic's lien).** 2016 IL App (1st) 140797-U at ¶17.

The court followed the reasoning in *Charter Bank & Trust of Illinois v. Edward Hines Lumber Co.,* 233 Ill.App.3d 574, 599 N.E.2d 458, 461, 174 Ill.Dec. 674 (2d Dist. 1992):

> **The appellate court held that the contractor had complied with section 34 by filing his answer within 30 days of its receipt of the summons, and that nothing else was required to preserve its lien claim. . . . The court went on to hold that compliance with section 34 of the Act did not require the contractor to file his counterclaim and that subsequently seeking leave of court to file his counterclaim was proper and timely. [**Citations omitted.**]** 2016 IL App (1st) 140797-U at ¶19.

Accord Faith Technologies, Inc. v. Arlington Downs Residential, LLC, Case No. 15 C 7903, 2016 WL 757998 (N.D.Ill. Feb. 26, 2016), in which a federal court dismissed a mechanics lien counterclaim that was filed some 50 days after a §34 demand from the owner. The court held the time limits imposed by the Mechanics Lien Act, including §34, were substantive requirements and, as such, were not subject to extension under federal rules governing pleadings.

E. [10.45] Conclusion

Section 34 of the Mechanics Lien Act, 770 ILCS 60/34, is an effective tool for flushing out defective mechanics liens, which could otherwise cloud title to property throughout the two-year limitations period under §9 of the Act, 770 ILCS 60/9. However, a §34 demand is a double-edged

sword. Mechanics lien litigation typically includes additional counts for breach of contract and unjust enrichment. Even if an owner prevails in having a defective mechanics lien held void and set aside, there is a risk that the contractor may prevail on the common-law counts and obtain a money judgment against the owner. And a recorded judgment also becomes a statutory lien against real property.

IX. [10.46] BONDING OVER MECHANICS LIENS

Effective January 1, 2016, an amendment to the Mechanics Lien Act allows parties with an interest in real estate to substitute an eligible surety bond to secure a mechanics lien claim. Section 38.1 provides, in part:

> **(c) An applicant may file a petition to substitute a bond for the property subject to a lien claim with the clerk of the circuit court of the county in which the property against which the lien claim is asserted is located, or if there is a pending action to enforce the lien claim, an applicant may at any time prior to 5 months after the filing of a complaint or counterclaim by a mechanics lien claimant to enforce its mechanics lien claim. . . .**
>
> *** * ***
>
> **(e) If no objection is filed to the substitution of the proposed eligible surety bond for the property securing the lien claim within 30 days after all persons entitled to notice under subsection (d) of this Section have either received the notice or have been served with the notice, or have waived any objections to the substitution, if the petition complies with the requirements of this Section, the court, on ex parte motion of the petitioner, shall, if the court finds that the proposed bond is in fact an eligible surety bond, enter an order:**
>
> > **(1) substituting the eligible surety bond for the property securing the lien claim; and**
> >
> > **(2) substituting the lien claimant's right to recover on the bond for the lien claimant's causes of action that could be asserted by the lien claimant under Section 9, 27, or 28 of this Act.** 770 ILCS 60/38.1(c), 60/38.1(e).

The statute specifies requirements for petitions to substitute bond, and for service thereof. However, §38.1 does not expand available defenses to mechanics liens:

> **The principal and surety of the bond may assert only those defenses that could have been asserted against the lien claim by the principal of the eligible surety bond or the owner of record of the real estate at the time the contractor's contract under which the lien claimant is claiming was let as if no surety bond had been issued.** 770 ILCS. 60/38.1(j).

Section 38.1 is a potentially useful workaround for mechanics liens and can facilitate real estate transactions involving encumbered property. However, an "eligible surety bond" must be for 175 percent of the amount of the lien claim, and a surety could conceivably require a financial deposit for that amount as a condition to issuing a mechanics lien bond. Thus, the utility of §38.1 may be limited to "deep pocket" owners.

X. [10.47] RECORDED RELEASE OF MECHANICS LIEN — SECTION 35 OF THE MECHANICS LIEN ACT

Section 35(b) of the Mechanics Lien Act provides that a release of mechanics lien, upon recording, bars with finality all actions on the lien:

> **(b) Such a satisfaction or release of lien may be filed with the recorder of deeds in whose office the claim for lien had been filed and when so filed shall forever thereafter discharge and release the claim for lien and shall bar all actions brought or to be brought thereupon.** 770 ILCS 60/35.

When a mechanics lien claim is settled and the lien is released of record, §35(b) bars refiling of the lien, even if the consideration for the settlement is not paid:

> **The dispositive fact in this case is that CMC voluntarily recorded a release in exchange for a partial payment, which as we held in *Rochelle* [***Vault Co. v. First National Bank of DeKalb,*** 5 Ill.App.3d 354, 283 N.E.2d 336 (2d Dist. 1972),**] was sufficient to bar any subsequent claim on the lien pursuant to section 35.** *Oxford 127 Huron Hotel Venture, LLC v. CMC Organization, LLC,* 2014 IL App (1st) 130265, ¶12 (Rule 23).

XI. [10.48] SUMMARY CONCLUSION — THE MECHANICS OF A MECHANICS LIEN CLAIM

Since a mechanics lien is a purely statutory remedy unknown at common law, such a claim for lien is strictly construed. A claim for lien that on its face does not comport with statutory requirements is not enforceable. Every claim for mechanics lien should be examined and closely scrutinized for statutory compliance.

The following questions provide an initial analysis to determine the validity of a claim for mechanics lien:

a. Does the claim accurately identify the contract and the parties to the contract?

b. Is the legal description of the property accurate?

c. Is the material, service, or work claimed lienable under the Mechanics Lien Act?

d. Is the completion date within two years of the recording date (or within four months if the rights of a mortgagee or purchaser are being affected)?

e. Is the claim for lien notarized?

f. Is the claim for lien overstated?

g. Is the financial claim consistent with money provisions in the contract?

h. Have all payments been duly applied and credited?

i. Were multiple claims for lien filed, and, if so, does the aggregate total of all claims exceed the balance due under the contract?

j. Is the claim for lien inconsistent with provisions in the contract?

The following additional questions provide an initial analysis to determine the validity of a claim for lien of the subcontractor or material supplier:

a. Was notice under §24(a) of the Mechanics Lien Act, 770 ILCS 60/24(a), served on the owner, agent, architect, or construction superintendent and on the lender within 90 days after the completion date (or is such notice satisfied by the contractor's sworn statement to the owner)?

b. If the premises is an owner-occupied, single-family residence, was notice served on the owner pursuant to §21 of the Mechanics Lien Act, 770 ILCS 60/21?

c. If any payments were made by the owner to the contractor prior to receipt of the subcontractor's §24 notice (and, if applicable, the §21 notice), were such payments supported by the contractor's sworn statements?

If a claim for lien does not pass muster under the foregoing analyses, it will probably not survive a dispositive motion in a lien enforcement suit, and counsel for the owner may advise serving notice under §34 of the Mechanics Lien Act, 770 ILCS 60/34, requiring the claimant to assert the claim within 30 days.

11 Common-Law and Consumer Statutory Defenses

JAMES T. ROHLFING
W. MATTHEW BRYANT
Saul Ewing LLP
Chicago

I. [11.1] A CONTRACT BETWEEN OWNER AND CONTRACTOR

A mechanics lien must be supported by a contract between an owner of real estate, or one knowingly authorized by an owner, and a person contracting to improve the real estate. 770 ILCS 60/1. It has been held that the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* does not distinguish between oral and written contracts and that the rights to a lien under either are the same. *Apollo Heating & Air Conditioning Corp. v. American National Bank & Trust Co.,* 135 Ill.App.3d 976, 482 N.E.2d 690, 692 – 693, 90 Ill.Dec. 711 (1st Dist. 1985). The contract may be express or implied. 770 ILCS 60/1.

Whether work was done under one contract or several separate contracts governs when steps must be taken to perfect a lien against the owner and achieve priority against third parties. In *Malicki v. Holiday Hills, Inc.,* 30 Ill.App.2d 459, 174 N.E.2d 915 (2d Dist. 1961), the court examined whether the plaintiff had (a) 1 contract to improve 48 lots and thus had brought suit timely as to all lots or (b) 48 contracts and thus had brought suit timely as to only 1 lot. The plaintiff contractor claimed to have entered into an oral agreement with the developer of a large residential subdivision for which the plaintiff was to supervise the construction of custom-built homes in the subdivision as each lot was sold to new owners. In all, the plaintiff asserted liens on 48 homes in the subdivision. He allegedly commenced work February 1, 1956; completed work August 1, 1957, on all lots except one (which was finished September 1, 1957); and filed suit August 12, 1959. The plaintiff contended he was entitled to a lien on each home for which he performed work as long as suit was commenced within two years of the completion of all construction under the alleged oral agreement. He claimed his contract with the subdivision developer was a continuing contract, which gave him the right to claim a lien against any purchaser of a custom-built home in the subdivision. He argued that his alleged oral contract resembled a contract for specific improvements and for whatever extras the owner and contractor might subsequently agree to add to the original contract.

Malicki recognized that §1 of the Act does refer to situations in which a single owner enters into a single contract for the erection or improvement of more than one building on one or more lots. However, it characterized the alleged agreement in *Malicki* as 48 contracts on 48 lots with 48 owners. If the plaintiff's contentions were to be adopted, the time for filing suit to foreclose the lien as against the owners would be two years after the completion of the last building on the last lot. The court in *Malicki* stressed that each of the homes in the subdivision was built under a separate and distinct contract between the developer and homeowner and, with one exception, all were completed more than two years before the filing of the suit to enforce a lien. The *Malicki* court quoted *E.R. Darlington Lumber Co. v. Harris,* 107 Mo.App. 148, 80 S.W. 688, 690 (1904), for the holding that a "completed transaction for which a lien will lie will not be seized by the law as a means to resuscitate a defunct lien pertaining to an entirely distinct transaction." 174 N.E.2d at 917. *See also Ehlers Construction, Inc. v. Timbers of Shorewood, L.P.,* No. 03 C 6966, 2004 WL 816748, *2 (N.D.Ill. Mar. 11, 2004) (citing *Malicki* and holding one lien based on work performed under multiple contracts on separate parcels of land would not be upheld).

Malicki also relied on the reasoning in *Schmidt v. Anderson,* 253 Ill. 29, 97 N.E. 291 (1911). In *Schmidt,* the Illinois Supreme Court rejected the lien claimant's contention that work on four houses erected on four separate lots for one owner entitled him to file his claim for lien as to all

houses within four months of the time of the last labor or material furnished on any one of the houses. It was held that the reasoning of the *Schmidt* court was applicable to *Malicki.* The *Malicki* court concluded, on this issue:

> **[**H**]ere, we do not believe the legislature intended to permit all of the houses in Holiday Hills Subdivision to be included in one suit to enforce a lien unless the suit was filed within two years after the last labor was performed *on each of the homes.* [**Emphasis added.**]** 174 N.E.2d at 918.

A different result was reached in *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990). A plumbing contractor relied on an oral contract based on time and material antedating the filing of a mortgage to encompass plumbing work performed on multiple occasions for the same general project. The work was not fully described in the original oral contract, and some work was performed after the filing of the mortgage, but the court held the plumber's mechanics lien had priority over the mortgage. The appellate court stressed that the only time labor and material prices were discussed was when the initial oral agreement was made and that all work done thereafter was on a no-bid, time-and-material basis. The court further held it was not fatal to the lien that neither a specific amount of work nor the length of the contractor's employment at the project was expressly defined by the terms of the contract. 549 N.E.2d at 936. *Lyons Federal* is readily distinguishable from *Malicki*. In *Malicki,* each job was a separate contract for a custom-built house, while in *Lyons Federal,* there was one oral time-and-material contract for multiple trips by a plumber for the same general project.

The labor or materials furnished by a contractor or subcontractor must be intended for a specifically identifiable project to confer lien rights. In *Midwest Generation EME LLC v. Estes Group, Inc.* (*In re Estes Group, Inc.),* 299 B.R. 502, 507 (Bankr. N.D.Ill. 2003), a subcontractor that had entered into an agreement to perform a Chapter 11 debtor's obligations under a consulting services agreement asserted a mechanics lien against funds owed to the debtor on the project. The Chapter 11 debtor defended on the ground that the contract was not "project-specific." *Id.* The court held that "the Illinois Mechanics' Lien Act does not mandate that the contractor's written agreement with the owner expressly detail job locations or services." *Id.* However, to support a lien claim, a subcontractor must show its work was directed to a specific project and it undertook to perform a portion of the prime contractor's contractual obligation to perform work at a specific location. The *Estes* court discussed the holding in *Onsite Engineering & Management, Inc. v. Illinois Tool Works, Inc.,* 319 Ill.App.3d 362, 744 N.E.2d 928, 253 Ill.Dec. 195 (1st Dist. 2001), which invalidated a mechanics lien on behalf of a temporary labor services subcontractor because the laborers it provided to its customer were not "project specific"; they could be used in whatever project the customer chose. *Estes* quotes *Onsite,* 744 N.E.2d at 932, for the proposition that a "subcontractor, in general, is one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance." 299 B.R. at 507. Thus, though the specific parcel of land need not be identified in a subcontract to support a lien claim, for the labor or materials provided under a subcontract to support a mechanics lien, they must be intended for a specific project.

II. [11.2] OWNER — A PERSON OR ENTITY WITH ANY LEGAL OR BENEFICIAL TITLE

Section 1 of the Mechanics Lien Act defines a "contractor" as one who contracts with the owner of a lot or tract of land to improve the lot or tract. 770 ILCS 60/1(a). The owner, for purposes of the Act, is not limited to the one vested with legal title to the lot or tract of land. *Edward Hines Lumber Co. v. Dell Corp.,* 49 Ill.App.3d 873, 364 N.E.2d 368, 7 Ill.Dec. 207 (1st Dist. 1977). Illinois has long followed the rule that when land is held in trust and the trustee has the authority to build on and improve the land, then, for purposes of the Mechanics Lien Act, the trustee is the owner. *Id.; Taylor v. Gilsdorff,* 74 Ill. 354 (1874); *Springer v. Kroeschell,* 161 Ill. 358, 43 N.E. 1084 (1896). Illinois courts have repeatedly and consistently held that the beneficiary of a land trust is an owner under the Mechanics Lien Act. *See Edward Hines Lumber, supra. See also Dunlop v. McAtee,* 31 Ill.App.3d 56, 333 N.E.2d 76 (2d Dist. 1975); *Hill Behan Lumber Co. v. American National Bank & Trust Company of Waukegan,* 101 Ill.App.3d 268, 427 N.E.2d 1325, 56 Ill.Dec. 779 (2d Dist. 1981); *Dual Temp Installations, Inc. v. Chicago Title & Trust Co.,* 41 Ill.App.3d 415, 354 N.E.2d 131 (1st Dist. 1976).

III. [11.3] ONLY THE OWNER'S INTEREST IS SUBJECT TO LIEN

A party is an owner only to the extent of his or her interest in the property, or to the extent another owner authorizes or knowingly permits that first party to contract. See §11.7 below. It is that interest only that is subject to the lien. A tenant for life or years may contract to create a lien, but only to the extent of his or her interest in the premises. This principle stems from §1 of the Mechanics Lien Act, which provides in part that the lien shall extend "to an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have in the lot or tract of land at the time of making such contract." 770 ILCS 60/1(a). Accordingly, if a contractor contracts to improve property with a person who owns an estate in land less than a fee, and if (a) that person is not the agent for the owner of the fee, (b) that person is not "knowingly permitted" by the owner to contract for the improvements, or (c) the owner did not ratify the contract after it was made, then the contractor's lien is on the lesser interest of the party with whom it dealt directly. *Id.; Williams v. Vanderbilt,* 145 Ill. 238, 34 N.E. 476 (1893); *F.K. Ketler Co. v. County Fair Grounds Corp.,* 301 Ill.App. 117, 21 N.E.2d 779 (1st Dist. 1939). *See also Robinson v. Robinson,* 100 Ill.App.3d 437, 429 N.E.2d 183, 188, 57 Ill.Dec. 532 (2d Dist. 1981) (improvements upon real estate without consent of owner of fee, by one having no title or interest, become part of realty and vest in owner of fee).

A mere easement, or right to use property of another, is insufficient to subject the benefited property to a mechanics lien for construction work on the easement parcel. In *Matanky Realty Group, Inc. v. Katris,* 367 Ill.App.3d 839, 856 N.E.2d 579, 305 Ill.Dec. 774 (1st Dist. 2006), the court held that a mechanics lien that had been recorded against the owners of a restaurant parcel adjacent to a shopping center could not be sustained because the restaurant owners did not own the improved property. The restaurant parcel did not have its own direct street access but had the right to use the shopping center driveway for street access pursuant to a recorded easement agreement, which also obligated the owners of the restaurant parcel to pay 5.8 percent of the cost of maintaining the shopping center parking lot. 856 N.E.2d at 581. The lien claimant, who had been hired by the

shopping center owner to "provide services to maintain, renovate, repair, improve and manage" the parking lot, recorded a lien against the restaurant parcel for its percentage share of work done on the parking lot and filed suit to foreclose the lien. 856 N.E.2d at 581 – 582. The court dismissed the foreclosure suit, citing §1 of the Act, and held that the defendants were not owners of the shopping center parking lot and that no lien could be imposed on their property by virtue of the easement, notwithstanding its direct proximity to the improvements. Consequently, the mechanics lien failed as a matter of law. *See also AUI Construction Group, LLC v. Vaessen,* 2016 IL App (2d) 160009, ¶51, 67 N.E.3d 500, 409 Ill.Dec. 288 ("[A]lthough leases may be subject to mechanic's liens . . . easements clearly are not.").

IV. [11.4] ILLINOIS HOMESTEAD EXEMPTION

The Illinois homestead exemption is neither a defense nor a setoff to a mechanics lien foreclosure. In *Richardson v. Bunch (In re Bunch),* No. 04-70142, 2005 Bankr. LEXIS 154 (Bankr. C.D.Ill. Feb. 7, 2005), citing §3 of the Mechanics Lien Act, 770 ILCS 60/3, the court found that a mechanics lien had priority over the Illinois statutory homestead exemption of an owner. *See also In re Cramer,* 393 B.R. 611, 614 (Bankr. N.D.Ill. 2008) ("[U]nder the Illinois Mechanics Lien Act a debtor's homestead exemption cannot defeat a perfected mechanics lien.").

V. [11.5] "OWNER" AND "OWNER OF RECORD"

The "owner" at the time of entering into the contract with the general contractor is not necessarily the "owner of record" on whom notice must be served for perfection of a subcontractor's lien. It is the existing owner at the time the lien claim is filed and at the time notice must be given to parties that would be directly affected by an encumbrance on the property and would need an opportunity to protect their property interests. At that point, the prior owner or the original owner who contracted with the general contractor may have no interest whatsoever. *Edward Electric Co. v. Automation, Inc.,* 164 Ill.App.3d 547, 518 N.E.2d 172, 115 Ill.Dec. 647 (1st Dist. 1987).

VI. [11.6] CONTRACTOR OR JOINT VENTURER

Every agreement between an owner and a contractor for the improvement of property, however, does not entitle the contractor to a mechanics lien. For example, if the contractor obtains an interest in future profits from the development of the real estate, it may be characterized as a joint venturer with the owners. In such capacity, the contractor is not entitled to a mechanics lien. *Fitzgerald v. Van Buskirk,* 16 Ill.App.3d 348, 306 N.E.2d 76 (2d Dist. 1974); *Liddell v. Smith,* 65 Ill.App.2d 295, 213 N.E.2d 599 (5th Dist. 1965) (plaintiff denied lien because his work was to be his capital contribution in connection with acquisition of land); *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990) (plumber was contractor and not subcontractor when person with whom it entered into contract was both contractor and one of several partners that owned improved real estate); *Malesa v. Royal Harbour Management Corp.,* 187 Ill.App.3d 655, 543 N.E.2d 591, 135 Ill.Dec. 208 (2d Dist. 1989) (construction supervisor was contractor and not subcontractor).

A construction manager is a "contractor" as defined in §1 of the Mechanics Lien Act, 770 ILCS 60/1. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008). P.A. 94-627 (eff. Jan. 1, 2006) amended §1 to expand the definition of the term "contractor" to include any person employed "to manage a structure under construction." 770 ILCS 60/1(a). However, because the term "construction manager" is used to include varying responsibilities under some construction contracts, care must be taken not to confuse the meaning of the 2006 amendment to the Act.

Though an owner or coowner of property may not claim a lien against his or her own property (*Bonhiver v. State Bank of Clearing,* 29 Ill.App.3d 794, 331 N.E.2d 390, 398 (1st Dist. 1975)), a limited liability company (LLC) is a legal entity distinct from its members. Therefore, if the contractor is a member of an LLC that owns the property, the contractor is entitled to assert a mechanics lien for its work if it is not paid. *Peabody-Waterside Development, LLC v. Islands of Waterside, LLC,* 2013 IL App (5th) 120490, 995 N.E.2d 1021, 374 Ill.Dec. 524. Because the contractor in *Peabody-Waterside* was not a joint owner of the property and performed the work as required under its contract with the property owner, it was entitled to enforce its lien claim.

VII. [11.7] IMPROVEMENTS AUTHORIZED OR KNOWINGLY PERMITTED

Under the Mechanics Lien Act, a lien arises not only from the contractor's contract with the owner, but also pursuant to a contract with one whom the owner has authorized or "knowingly permitted" to contract for the improvement of land. 770 ILCS 60/1(a). The owner is assumed to have knowingly permitted the improvements when it knew the improvements were underway and failed to protest the work or, upon completion, accepted the benefits of the improvements. *Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131 (5th Dist. 1973) (owner held to have knowingly permitted tenant to contract for improvements). In one case, the owner's presence at the property during the time of construction was considered sufficient notice to conclude that the owner knowingly permitted the repairs. *Loeff v. Meyer,* 209 Ill.App. 382 (1st Dist. 1918). In *Young v. Bergner,* 243 Ill.App. 473 (4th Dist. 1927), the owners were charged with constructive notice of the construction work because they lived within 200 yards of the work.

The term "knowingly permitted" is broadly construed. An owner is deemed to have "knowingly permitted" improvements to property even if he or she did not learn of them until after they began (*Construx of Illinois, Inc. v. Kaiserman,* 345 Ill.App.3d 847, 800 N.E.2d 1267, 1277, 279 Ill.Dec. 684 (4th Dist. 2003)) or if the owner's agent had knowledge of the work, though the agent's scope of authority would not have been broad enough to enter into a contract for improvements (*Mutual Construction Co. v. Baker,* 237 Ill.App. 596 (1st Dist. 1925); *Martinez v. Knochel,* 123 Ill.App.3d 555, 462 N.E.2d 1281, 78 Ill.Dec. 927 (4th Dist. 1984)). Of course, there are limits to what is "knowingly permitted." In *Fettes, Love & Sieben, Inc. v. Simon,* 46 Ill.App.2d 232, 196 N.E.2d 700 (1st Dist. 1964), a plumber sought to foreclose a mechanics lien against an owner and a tenant. While the work was progressing, the tenant had advised the owner's husband of the progress of the work when he stopped by to pick up a rent check. The owner claimed she did not knowingly permit the contract because her husband was not her agent for purposes of the Mechanics Lien Act. The court agreed and found that the owner's husband was authorized only to collect the rent. Therefore, his knowledge of the work could not be imputed to her.

A mechanics lien may also fail for lack of an agency relationship with the owner. In *Thomas Hake Enterprises, Inc. v. Betke,* 301 Ill.App.3d 176, 703 N.E.2d 114, 234 Ill.Dec. 502 (2d Dist. 1998), a contractor (Betke) acquired an interest in property and began construction before he ran out of money, suspended construction, and then sold the property to a third party (Charlotte), who titled it in her son's name (Jason). Jason took no part in the construction and denied any knowledge thereof. Betke expected to repurchase the property and resumed construction, and Charlotte provided additional funds to complete the project. Several subcontractors filed liens that were dismissed by directed finding. On appeal, the court noted that there was no contract between Betke and Charlotte to hire subcontractors, and Betke testified that, in hiring subcontractors, he acted as his own contractor. Based on a limited record, the court held that Charlotte and Jason were not bound by any subcontracts because Betke was not their agent and did not have authority to enter into agreements on their behalf. Thus, there is no presumption that a party hiring contractors has authority to bind the owner or that an owner has knowingly permitted construction to occur. Unless either of those elements is admitted or proven, the mechanics lien will fail.

A. [11.8] Husbands and Wives

Section 3 of the Mechanics Lien Act provides that a contractor performing work or property owned by a married couple may assert a lien even though the contract is with only one of them. 770 ILCS 60/3. However, if the property is owned solely by one of them, there is no such presumption. An owner is presumed to have "knowingly permitted" a contract for improvements if he or she knew of the contract, failed to protest it, or accepted the benefits of the improvements. *Fettes, Love & Sieben, Inc. v. Simon,* 46 Ill.App.2d 232, 196 N.E.2d 700 (1st Dist. 1964). Proof of the existence of a marital relationship does not establish a husband's agency for his wife. In an action against the wife to hold her responsible for the act or contract of her husband, the plaintiff has the burden of showing the agency and authority of the husband or a ratification by the wife. *Id.* (wife held not to have knowingly permitted alterations on her premises because there was no evidence that she knew work was being undertaken nor did she acquiesce in accepting alleged benefits).

B. [11.9] Vendors and Vendees

If property is sold and the vendor does not expressly authorize the vendee to make improvements, a mechanics lien may attach only to whatever title the purchaser has. However, when the contract of sale unquestionably contemplated that the vendee would commence construction of improvements, it was held that the only reasonable and fair construction to be placed on the contract was that the purchaser was authorized and empowered by the owner to enter into contracts with builders to furnish material and erect a structure. Accordingly, the purchasers were held to be authorized to improve the property, and the builder was entitled to a mechanics lien. *Henderson v. Connolly,* 123 Ill. 98, 14 N.E. 1 (1887). *See also Edward Hines Lumber Co. v. Great Lakes Chemical Works,* 237 Ill.App. 246, 252 (2d Dist. 1925).

Application of the Mechanics Lien Act to an installment land sale contract was considered in *Construx of Illinois, Inc. v. Kaiserman,* 345 Ill.App.3d 847, 800 N.E.2d 1267, 279 Ill.Dec. 684 (4th Dist. 2003). A contract purchaser contracted for the replacement of a staircase and deck. The lien claimant alleged the contract seller knowingly permitted the work to be performed because the

contract seller was aware of the construction. Invoking the doctrine of equitable conversion, the owner-contract seller asserted that her position was that of a lienholder whose liability under §16 of the Act is limited to enhancement in the value of the property resulting from the improvement, and not the full contract price. The court rejected the lienholder's argument, finding that the doctrine of equitable conversion is "limited to the extent necessary to accomplish equity" (quoting *City of Chicago v. Salinger,* 384 Ill. 515, 52 N.E.2d 184, 187 (1943)) and it "does not apply if it would circumvent or avoid established principles of law and public policy." 800 N.E.2d at 1275 – 1276. The validity of the lien boiled down to whether the owner knowingly permitted the contract purchaser to proceed with the construction. The court upheld the lien because there was evidence to support the finding that the owner knowingly permitted the work and did not inform the contractor that she was not authorizing or permitting the construction to take place.

The doctrine of equitable conversion does not transform a real estate purchaser into an owner for the purpose of mechanics lien liability. In *Stafford-Smith, Inc. v. Intercontinental River East, LLC,* 378 Ill.App.3d 236, 881 N.E.2d 534, 317 Ill.Dec. 366 (1st Dist. 2007), a lien claimant sold appliances to a restaurant tenant of a building, who did not pay for them. The supplier recorded a mechanics lien within four months after completion; however, that lien was defective because it had an incorrect legal description and property index number (PIN). Five months later, the lien claimant filed an amended mechanics lien, which corrected the legal description and named the new owner of the property. The court applied the four-month rule in §7 of the Act and held that, because the supplier failed to record a proper mechanics lien within four months after the completion date, the new owner was not subject to the claim for mechanics lien. The supplier argued that the new owner "could have been a beneficial owner of the premises under the doctrine of equitable conversion." 881 N.E.2d at 540. The appellate court rejected the equitable conversion argument on three grounds: (1) there was no evidence in the record as to when the new owner contracted to purchase the building; (2) there was no precedent employing the doctrine of equitable conversion to impose a lien against a purchaser's interest in land as a result of a seller's failure to pay for improvements for which the seller contracted; and (3) applying equitable conversion would be contrary to the secondary purpose of the Mechanics Lien Act, which is to protect innocent parties from liens of which they may be unaware and have no opportunity to defend against.

C. [11.10] Lessors and Lessees

A lessor was held to have knowingly permitted improvements to real estate when the lease required the tenant to make substantial improvements to the property, even though the lease also required the tenant to place in escrow the money needed to pay for the improvements; other conditions were also breached by the tenant. The court held it was not the obligation of the contractor to inquire about particular conditions in the lease intended to protect the lessor when the lease was not recorded. *Armco Steel Corp. v. LaSalle National Bank,* 31 Ill.App.3d 695, 335 N.E.2d 93 (2d Dist. 1975). However, it has also been held that when a lease merely uses the word "repair," obligating a lessee to keep the "premises in good repair," which might include restoration after decay, injury, or partial destruction, that is not authorization to undertake alterations and additions. *Hacken v. Isenberg,* 288 Ill. 589, 124 N.E. 306, 309 (1919).

A lessee that provides labor and materials for the improvement of leased premises at the request of the lessor has a right to a lien. In a case of first impression, the court in *Leveyfilm, Inc. v.*

Cosmopolitan Bank & Trust, 274 Ill.App.3d 348, 653 N.E.2d 875, 878, 210 Ill.Dec. 680 (1st Dist. 1995), noted that §1 of the Mechanics Lien Act provides that "any person" who makes an improvement to land under a contract with the owner can claim a mechanics lien, and that would be just as true if a lessor authorized a lessee to perform work on the premises.

In *Matot v. Barnheisel,* 212 Ill.App. 489, 494 (1st Dist. 1918), a sublessee contracted for improvements to the property with a contractor who asserted a mechanics lien claim. After the lessee testified he "supposed they were working in there, but I didn't know," the court held he had sufficient knowledge of the fact that there was construction and the lien was enforceable. *See also Wanzer v. Smorgas-Brickan Developers, Inc.,* 130 Ill.App.2d 378, 264 N.E.2d 435 (2d Dist. 1970).

Loeff v. Meyer, 284 Ill. 114, 119 N.E. 908 (1918), held a lessor knowingly permitted a tenant to contract for improvements to property when the lease put it within the power of the tenant to make improvements. The court was not dissuaded from its holding by the landlord's argument that the lease required the tenant to give the landlord written notice when it undertook to improve the property. Further, a provision in the lease that the lessee shall pay for the improvements may be enforced by the lessor against the lessee, but it is not binding on the contractor who makes the improvements even if the contractor has notice of it.

A mechanics lien that attaches to only a leasehold estate has no greater rights in the property than does the lessee. *F.K. Ketler Co. v. County Fair Grounds Corp.,* 301 Ill.App. 117, 21 N.E.2d 779, 782 (1st Dist. 1939) (mechanics lien that attaches to leasehold estate is subject to all conditions of lease). For example, if one of the conditions of the lease was that in case of default in the payment of rent the landlord could declare the term ended and reenter the premises, then, upon the occurrence of those conditions, there would be a forfeiture of the leasehold, and the mechanics lien claimant's rights in the leasehold would also be forfeited. *Williams v. Vanderbilt,* 145 Ill. 238, 34 N.E. 476 (1893).

D. [11.11] Contractors and Subcontractors

Subcontractors may not be recharacterized as contractors on the theory that the general contractor was the owner's agent for the purpose of purchasing materials or obtaining the services of the subcontractor or that the owner "knowingly permitted" improvement of the property by the subcontractor. It has consistently been held that if the owner of real estate has let out the entire work to an original contractor, then the owner will not be deemed to have "knowingly permitted" or "authorized" a subcontractor of the original contractor to furnish services or materials, because the owners are entitled to assume that the subcontractor is doing the work and furnishing materials for the original contractor and not for the owner. *Philip S. Lindner & Co. v. Edwards,* 13 Ill.App.3d 365, 300 N.E.2d 283, 287 (3d Dist. 1973).

VIII. [11.12] LEGALITY OF CONTRACT

As the indispensable basis for a lien, §1 of the Mechanics Lien Act, 770 ILCS 60/1, requires a contract. To support a mechanics lien, the contract must be valid and enforceable. *Pascal P. Paddock, Inc. v. Glennon,* 32 Ill.2d 51, 203 N.E.2d 421 (1964); *Rittenhouse & Embree Co. v.*

Warren Const. Co., 264 Ill. 619, 106 N.E. 466 (1914). A contract that is void due to violation of Illinois law and public policy cannot support a mechanics lien. In *G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.,* 355 Ill.App.3d 428, 822 N.E.2d 905, 291 Ill.Dec. 30 (3d Dist. 2005), the court held that the contract of an unlicensed architect was void, and because the contract was void, the mechanics lien was not valid. Therefore, the claimant lacked the legal capacity to sue to foreclose the invalid mechanics lien for architectural services.

A. [11.13] Degrees of Culpability

A construction contract may be invalid, for example, because it provides for placing a structure in violation of governing zoning regulations or building a structure in violation of the governing building code. However, the relative magnitude of the owner's misconduct compared to the contractor's may render the contract enforceable against an owner under the doctrine of the balancing of degrees of culpability. This doctrine was discussed in *Evans v. Funk,* 151 Ill. 650, 38 N.E. 230, 233 (1894), in which the Supreme Court stated:

> **It is true, as a general rule, that when two or more persons engage in an unlawful enterprise, or agree to do an illegal act or one prohibited by public policy, and spend or pay out money to each other or otherwise in aid of some unlawful enterprise, the law will aid neither, and leave them where they place themselves. But this general rule has its exceptions, arising out of necessity, or from unyielding principles of public policy, or from the different conditions of the parties. The different degrees of turpitude, immorality, or illegality may be so great between different persons engaged in such acts that the general rule will bend to meet the demands of such case, and allow a recovery. In [**Joseph Story, COMMENTARIES ON EQUITY JURISPRUDENCE**] §300, it is said that: "In cases where both parties are in delicto, concurring in illegal acts, it does not follow that they are in pari delicto, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, or undue influence, or great inequality in conditions of age, so that his guilt may be far less in degree than that of his associate in the offense; and, besides, there may be on the part of the court itself a necessity of supporting the public interest or public policy, in many cases, however reprehensible the acts of the parties may be."**

An unlicensed electrical contractor that performed work under a permit issued to another contractor successfully asserted a mechanics lien in *Mani Electrical Contractors v. Kioutas,* 243 Ill.App.3d 662, 611 N.E.2d 1167, 183 Ill.Dec. 519 (1st Dist. 1993). The court drew a distinction between illegal contracts and legal contracts, even when the performance of a legal contract involves some violation of law. The court held that a construction contract would be unenforceable only if there was no legal way for *anyone* to obtain a building permit. *Id*.

B. [11.14] Owner Fraud

In *Excellent Builders, Inc. v. Pioneer Trust & Savings Bank,* 15 Ill.App.3d 832, 305 N.E.2d 273, 278 (1st Dist. 1973), the court weighed the relative conduct of the parties in what appeared to be a fraud by the owner to obtain a permit from the city based on fraudulent plans. Though the

builder had carried out the work based on a fraudulently issued permit, the builder's participation in the owner's fraud was "purely formal and passive," and therefore the case was remanded to the trial court for weighing of equities and other considerations. *Id.*

C. [11.15] Home Repair and Remodeling Act — Consumer Fraud

Homeowners have asserted the Home Repair and Remodeling Act, 815 ILCS 513/1, *et seq.,* in defense of a mechanics lien. The Home Repair and Remodeling Act broadly applies to work on residential properties (other than original construction) and requires that contractors obtain signed written contracts prior to initiating work on jobs in excess of $1,000. 815 ILCS 513/15. The contract must set forth the total cost of the project and enumerate the cost of parts and materials, among other things. *Id.* Contractors are also required to provide homeowners with a pamphlet entitled *Home Repair: Know Your Consumer Rights,* set forth at 815 ILCS 513/20(c) and available on the Illinois Attorney General's website at https://illinoisattorneygeneral.gov/consumers/homerep0505c.pdf. Any knowing violation of the Home Repair and Remodeling Act also constitutes a violation of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* 815 ILCS 505/2Z, 513/30.

Before 2010, a contractor's failure to comply with the Home Repair and Remodeling Act caused the contract between contractor and homeowner to be unenforceable. The contractor's failure to comply with the Home Repair and Remodeling Act also caused any mechanics lien to be unenforceable because a mechanics lien must be supported by a valid contract. *See Central Illinois Electrical Services, L.L.C. v. Slepian,* 358 Ill.App.3d 545, 831 N.E.2d 1169, 294 Ill.Dec. 844 (3d Dist. 2005).

In 2010, the Illinois Supreme Court held that a contract violating the Home Repair and Remodeling Act was not unenforceable. *K. Miller Construction Co. v. McGinnis,* 238 Ill.2d 284, 938 N.E.2d 471, 478, 345 Ill.Dec. 32 (2010). Instead, an owner's remedy for a contractor's violation of the Home Repair and Remodeling Act is found in the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/10a. 938 N.E.2d at 481. Therefore, a violation of the Home Repair and Remodeling Act no longer makes an otherwise valid mechanics lien unenforceable.

The Illinois Supreme Court has held that the Home Repair and Remodeling Act does not apply to subcontractors, but applies only to those who contract directly with homeowners. *MD Electrical Contractors, Inc. v. Abrams,* 228 Ill.2d 281, 888 N.E.2d 54, 320 Ill.Dec. 837 (2008).

A written but unsigned work order tendered by a contractor to a homeowner was held to have substantially complied with the intent of the Home Repair and Remodeling Act, such that a mechanics lien foreclosure suit by the contractor was not subject to dismissal. *Behl v. Gingerich,* 396 Ill.App.3d 1078, 920 N.E.2d 665, 336 Ill.Dec. 456 (4th Dist. 2009). The homeowner negotiated the scope and cost of the project and could not show that he suffered any prejudice due to the contractor's failure to strictly comply with the Act. Although this case was decided before *K. Miller Construction, supra,* the court's analysis of a contractor's substantial compliance with the intent of the Home Repair and Remodeling Act should continue to apply to compliance determinations under an owner's Consumer Fraud and Deceptive Business Practices Act claim.

In *Fandel v. Allen,* 398 Ill.App.3d 177, 937 N.E.2d 1124, 344 Ill.Dec. 783 (3d Dist. 2010), the trial court erred in granting summary judgment to a customer on a contractor's action to enforce the contractor's mechanics lien. The Third District held that the legislature did not intend that a Home Repair and Remodeling Act violation could serve as an affirmative defense to a mechanics lien filed after the contractor otherwise validly performed a home repair agreement.

In *Tom Geise Plumbing, Inc. v. Taylor,* 396 Ill.App.3d 289, 917 N.E.2d 1209, 335 Ill.Dec. 145 (4th Dist. 2009), the trial court erred in dismissing a plumbing corporation's complaint seeking damages for the customers' failure to pay for plumbing work. The customers' defense that the Home Repair and Remodeling Act was violated was rejected, as the Act applied to residences and not, as in the present case, commercial buildings partly converted to residential space.

D. [11.16] Unlicensed Contractor

In *Pascal P. Paddock, Inc. v. Glennon,* 32 Ill.2d 51, 203 N.E.2d 421 (1964), it was held that, although a mechanics lien must be based on a valid contract, the validity should be judged as of the date of the making of the contract. Unless the agreement necessarily contemplates an illegal act or a violation of law, the mere fact that it was performed in violation of law will not invalidate the resulting lien if enforcing the lien is not seriously injurious to the public order. Thus, it was held in *Paddock* that work performed using unlicensed plumbers was nevertheless lienable when it was performed under the supervision and inspection of a licensed plumber. Further, it appeared that the plumbing work represented a very minor portion of the total construction to be performed. However, a contract made by an unlicensed person for architectural services was held illegal at the time of execution and thus unenforceable. *Douthart v. Congdon,* 197 Ill. 349, 64 N.E. 348 (1902); *Keenan v. Tuma,* 240 Ill.App. 448 (1st Dist. 1926). However, an unlicensed owner or firm may contract for the performance of services by licensed individuals. *People ex rel. State Board of Examiners of Architects v. Rodgers Co.,* 277 Ill. 151, 115 N.E. 146 (1917); *Greenberg v. Reinken,* 197 Ill.App. 318 (1st Dist. 1916).

In *Douglas Lumber Co. v. Chicago Home for Incurables,* 380 Ill. 87, 43 N.E.2d 535 (1942), the court examined a City of Chicago ordinance that provided for penalizing a person who performed masonry work without a license. In rejecting the request to invalidate the contract and not enforce the lien, the court observed that the ordinance did not prohibit unlicensed masons from engaging in masonry work or entering into a contract to do such work. The ordinance provided a penalty for failure to obtain a license, but that, the court wrote, was "a matter between the mason and the city." 43 N.E.2d at 540. The court distinguished *Douglas Lumber* from *Douthart, supra,* in which the ordinance prohibited anyone from engaging in a brokerage business without a license. The court also noted that the city issued a construction permit to the mason that performed the work, which was "some evidence of the construction the city placed upon its own ordinance, for it would be assumed that it would not issue a permit to do construction work when the holder of such permit was prohibited from doing it." *Id.*

The right of an unlicensed electrical contractor to assert a mechanics lien was recognized and upheld in *Mani Electrical Contractors v. Kioutas,* 243 Ill.App.3d 662, 611 N.E.2d 1167, 183 Ill.Dec. 519 (1st Dist. 1993). The court's holding was influenced by the fact that the electrical contractor did the work under a valid permit, though the permit had been issued to another company.

In *Parkman & Weston Associates, Ltd. v. Ebenezer African Methodist Episcopal Church,* No. 01 C 9839, 2003 WL 22287358 (N.D.Ill. Sept. 30, 2003), the plaintiff (PWA) entered into a contract with a church to design and build a senior living facility. PWA had only one stockholder and employee, Larry W. Parkman, who was a licensed architect in Illinois and did all the architectural work. PWA was required to be registered under §21 of the Illinois Architecture Practice Act of 1989, 225 ILCS 305/1, *et seq.,* but was not duly registered. The defendants argued that the contract was void for failure to register, although they had accepted the architectural services, built the structure designed by PWA, and not paid for the architectural services. The defendants relied on *Kaplan v. Tabb Associates, Inc.,* 276 Ill.App.3d 320, 657 N.E.2d 1065, 212 Ill.Dec. 720 (1st Dist. 1995), in which Tabb Associates' contract for architectural services was held void under the same circumstances as occurred in *Parkman, supra*. Gregory Tabb, a licensed architect, oversaw the plaintiff's project and solely owned the defendant corporation. The Illinois appellate court held that the violation of the Illinois Architecture Practice Act rendered the contract void.

The district judge in *Parkman* followed *Grody v. Scalone,* 408 Ill. 61, 96 N.E.2d 97 (1950), rather than *Kaplan*. The contractor in *Grody* installed a furnace in the defendant's home and sought to recover the unpaid balance of $840 of the contract price. Mr. Grody had failed to register under the assumed business name of Modern Furnace Company, thereby violating the Illinois Assumed Business Name Act, 805 ILCS 405/0.01, *et seq.* The defendant claimed that Grody was in business unlawfully and thus could not legally enforce the contract. The Illinois Assumed Business Name Act prohibited anyone from conducting business under an assumed name unless the name was registered. Violators of the Act were subject to a $25 – $100 fine and/or imprisonment for 10 – 30 days. 96 N.E.2d at 99. In *Grody,* the Illinois Supreme Court held that, because the statute already expressly provided a penalty for conducting business in violation of the Illinois Assumed Name Act, it would not be reasonable under conditions in which a person furnished material and labor on a just basis that the contract be held void and that to deny recovery would be affording a means by which a person having received a benefit from another would be able to retain it without compensation. Thus, the contract would be enforced, even though it was in violation of the Illinois Assumed Business Name Act.

Applying the reasoning of *Grody,* the district court in *Parkman, supra,* held that the inclusion of penalties in the Illinois Architecture Practice Act supports a holding that a contract made in violation of the Act should not be voided as an additional penalty. The federal court also relied on *Paddock, supra*. The Illinois Supreme Court in *Paddock* recognized that while "a contract made by an unlicensed individual calling for his personal services . . . or by a firm having no licensed officers or employees . . . is unenforceable . . . an unlicensed owner or firm may contract for the performance of services by licensed individuals." [Citations omitted.] 203 N.E.2d at 423. *Kaplan, supra,* is inconsistent with other precedent as well, though it does not discuss them. *See, e.g., Hattis Associates, Inc. v. Metro Sports Inc.,* 34 Ill.App.3d 125, 339 N.E.2d 270, 272 – 273 (1st Dist. 1975).

An Indiana architectural firm, not registered in Illinois, was denied mechanics lien recovery in *G.M. Fedorchak & Associates, Inc. v. Chicago Title Land Trust Co.,* 355 Ill.App.3d 428, 822 N.E.2d 905, 291 Ill.Dec. 30 (3d Dist. 2005). The firm entered into a contract to prepare design drawings for a commercial development in Illinois and later entered into a second contract to supply construction management services for the project. When the contract was entered into, the senior architect in the firm held an inactive Illinois license, and the junior architect did not acquire an Illinois license until after the design-drawing project had begun. The court held that, because

neither of the individual architects nor the architectural firm was authorized to practice architecture in Illinois at the time the contract was made, the contract for architectural services was void, and the mechanics lien was not valid. Therefore, the invalid mechanics lien was unenforceable. Finally, *Power Dry of Chicago, Inc. v. Bean,* 2022 IL App (2d) 210043, held that a purported contract with a party claiming to be in the business of adjusting insurance claims without a valid license to do so under the Public Adjusters Law, 215 ILCS 5/1501, *et seq.,* was invalid and, without a valid contract, the count to foreclose a mechanics lien claim also failed.

IX. [11.17] EXTRAS; SUPPLEMENTAL AND ADDITIONAL WORK

It has been said that extras are probably the largest single source of disputes between owners and contractors. An owner is frequently carried away during the course of construction, assenting to extras without fully understanding their ultimate impact on cost. A contractor who supplies extra labor or material need not tender a competitive bid to obtain the work and, therefore, may include a safer mark up. *Wingler v. Niblack,* 58 Ill.App.3d 287, 374 N.E.2d 252, 15 Ill.Dec. 817 (4th Dist. 1978). It is also true that contractors complain that owners request extras and assure contractors they will be paid for the work, only to refuse payment later when they realize the construction budget did not account for the extras.

A. [11.18] No Agreed Price

If the agreement for extras does not fix a definite price for the material and work supplied, the trial court may find an implied contract that the price of the material should be reasonable market value and the price for labor should be that customarily obtained for similar work. *Wingler v. Niblack,* 58 Ill.App.3d 287, 374 N.E.2d 252, 15 Ill.Dec. 817 (4th Dist. 1978). An example is found in *Peter J. Hartmann Co. v. Capitol Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004), in which the court recounted a 14-year litigation history based on a written contract that briefly described the scope of work to be performed for a fixed price of $9,700. The bulk of the work was pursuant to a "soil removal clause" that did not include a price term but required far more work than the main scope. Much litigation might have been avoided if the parties had not left open the price term for soil removal.

B. [11.19] Is There a Contract for Extras?

In *Watson Lumber Co. v. Guennewig,* 79 Ill.App.2d 377, 226 N.E.2d 270 (5th Dist. 1967), the court examined the common construction contract provision that requires "extras," work performed outside the original scope of work in the contract, to be pursuant to a written change order signed by the owner. *Watson* and established law in Illinois generally provide that a contractor has the burden of proving, by clear and convincing evidence, five factors to recover for extras in the face of such a contract clause. The contractor must establish that (1) the work was outside the scope of its contract, (2) the extra items were ordered by the owner (*Dickinson v. Prince,* 61 Ill.App. 335 (1st Dist. 1895); *Edward Edinger Co. v. Willis,* 260 Ill.App. 106 (3d Dist. 1931)), (3) the owner agreed to pay extra either by words or by conduct (*Snead & Co. Iron Works v. Merchants' Loan & Trust Co.,* 225 Ill. 442, 80 N.E. 237 (1907)), (4) the extras were not furnished by the contractor as its voluntary act, and (5) the extra items were not rendered necessary by fault of the contractor

(*McKay Engineering & Construction Co. v. Sanitary Dist. of Chicago,* 348 Ill.App. 89, 108 N.E.2d 39 (1st Dist. 1952); *Salomon-Waterton Co. v. Union Asbestos & Rubber Co.,* 263 Ill.App. 583 (1st Dist. 1931)). *Watson* is frequently cited with approval for the above holding. *See, e.g., Duncan v. Cannon,* 204 Ill.App.3d 160, 561 N.E.2d 1147, 1149, 149 Ill.Dec. 451 (1st Dist. 1990).

In *Castle Concrete Co. v. Fleetwood Associates, Inc.,* 131 Ill.App.2d 289, 268 N.E.2d 474 (1st Dist. 1971), the subcontractor's mechanics lien claim was held to be unenforceable because it was based on work not within the scope of the original contract between the owner and the general contractor, and the above-recited elements required to prove the work was an authorized extra also were not shown. Therefore, because the subcontractor's work was not supported by the contract with the owner, the subcontractor would not be permitted to enforce the mechanics lien claim that was premised on that work.

C. [11.20] Failure To Follow Formalities of Original Contract

In *Ed Keim Builders, Inc. v. Hartley,* 132 Ill.App.2d 119, 268 N.E.2d 49, 51 (2d Dist. 1971), the court construed a contract provision requiring that extra work not be performed unless the owner and a purchaser signed a written memorandum stating the nature of the extra work and the cost and that "no claim for an addition to the contract price shall be allowed or valid unless the amount thereof is so agreed upon in writing prior to the performance of the work involved." Nevertheless, the owner was held liable for extras on the theory that he waived the above-quoted provision of the contract by orally requesting extras and allowing them to proceed.

X. [11.21] CONTRACT TERMS INFLUENCING LIEN RIGHTS — THE HIERARCHY OF CONTRACT POWER

Certain terms of a contract between an owner and a general contractor can have a drastic influence on the rights of contractors, subcontractors, material suppliers, and laborers to exercise rights under the Mechanics Lien Act. For example, in *United States v. Village of Alsip,* 345 F.2d 365, 367 (7th Cir. 1965), the contract between the owner and the construction company explicitly provided that the owner was not liable in "any manner for payment" of certain construction. It was held that this clause constituted a waiver of the general contractor's rights to payment from the owner for that particular described construction. As a result of the waiver, the general contractor was relegated to the position of an unsecured general creditor.

Generally, in the construction industry, there is a hierarchy of contract negotiating power in the construction process. The party most able to dictate terms is the lender, if required, then the owner, and, subordinate to the owner, the design professional. Next comes the prime contractor, and lowest on the totem pole are the subcontractors and material suppliers. One objective of the contract documents between the owner and the prime contractor and the prime contractor and its subcontractors is the shifting of various risks inherent in the process. As might be expected, the shifting is invariably downstream to the subcontractor, typically the party least able to bear many of the risks. Some of the contract clauses that shift risks downstream are the following:

a. pay-when-paid clauses that attempt to eliminate the general contractor's duty to pay the subcontractor if the owner defaults in payment to the general contractor;

b. waiver-of-lien clauses as described in *Village of Alsip, supra;*

c. no-damage-for-delay clauses in which a contractor, subcontractor, or both waive the right to recover damages caused by an owner or prime contractor;

d. liquidated damages clauses that agree on an amount of damages at the time of contracting that may be recovered in the event of described contract breaches when damages are difficult to quantify and would be difficult to prove; and

e. flow-through clauses that shift other risks specific to the particular project.

As shown in §§11.22 – 11.30 below, statutory law and common law sometimes limit or otherwise affect attempts by the parties to use risk-shifting or other contract provisions.

A. [11.22] Contract Price — A Limit of Owner Liability

Section 21 of the Mechanics Lien Act, 770 ILCS 60/21, protects an owner from paying a greater sum for the completion of an improvement than the price stipulated in the original contract, plus extras, unless the owner "wrongfully pays money to the contractor" after service of notice of a subcontractor's lien. *Koenig v. McCarthy Const. Co.,* 344 Ill.App. 93, 100 N.E.2d 338, 342 (2d Dist. 1951). An owner must retain sufficient funds to pay a subcontractor when the owner receives notice of a subcontractor claim either from a subcontractor's notice of claim for lien or from a contractor's sworn statement under §5 of the Act. 770 ILCS 60/21; *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 835, 330 Ill.Dec. 808 (2009). If an owner does not have knowledge of a subcontractor's claim for lien and makes payments to its prime contractor in reliance on a sworn statement under §5 of the Act together with appropriate lien waivers, the owner will be protected against having to make double payment for the same work. *Id*. Provided the owner makes proper payment of the contract price as required under the Act, the mechanics liens of subcontractors at any tier are limited in amount to payments due the subcontractor and contractor above it in the contract chain from the owner. *Koenig, supra.* However, if the owner and contractor fix an unreasonably low contract price, the owner will lose the protection afforded by §21. *Edward Hines Lumber Co. v. Dell Corp.,* 49 Ill.App.3d 873, 364 N.E.2d 368, 375, 7 Ill.Dec. 207 (1st Dist. 1977) (contract price was unsecured note for $200,950 due in 40 years with present value of $9,500, and reasonable price for construction was $549,911).

As between the lienor and the owner, it is not necessary that materials and labor furnished enhance the value of the premises. As between the parties to the contract, the contract price establishes the value of the improvements. *Ripperden v. Henry Absher Chevrolet, Inc.,* 1 Ill.App.3d 712, 274 N.E.2d 113 (5th Dist. 1971). The contractor's price includes not only the original contract price but also the extras that the owners are obligated to pay. *Capital Plumbing & Heating Supply Co. v. Snyder,* 2 Ill.App.3d 660, 275 N.E.2d 663 (4th Dist. 1971).

If the general contractor has not substantially performed its contract with the owner, then it is entitled only to a reasonable value for services rendered and materials furnished to the owner, which may be less than the aggregate sum owed to subcontractors who have perfected their liens and who did not breach in any respect. *Folk v. Central National Bank & Trust Company of Rockford,* 210

Ill.App.3d 43, 567 N.E.2d 1, 3, 153 Ill.Dec. 286 (2d Dist. 1990). Under those circumstances, if the total amount of the mechanics liens of the general and subcontractors combined exceeds the sum due to the general contractor from the owner, then the amounts of the mechanics lien claims of all subcontractors and the contractor shall be proportionately reduced and prorated pursuant to §21 of the Mechanics Lien Act. 567 N.E.2d at 9.

The owner may initiate a general settlement under §30 of the Mechanics Lien Act if the owner fears that the lien claims exceed the total sum due the general contractor. Under §30, the owner files a complaint joining the contractor, all the subcontractors, sub-subcontractors, and material suppliers. The lien claimants bear the burden of proving their respective liens. *Hacken v. Isenberg,* 288 Ill. 589, 124 N.E. 306 (1919). The owner thus resolves the amount due the contractor and avoids piecemeal litigation with the other potential lien claimants.

B. [11.23] Payment upon Architect's Certificate — Presentation of Waivers

When a contract calls for an architect's certificate as a precondition of payment, the contractor is not entitled to a mechanics lien unless it has obtained the specified certificate. *Barney v. Giles,* 120 Ill. 154, 11 N.E. 206 (1887). However, in *Arnold v. Bournique*, 144 Ill. 132, 137, 33 N.E. 530, 531 (1893), the court held that when the work has been performed in accordance with the provisions of the contract, "and a certificate has been demanded from the architect and fraudulently withheld by him, the contractor will be relieved from the necessity of procuring the architect's certificate." Citing *Michaelis v. Wolf,* 136 Ill. 68, 26 N.E. 384 (1891). Nonetheless, the parties to a building contract may agree that "disputed questions should be submitted to the architect and that payment should not be made without his certificate." *Pacaud v. Waite,* 218 Ill. 138, 75 N.E. 779, 782 (1905). If the contract so provides, an owner may insist that payment not be made to the contractor without the architect's certificate, but not if the architect refuses to act or withholds the certificate by collusive arrangement with the owner. *McDonald v. Patterson,* 186 Ill. 381, 57 N.E. 1027, 1028 (1900). *See also Provost v. Shirk,* 223 Ill. 468, 79 N.E. 178 (1906) (when contract requires procuring architect's certificate as condition precedent, it must be obtained or reason shown why it was not).

A contract provision requiring the presentment of lien waivers in exchange for payment is valid. In *Booher v. Williams,* 341 Ill.App. 504, 95 N.E.2d 518, 521 (4th Dist. 1950), the contract provided for payment by the owner "upon presentation of proper lien waivers." These were not provided. When subcontractors sued to foreclose their liens, it was held that payments were not due by the contract terms.

C. [11.24] Completion Beyond Three Years from Commencement

Section 6 of the Mechanics Lien Act, 770 ILCS 60/6, provides that in the case of work done or material furnished as to residential property, a lien may be obtained only if completion is within three years of commencement. As to all other construction, §6 provides that a lien may be obtained only if completion is within five years of commencement. However, per P.A. 102-563 (eff. Aug. 20, 2021), the longer time period for nonresidential construction sunsets December 31, 2024.

The policy behind limiting the time for asserting a lien claim is to prevent surprise and prejudice. If performance of a contract is extended well beyond a typical time frame, owners,

property purchasers, lenders, and others might assume no liens could be asserted on property because work has not been performed recently. Older cases held that the time limit under §6 or its predecessor applied to the entire length of the project. In *Harwood v. Brownell,* 32 Ill.App. 347 (3d Dist. 1889), for example, the contractor filed a claim for lien based on a blanket oral contract to provide improvement work as required. The circuit court held that the contractor was not entitled to a lien and that a mortgage holder had priority.

Later cases provide that the three-year (now five-year for commercial projects) period relates only to the amounts for which a party seeks to enforce a lien. A subcontractor that completes its work within three years of the prime contract date does not lose its right to lien if the general contractor's work extends beyond three (or five) years. "The work" to be completed within the time limits of §6 is construed to mean the work for which lien enforcement is sought. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 394 Ill.App.3d 870, 917 N.E.2d 536, 542, 334 Ill.Dec. 710 (1st Dist. 2009).

Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C., 403 Ill.App.3d 468, 932 N.E.2d 1073, 1087, 342 Ill.Dec. 612 (1st Dist. 2010), citing *Cordeck, supra,* and other cases, clarified the law further in holding that, "[b]ased on the plain language of section 6, 'the 3-year period commences with the beginning of work for which the mechanic's lien is asserted and not with the date upon which the contract for such work was entered into' " [Emphasis omitted]. Quoting *Robb v. Lindquist,* 23 Ill.App.3d 186, 318 N.E.2d 301, 303 (3d Dist. 1974). In *Doornbos Heating,* a subcontractor's mechanics lien claim was not barred under §6 when the subcontractor did not seek a lien for all work it performed but only for work it completed less than three years before filing its claim.

D. [11.25] Waiver of Contract Terms

Defects in materials and workmanship are not waived by the fact that a superintendent or architect makes no objection. The evidence must show that the superintendent's or architect's attention was called to the fact of defective performance. Although deviation from the terms of the contract may be expressly or impliedly authorized by an architect or superintendent to bind an owner as in *Vermont Street M.E. Church of Quincy v. Brose,* 104 Ill. 206 (1882), nevertheless, accepting work is not held to be a waiver of defects if, as with plastering, there may be latent defects not open to inspection. *Korf v. Lull,* 70 Ill. 420 (1873); *Van Buskirk v. Murden,* 22 Ill. 446 (1859); *Monahan v. Fitzgerald,* 164 Ill. 525, 45 N.E. 1013 (1897).

Parties may, by agreed order, waive a generic arbitration clause contained in a contract. *Advance Iron Works, Inc. v. ECD Lincolnshire Theater, L.L.C.,* 339 Ill.App.3d 882, 791 N.E.2d 631, 274 Ill.Dec. 539 (2d Dist. 2003), involved a four-count complaint: Count I was for an accounting under the Mechanics Lien Act; Count II sought damages for breach of contract; Count III sounded in quantum meruit; and Count IV was for unjust enrichment. The contract contained a generic arbitration clause: "Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration." 791 N.E.2d at 633. In the course of judicial proceedings, only the claim for breach of contract was submitted to arbitration. The plaintiff expressly reserved its intention to pursue interest and attorneys' fees under the Mechanics Lien

Act. Following arbitration, Advance moved in the trial court for interest and attorneys' fees under the Act. The trial court denied the motion, finding, among other things, that under the contract all matters were to be arbitrated. On appeal, it was held that because the agreed order assigned only Count II for arbitration, the parties thereby waived their right to arbitrate the remaining claims.

A party that initiates litigation and opposes and forgoes arbitration of its own claim also waives the right to arbitrate a counterclaim arising out of the same contract. In *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC,* 319 Ill.App.3d 1089, 746 N.E.2d 294, 253 Ill.Dec. 846 (1st Dist. 2001), an architectural firm (SML) waived its right to arbitrate by filing suit, by opposing the owner's motion to compel arbitration, and by failing to initiate arbitration during a 90-day period in which the case was dismissed, pending arbitration. After the case was reinstated, a counterclaim was filed, and SML promptly moved to stay pending arbitration, arguing that it was within its right to waive arbitration as to its own claim without waiver of the right to arbitrate new claims raised in the counterclaim. The court found that SML's complaint and the owner's counterclaim both arose out of the same contractual dispute. The court held that SML's conduct and participation in the legal forum were inconsistent with its contractual right to arbitrate and constituted an abandonment of that right.

E. [11.26] "No-Lien" Contract Provisions

Before January 1992, §21 of the Mechanics Lien Act, 770 ILCS 60/21, provided that a "no-lien" provision in any contract between the owner and the contractor would be binding as against a subcontractor or material supplier if the subcontractor or material supplier had actual or constructive notice of the no-lien provision not less than ten days before the contract of the subcontractor or material supplier. The recording in the recorder's office in the county in which the project was located of a duly written and signed stipulation or agreement to the effect that the general contract contained a no-lien provision imparted constructive notice of a no-lien provision to the subcontractor or material supplier. Illinois courts uniformly upheld no-lien provisions that complied with the requirements of §21. *Ridgeview Construction Co. v. American National Bank & Trust Company of Chicago,* 205 Ill.App.3d 1045, 563 N.E.2d 986, 150 Ill.Dec. 859 (1st Dist. 1990). *See Jankoviak v. Butcher,* 22 Ill.App.2d 126, 159 N.E.2d 377 (2d Dist. 1959); *Ellman v. Ianni,* 21 Ill.App.2d 353, 157 N.E.2d 807 (2d Dist. 1959).

P.A. 87-361 (eff. Jan. 1, 1992) added §1.1 to the Mechanics Lien Act. Section 1.1 was repealed by P.A. 94-627 (eff. Jan. 1, 2006), and its provisions are now contained in §1(d) of the Mechanics Lien Act, which currently provides:

> **An agreement to waive any right to enforce or claim any lien under this Act, or an agreement to subordinate the lien, where the agreement is in anticipation of and in consideration for the awarding of a contract or subcontract, either express or implied, to perform work or supply materials for an improvement upon real property is against public policy and unenforceable. This Section does not prohibit release of lien under subsection (b) of Section 35 of this Act, nor does it prohibit an agreement to subordinate a mechanics lien to a mortgage lien that secures a construction loan if that agreement is made after more than 50% of the loan has been disbursed to fund improvements to the property.** 770 ILCS 60/1(d).

Though lien rights may still be waived, as they routinely are in exchange for payment for work performed, the waiver may no longer be contained in the contract for construction after January 1, 1992.

In *R.W. Dunteman Co. v. C/G Enterprises, Inc.,* 181 Ill.2d 153, 692 N.E.2d 306, 229 Ill.Dec. 533 (1998), the Illinois Supreme Court upheld the constitutionality of former §1.1 of the Act and denied enforcement of a waiver-of-lien clause contained in a construction contract with a municipality. The court construed former §1.1 as in harmony with §21, which permits waiver of mechanics lien rights as long as "the waiver is not prohibited by this Act." 692 N.E.2d at 313. The court observed that an agreement to waive a lien claim after work has been completed would not be prohibited. The court concluded that former §1.1 furthered the purpose of the Mechanics Lien Act to protect subcontractors by allowing liens as a means of compelling payment and did not violate due process because it advanced a legitimate governmental interest.

Former §1.1 was applied to invalidate a lien waiver requirement in *Brown & Kerr, Inc. v. American Stores Properties, Inc.,* 306 Ill.App.3d 1023, 715 N.E.2d 804, 240 Ill.Dec. 117 (1st Dist. 1999). The subcontract incorporated the prime contract, which required "releases and waivers of liens" as a condition for final payment. 715 N.E.2d at 811. The subcontractor had a claim for extras and offered to provide a partial waiver of lien in exchange for payment of the undisputed balance due; however, that offer was refused because the owner required final waivers. The court construed the release and waiver clause as an implied waiver because it required the subcontractor to waive lien rights to require full performance on the contract. The court held that the release and waiver requirement was void under former §1.1.

F. [11.27] Pay-If-Paid Provisions

A provision that frequently appears in construction contracts, especially those between a general contractor and a subcontractor, is a "pay-if-paid" provision, which conditions payment to a subcontractor upon the contractor's receipt of payment from the owner. These provisions cause a great deal of mischief. "Pay-if-paid" provisions were partially invalidated by an amendment to §21 of the Mechanics Lien Act, effective 1993. Prior to the amendment, unpaid subcontractors could be precluded from enforcing subcontractor mechanics lien claims because no money was due to them because the general contractor had not yet been paid. The language of what is now §21(e) of the Mechanics Lien Act states:

> **Any provision in a contract, agreement, or understanding, when payment from a contractor to a subcontractor or supplier is conditioned upon receipt of the payment from any other party including a private or public owner, shall not be a defense by the party responsible for payment to a claim brought under Section 21, 22, 23, or 28 of this Act against the party. For the purpose of this Section, "contractor" also includes subcontractor or supplier. The provisions of this Public Act 87-1180 shall be construed as declarative of existing law and not as a new enactment.** 770 ILCS 60/21(e).

Using pay-if-paid provisions as a defense to a subcontractor's mechanics lien claim was not allowed after this amendment, but such clauses can still be a defense to a breach of contract claim

under *A.A. Conte, Inc. v. Campbell-Lowrie-Lautermilch Corp.,* 132 Ill.App.3d 325, 477 N.E.2d 30, 87 Ill.Dec. 429 (1st Dist. 1985). In *A.A. Conte*, the court held that the insolvency of the owner would provide a defense to the general contractor's refusal to pay its subcontractors. The court held that while the result appeared inequitable, Illinois courts could not rewrite a contract to suit one of the parties but must enforce the terms as written. The contract in *Conte* expressly stated that it intended to create a condition precedent to the payment of subcontractors. *Conte* stands for the proposition that clearly written pay-if-paid provisions will be enforced even if doing so produces harsh or inequitable results.

The holding in *Conte* was distinguished but not rejected by *Beal Bank Nevada v. Northshore Center THC, LLC,* 2016 IL App (1st) 151697, ¶27, 64 N.E.3d 201, 407 Ill.Dec. 823. In *Beal Bank,* the court refused to enforce a contract provision that was not a clear condition precedent to payment but was instead a mechanism for determining the timing of payments to be made. A provision such as the one examined in *Conte, supra,* is often referred to as a "pay-if-paid" provision, and a provision such as the one considered by the court in *Beal Bank* is referred to as a "pay-when-paid" provision.

G. [11.28] Settlement with Owner

Because a subcontractor's lien rights depend on the existence of a contract between the owner and the contractor, a subcontractor's lien may be compromised without consent of the subcontractor in a comprehensive settlement with the owner. In *Premier Electrical Construction Co. v. American National Bank of Chicago,* 276 Ill.App.3d 816, 658 N.E.2d 877, 213 Ill.Dec. 128 (1st Dist. 1995), a general contractor recorded liens totaling over $2.4 million, which included a $626,280 subcontractor's lien. A lender purchased the property following a mortgage foreclosure sale and entered into a settlement agreement in which the general contractor agreed to release all liens in exchange for payment of $750,000. The court strictly construed §28 of the Mechanics Lien Act, 770 ILCS 60/28, and held that the subcontractor did not have a valid claim for lien against the purchaser at the foreclosure sale beyond that subcontractor's pro rata share ($169,895) of the settlement proceeds. The court's holding hinged on §28, which restricts an owner's liability under the Mechanics Lien Act to no more than the full amount of its contract with the general contractor, absent fraud. 658 N.E.2d at 884. Therefore, the subcontractors were entitled to recover only a pro rata amount for each of their liens.

H. [11.29] Completion

When a contract provides that a final invoice constitutes notice of completion, the 90-day period for service of a notice under §24 of the Mechanics Lien Act, 770 ILCS 60/24, commences on the date of final invoice, and a subcontractor who did not serve such notice or assert a claim for lien within 90 days thereafter was held to have no right of lien in *Caruso v. Kafka,* 265 Ill.App.3d 310, 638 N.E.2d 663, 202 Ill.Dec. 795 (1st Dist. 1994), notwithstanding subsequent invoicing for "service charges" (interest). *Accord Cyclonaire Corp. v. ISG Riverdale, Inc.,* 378 Ill.App.3d 554, 882 N.E.2d 684, 690, 317 Ill.Dec. 804 (1st Dist. 2007) ("final invoice establishes a completion date for the project"), quoting *Caruso, supra,* 638 N.E.2d at 666.

I. [11.30] Alternative Dispute Resolution

If a contract contains a valid agreement to arbitrate disputes, then the court must compel arbitration even when related litigation involves parties who are not signatories to the arbitration agreement. *Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc.,* 183 Ill.2d 66, 697 N.E.2d 727, 231 Ill.Dec. 942 (1998), *overruling J.F. Inc. v. Vicik,* 99 Ill.App.3d 815, 426 N.E.2d 257, 55 Ill.Dec. 282 (5th Dist. 1981) (involving mechanics lien foreclosure). If a construction claim is properly subject to arbitration and the arbitrator rules in favor of the owner, the arbitrator does not exceed his or her authority by also declaring the mechanics lien to be null and void. *Father & Sons, Inc. v. Taylor,* 301 Ill.App.3d 448, 703 N.E.2d 532, 234 Ill.Dec. 671 (1st Dist. 1998). If a contract with an owner contains an arbitration clause and subcontractors file suit to foreclose liens, the lien foreclosure litigation is properly stayed, pending the outcome of arbitration between the owner and the general contractor. *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.,* 119 Ill.App.3d 663, 456 N.E.2d 889, 75 Ill.Dec. 68 (2d Dist. 1983).

In *La Hood v. Central Illinois Construction, Inc.,* 335 Ill.App.3d 363, 781 N.E.2d 585, 269 Ill.Dec. 788 (3d Dist. 2002), the contract contained an arbitration clause. When a dispute arose, the contractor filed a mechanics lien and then commenced an arbitration proceeding. The owner filed a written demand under §34 of the Mechanics Lien Act, 770 ILCS 60/34, that suit be commenced within 30 days to enforce the mechanics lien. In compliance with the statute, the contractor filed suit and immediately moved to stay the court proceedings and compel arbitration. The owner objected to the stay, claiming that the contractor had waived and abandoned its contractual right to arbitrate when it filed the mechanics lien action. The court held that the filing of the mechanics lien sensibly protected the contractor's interest in the property and was acted on only because the owner made demand under §34. By immediately seeking a stay of the mechanics lien action pending arbitration, the contractor preserved its right to compel arbitration.

Parties may, by agreed order, waive a generic arbitration clause contained in a contract. *Advance Iron Works, Inc. v. ECD Lincolnshire Theater, L.L.C.,* 339 Ill.App.3d 882, 791 N.E.2d 631, 274 Ill.Dec. 539 (2d Dist. 2003). See §11.25 above. A party that initiates litigation and opposes and forgoes arbitration of its own claims also waives the right to arbitrate a counterclaim arising out of the same contract. *Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC,* 319 Ill.App.3d 1089, 746 N.E.2d 294, 253 Ill.Dec. 846 (1st Dist. 2001). See §11.25 above.

Filing an answer and counterclaim to foreclose a mechanics lien in response to an owner's lawsuit and demand under §34 of the Act, and pleading amendments, did not constitute waiver of the right to arbitrate:

> **Assuming plaintiff's demand satisfied the written-demand requirements of section 34 of the Act and triggered the tolling of the 30-day limitations period, defendant was forced to file the foreclosure action or lose its liens under the Act. Under these circumstances, the filing of responsive pleadings along with the 10½-month delay in asserting a right to arbitration does not establish that defendant acted inconsistently with its right to arbitrate.** *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC,* 382 Ill.App.3d 1171, 890 N.E.2d 1220, 1224, 322 Ill.Dec. 301 (4th Dist. 2008).

Sloan Electric v. Professional Realty & Development Corp., 353 Ill.App.3d 614, 819 N.E.2d 37, 289 Ill.Dec. 125 (3d Dist. 2004), was a proceeding to confirm an arbitration award. The owner terminated the contract due to failure of the contractor to provide a fully detailed electrical system design plan and due to numerous electrical code violations that required 1,161 hours of corrective work, resulting in $258,195 in damages. The contractor defended on the basis of improper termination and sought recovery under the Mechanics Lien Act. The arbitrator sided with the contractor and awarded $68,643.66 in damages, including attorneys' fees recoverable under §17 of the Act, 770 ILCS 60/17. On appeal, the court affirmed the arbitrator's award in favor of the contractor but held that the arbitrator committed a gross error of law by determining damages without an evidentiary hearing, finding that there were significant disputed issues of fact relating to damages.

In *R.A. Bright Construction, Inc. v. Weis Builders, Inc.,* 402 Ill.App.3d 248, 930 N.E.2d 565, 571 – 572, 341 Ill.Dec. 355 (3d Dist. 2010), a contract between a subcontractor and contractor arose out of a transaction involving interstate commerce and was governed by the Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (see 9 U.S.C. §2), and that Act preempted the Illinois Building and Construction Contract Act, 815 ILCS 665/1, *et seq.* Therefore, the contractor's motion to stay proceedings and compel arbitration should have been granted.

In *Illinois Concrete-I.C.I., Inc. v. Storefitters, Inc.,* 397 Ill.App.3d 798, 922 N.E.2d 542, 337 Ill.Dec. 419 (2d Dist. 2010), the trial court properly determined that customers, by making their §34 demand that the contractor file suit for relief regarding its mechanics liens, waived their right to compel arbitration. The demand to file suit was inconsistent with the customers' right to seek arbitration.

XI. [11.31] PERFORMANCE, BREACH, JUSTIFIABLE ABANDONMENT

Normally, it is a prerequisite to a mechanics lien that the contractor complete performance of the contract. In *Stanley J. Gottschalk Construction Co. v. Carlson,* 253 Ill.App. 520, 529 (1st Dist. 1929), the court stated:

> **The contract is the basis of the lien and to maintain a mechanic's lien suit, petitioner must show either performance or excuse for nonperformance, which must result from the owner's breach of the contract.**

As a general rule, although a mechanics lien claimant must show performance of the contract as a prerequisite to enforcement of the lien, substantial performance of the contract made in good faith will generally entitle the contractor to maintain its suit to enforce its lien. *Ruddy v. McDonald,* 244 Ill. 494, 91 N.E. 651 (1910). A contractor must prove that there was an honest and faithful performance of the contract in its material and substantial parts with no willful departure from or omission of the essential elements of the contract. *Delta Construction, Inc. v. Dressler,* 64 Ill.App.3d 867, 381 N.E.2d 1023, 21 Ill.Dec. 576 (3d Dist. 1978). A contractor is not required to perform perfectly but rather is held only to the duty of substantial performance in a workmanlike manner. *Watson Lumber Co. v. Guennewig,* 79 Ill.App.2d 377, 226 N.E.2d 270 (5th Dist. 1967). What constitutes "substantial performance" is difficult to define, and whether substantial

performance has been given will depend on the relevant facts of each case. *Brewer v. Custom Builders Corp.,* 42 Ill.App.3d 668, 356 N.E.2d 565, 1 Ill.Dec. 377 (5th Dist. 1976). However, the burden is on the contractor to prove the elements of substantial performance to enforce its lien. *Watson Lumber, supra.*

The concept of substantial performance was addressed in *Mani Electrical Contractors v. Kioutas,* 243 Ill.App.3d 662, 611 N.E.2d 1167, 1172, 183 Ill.Dec. 519 (1st Dist. 1993), involving a $45,000 contract for electrical work. The job was mostly complete except for punch list items, cleanup, and certain corrective work that the plaintiff refused to complete. The court found that there was substantial completion and recognized that the measure of damages for completing and correcting the work was "the difference between the total reasonable cost of securing performance and the contract price." 611 N.E.2d at 1171. The court permitted the owner a setoff in the amount of $5,234.22 and determined that the contractor had a lien for the remaining balance due.

A contractor whose performance amounts to less than substantial performance is not entitled to the contract price. If there is not substantial performance, then the contractor can recover under a theory of quantum meruit only the reasonable value received by the purchaser over and above the injuries suffered by the builder's breach. *George Butkovich & Sons, Inc. v. State Bank of St. Charles,* 62 Ill.App.3d 810, 379 N.E.2d 837, 20 Ill.Dec. 4 (2d Dist. 1978); *Folk v. Central National Bank & Trust Company of Rockford,* 210 Ill.App.3d 43, 567 N.E.2d 1, 153 Ill.Dec. 286 (2d Dist. 1990).

A contractor who did not substantially perform the contract in a workmanlike manner was denied the remedy of a mechanics lien in *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 243 Ill.Dec. 740 (1st Dist. 1999). In that case, a home remodeling contractor was found to have breached its contract due to poor workmanship and inadequate supervision resulting in damage to the work. The court held:

> **It would be inconsistent with the language of the Act, the attendant legal principles, and the holdings in the judicial opinions to entitle a contractor to a mechanic's lien where he did not substantially perform the contract in a workmanlike manner and, indeed, was found to have breached the contract. In light of these facts, we hold that a contractor is not entitled to a mechanic's lien and is limited to recovery in *quantum meruit* only.** 724 N.E.2d at 60.

Even though the quantum meruit judgment was substantial ($84,148.25), it was not secured by a mechanics lien.

Situations arise that are neither performance of the contract nor breach and are described generally as "justifiable abandonment." For example, in *Cooper v. Palais Royal Theatre Co.,* 242 Ill.App. 184 (1st Dist. 1926), a contractor who had agreed to construct the foundation for a theater building was held entitled to a mechanics lien for a total sum based on the number of cubic feet of concrete work and the established price per cubic foot plus the cost of the number of cubic yards of trench excavation at an established price per cubic yard plus the cost of labor for constructing forms for the concrete work when the job was stopped because of the failure of the owner to make any payments. In upholding a decree establishing a mechanics lien in favor of the plaintiff

contractor, the appellate court rejected the contention that the amount of the decree was too large, pointing out that the claim was not to be figured on the basis of the contract itself but on a quantum meruit, representing the value of the work and material furnished. *See also Sohns v. Murphy,* 168 Ill. 346, 48 N.E. 52 (1897).

In *Gerdau Ameristeel US, Inc. v. Broeren Russo Construction, Inc.,* 2013 IL App (4th) 120547, 992 N.E.2d 27, 372 Ill.Dec. 488, an action to enforce mechanics liens, the trial court erred by granting summary judgment for secondary subcontractors because they were entitled to recover only their pro rata shares of funds remaining due the subcontractor from the general contractor at the time they filed their notices of lien under §24 of the Mechanics Lien Act, 770 ILCS 60/24.

In *Asset Recovery Contracting, LLC v. Walsh Construction Company of Illinois,* 2012 IL App (1st) 101226, 980 N.E.2d 708, 366 Ill.Dec. 615, the trial court did not err in barring delay damages under the subcontract's no-damage-for-delay clause when delays were within the reasonable contemplation of the parties and the subcontractor agreed to modifications of the schedule with requests for increased costs.

In *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC,* 391 Ill.App.3d 533, 909 N.E.2d 294, 330 Ill.Dec. 581 (1st Dist. 2009), the First District held that because it was evident that, although the trial court found that the general contractor and property owner had breached the contract, the trial court actually calculated damages on the quantum meruit basis, and the matter had to be remanded for a recalculation of damages.

A. [11.32] Damages Equal to Contract Price

When there has been substantial performance of the contract before it is terminated without fault on the part of the contractor, the courts have permitted recovery and a mechanics lien based on the contract price less the cost of completion. *Kipp v. Massin,* 15 Ill.App. 300 (2d Dist. 1884). In *Kipp,* a contractor who had been paid nothing under the contract to construct a dwelling and had been prevented from completing the job by the owner when everything was done except for a few days' work on the house was granted relief in a lien for an amount equal to the contract price less the amount that it would take to complete the work. *See also Wilmette Partners v. Hamel,* 230 Ill.App.3d 248, 594 N.E.2d 1177, 171 Ill.Dec. 657 (1st Dist. 1992).

B. [11.33] Damages Equal to Value of Work Done

Normally, under the Mechanics Lien Act it is a prerequisite to a lien that the contractor complete performance of the contract. An excuse for nonperformance such as breach of contract will entitle the contractor to enforce its lien for the value of what has been done. *Wilmette Partners v. Hamel,* 230 Ill.App.3d 248, 594 N.E.2d 1177, 171 Ill.Dec. 657 (1st Dist. 1992).

C. [11.34] Whose Cost To Complete?

When the cost to complete is relevant, there is a question of whose cost it is. If the contractor is at fault, then the owner's cost to complete is relevant. If the owner is at fault, then the contractor's cost to complete or what would have been the contractor's cost to complete is relevant. *Wilmette Partners v. Hamel,* 230 Ill.App.3d 248, 594 N.E.2d 1177, 171 Ill.Dec. 657 (1st Dist. 1992).

In *Downes Swimming Pool, Inc. v. North Shore National Bank,* 124 Ill.App.3d 457, 464 N.E.2d 761, 766 – 767, 79 Ill.Dec. 857 (1st Dist. 1984), the court held that Illinois law provides that an owner defending against a mechanics lien claim is entitled to a setoff for costs to repair a mechanics lien claimant's defective work.

In *In re 1555 Wabash LLC,* 493 B.R. 756 (Bankr. N.D.Ill. 2013), the court did not allow a setoff for alleged defective construction work when the evidence showed that the alleged imperfections were the result of the debtor's attempt to cut costs and were explicitly contracted for by the debtor.

D. [11.35] Lost Profits as Damages

Lost profits will be allowed only if (1) their loss is proved with a reasonable degree of certainty, (2) the court is satisfied that the wrongful act of the defendant caused the loss of profits, and (3) the profits were reasonably within the contemplation of the defaulting party at the time the contract was entered. *Wilmette Partners v. Hamel,* 230 Ill.App.3d 248, 594 N.E.2d 1177, 171 Ill.Dec. 657 (1st Dist. 1992).

E. [11.36] Failure of Contractor To Furnish Sworn Statement as Breach

If the owner requires the general contractor to furnish a list of subcontractors as described in §5 of the Mechanics Lien Act, 770 ILCS 60/5, and the contractor fails to comply, then the owner may validly discontinue payments to the contractor. If the contractor then stops work, it breaches the contract and loses its right to a mechanics lien. *Stanley J. Gottschalk Construction Co. v. Carlson,* 253 Ill.App. 520 (1st Dist. 1929); *Deerfield Electric Co. v. Herbert W. Jaeger & Associates, Inc.,* 74 Ill.App.3d 380, 392 N.E.2d 914, 30 Ill.Dec. 149 (2d Dist. 1979). The request for the sworn statement of subcontractors, of course, may come directly from the owner or the owner's agent. *Deerfield Electric, supra* (bank, serving as owner's agent for disbursing construction loan, requested sworn statement listing subcontractors from general contractor).

F. [11.37] Breach by the Owner's Alter Ego

"The delay and dilatory action" of the owner that interfere with the contractor's performance are "an excuse for non-performance within the meaning of" the language of *Stanley J. Gottschalk Construction Co. v. Carlson,* 253 Ill.App. 520, 529 (1st Dist. 1929). *Miller v. Reed,* 13 Ill.App.3d 1074, 302 N.E.2d 131, 134 (5th Dist. 1973).

In *Cooper v. Palais Royal Theatre Co.,* 242 Ill.App. 184, 195 (1st Dist. 1926), it was held that the meaning of the word "owner" as used in §4 of the Mechanics Lien Act (now codified at 770 ILCS 60/4) was the same as the meaning of "owner" in §1 (now codified at 770 ILCS 60/1) and, thus, that when a contractor had furnished labor and materials for an improvement on property under a contract not with the actual owner but rather with one whom the owner had "knowingly permitted" to make the improvement, the contractor was entitled to a lien for the reasonable worth of such labor and materials, although he did not complete the contract because of the failure of the party whom the owner had knowingly permitted to make the improvement to perform his part of the contract. Thus, the trial court properly entered a lien for the amount of work actually performed.

G. [11.38] Contractor's Responsibility for Design

When the general contractor does not contract to improve on the plans prepared by the owner and its architects but simply to follow those plans, it cannot be held responsible for any fault in architecture. The general contractor can be held responsible for faulty workmanship and faulty material or a failure to comply with the plans. *Ruddy v. McDonald,* 244 Ill. 494, 91 N.E. 651 (1910).

XII. [11.39] ESTOPPEL — CONSTRUCTIVE FRAUD

It is a long-accepted principle of Illinois law that a mechanics lien claimant may be estopped from asserting a lien based on its prior representations about the amount of its claim or other conduct. For example, in *Hughes v. McCasland,* 122 Ill.App. 365 (4th Dist. 1905), the contractor had a mechanics lien that technically had priority over a mortgage. However, after the contractor's lien had attached and while the mortgagee was still "holding the proceeds of the loan for the purpose of making himself secure against any and all liens that might have attached to these premises for improvements," the contractor gave the mortgagee a detailed statement of all amounts due to him. 122 Ill.App. at 367 – 368. In reliance on that representation, the mortgagee paid out the money. The contractor later claimed that he had multiple contracts and that he understood that the mortgagee intended to require disclosure of his liens only under the first contract, but the appellate court held that he was estopped from asserting a mechanics lien against the mortgagee for any additional sums due, reversing the trial court's determination that the mechanics lien had priority over the mortgage.

Similarly, in *Commercial Loan & Building Ass'n v. Trevette,* 160 Ill. 390, 43 N.E. 769 (1896), the contractor's mechanics lien rights attached before the mortgage. However, when the mortgagee agreed to pay out the proceeds of his loan, the contractor told him that the contract was to construct a two-story building and that the full amount to be collected was due under that contract. The contractor failed to disclose to the mortgagee that he had also been hired to add a third story to the building and subsequently filed a mechanics lien for labor and materials involved in the construction of the third floor. The trial court found that the contractor was entitled to a mechanics lien for the full amount of its claim, but the appellate court reversed, and the Supreme Court upheld the appellate court:

> **The decision of the case may be placed upon the doctrine of equitable estoppel. Appellees obtained payment upon the contract of $8,000 by drawing moneys to the amount of $4,500 from the appellant, at various times, between April 1, 1893, and June 16, 1893, upon certificates of the architect bearing the orders of the mortgagors thereon, and requesting the appellant to pay out said moneys; and the appellees presented these orders, bearing upon their face a false statement as to the amount claimed to be due and owing to them for the carpenter work on the premises. Appellees not only failed to apprise the mortgagee of having acquired an additional contract, that of April 12, 1893, with the owners of the premises, for other and different work confined to the third story of the building, and for which the appellees were to receive $1,738, but, on the contrary, suppressed the knowledge of such later**

> **contract from appellant, by continuing to present vouchers for payment in which the total amount was still shown to be $8,000, less the money which had been actually paid.** 43 N.E. at 770.

The mortgagee was held to have priority over the contractor's mechanics lien.

A mechanics lien claiming additional sums for interference and delay was construed as "baseless" by a trial court. In *William J. Templeman Co. v. W.E. O'Neil Construction Co.,* 282 Ill.App.3d 1112, 707 N.E.2d 300, 236 Ill.Dec. 455 (1st Dist. 1996) (table), the claimant failed to serve notice in accordance with §24 of the Mechanics Lien Act, 770 ILCS 60/24, and recorded a claim for lien with a "fabricated" completion date that was seven and one-half months after the actual completion date and excessive by $1.2 million. Estoppel was applied to preclude recovery for breach of contract because the additional claims asserted were not disclosed in sworn statements, affidavits, and waivers previously furnished and because the claimant never submitted written requests for change orders as required by the contract. Moreover, sanctions in the amount of $350,000 were imposed. *See also William J. Templeman Co. v. W.E. O'Neil Construction Co.,* No. 1-96-3434, 1998 WL 34359217, *15 (1st Dist. Aug. 19, 1998).

Another aspect of the rule of equitable estoppel is that when the contractor's prior disclosures of amounts due and owing have the effect of helping to defraud a mortgagee, the contractor is estopped from asserting any lien regardless of whether it actually intended a fraud. The Supreme Court first enunciated this rule in *Heidenbluth v. Fromhold,* 152 Ill. 316, 38 N.E. 930 (1894), in which the owner of certain undeveloped real estate had agreed to convey it to a developer provided that the developer paid certain funds of his own resources to finance construction and to obtain additional financing in that event. The developer obtained receipts from the contractors bearing misleading amounts for the total contract price and reflecting consideration that had not actually been paid. In reliance on those receipts, the owner conveyed the property to the developer and obtained financing from several mortgagees. The developer's fraud was discovered, and the property was conveyed back to the owner. The contractor then filed for a mechanics lien and asserted priority over the mortgagees. The court held that the contractor could not enforce his mechanics lien rights against the mortgagees:

> **It is insisted that Heidenbluth Bros. [**the contractor**] and Manske [**the developer**] did not intend, in giving the false receipts, to deceive Kerr [**the owner**], or commit a fraud upon him or the holders of the notes now outstanding; nevertheless they permitted false amounts to be stated in their contracts, and gave false receipts, which were used to deceive Kerr and the persons who loaned the money on the trust deeds. . . . Their acts in fact constituted a fraud upon Kerr and the lenders of the money, and so far as their right of recovery in a court of equity is concerned, it is immaterial whether they intended the injury inflicted or not. Whoever seeks aid in a court of equity must come with clean hands.** 38 N.E. at 931.

On the same rationale, a mechanics lien claim that is excessive may be voided in its entirety even though the contractor is found actually to be owed certain amounts and to have technically perfected lien rights. In *Marsh v. Mick,* 159 Ill.App. 399, 402 (1st Dist. 1911), the contractor filed

a lien claim for $4,025, the full contract price. In testimony, however, the contractor admitted that the full amount of material contemplated in the contract had never been used and that the total value of the labor and materials actually supplied was only $2,833.71. *Id.* The circuit court awarded the contractor a lien in the true amount owed, but the appellate court reversed:

> **In making and filing his claim for a lien in the office of the Clerk of the Circuit Court, and in asserting that claim in his petition for a lien, we think that O'Meara [**the contractor**] was guilty of fraud; that he could not have honestly believed that he was entitled to the full contract price for the work which he had contracted to do, but which was not done, and that the attempt to claim a lien upon the premises so much in excess of the amount to which he was entitled, shows an intent on O'Meara's part to defraud the other lienors on the premises. . . .**
>
> *** * ***
>
> **. . . [**Due to the gross nature of the exaggeration, we**] think it cannot be said that the assertion of O'Meara in his claim for a lien for the sum of $4,025 is a mere mistake and error.** 159 Ill.App. at 405 – 406.

Regardless of the lack of evidence of intent on O'Meara's part to defraud or of any factual finding of such intent by the trial court, the appellate court voided the lien.

The doctrine of constructive fraud has been applied to set aside mechanics liens in several other reported cases. *See Hyde Park Investment Co. v. Hyde Park State Bank,* 257 Ill.App. 539 (1st Dist. 1930); *Fedco Electric Co. v. Stunkel,* 77 Ill.App.3d 48, 395 N.E.2d 1116, 32 Ill.Dec. 735 (4th Dist. 1979); *Edward Edinger Co. v. Willis,* 260 Ill.App. 106 (3d Dist. 1931). In *Edward Edinger,* the appellate court described the criteria for applying this rule:

> **It cannot be out of place to quote definitions of fraud given in Corpus Juris, vol. 26, 1059: "Fraud in its generic sense, especially as the word is used in courts of equity, comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another. Fraud has also been defined as any cunning or artifice used to cheat or deceive another. However, the wisdom of an exact legal definition of fraud has been questioned, and it has been stated that fraud is better left undefined, and some courts have said that the common law not only fails to define fraud but perhaps asserts as a principle that there shall be no definition. Further it is frequently stated that owing to the multiform character of fraud and the great variety of attendant circumstances no definition which is all inclusive can be framed, but each case must be determined on its particular facts." And again in the same volume of Corpus Juris, page 1061: "Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud."** 260 Ill.App. at 131 – 132.

After a 14-year legal battle involving two trials and two appeals, a contractor's claim for lien was upheld in *Peter J. Hartmann Co. v. Capitol Bank & Trust Co.,* 353 Ill.App.3d 700, 817 N.E.2d 913, 288 Ill.Dec. 263 (1st Dist. 2004). The contractor recorded a claim for lien in the amount of $250,000 and seven weeks later recorded another claim for lien in the amount of $279,824.35. 817 N.E.2d at 915 – 916. On appeal, the court found that both recorded lien claims stated a single contract date for the same described work on the same property with the same completion date. The second recorded claim for lien added necessary parties and clarified the amount owed. The court held that the subsequent filing was "amendatory in nature" and did not indicate fraud. 817 N.E.2d at 921. The court held that the contractor was entitled to recover the amount of the second recorded lien notice, $279,824.35, plus interest under the Mechanics Lien Act, and remitted the case for calculation of the proper interest amount. One may speculate as to how many years of litigation were avoidable had the contractor recorded only one notice and claim for lien.

XIII. [11.40] SLANDER OF TITLE

The act of maliciously recording a document that clouds another's title to real estate is actionable as slander of title. In *Contract Development Corp. v. Beck,* 255 Ill.App.3d 660, 627 N.E.2d 760, 194 Ill.Dec. 423 (2d Dist. 1994), the court held that a finding that services were non-lienable was not dispositive of the issue of malice and that further inquiry was required as to whether the claimant reasonably believed that it was entitled to a lien.

In *Kurtz v. Hubbard,* 2012 IL App (1st) 111360, 973 N.E.2d 924, 362 Ill.Dec. 528, the First District held that statements in recording a lien are protected from tort liability for slander of title only if they are found to be made without knowledge as to their falsity or without reckless disregard as to their truth or falsity. Thus, in *Kurtz* the trial court erred in dismissing claims of false light and slander of title based on statements being absolutely privileged.

XIV. [11.41] WAIVER OF LIENS

A clear, unambiguous waiver of mechanics lien rights bars an action under the Mechanics Lien Act. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008); *Lyons Federal Trust & Savings Bank v. Moline National Bank,* 193 Ill.App.3d 108, 549 N.E.2d 933, 140 Ill.Dec. 282 (3d Dist. 1990) (waiver bars only right to lien; it does not extinguish underlying debt). But this rule is applicable only when an innocent party has relied on the waiver in making payments. *Cordeck Sales, supra; Fisher v. Harris Bank & Trust Co.,* 154 Ill.App.3d 79, 506 N.E.2d 418, 106 Ill.Dec. 711 (2d Dist. 1987); *Luczak Bros. v. Generes,* 116 Ill.App.3d 286, 451 N.E.2d 1267, 71 Ill.Dec. 900 (1st Dist. 1983). Whether an innocent party relied on the waiver when making payments is a question of fact. *Cordeck Sales, supra; Fisher, supra.* It may also be a question of fact whether the waiver was a full or partial waiver. *See Lyons Federal, supra.*

A. [11.42] Is There Reliance if Owner Knows Subcontractor Is Not Paid?

There is some authority that a contractor may repudiate its unambiguous waiver of lien on the theory that the owner did not innocently accept it if the owner was aware when it received the waiver that the subcontractor had not yet been paid. In *Edward Hines Lumber Co. v. Dell Corp.,* 49 Ill.App.3d 873, 364 N.E.2d 368, 376, 7 Ill.Dec. 207 (1st Dist. 1977), the court stated:

> **[T]he issue is whether Des Plaines, once having issued its lien waiver, may subsequently repudiate it and assert their claim. In light of the proof adduced as to the industry custom for lien waivers to be given before payment has been made, the defendants' knowledge and use of the aforesaid custom, and the express agreement of the parties to employ a joint check to assure Des Plaines' payment for material we hold that Des Plaines may repudiate their lien waiver.**

On the other hand, in *Contract Builders Service Corp. v. Eland,* 101 Ill.App.3d 366, 428 N.E.2d 178, 56 Ill.Dec. 859 (2d Dist. 1981), the court held that an innocent party has a right to rely on a signed lien waiver even though it knows that the contractor or subcontractor who issued the waiver probably was not yet paid at the time of issuance of the waiver. In *Contract Builders Service,* the contractor knew that its lien waivers were only partial and were intended by the parties to waive its lien rights only to the extent of sums actually paid to it. It was also stated in an affidavit in that case that it was customary in the building industry in Lake County to use such lien waiver forms for a waiver of lien rights only to the extent of money actually received by the contractor. The appellate court in *Contract Builders Service* held that no ambiguity existed in the language of the lien wavier, and, accordingly, affidavits of the intention of the contractor and the owner would not be considered in determining whether, on the one hand, the owner was "innocent" in paying on reliance on the waiver and whether, on the other, the contractor could repudiate its waiver. 428 N.E.2d at 184. The court stated:

> **Under the circumstances in this case . . . Hines will not be able to assert that a document which in essence, said "for value received we hereby waive" should have been construed to have read "for value, which we may or may not have received, we waive or do not waive, as the case may be, our lien rights."** *Id.*

If an owner draws checks to the joint order of the contractor and a subcontractor, can the owner be said to have relied on the subcontractor's waiver when the owner was aware the subcontractor had not yet been paid? The answer should be that the owner has relied on the waiver to the extent that he or she has advanced funds in reliance on it that would not have been advanced without the waiver. Whether the subcontractor was paid before it delivered a waiver is immaterial. The subcontractor is at liberty to waive lien rights before or at the time of payment, and if it relies on the contractor's honesty, that should not influence the validity of its lien waiver.

B. [11.43] Owner Fraud on Subcontractor

In *Fisher v. Harris Bank & Trust Co.,* 154 Ill.App.3d 79, 506 N.E.2d 418, 106 Ill.Dec. 711 (2d Dist. 1987), it was held that the contractor could repudiate its unambiguous lien waiver if it could show that the owner was guilty of a fraudulent plan to induce the contractor to perform work and supply labor and materials with the intention of not fully paying the contractor for the work.

C. [11.44] Trade Usage/Customary Practice

In addition to the issues of the owner's innocence and good-faith reliance on an unambiguous and unconditional lien waiver, *Premier Electrical Construction Co. v. LaSalle National Bank,* 132 Ill.App.3d 485, 477 N.E.2d 1249, 1255, 87 Ill.Dec. 721 (1st Dist. 1984), recognized a possible additional issue that could warrant a contractor's repudiation of its waiver of lien, *i.e.,* precedents of customary practice between the parties and trade usage in the industry with respect to a subcontractor's lien waiver. Citing *Chicago Bridge & Iron Co. v. Reliance Insurance Co.,* 46 Ill.2d 522, 264 N.E.2d 134 (1970). The subcontractor, Premier, and the owners disputed in their respective affidavits whether there had been innocent, good-faith reliance on Premier's waiver of lien, the customary practice between them, and trade usage regarding the subcontractor's waivers of lien. In short, the subcontractor asserted that the owners knew that the amounts shown on Premier's payout notes and lien waivers did not accurately reflect the amounts due it for materials and labor Premier had provided on the project.

In *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership,* 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000), the court construed a waiver of lien to date, which the defendants argued was a final release of mechanics lien claims for all work performed up to the date of the waiver. Noting that the parol evidence rule applies only when the party against whose property a lien is sought has relied on the waiver innocently and in good faith, the court expressed doubt that the defendants relied in good faith on the waiver as a final release because the waiver on its face stated that, after the current payment, there was an unpaid balance due in excess of $200,000. 731 N.E.2d at 407. The court held that evidence including prior custom or usage could support an inference that the defendants did not rely in good faith on the waiver as a full release of mechanics lien rights.

In *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill.App.3d 334, 887 N.E.2d 474, 320 Ill.Dec. 330 (1st Dist. 2008), the court considered extrinsic evidence as to reliance on lien waivers. The court considered the customary practice of the parties as well as the practices of the industry with respect to lien waivers. The court specifically considered the deposition testimony of a senior construction escrow officer regarding the practices on the project, including that she construed the lien waiver as a partial waiver, that the heading of the lien waiver was "Partial Waiver of Lien," and that the lien waiver was accompanied by an affidavit reflecting that a substantial balance remained due and owing to the lien claimant. 887 N.E.2d at 510 – 511. The court affirmed a determination that under the circumstances there was no innocent reliance on the waiver as to the portion of the work for which the lien claimant sought its lien. 887 N.E.2d at 511.

D. [11.45] Ambiguous Waiver

In case of ambiguity in the language of the lien waiver, it has been held that doubt should be resolved against the waiver because it should be presumed, in the absence of clear evidence to the contrary, that a party has not disabled itself from the use of so valuable a privilege as that given by statute for the enforcement of builders' rights in the circumstances involved. *Burgoyne v. Pyle,* 261 Ill.App. 356 (1st Dist. 1931); *Edward Hines Lumber Co. v. Dell Corp.,* 49 Ill.App.3d 873, 364 N.E.2d 368, 7 Ill.Dec. 207 (1st Dist. 1977).

It has been stated that because mechanics liens are statutory in nature, they must be strictly construed with reference to the requirements on which the lien rights depend. One right the lien claimant has is to execute a full and general waiver releasing its rights to a mechanics lien against the property. The Illinois Supreme Court stated in *Decatur Lumber & Mfg. Co. v. Crail,* 350 Ill. 319, 183 N.E. 228, 230 (1932):

> **While a waiver of lien for a clearly expressed special purpose will be confined by the courts to the purpose intended, yet, where a general waiver is executed, and there is nothing in the context to show a contrary intention, there is nothing left for the court to do but enforce the contract as the parties have made it.**

E. [11.46] Waiver of Lien on Premises or Money Due or Both?

A waiver can be executed with respect to both the premises and money due, or a waiver may include only the premises if the contract so provides. *Bethlehem Steel Corp. v. Tishman-Adams, Inc.,* 45 Ill.App.3d 1003, 360 N.E.2d 475, 4 Ill.Dec. 539 (1st Dist. 1977); *Ellman v. Ianni,* 21 Ill.App.2d 353, 157 N.E.2d 807 (2d Dist. 1959); *In re H.G. Prizant & Co.,* 257 F.Supp. 145 (N.D.Ill. 1965); *North Side Sash & Door Co. v. Goldstein,* 286 Ill. 209, 121 N.E. 563 (1918); *Douglas Lumber Co. v. Chicago Home for Incurables,* 380 Ill. 87, 43 N.E.2d 535 (1942).

In *Capitol Plumbing & Heating Supply Co. v. Snyder,* 104 Ill.App.2d 431, 244 N.E.2d 856 (4th Dist. 1969), the court construed a lien waiver to discern whether it waived both a mechanics lien on the premises and a lien on funds due under the contract or only one or the other. The language of the lien waiver in part stated, "and all the lien laws of the State of Illinois on account of labor or materials, or both, *furnished* or *which may be furnished* by the undersigned to or on account of said labor [and/or] materials or both for said building and premises." [Emphasis added.] 244 N.E.2d at 859. It was held that the language was so general and apparently all-inclusive as to be deceptive if it were intended to release the real estate only and to retain a lien on funds due under the contract. Accordingly, the court concluded: "In short we believe . . . that one furnishing such a waiver would be estopped to claim wrongful payment made pursuant to the waiver." 244 N.E.2d at 860.

North Side Sash & Door, supra, and *Douglas Lumber, supra,* also stand for the proposition that a lien waiver will be limited to the express terms of the contract.

F. [11.47] Stolen Lien Waivers

Stolen lien waivers were the subject of *Richard's Lumber & Supply Co. v. National Bank of Joliet,* 32 Ill.App.3d 835, 336 N.E.2d 820 (3d Dist. 1975). A bank loaned money in reliance on a mortgage as collateral. When the loan was unpaid, the bank commenced a foreclosure suit. Before the foreclosure could be completed, a contractor commenced proceedings to foreclose its mechanics lien and joined the bank as a party defendant. The bank's defense was that it loaned money to the borrower in reliance on several waivers of lien signed by the president of the plaintiff contractor. It turned out that the lien waivers were stolen by the borrower from the contractor. The lien waivers, before being stolen, had been signed in blank by the president of the contractor. It was held that the bank was entitled to rely on the waivers in paying out money and recording its own trust deed. Further, the *Richard's Lumber* court quoted *Decatur Lumber & Mfg. Co. v. Crail,* 350 Ill. 319, 183 N.E. 228, 230 (1932):

> **Where one of two innocent persons must suffer by the fraud of a third person, the loss must fall upon him who by his conduct put it in the power of such third person to cause the injury.** 336 N.E.2d at 822.

Here, the contractor made it possible for its employee to commit the fraud by leaving the company waivers, which were already signed in blank by the company president, in a place where the borrower could obtain them.

G. [11.48] Consideration Not Required

Consideration is not an essential prerequisite to the validity of lien waivers. *Richard's Lumber & Supply Co. v. National Bank of Joliet,* 32 Ill.App.3d 835, 336 N.E.2d 820 (3d Dist. 1975); *Capitol Plumbing & Heating Supply Co. v. Snyder,* 104 Ill.App.2d 431, 244 N.E.2d 856 (4th Dist. 1969). In *Capitol Plumbing,* the court reasoned that a waiver of a mechanics lien is merely the waiver of a particular additional remedy and not the release of the underlying obligations.

H. [11.49] Waiver of Lien for Future Work

The waiver of a lien for work that might be done in the future was the subject of *William Aupperle & Sons, Inc. v. American National Bank & Trust Company of Chicago,* 28 Ill.App.3d 573, 329 N.E.2d 458 (3d Dist. 1975). The lien waivers recited on their face that all lien rights against the owner "on account of labor or materials, or both, furnished or which may be furnished" by the plaintiff were waived. 329 N.E.2d at 461. The last lien waiver recited that the plaintiff released

> **any and all claims which we have or may have for labor or materials . . . including any and all claims we have or [***t***]*hat may after accrue to us* under and by virtue of the laws of Illinois relating to mechanics' lien or otherwise; and we hereby certify that there are no outstanding bills for labor or material under [***o***]*ur contract* on said building. [**Emphasis added by *Aupperle* court.**]** *Id.*

It was held that the lien waivers were a complete defense to the contractor's right of lien to the extent that the lien arose out of contracts in existence at the date the final waiver was given. However, a new contract entered into after the final waiver, which was dated June 15, 1970, would not be barred. 329 N.E.2d at 462.

With respect to the waiver of claims for materials that may be furnished in the future, the court in *Capitol Plumbing & Heating Supply Co. v. Snyder,* 104 Ill.App.2d 431, 244 N.E.2d 856 (4th Dist. 1969), observed that by its very terms such a waiver poses a possible inadequacy of consideration, but it is nevertheless effective according to such terms.

I. [11.50] Reformation of Full Waivers to Partial Waivers

Even a lien waiver that states that it is a waiver of lien for all work performed and materials furnished "to date" can be interpreted in light of extrinsic evidence regarding whether there was innocent reliance on the waiver. In *Merchants Environmental Industries, Inc. v. SLT Realty Limited*

Partnership, 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000), the court examined extrinsic evidence to determine whether a lien waiver that was plainly unambiguous on its face that it waived a lien claim for all work performed "to date" was in fact innocently relied on so as to bar a lien claim. The court considered that there were prior lien waivers for lesser amounts that put the parties on notice that the lien waivers did not reflect the up-to-date contract price, and that there were substantial amounts stated as the balance due, which led the court to question whether it was reasonable to infer that the defendants believed in good faith that the contractor was willing to forgo its mechanics lien rights as to a balance of more than $200,000 in return for a payment of $31,938. 731 N.E.2d at 397. The court also considered correspondence from the owner to the contractor, and additional meetings between the plaintiff and the defendants, that there was a dispute about all invoices for the subject work.

Merchants Environmental Industries distinguishes certain prior cases that interpreted lien waivers without inquiring into whether payment was in fact made in innocent reliance on the waiver. For example, in *Miller Bros. Industrial Sheet Metal Corp. v. LaSalle National Bank,* 119 Ill.App.2d 23, 255 N.E.2d 755 (2d Dist. 1969), refusal to reform an explicit final waiver of lien into a partial waiver of lien was affirmed. The appellate court was not impressed that when the complete waiver was delivered, $160,000 was still due. 255 N.E.2d at 759. The standards for reformation are quite strenuous. It is axiomatic that a written instrument is presumed to show the intention of the parties and will not be reformed unless the evidence of mutual mistake or other grounds for reformation are strong and convincing. *Michigan Mutual Liability Co. v. Type & Press Company of Illinois, Inc.,* 62 Ill.App.2d 364, 210 N.E.2d 787 (1st Dist. 1965); *Almer Coe & Co. v. American National Bank & Trust Company of Chicago,* 44 Ill.App.2d 104, 194 N.E.2d 14 (1st Dist. 1963).

A waiver effective as to a contractor's lien rights would also be effective as to any third-party beneficiary rights claimed by the contractor that are the same rights as those conferred by the Mechanics Lien Act. *Capitol Plumbing & Heating Supply Co. v. Snyder,* 104 Ill.App.2d 431, 244 N.E.2d 856 (4th Dist. 1969).

J. [11.51] Mistakenly Issued Waivers

There is one old case, *Peters v. Becklenberg,* 265 Ill.App. 603 (1st Dist. 1932) (abst.), that affirmed the decision of the trial court setting aside a lien waiver in a suit between a contractor and an owner when the evidence showed that through a mistake of the scrivener the instrument did not speak the true intent of the parties. However, in *Capitol Plumbing & Heating Supply Co. v. Snyder,* 104 Ill.App.2d 431, 244 N.E.2d 856 (4th Dist. 1969), the appellate court affirmed a denial by the trial court of the contractor's reforming of a final lien waiver that it allegedly signed by mistake in the course of its haste and the circumstances. The court observed that it would be necessary to allege that there was no reliance or change of position based on the lien waivers and that because the contractor elected to stand on its complaint, which did not so allege, no cause of action remained for reformation of the waiver.

K. [11.52] Owner Breach

Since 1992, an agreement to waive any right to enforce or claim any lien under the Mechanics Lien Act when the agreement is in anticipation of and in consideration for the awarding of a contract

or a subcontract has been against public policy and unenforceable. P.A. 87-361 (eff. Jan. 1, 1992), now codified at 770 ILCS 60/1(d). Before 1992, a lien waiver by execution of a no-lien contract was effective despite the fact that the owner subsequently breached the contract. *Jankoviak v. Butcher,* 22 Ill.App.2d 126, 159 N.E.2d 377 (2d Dist. 1959). The reasoning was that a mechanics lien can be obtained only if there is a breach of contract, and if, as the contractor contended in *Jankoviak,* a breach of contract nullifies a written waiver of lien, then there would be no way to effectively waive the right to a mechanics lien.

XV. [11.53] A FEW COMMON NONSTATUTORY CLAIMS AGAINST OWNERS

If owners can defeat or avoid mechanics liens altogether, one might conclude that owners have no further exposure to subcontractors because of the absence of privity. It is worth noting that although generally the foregoing is true, there are a few well-known exceptions that deserve brief mention.

A. [11.54] Third-Party Beneficiary Claims

Illinois law is clear that absent proper compliance with the provisions of the appropriate lien statute, a subcontractor has no right of action against the owner of property. *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970). *See generally Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 1071, 211 Ill.Dec. 682 (1st Dist. 1995) ("party cannot ignore or fail to comply with the remedies available to it under the [Mechanics Lien] Act and then gain redress by claiming that it is the victim of the other party's unjust enrichment"). Further, the court in *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451, 453 (2d Dist. 1971), held that the subcontractor was not "entitled to an equitable lien on the grounds of unjust enrichment" when the owner had notice of the contractor's default and failure to pay subcontractors.

It is clear from the above that Illinois courts would not generally recognize a right of action against the owner of property by an unpaid subcontractor absent compliance with the lien statute. For a third party to be the beneficiary of a contract between two other parties, the contracting parties must define a third party by name or by description of a class at the time of contracting so that the beneficiary can be identified at the time of performance. *General Electric Capital, Corp. v. Equifax Services, Inc.,* 797 F.Supp. 1432, 1445 – 1447 (N.D.Ill. 1992), citing *Hunter v. Old Ben Coal Co.,* 844 F.2d 428 (7th Cir. 1988), and *Altevogt v. Brinkoetter,* 85 Ill.2d 44, 421 N.E.2d 182, 51 Ill.Dec. 674 (1981). Under a superseded interpretation of the third-party beneficiary rule in *Avco Delta Corporation Canada Ltd. v. United States,* 484 F.2d 692 (7th Cir. 1973), the federal circuit court recognized claims by subcontractors to a retainage fund held by the owner that was not created solely for the protection of the general contractor. In fact, the retainage fund covered claims for which the general contractor could not be held personally liable.

In *East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.,* 235 Ill.App.3d 756, 601 N.E.2d 972, 176 Ill.Dec. 274 (3d Dist. 1992), the court held that the Public Construction Bond Act (Bond Act), now codified at 30 ILCS 550/0.01, *et seq.,* mandated that the

public entity that was the owner require the general contractor to obtain a payment bond. Having failed to require the payment bond for the benefit of the subcontractors, it was held: "As a policy matter, it would be meaningless here to read the Bond Act requirements into the Construction Manager Agreement without reading in third party rights to enforce that statute." 601 N.E.2d at 975. Further, in the construction manager agreement, the general contractor agreed "to 'promptly pay all amounts due' the trade contractors upon receipt of any payment from plaintiff," and the general contractor agreed to "develop and implement a procedure for the review, processing, and payment of applications by Trade Creditors for progress and final payment." *Id.* Finally, the general contract provided that before issuance of final payment the general contractor was required to submit satisfactory evidence that all indebtedness had been paid.

The Illinois Supreme Court in *Rozny v. Marnul,* 43 Ill.2d 54, 250 N.E.2d 656 (1969), declined an opportunity to broaden the rights of third-party beneficiaries. In a suit by the purchaser of land against a surveyor who had surveyed property inaccurately so that the vendor had built improvements on an adjacent lot, the court chose to rely on a tortious misrepresentation theory rather than on an expanded third-party beneficiary theory (*i.e.,* that the survey was done for the "benefit" of some unknown and ultimate purchaser of the land from the builder) in awarding relief.

B. [11.55] Casualty Insurance

If the real estate that is subject to a mechanics lien is destroyed by fire, the claim is sometimes made that the mechanics lien then attaches to the proceeds of the insurance policy. However, insurance proceeds are not considered to arise out of the real estate but rather are considered to arise out of an unrelated contract between the owner of the real estate and an insurance company. Therefore, a contractor's or subcontractor's mechanics lien will not attach to the insurance proceeds fund. Contractors stand in no better position with regard to the proceeds than any other creditor of the owner. The apparent harshness of this rule is softened by the fact that lien creditors can, and often do, obtain an assignment of the insurance policy or arrange to be a beneficiary of the policy to the extent of their mechanics liens. *In re Pentell,* 777 F.2d 1281, 1284 n.3 (7th Cir. 1985).

C. [11.56] Deficiency — Personal Judgments

A mechanics lien may attach to the real estate as of the date of the contract. The lien attaches to the property and not to the owner. While there is a statutory provision for a deficiency judgment against the defendant should a sale upon foreclosure not yield enough to satisfy the amount of the lien, a deficiency necessarily requires a sale. *Swords v. Risser,* 55 Ill.App.3d 676, 371 N.E.2d 182, 13 Ill.Dec. 487 (4th Dist. 1977). In *Wise v. Jerome,* 5 Ill.App.2d 214, 125 N.E.2d 292 (2d Dist. 1955), the appellate court held that when the plaintiff had failed to establish his mechanics lien, the trial court had no authority to enter a money judgment or personal decree. The court noted that the plaintiff sought relief under the Mechanics Lien Act, that he had failed to amend his complaint, and that his relief must be limited by the statute.

A subcontractor may obtain a money judgment against the general contractor and against the owner, jointly, pursuant to §28 of the Mechanics Lien Act, 770 ILCS 60/28. Liability of an owner is limited to the extent that the owner is liable under his or her contract.

D. [11.57] Unjust Enrichment

Suits to enforce mechanics liens often include ancillary counts for equitable relief. Quantum meruit is used as an equitable remedy to provide restitution for unjust enrichment and is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff may recover even if the contract is unenforceable. A contractor who is not entitled to a mechanics lien because it did not substantially perform the contract in a workmanlike manner is limited to recovery in quantum meruit. *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 60, 243 Ill.Dec. 740 (1st Dist. 1999). Similarly, a contractor whose mechanics lien was invalid due to failure to provide a sworn statement to the owner as required by §5 of the Mechanics Lien Act, 770 ILCS 60/5, was allowed to maintain a claim for quantum meruit. *Weydert Homes, Inc. v. Kammes,* 395 Ill.App.3d 512, 917 N.E.2d 64, 334 Ill.Dec. 467 (2d Dist. 2009).

To state a valid claim for quantum meruit, a contractor must allege that (1) it performed a service to benefit the owner, (2) it performed this service non-gratuitously, (3) the owner accepted this service, and (4) no contract existed to prescribe payment for this service. A lien claimant's assertion that a valid contract existed precluded quantum meruit recovery in *Ehlers Construction, Inc. v. Timbers of Shorewood, L.P.,* Nos. 03 C 6966, 03 C 6969, 2004 WL 816748 (N.D.Ill. Mar. 11, 2004).

Subcontractors, on the other hand, do not have direct recourse against owners for unjust enrichment or quantum meruit. In *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive at Oakwood, LLC,* 387 Ill.App.3d 906, 901 N.E.2d 978, 986, 327 Ill.Dec. 245 (1st Dist. 2009), the court affirmed dismissal of a subcontractor's claims for unjust enrichment and quantum meruit based on lack of privity between the subcontractor and the owner and because

> **the rights afforded by the Act are purely statutory in nature and are not governed by the rules of equitable jurisprudence. . . . Generally, a subcontractor's exclusive remedy against a property owner is provided for through the Act. . . . As such, the trial court did not err in finding that Springfield's counts for the equitable relief of unjust enrichment and *quantum meruit* failed to state a cause of action for which relief can be granted. [**Citations omitted.**]**

Similarly, a second-tier subcontractor that loses a mechanics lien due to failure to serve statutory notices on the owner and general contractor does not have an equitable claim for unjust enrichment. In *Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 211 Ill.Dec. 682 (1st Dist. 1995), the court held that the plaintiff had an adequate remedy at law (mechanics lien) that was not properly pursued. Moreover, because the plaintiff's immediate contractor was paid in full, the owner and general contractor were not unjustly enriched by the plaintiff's loss.

In a case of first impression, a contractor hired by a tenant could not maintain quantum meruit and unjust enrichment claims against a landlord when the landlord had no contact with the contractor and did nothing to entice, coerce, or mislead the contractor. *Hayes Mechanical, Inc. v. First Industrial, L.P.,* 351 Ill.App.3d 1, 812 N.E.2d 419, 285 Ill.Dec. 599 (1st Dist. 2004). The

contractor, as a matter of litigation strategy, elected not to pursue its mechanics lien claim against the landlord and recorded a satisfaction and release of mechanics lien, then sought leave to amend its complaint against the landlord to assert claims for quantum meruit and unjust enrichment. The court squarely rejected application of unjust enrichment under the circumstances presented:

> **Not only did Hayes Mechanical fail to allege or otherwise present specific facts to the trial judge, the record discloses no facts upon which Hayes Mechanical could state quasi-contractual claims against First Industrial. . . . [**W**]e note that it is unjust for the contractor to bear the loss of the unpaid debt; however, the unpaid debt was incurred by the building's tenant, and an injustice that warrants the imposition of restitution includes not only a loss to the contractor but also improper conduct by the landlord. Because there were no indications of improper conduct here on the part of the landlord, it would be unjust to impose the burden of the unpaid debt upon the innocent landlord. [**Citation omitted.**]** 812 N.E.2d at 429.

In *C. Szabo Contracting, Inc. v. Lorig Construction Co.,* 2014 IL App (2d) 131328, 19 N.E.3d 638, 385 Ill.Dec. 706, a subcontractor was permitted to bring an unjust enrichment claim against a nonparty to a contract on the basis that the nonparty requested and received a benefit but paid no one for it. In this case, the contractor (Lorig) contracted with a subcontractor (JLA) for "pipe-jacking" work. The subcontractor then sub-subcontracted the pipe-jacking work to C. Szabo at the same price. In the course of litigating claims against Lorig, JLA dismissed its claims against Lorig without being paid for the pipe-jacking work. However, C. Szabo did not dismiss its unjust enrichment claim against Lorig. The court determined that when Lorig would receive the benefit of the work and would not have an obligation to pay anyone else for the work, C. Szabo would be able to recover the value of the work provided rather than allow Lorig to receive a windfall.

12 Miscellaneous Remedies

STEVEN D. MROCZKOWSKI
Ice Miller LLP
Chicago

XIII. [12.25] Subrogation

XIV. [12.26] Watercraft

I. [12.1] SCOPE OF CHAPTER

This chapter deals with the extent to which alternative theories of recovery may be employed in addition to or in lieu of pursuing a remedy under the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.*

II. ALTERNATIVE THEORIES OF RECOVERY

A. [12.2] Mechanics Lien Act as Exclusive Remedy Against Those Not in Privity of Contract

It has been uniformly held that neither a subcontractor nor a sub-subcontractor may maintain an action at law against the owner alone because of a lack of privity. Almost without exception, courts consider the Mechanics Lien Act as affording extraordinary remedies to contractors and subcontractors as well as equitable protection to owners, lenders, and potential purchasers of the property that is the subject of the improvements. *E.g., Contractors' Ready-Mix, Inc. v. Earl Given Construction Co.,* 242 Ill.App.3d 448, 611 N.E.2d 529, 536, 183 Ill.Dec. 266 (4th Dist. 1993). There has been a Mechanics Lien Act in existence in Illinois since 1825. The courts historically have considered the Act to be designed uniquely and adequately to balance each of those competing interests. However, the Illinois Supreme Court has emphasized that the Mechanics Lien "Act is to protect contractors and subcontractors providing labor and materials for the benefit of an owner's property." *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 834, 330 Ill.Dec. 808 (2009). The significance of *Weather-Tite* is its focus on the protection of the subcontractors' rights and the obligation of the owners to protect those rights when notified of the subcontractors through a contractor's sworn statement as opposed to the balancing of competing interests. Absent some compellingly unique element, courts generally hold that the Act is the exclusive remedy of contractors and subcontractors other than their respective and customary actions at law against the party with whom they contracted. Save incidents of fraud or collusion, it makes absolutely no difference that the owner knew of the subcontractor's existence and that the subcontractor was performing work on the owner's property.

In *Suddarth v. Rosen,* 81 Ill.App.2d 136, 224 N.E.2d 602 (2d Dist. 1967), a subcontractor filed a complaint to foreclose its mechanics lien and for other relief. The plaintiff had failed to serve notice as required by §24 of the Mechanics Lien Act, 770 ILCS 60/24, but alleged that both the owner and the construction lender had actual knowledge that the plaintiff had not been paid and that service of notice as required by §24 would have been a redundant and unnecessary act. The plaintiff further urged that the Mechanics Lien Act was designed to protect those who in good faith furnished labor and material in the improvement of the property and that its purpose should not be defeated by a strict and literal adherence to a highly technical provision, particularly in the plaintiff's case, in which the purpose of the provision already had been fulfilled (*i.e.,* notice of a claimant). The trial court granted the defendant's motion to dismiss, and the appellate court affirmed, stating:

> **It is well known that mechanics liens are in derogation of the common law and must, therefore, be strictly construed. . . . Mechanics lien statutes afford extraordinary**

> **remedies to certain classes of contractors and subcontractors and it is not unreasonable to expect them to conform to the requirements of the law that creates those remedies. Obviously, without a mechanics lien statute, the plaintiff would have no redress against the owners of the property or their lending institution. The General Assembly has seen fit to grant to a subcontractor, such as the plaintiff, a potent device to secure payment of his improvement of real property by its provision that a lien can be placed against the property so improved. However, the legislature has required that the subcontractor adhere to certain technical procedures to effectuate his lien and his failure to do so means simply that he has not availed himself of the remedy extended and that he has no lien. [**Citation omitted.**]** 224 N.E.2d at 603.

Likewise, in *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970), a subcontractor sued the general contractor and owner for the balance due under its contract. The plaintiff alleged its contract with the general contractor, its performance, and the balance due to it; that at the time the plaintiff completed the work, the owners were indebted to the contractor in an amount greater than the balance due the plaintiff; and that the owners knew that the plaintiff had not been paid by the contractor. Count II of the complaint further alleged that the plaintiff's subcontract "was prepared 'by and at the direction' of the owners" and incorporated the terms of the principal contract between the contractor and the owners, that the owners received the benefits resulting from the plaintiff's construction, and that the plaintiff performed in accordance with the directions of the owner's engineer. 255 N.E.2d at 616. The defendants moved to dismiss on the basis that the plaintiff failed to allege service of notice pursuant to §24. The trial court denied the motion, and the defendants elected to stand on their pleadings. A judgment was entered in favor of the plaintiff, and the owners appealed. The appellate court reversed, holding: "In the absence of an express contract with the owner, a sub-contractor, or one contracting with a principal contractor, cannot recover against the owner upon a contract theory for there is no employment between them. . . . As to recovery from the owner, the rights of a sub-contractor arise under the Mechanics Lien Statute." [Citations omitted.] 255 N.E.2d at 617.

The *Vanderlaan* court further stated:

> **Here the plaintiff contends that the owners should be held liable because they knew of the work and received the benefit thereof. In Campbell v. Day, 90 Ill. 363, it is stated that the doctrine that one seeing work done upon his property without objection is liable to the person performing it has no application where the entire work is contracted for and placed under another who has the power to employ whom he chooses. It is said that the owner has the right to presume that such work is being done for and in behalf of the contractor. See also Sloan v. Cleveland, C., C. & St. L. Ry. Co., 140 Ill.App. 31.**
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> * * *
>
> **In view of the law established as to the applications of the Mechanics Lien Statute, it is unnecessary to discuss at length plaintiff's contention that the principal contract and the sub-contract must be construed as one instrument so as to create liability in the defendant-owners.** *Id.*

Accord Bennett v. Ascher, 228 Ill.App. 350 (1st Dist. 1923).

Therefore, the mere presence or knowledge of a contractor's worker on a job will not constitute notice to satisfy the statute. *Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 1070, 211 Ill.Dec. 682 (1st Dist. 1995), citing *Sanaghan v. Lawndale National Bank,* 90 Ill.App.2d 254, 232 N.E.2d 546, 549 (1st Dist. 1967). *See also Salce, Inc. v. Downers Grove, IL (1149 Ogden), LLC,* 2019 IL App (2d) 180370-U, ¶¶34 – 35. It is sound argument that the owner that sees a laborer or other subcontractor working on the building is justified in assuming that the latter is working under its contract with the original contractor and for the benefit of the original contractor rather than for the benefit of the owner. It is not the theory of the Illinois statute that the original contractor is the agent of the owner for the purpose of purchasing material. *Philip S. Lindner & Co. v. Edwards,* 13 Ill.App.3d 365, 300 N.E.2d 283, 287 (3d Dist. 1973).

While the mere presence or knowledge of a contractor's worker will not waive the notice requirements under the Mechanics Lien Act, *Weather-Tite, supra,* requires owners to withhold sufficient funds for subcontractors based on the information on the contractor's sworn statement. 909 N.E.2d at 835. Therefore, under *Weather-Tite,* an owner arguably is not protected from having to pay twice if it reasonably relies on the contractor's sworn statement and if that contractor fails to pay its subcontractors. Because the Illinois Supreme Court has held specifically that the owner has a duty to retain sufficient funds to pay subcontractors listed on a sworn statement, and while it is the industry practice in general, an owner is well advised to insist on lien waivers from every subcontractor before issuing payments in light of *Weather-Tite*.

In *Malicki v. Holiday Hills, Inc.,* 30 Ill.App.2d 459, 174 N.E.2d 915 (2d Dist. 1961), the plaintiff, an employee of the developer, sought to enforce a lien as an original contractor against the homes built and sold by his employer. The court held that as an employee of the contractor, the plaintiff's only security interest in the homes built was as a subcontractor:

> **Here, the employment of the plaintiff was solely for the benefit of the [**general contractors**] in the expectation of a profit and the only contractual relationship was between the plaintiff and the [**general contractors**].** 174 N.E.2d at 919.

Notwithstanding *Weather-Tite*'s heightened scrutiny on the owner's duties, as §§12.3 – 12.14 below detail, with few exceptions, actions intended to accomplish the objective of either (1) imposing a lien on real property by a either a contractor or a subcontractor or (2) bypassing a party and skipping privity by bringing an action against a third party, such as an attempt by a subcontractor to bring an action against the owner, are generally unsuccessful unless the party has perfected its claim under the Mechanics Lien Act, regardless of the alternative theory of law under which the action is brought.

B. [12.3] Equitable Liens

An equitable lien is the right to have property subjected to the payment of a claim. *Watson v. Hobson,* 401 Ill. 191, 81 N.E.2d 885 (1948); *Hargrove v. Gerill Corp.,* 124 Ill.App.3d 924, 464 N.E.2d 1226, 80 Ill.Dec. 243 (2d Dist. 1984). The imposition of an equitable lien arises in two situations. The first situation is one in which the parties express in writing their intention to make a particular property (real or personal) or some fund the security for a debt or in which there has been a promise to convey or assign the property as security. *Oppenheimer v. Szulerecki,* 297 Ill. 81,

130 N.E. 325 (1921); *Carlyle v. Jaskiewicz,* 124 Ill.App.3d 487, 464 N.E.2d 751, 79 Ill.Dec. 847 (1st Dist. 1984); John N. Pomeroy, 4 EQUITY JURISPRUDENCE §1235 (5th ed. 1941). In the second class of cases, equity has imposed equitable liens without an express agreement between the parties wholly from general considerations of fairness. *Oppenheimer, supra; Pope v. Speiser,* 7 Ill.2d 231, 130 N.E.2d 507 (1955); *Calacurcio v. Levson,* 68 Ill.App.2d 260, 215 N.E.2d 839 (2d Dist. 1966); RESTATEMENT (FIRST) OF RESTITUTION §170 (1937).

In either of these two situations, the essential elements of an equitable lien are (1) a debt, duty, or obligation owing by one person to another and (2) a res to which that obligation fastens. *Hargrove, supra; Marshall Savings & Loan Ass'n v. Chicago National Bank,* 56 Ill.App.2d 372, 206 N.E.2d 117 (2d Dist. 1965), *overruled on other grounds by First National Bank of Barrington v. Oldenburg,* 101 Ill.App.3d 283, 427 N.E.2d 1312, 56 Ill.Dec. 766 (2d Dist. 1981).

An equitable lien has been described as follows:

> **An equitable lien is the right to have property subjected, in a court of equity, to the payment of a claim. It is neither a debt nor a right to property but a remedy for a debt. It is simply a right of a special nature over the property which constitutes a charge or encumbrance thereon, so that the very property itself may be proceeded against in an equitable action and either sold or sequestered under a judicial decree, and its proceeds in one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists. . . . Equity recognizes, in addition to the personal obligation, in some cases, a peculiar right over the thing concerning which a contract deals, which it calls a "lien," and which, though not property, is analogous to property, by means of which the plaintiff is enabled to follow the identical thing and to enforce the defendant's obligation by a remedy which operates directly upon that thing. [**Citations omitted.**]** *Hargrove, supra,* 464 N.E.2d at 1231, quoting *Watson, supra,* 81 N.E.2d at 890.

In *W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.,* 132 Ill.App.3d 260, 477 N.E.2d 513, 87 Ill.Dec. 536 (1st Dist. 1985), the court held that an equitable lien existed in favor of a contractor against the owner's property; however, note that the owner-developer had deeded the property to the contractor as security for the owner-developer's indebtedness to the contractor for the construction costs and that the deed had failed because the owner-developer did not actually own the property. The court held that an equitable lien could be imposed on behalf of the contractor because of the mutual mistake regarding the validity of the warranty deed the contractor received from the developer as security for additional financing for the improvements.

It has been stated that

> **Illinois has recognized equitable liens which arise wholly from a consideration of right and justice even in the absence of an express agreement, such as where a tenant has made improvements in order to restore a building to use, where one of the joint tenants has made permanent improvements upon property which has added to its value, or where a vendor's lien exists.** *Hargrove, supra,* 464 N.E.2d at 1231.

See also Oppenheimer, supra; In re Estate of Holder, 42 Ill.App.3d 35, 355 N.E.2d 333 (4th Dist. 1976); *Sentel v. James,* 16 Ill.App.2d 373, 148 N.E.2d 22 (3d Dist. 1958) (abst.); *Pope, supra.*

Calacurcio, supra, presented a situation in which there was no written agreement. There, the defendants requested that the plaintiff make the construction payouts to the contractor. In the process, they requested that he advance funds before their loan was approved so that the construction could progress. The contractor expended his own money for all but a small portion of the project. When the defendants refused to reimburse him, he filed a two-count complaint. In Count I, he sought to enforce a mechanics lien as a subrogee of the contractor and others for whose labor and materials he had paid. In Count II, he sought to impress an equitable lien. The trial court dismissed Count I and entered an order granting the plaintiff an equitable lien. The appellate court affirmed the award.

> **The trend of modern decisions is to hold that in the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. . . . In this case the trial court determined that plaintiff had expended his own money for the improvement of property belonging to the [**defendants**] and that he did so at their request. To permit them to enjoy the benefits of the improvements without impressing a lien on the property in favor of the plaintiff would constitute unjust enrichment. It is a general rule that if a stranger makes an improvement on land of another, the improvement becomes the property of the owner of the land. In equity, if the owner stands by and permits another to spend money in improving the land, there is an implied promise that the owner will pay the reasonable value of the improvements. . . . It must follow that when one requests a stranger to improve the land, equity will afford that stranger a just remedy for the debt thereby created. [**Citations omitted.**]** 215 N.E.2d at 841.

Illinois courts, however, have universally declined the invitation to impose an equitable lien when a contractor or a subcontractor has been found not to have complied with the statutory requirements of the Mechanics Lien Act and thereby forfeited the remedies made available by its provisions. *Swansea Concrete Products, Inc. v. Distler,* 126 Ill.App.3d 927, 467 N.E.2d 388, 81 Ill.Dec. 688 (5th Dist. 1984). While the equitable lien theory most often has been advanced by subcontractors who have failed in one way or another to perfect their liens to recover against the owner, with whom the subcontractor is not in privity, or to impose a lien on the owner's property, the theory occasionally, and equally unsuccessfully, has been advanced by contractors who have failed to comply with the Mechanics Lien Act's requirements to obtain priority over or in parity with mortgagees.

In *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451 (2d Dist. 1971), the plaintiff failed to perfect its mechanics lien against the owner of the property by failing to timely serve its notice required by §24 of the Mechanics Lien Act, 770 ILCS 60/24. The owner failed to obtain the §5 contractor's sworn statement (see 770 ILCS 60/5), so the material supplier's lien was not saved by being shown on the sworn statement. The court saw no reason to break with precedent

and held that the owner's failure to comply with the statute did not excuse the subcontractor's failure to comply with the Mechanics Lien Act and that the subcontractor's lien was unenforceable. The court made short shrift of the subcontractor's second argument — that it was entitled to an equitable lien — disposing of it with the following comment:

> **Plaintiff also contends that it was entitled to an equitable lien on the grounds of unjust enrichment. We are unable to find any authority which would grant an equitable lien in a situation where it would have been appropriate to impose a mechanic's lien had there been compliance with the statute. Our research reveals that the sole remedy of subcontractor against the owner of premises is under the Mechanics' Liens Act.** 275 N.E.2d at 453.

Accord Traubco Food Equipment Fabricators, Inc. v. United Auto Workers, Local 588, Rank & File Union Center, AFL-CIO, 123 Ill.App.2d 106, 258 N.E.2d 817 (1st Dist. 1970) (abst.); *Sloan v. Cleveland, Cincinnati, Chicago & St. Louis Ry.,* 140 Ill.App. 31 (4th Dist. 1908).

The principle decided in *Hill Behan Lumber, supra,* was used as an analogy in *Canton v. Chorbajian,* 88 Ill.App.3d 1015, 410 N.E.2d 1166, 1173, 44 Ill.Dec. 74 (2d Dist. 1980), a non-mechanics lien case, in which the court stated:

> **An analogy can be made, however, to cases where a subcontractor has sought to obtain an equitable lien against the owner of the premises absent compliance with the Mechanics' Liens Act. Illinois law is clear that absent compliance with the provisions of the appropriate liens' statute, a subcontractor has no right of action against the owner of property.**

The court cited *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970), and *Hill Behan Lumber, supra.*

When a subcontractor failed to perfect its mechanics lien on funds due to the contractor from a public construction project, the court held that it had no equitable lien on the funds owed by the public body to the general contractor. Priority as to those funds was lost to the bank assignee of the general contractor. *Board of Education of School District No. 108, Tazewell County, Illinois v. Collom,* 77 Ill.App.2d 479, 222 N.E.2d 804 (3d Dist. 1966).

The plaintiff in *P.H. Broughton & Sons, Inc. v. Muller & Allen Realty Co.,* 40 Ill.App.3d 776, 353 N.E.2d 30 (4th Dist. 1976), contracted with the developer of a subdivision to pave certain streets and sidewalks and do related work. At the time the plaintiff entered into its contract, Security Federal Savings & Loan had a first mortgage against the property and had agreed to make additional advances to be secured by a second mortgage on the property. To placate the plaintiff contractor's qualms regarding the solvency of the developer, an agreement was signed by the plaintiff, the developer, and Security Federal, by which Security Federal agreed not to disburse funds to the developer until certain sums were paid by the developer to the plaintiff contractor. The agreement also contained language saying that nothing contained therein was to "have any effect on the fact that [the lender's] mortgage is to be considered as a first and valid lien on said land and that all other debts and claims shall be inferior and subordinate to the lien of said mortgage." 353 N.E.2d at 32.

When the plaintiff filed suit to foreclose its mechanics lien, a substantial portion of the contract price remained unpaid to the plaintiff. In addition to seeking to foreclose its mechanics lien, the plaintiff also alleged that the terms of the three-party agreement created an equitable lien in its favor. The court found that the plaintiff had failed to perfect its mechanics lien, and that being the case, it also had no equitable lien against the developer's interests in the property:

> **The performance of work upon real estate under contract with the owner does not give the one performing the work an equitable lien to secure payment to the one performing the work when that party fails to perfect a mechanics' lien.** 353 N.E.2d at 34.

As to the imposition of an equitable lien on the property in priority to, in parity with, or even subordinate to the interests of the lender, the court held that, even construing the three-party agreement most strictly against the lender,

> **no intention can be found in the document to create a lien with the mortgage interest of Security as its res to secure its obligation to aid Broughton in making collection upon the sale of each lot. Such a construction would be directly contrary to the express provision of the addendum that Security's mortgage interest was to be unimpaired. The trial court correctly ruled that the documents before it showed, as a matter of law, that Broughton did not have an equitable lien against any interest of Security in the real estate.** *Id.*

In *R.W. Boeker Co. v. Eagle Bank of Madison County,* 170 Ill.App.3d 693, 525 N.E.2d 146, 121 Ill.Dec. 340 (5th Dist. 1988), a contractor sought an equitable lien against a lender that had foreclosed on certain property. The plaintiff contractor's mechanics lien had been extinguished by the lender's foreclosure suit, which it had failed to join. The basis for the contractor's equitable lien theory was that during the entire time the lender was foreclosing on the property, the contractor had a construction trailer on the site with its name in bold letters on the side and the jobsite was three and one-half blocks from the lender's offices on the same side of Illinois Highway 159. The appellate court first found that the issue was not raised at the trial court level and therefore was not preserved for appeal. The court went on, however, to decide the issue based on the pleadings as though it had been preserved. The court found that the essential elements of an equitable lien are (1) a debt, duty, or obligation owing by one person to another and (2) an identifiable res to which that obligation fastens. The court held that the contractor could have no equitable lien because one of the essential elements was missing. There was no debt, duty, or obligation on the part of the bank toward the contractor. During the foreclosure proceeding, the lender bank was not the owner of the property and did not have sufficient interest in the property to allow it to prevent the contractor's expenditure of time and money.

> **Moreover, equitable liens cannot be imposed when a lienor fails to perfect his mechanic's lien. . . . Plaintiff had an adequate remedy at law; it had a perfected mechanic's lien upon which it could have pursued recovery in the [**lender's**] mortgage foreclosure proceedings. Plaintiff failed to do so and is now barred from further action. [**Citations omitted.**]** 525 N.E.2d at 148 – 149.

In a suit brought in Cook County, an argument could be made that under Cook County Circuit Court Rule 7.3 (effective as of October 1, 1996), the lender failed to properly join the contractor in *R.W. Boeker* and that this requirement was an obligation owed to parties in interest. Counsel for lenders and contractors alike should be mindful of this local rule and of its potential import on a foreclosure and a mechanics lien case.

The court in *Jacobsen v. Conlon,* 14 Ill.App.3d 306, 302 N.E.2d 471 (1st Dist. 1973), addressed a similar situation except that the party against whom the contractor — which did not appeal dismissal of its mechanics lien claim — sought to impose an equitable lien was a tax purchaser. Again, the court held that the fact that there was no debt, duty, or obligation of the tax purchaser to the contractor was fatal to the contractor's claim. There was also no conduct on the part of the tax purchaser that created a debt, duty, or obligation to the contractor. The tax purchaser did not enter into a contract with the contractor, nor did he stand idly by and allow the contractor to perform work for which the tax purchaser knew the contractor otherwise would be entitled to compensation.

Generally speaking, a party who has failed to perfect its mechanics lien will obtain no better position in the bankruptcy of the upper-tier party with whom it contracted than that of a general creditor.

> **Equitable liens are not favored in bankruptcy, especially in this context. "A creditor who failed to take the steps necessary to perfect a security interest should not be provided with a favorable position by the Bankruptcy Court at the expense of other creditors who had no notice of that interest."** *In re T. Brady Mechanical Services Inc.,* 133 B.R. 441, 446 (Bankr. N.D.Ill. 1991), quoting *In re Hendleman,* 91 B.R. 475, 476 (Bankr. N.D.Ill. 1988).

From the facts stated in the opinion, however, the court in *T. Brady Mechanical Services, supra,* was incorrect in holding that the subcontractor's last work was warranty work that did not constitute final work for determining the timeliness of the subcontractor's lien notice.

An Illinois case in which an equitable lien was not discussed but may have formed the basis for the result is *McCann Construction Specialties Co. v. Alan Construction Co.,* 12 Ill.App.3d 206, 298 N.E.2d 222 (1st Dist. 1973). In that case, R. Lavin and Sons, the owner, contracted with Alan Construction to construct a building on a site in Chicago. Alan Construction subcontracted the concrete work to Thompson Construction, which ultimately defaulted on its contract and left the job. At the time Thompson Construction defaulted, it had furnished sworn statements to Alan Construction that did not list McCann Construction Specialties, a material supplier. Alan Construction, in turn, presented its sworn statements of creditors to R. Lavin and Sons. Alan Construction's sworn statements, being based on Thompson Construction's sworn statements, did not list McCann Construction Specialties as a supplier. McCann Construction Specialties first perfected its lien by serving timely notice and by timely recording its claim. It then brought suit to foreclose its lien. The owner and the general contractor defended on the basis that they had paid out in reliance on the sworn statements that they had received from Thompson Construction and that, therefore, McCann Construction Specialties must bear the loss. The appellate court disagreed and held in favor of the material supplier in this case, distinguishing the facts before it from those in *Knickerbocker Ice Co. v. Halsey Bros.,* 262 Ill. 241, 104 N.E. 665 (1914), and *Sanaghan v. Lawndale National Bank,* 90 Ill.App.2d 254, 232 N.E.2d 546 (1st Dist. 1967).

The lien in *McCann Construction Specialties,* however, was imposed on retention funds held by Lavin and Sons for Thompson Construction's work. If there had not been funds remaining due to Thompson Construction, the decision might have resulted in the owner, who complied with the Mechanics Lien Act, being liable for more than the original contract price, a violation of 770 ILCS 60/21. *See Bricks, Inc. v. C & F Developers, Inc.,* 361 Ill.App.3d 157, 836 N.E.2d 743, 297 Ill.Dec. 12 (1st Dist. 2005) (claimant's lien attached only to amount owed its immediate contractor). *But see Struebing Construction Co. v. Golub-Lake Shore Place Corp.,* 281 Ill.App.3d 689, 666 N.E.2d 846, 217 Ill.Dec. 177 (1st Dist. 1996), in which the First District previously had reached an opposite conclusion with nearly identical facts, holding that a third-tier claimant's lien attached to the amounts still owed to the general contractor, thus forcing the owner into a situation in which it would have to pay twice for work performed even if it reasonably relied on the contractor's sworn statement. Of course, reliance on the sworn statement without lien waivers, under *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill.2d 385, 909 N.E.2d 830, 330 Ill.Dec. 808 (2009), also will not guarantee an owner from having to pay twice for work performed if contractors wrongfully fail to pay the downstream contractors and suppliers. Inasmuch as there were funds left due and owing to Thompson Construction, the *McCann Construction Specialties* decision was equitable.

An equitable lien was imposed on a federal entity that did not have sovereign immunity in *Active Fire Sprinkler Corp. v. United States Postal Service,* 811 F.2d 747 (2d Cir. 1987). There, the federal agency failed to require an adequate Miller Act, ch. 642, 49 Stat. 793 (1935), bond. See the discussion of the case and the limitations of its impact in §12.8 below. One court in an unreported case held that the holding may be limited to situations in which the prime contractor is insolvent or unable to pay the judgment. *Fortna, Inc. v. United States Postal Service,* No. Civ.A. 00-3081, 2000 WL 33119416 (E.D.Pa. Dec. 29, 2000).

In *First Bank of Roscoe v. Rinaldi,* 262 Ill.App.3d 179, 634 N.E.2d 1204, 199 Ill.Dec. 850 (2d Dist. 1994), the appellate court confirmed the trial court's granting of a motion to dismiss with prejudice a count requesting the imposition of a mechanics lien of a party who had a contract to develop a site into a shopping center but whom the court found did not fall within the ambit of the Mechanics Lien Act.

The lien claimant also sought an equitable lien. The *First Bank of Roscoe* court held that when the contract between the parties covers the entire subject matter and does not provide for a lien, a lien will not be inferred. The court found that the contract between the parties embodied the entire understanding between them with respect to the subject matter and made no provision for a lien on the property. The appellate court affirmed the trial court's dismissal of the count and went on to state:

> **Although equitable liens may be imposed in the absence of an express agreement out of considerations of fairness . . . there must be some ground for the intervention of equity, such as the absence of an adequate remedy at law. . . . The tendency is to limit rather than extend the doctrine of equitable liens. [**Citations omitted.**]** 634 N.E.2d at 1212.

Therefore, in this instance, the emphasis by the Second District was contemplated in the contract as opposed to whether there was a debt and a res. One can infer, as well, that the Second District recognized that there was an alternative remedy at law available to the plaintiff.

Under federal law, equitable liens are recognized for sureties and contractors that pay subcontractors and suppliers and that are said to accede to the equitable rights of such subcontractors and suppliers. *Balboa Insurance Co. v. United States,* 775 F.2d 1158, 1161 (Fed.Cir. 1985), citing *United States Fidelity & Guaranty Co. v. United States,* 475 F.2d 1377, 1382 (Ct.Cl. 1973); *Prairie State Nat. Bank of Chicago v. United States,* 164 U.S. 227, 41 L.Ed. 412, 17 S.Ct. 142 (1896); *Henningsen v. United States Fidelity & Guaranty Company of Baltimore Maryland,* 208 U.S. 404, 52 L.Ed. 547, 28 S.Ct. 389 (1908); *Pearlman v. Reliance Insurance Co.,* 371 U.S. 132, 9 L.Ed.2d 190, 83 S.Ct. 232 (1962).

C. [12.4] Third-Party Beneficiary Theory

The right to assert a claim as a third-party beneficiary of a contract is limited to those who are expressly intended to be so or who are of a class of beneficiaries that are expressly considered to be so under the terms of the contract. Within the context of a contractor who is not in privity with the owner and has performed work on the owner's real property, the court said, in pertinent part, in *Carson Pirie Scott & Co. v. Parrett,* 346 Ill. 252, 178 N.E. 498, 501 (1931):

> **The rule is settled in this state that, if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct, he may sue on the contract; if incidental he has no right of recovery thereon. This rule has been announced without variation in numerous cases decided by this court.**

Other courts have commented:

> **In Illinois, the promisor's intention must be evidenced by an express provision in the contract identifying the third-party beneficiary.** *Wheeling Trust & Savings Bank v. Tremco Inc.,* 153 Ill.App.3d 136, 505 N.E.2d 1045, 1048, 106 Ill.Dec. 254 (1st Dist. 1987).

> **[**T**]here is a strong presumption that parties . . . intend that the contract's provisions apply to only them and not to third parties. In order to overcome that presumption, the implication that the contract applies to third parties must be so strong as to be practically an express declaration. (*Alaniz v. Schal Associates* (1988), 175 Ill.App.3d 310, 124 Ill.Dec. 851, 529 N.E.2d 832.) . . . It is not enough that the beneficiary is an incidental beneficiary, *i.e.,* that the third party will reap incidental benefits from the contract. Only a direct beneficiary has a right against the promisor or promisee. . . . A third party is a direct rather than an incidental beneficiary when the contracting parties have manifested in their contract an intention to confer a benefit upon the third party. [**Citation omitted.**]** *Ball Corp. v. Bohlin Building Corp.,* 187 Ill.App.3d 175, 543 N.E.2d 106, 107, 134 Ill.Dec. 823 (1st Dist. 1989).

The Northern District has reinforced the principal that the presumption against third-party beneficiaries to the contract will not be overcome unless the contract clearly delineates a benefit for a class of third parties. *MCI Worldcom Network Services, Inc. v. Atlas Excavating, Inc.,* No. 02 C 4394, 2005 WL 1300766 (N.D.Ill. Feb. 23, 2005).

1. [12.5] Subcontractors and Owners Are Incidental Beneficiaries to Each Other

In the construction context, courts generally refuse to create a third-party beneficiary relationship in favor of either a subcontractor against the owner or the owner against the subcontractor.

To put this into context, a subcontractor that has failed to perfect its mechanics lien generally will not be permitted to bring suit against an upper-tier contractor or owner with whom the subcontractor is not in direct privity of contract. A third-party beneficiary theory will not provide an avenue for the subcontractor or supplier that has failed to perfect its mechanics lien. No Illinois court has permitted a subcontractor to avoid compliance with the Mechanics Lien Act and yet obtain recovery against an owner or upper-tier contractor with whom it was not in privity of contract under a third-party beneficiary theory. To the contrary, subcontractors' remedies have been stated to be those provided by the Act, contract actions, or actions on the bond. *E.g., J & K Cement Construction, Inc. v. Montalbano Builders, Inc.,* 119 Ill.App.3d 663, 456 N.E.2d 889, 75 Ill.Dec. 68 (2d Dist. 1983).

In *Kilburg v. Petrolagar Laboratories, Inc.,* 280 Ill.App. 527 (1st Dist. 1935), the owner made a contract with a construction company under which the construction company was to sublet all contracts on the basis of the cost of labor and material plus a profit to the subcontractor plus ten percent to the construction company for its services. All of the subcontracts were to be approved in advance in writing by the owner, who was to pay all invoices for labor and material as rendered. When they were not paid all of the amounts due to them, the electrical subcontractors filed suit directly against the owner. The appellate court reversed the verdict and judgment in the plaintiffs' favor and held that, in view of the contract, the construction company was an original contractor and not the owner's agent and that therefore a subcontractor could not maintain an action at law directly against the owner. It also held that, as subcontractors, the plaintiffs were not the third-party beneficiaries of the contract between the owner and the general contractor.

> **The facts in the instant case do not bring plaintiffs within the rule, as they contend. The written and oral contracts in the instant case were not entered into for the direct benefit of plaintiffs (a third party), but the benefit to them is merely incidental and they have no right to recover under the contract.** 280 Ill.App. at 531.

One court held that a subcontractor's third-party beneficiary rights are identical to its mechanics lien rights and thus subject to the same defenses. In *Capitol Plumbing & Heating Supply Co. v. Snyder,* 104 Ill.App.2d 431, 244 N.E.2d 856 (4th Dist. 1969), the plaintiff, a material supplier to a subcontractor who had provided a final waiver of lien, sought to make the original construction contract between the owner and the general contractor a third-party beneficiary contract with the plaintiff as the third-party beneficiary. The plaintiff named the original owners of the property, the contractor, and the lender as defendants. The court held that it was a defense to the lender that it did not sign the contract. With respect to the remaining defendants, the court held:

> **As to the other defendants, no extended discussion is required as to Count II based upon the theory that plaintiff is a third party beneficiary because the benefit claimed is the same benefit that would be provided by the Mechanics Lien Act, that is the**

> **furnishing of the affidavits required by Section 5 of the Mechanics Lien Act. No question has been raised by any party as to service of the subcontractor's lien notice on time. Therefore, unless the lien waivers, heretofore referred to, are effective, a proper subcontractor's lien would have been perfected. A waiver effective as to lien rights would be effective as to any third party beneficiary rights which are the same rights as those conferred by the statute.** 244 N.E.2d at 859.

The court's decision in *Capitol Plumbing & Heating Supply* is both logical and practical. If the subcontractors had third-party beneficiary rights, there would be either (a) little, if any, need for a Mechanics Lien Act or (b) two parallel, and perhaps conflicting, bodies of law covering the same subject matter.

Likewise, owners have been held to be incidental beneficiaries of the contracts between the general contractor and its subcontractors and therefore not entitled to recover from subcontractors for construction defects. *E.g., 155 Harbor Drive Condominium Ass'n v. Harbor Point Inc.,* 209 Ill.App.3d 631, 568 N.E.2d 365, 154 Ill.Dec. 365 (1st Dist. 1991) (breach of warranty — construction defects); *Ball Corp. v. Bohlin Building Corp.,* 187 Ill.App.3d 175, 543 N.E.2d 106, 134 Ill.Dec. 823 (1st Dist. 1989) (breach of warranty — construction defects).

In *155 Harbor Drive, supra,* the plaintiff condominium association maintained that it was a third-party beneficiary of the subcontract between the general contractor and the subcontractor because (a) the subcontract incorporated by reference the warranty and guaranty provisions of the contract between the owner and the general contractor, (b) the subcontract established a warranty fund as a security for the performance of warranty service to the condominium purchasers by the subcontractor, and (c) the subcontract guaranteed the materials and workmanship of the subcontractor. The court held that the trial court properly dismissed the third-party beneficiary claims. It found:

> **With respect to construction contracts, this court has held that "[i]t is not enough that the parties to the contract know, expect or even intend that others will benefit from the construction of the building in that they will be users of it. The contract must be undertaken for the plaintiff's direct benefit and the contract itself must affirmatively make this intention clear."** 568 N.E.2d at 374, quoting *Waterford Condominium Ass'n v. Dunbar Corp.,* 104 Ill.App.3d 371, 432 N.E.2d 1009, 1011, 60 Ill.Dec. 110 (1st Dist. 1982).

See also Midwest Concrete Products Co. v. LaSalle National Bank, 94 Ill.App.3d 394, 418 N.E.2d 988, 49 Ill.Dec. 968 (1st Dist. 1981), a mechanics lien action by a subcontractor in which the court denied the user of the property recovery against the subcontractor with whom the user was not in privity of contract. Financially contributing to a project also does not render one, even an occupant of the improved property, an intended third-party beneficiary. *See Goldfarb v. Bautista Concrete, Inc.,* 2019 IL App (1st) 172968, 126 N.E.3d 516, 430 Ill.Dec. 428 (owner's son financially contributed to cost of construction and brought suit against subcontractor for allegedly defective work; he was not in privity of contract with general contractor or subcontractor, and no contractual language indicated son was intended beneficiary; as such, he could not maintain his action against subcontractor).

Consistent with the holding in *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615 (4th Dist. 1970), the court in *Ball, supra,* stated, relevant to the main inquiry of this discussion:

> **Furthermore, contrary to Ball's position that Bohlin and Boice acted for its direct benefit thereby making Ball a direct beneficiary of the Bohlin-Boice contract, we find that Bohlin and Boice acted entirely in their own self-interest and Ball was merely an incidental beneficiary. Bohlin contracted with Boice for materials and labor that it needed to fulfill its obligations under the general contract. Boice agreed to supply the material and the labor with the expectations of making a profit. Any benefit to Ball was incidental and, as such, does not confer third-party beneficiary status. To hold otherwise under these facts would allow Ball to have a contractual relationship with Boice when it would be economically beneficial to Ball and to disavow a contractual relationship in the event Boice, as subcontractor, is not paid by Bohlin.** 543 N.E.2d at 108.

Of course, if there is a direct undertaking made to a third party, that undertaking may be enforceable as a binding contract. *Central National Bank & Trust Company of Rockford v. Consumers Construction Co.,* 5 Ill.App.3d 274, 282 N.E.2d 158 (2d Dist. 1972). *See also MCI Worldcom Network Services, Inc. v. Atlas Excavating, Inc.,* No. 02 C 4394, 2005 WL 1300766 (N.D.Ill. Feb. 23, 2005); *Estate of Willis v. Kiferbaum Construction Corp.,* 357 Ill.App.3d 1002, 830 N.E.2d 636, 294 Ill.Dec. 224 (1st Dist. 2005) (if terms of promise for which promisee bargained with promisor are to render performance directly to third party, in nearly every case third party who is to receive performance will be party intended to be benefited); *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.,* 78 Ill.2d 381, 400 N.E.2d 918, 920, 36 Ill.Dec. 338 (1980) (Illinois Supreme Court held that owner may enforce contract as third-party beneficiary when contract requires subcontractors to consult with owner as to project's requirements and describes method by which third party may recover).

2. [12.6] Conflicting Claims Among General Contractor's Creditors

In *Avco Delta Corporation Canada Ltd. v. United States,* 484 F.2d 692 (7th Cir. 1973), the Seventh Circuit, faced with conflicting claims of creditors over a retainage fund, determined that the subcontractors and material suppliers were a designated class of third-party beneficiaries to the fund and that an equitable lien could be imposed. The *Avco* court also noted that under the facts before it, when a retainage fund has been created for the express and intended benefit of subcontractors and material suppliers, Illinois courts likely would either find a third-party beneficiary relationship or impose an equitable trust.

Similarly, in *Town & Country Bank of Springfield v. James M. Canfield Contracting Co.,* 55 Ill.App.3d 91, 370 N.E.2d 630, 12 Ill.Dec. 826 (4th Dist. 1977), which also involved the conflicting rights of creditors of the general contractor, the Fourth District Appellate Court concurred with *Avco, supra,* and stated that it failed to perceive any difference in function between contract provisions for subcontractors and performance bonds. It also held that *Avco,* not *Kilburg v. Petrolagar Laboratories, Inc.,* 280 Ill.App. 527 (1st Dist. 1935), represented the modern view in Illinois and that a material supplier who had not perfected its lien rights had priority status over an

assignee-creditor of the subcontractor as a third-party beneficiary to funds retained by the general contractor. Given the strong language in *155 Harbor Drive Condominium Ass'n v. Harbor Point Inc.,* 209 Ill.App.3d 631, 568 N.E.2d 365, 154 Ill.Dec. 365 (1st Dist. 1991), and *Ball Corp. v. Bohlin Building Corp.,* 187 Ill.App.3d 175, 543 N.E.2d 106, 134 Ill.Dec. 823 (1st Dist. 1989) (discussed in §12.5 above), however, the statement is questionable except in the context in which it was applied. Moreover, in *Board of Education of School District No. 108, Tazewell County, Illinois v. Collom,* 77 Ill.App.2d 479, 222 N.E.2d 804 (3d Dist. 1966), the court refused to grant an equitable lien in favor of a subcontractor that had not perfected its mechanics lien. An assignee-creditor of the contractor thus attained priority over the subcontractor.

3. [12.7] Actions Against Surety on Payment Bonds

It has been held that a subcontractor is the third-party beneficiary of a payment bond furnished by a general contractor to the owner because assurance of payment to subcontractors is the precise reason the bond is given. *Neenah Foundry Co. v. National Surety Corp.,* 47 Ill.App.2d 427, 197 N.E.2d 744 (1st Dist. 1964). Note, however, that a waiver of mechanics lien claim consistently has been held to operate as a waiver of claim against the payment bond. See §1.32 of this handbook.

4. [12.8] Actions Against Government Agency for Failure To Obtain Statutory Bond

In *Western Waterproofing Co. v. Springfield Housing Authority,* 669 F.Supp. 901 (C.D.Ill. 1987), the court held that the Public Construction Bond Act (Bond Act), 30 ILCS 550/0.01, *et seq.,* becomes part of every contract and is for the direct benefit of the subcontractors because they have no lien rights. Thus, if a municipal body neglects to obtain the payment bond, the subcontractors have an action against it as third-party beneficiaries of the statutory, implied provision. *Western Waterproofing* was followed in *East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.,* 233 Ill.App.3d 481, 601 N.E.2d 976, 176 Ill.Dec. 278 (3d Dist. 1992).

An equitable lien has been imposed on a federal entity that does not have sovereign immunity in a case in which the federal agency failed to require an adequate Miller Act bond. *Active Fire Sprinkler Corp. v. United States Postal Service,* 811 F.2d 747 (2d Cir. 1987). Unpaid subcontractors hold an equitable interest in a contract balance owed by a building owner to a general contractor. 811 F.2d at 755.

Note, however, that there are absolutely no mechanics lien rights in federal construction projects. This distinction was noted by the court in *Board of Education of School District No. 108, Tazewell County, Illinois v. Collom,* 77 Ill.App.2d 479, 222 N.E.2d 804 (3d Dist. 1966).

Significantly, the agency in *Active Fire Sprinkler, supra,* did not have sovereign immunity. Conversely, it has been recognized that the government has an unenforceable equitable obligation to see that subcontractors are paid, an obligation that is released by the presence of reliable payment bond sureties. *United States Fidelity & Guaranty Co. v. United States,* 475 F.2d 1377 (Ct.Cl. 1973); *United States v. Munsey Trust Co. of Washington, D.C.,* 332 U.S. 234, 91 L.Ed. 2022, 67 S.Ct. 1599 (1947); *In re Department of Army — Request for Advance Decision,* 63 Comp.Gen. 608 (1984). The keyword, however, according to the later cases, is "unenforceable." In *United Electric Corp. v. United States,* 647 F.2d 1082 (Ct.Cl.), *cert. denied,* 102 S.Ct. 322 (1981), the subcontractor

sued the government after the surety refused to pay on the Miller Act bond, which was alleged to be inadequate anyway; it alleged that the government had negligently failed to comply with the Miller Act and sought an equitable lien against the retainage, which was more than sufficient to cover the plaintiff's claim. The court concluded that the subcontractor lacked standing to preserve the claim in the Court of Claims (now the Claims Court) inasmuch as there was no privity of contract with the government. The court described this outcome as "not a happy result" and stressed that the government might make payment voluntarily and had a moral obligation to do so if funds remained after the contract was completed. 647 F.2d at 1087.

Therefore, because of its sovereign immunity, it has been held that the United States is not liable for failing to require the prime contractor on a federal construction project to obtain a payment bond. Upon the default and insolvency of the prime contractor who failed to obtain the Miller Act bond, the loss falls on the subcontractor. *Arvanis v. Noslo Engineering Consultants, Inc.,* 739 F.2d 1287 (7th Cir. 1984), *cert. denied,* 105 S.Ct. 964 (1985); *Westbay Steel, Inc. v. United States,* 970 F.2d 648 (9th Cir. 1992); *United States v. Maxwell,* 157 F.3d 1099 (7th Cir. 1998); *Department of Army v. Blue Fox, Inc.,* 525 U.S. 255, 142 L.Ed.2d 718, 119 S.Ct. 687 (1999). It likewise has been decided that the United States has no duty to require financially secure sureties. *United States v. TAC Construction Co.,* 760 F.Supp. 590 (S.D.Miss. 1991).

Similarly, if an agency of the United States government, which is immune from suit, fails to comply with the congressional mandate as expressed in the Miller Act, it has been held consistently that no suit can be brought against it under 28 U.S.C. §§1346(b) and 2674 (*Devlin Lumber & Supply Corp. v. United States,* 488 F.2d 88, 89 (4th Cir. 1973); *J.C. Driskill, Inc. v. Abdnor,* 901 F.2d 383 (4th Cir. 1990)) or under 28 U.S.C. §1491 (*4-Star Construction Corp. v. United States,* 6 Cl.Ct. 271 (1984)).

5. [12.9] United States Department of Housing and Urban Development Projects

There is also a line of cases treating general contractors as third-party beneficiaries of the building loan agreement between sponsors and the insured mortgagee on projects insured by the United States Department of Housing and Urban Development (HUD). As such, the contractors have an equitable lien on the HUD funds due to be disbursed to the project sponsors. *See, e.g., Trans-Bay Engineers & Builders, Inc. v. Hills,* 551 F.2d 370 (D.C.Cir. 1976); *American Fidelity Fire Insurance Co. v. Construcciones Werl, Inc.,* 407 F.Supp. 164 (D.V.I. 1975); *Bennett Construction Co. v. Allen Gardens, Inc.,* 433 F.Supp. 825 (W.D.Mo. 1977). In these cases, the courts have held that both the language of the building loan agreement and federal regulations obligate disbursement to the mortgagor or the mortgagor's creditors.

D. [12.10] Unjust Enrichment/Quantum Meruit

A quasi-contract, or contract implied in law, is one in which no actual agreement between the parties occurred but a duty is imposed to prevent injustice. 66 AM.JUR.2d *Restitution and Implied Contracts* §6 (2021). The prevention of unjustness is the fundamental aspect of the doctrine of quasi-contracts. *Hayes Mechanical, Inc. v. First Industrial, L.P.,* 351 Ill.App.3d 1, 812 N.E.2d 419, 285 Ill.Dec. 599 (1st Dist. 2004), citing *Rutledge v. Housing Authority of City of East St. Louis, Illinois,* 88 Ill.App.3d 1064, 411 N.E.2d 82, 86, 44 Ill.Dec. 176 (5th Dist. 1980).

Quasi-contract claims include unjust enrichment and quantum meruit actions. See 66 AM.JUR.2d *Restitution and Implied Contracts* §§2, 8 (2021). "The two types of actions are similar, in that the plaintiff must show that valuable services or materials were furnished by the plaintiff, received by the defendant, under circumstances which would make it unjust for the defendant to retain the benefit without paying." *Hayes Mechanical, supra,* 812 N.E.2d at 426. "The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." *Id.,* quoting *Rutledge, supra,* 411 N.E.2d at 86.

The theory of unjust enrichment is based on a finding of a contract implied in law. Such a contract differs from a contract implied in fact in that it arises by implication of law wholly apart from the usual rules relating to contracts and does not depend on the agreement or consent of the parties. *Premier Electrical Construction Co. v. LaSalle National Bank,* 132 Ill.App.3d 485, 477 N.E.2d 1249, 87 Ill.Dec. 721 (1st Dist. 1984).

> **Unjust enrichment recovery requires a showing that the defendant has voluntarily accepted a benefit which it would be inequitable for him to retain without payment since the law implies a promise to pay compensation when value of services [**is**] knowingly accepted. . . . As a general rule, the doctrine of unjust enrichment does not apply where the entire work is contracted for and placed under a general contractor who has the power to employ whom he chooses, because in such circumstances the owner has the right to presume that work is being done for and on behalf of the contractor. [**Citation omitted.**]** 477 N.E.2d at 1257 – 1258, citing *Plastics & Equipment Sales Co. v. DeSoto, Inc.,* 91 Ill.App.3d 1011, 415 N.E.2d 492, 498, 47 Ill.Dec. 487 (1st Dist. 1980), and *Vanderlaan v. Berry Construction Co.,* 119 Ill.App.2d 142, 255 N.E.2d 615, 617 (4th Dist. 1970).

However, unjust enrichment may apply when services or material fall outside of the scope of an express agreement. *See Stark Excavating, Inc. v. Carter Construction Services, Inc.,* 2012 IL App (4th) 110357, ¶¶38 – 39, 967 N.E.2d 465, 359 Ill.Dec. 735. If proved, a plaintiff may recover damages in the amount of the "benefit received and retained as a result of the improvement provided by the contractor." 2012 IL App (4th) 110357 at ¶37.

One Illinois appellate district has held that a sub-subcontractor was able to recover against a general contractor on an unjust-enrichment claim despite the existence of an express contract covering the work at issue. *See C. Szabo Contracting, Inc. v. Lorig Construction Co.,* 2014 IL App (2d) 131328, 19 N.E.3d 638, 385 Ill.Dec. 706. In *C. Szabo Contracting,* the Illinois State Toll Highway Authority (Tollway) hired the defendant, Lorig Construction Company, to act as a general contractor on a construction project on Interstate 355 near the Des Plaines River. 2014 IL App (2d) 131328 at ¶1. Lorig contracted with JLA Construction, Inc., to install storm sewers and perform other work. JLA contracted with the plaintiff, C. Szabo Contracting, Inc., to perform pipe-jacking work. *Id.* The plaintiff faxed Lorig a letter indicating that it had obtained necessary union workers and was "on the job continuing with the bore." 2014 IL App (2d) 131328 at ¶6. Lorig did not respond. *Id.* After completion, JLA and the plaintiff sent Lorig a lien wavier for completed work that identified the plaintiff as the sub-subcontractor that had completed the work; the plaintiff faxed a payment request for the pipe-jacking; the plaintiff faxed a certified payroll related to the pipe-jacking; and, approximately one month later, the plaintiff sent another payment request for the pipe-jacking. 2014 IL App (2d) 131328 at ¶7. Again, Lorig did not respond. *Id.* The plaintiff sought to recover against Loring under a theory of unjust enrichment.

At trial, the plaintiff provided testimony that one of Lorig's senior project engineers discussed the timing and substance of the pipe-jacking work with it and encouraged the plaintiff to do the work. 2014 IL App (2d) 131328 at ¶9. Lorig provided testimony that the Tollway had paid it in full and that all work, including the pipe-jacking, was successfully completed. 2014 IL App (2d) 131328 at ¶16. The plaintiff claimed that neither it nor JLA was paid for the pipe-jacking work. 2014 IL App (2d) at ¶13. Lorig claimed that it paid JLA any remaining funds due to it (which would have included pipe-jacking work, per its contract) but could not produce evidence to support the testimony. 2014 IL App (2d) 131328 at ¶18. The trial court entered judgment against Lorig on the basis that "under the circumstances, it would violate the principles of justice, equity, and good conscience for Lorig to retain the benefit it received while paying no one for it." 2014 IL App (2d) 131328 at ¶19.

The appellate court affirmed the trial court's judgment. No case had, and no case has since, addressed whether a party to a contract may pursue quasi-contractual relief against a nonparty to the contract on the basis that the nonparty requested, received, and did not pay for the work. 2014 IL App (2d) 131328 at ¶35. In a review focused on equity, the appellate court analyzed cases from other jurisdictions that contained similar fact patterns. 2014 IL App (2d) 131328 at ¶¶35 – 37. Ultimately, the appellate court held that Lorig's retention of the plaintiff's work constituted unjust enrichment because evidence existed that Lorig had received payment for the work from the Tollway and had not paid anyone for said work. 2014 IL App (2d) 131328 at ¶50. There was no risk of double liability because JLA, the party with which Lorig directly contracted, had dismissed its claims and, as of the date of the appeal, would be unable to obtain a judgment against it. 2014 IL App (2d) 131328 at ¶43. There was also no improper shifting of risk to Lorig from JLA because Lorig's liability was that which it had expressly contracted for; it simply had not paid anyone for the pipe-jacking work yet. 2014 IL App (2d) 131328 at ¶¶44 – 46.

Unjust enrichment is not a theory of recovery that will serve as a substitute for perfecting a mechanics lien. "It is axiomatic that an unjust enrichment claim is viable only when there is no adequate remedy at law." *Season Comfort Corp. v. Ben A. Borenstein Co.,* 281 Ill.App.3d 648, 655 N.E.2d 1065, 1071, 211 Ill.Dec. 682 (1st Dist. 1995). *See also Hayes Mechanical, supra.*

In *Season Comfort,* a sub-subcontractor sought to enforce its mechanics lien against the contractor and owner after not being paid by the subcontractor with which it had contracted. The court found that the subcontractor had failed to perfect its lien on time, and the sub-subcontractor sought to advance other theories of recovery, including unjust enrichment. The court rejected the argument, holding:

> **Here, Season did have an adequate remedy at law against [**the subcontractor with which it had contracted, the contractor, and owner**] but its remedy was either not properly pursued or as against [**the subcontractor with which it had contracted**] its remedy is merely "uncollectible." An uncollectible debt because of bankruptcy by one party does not transfer into an unjust enrichment claim against a third party who is solvent. In addition, a party cannot ignore or fail to comply with the remedies available to it under the Act and then gain redress by claiming that it is the victim of the other party's unjust enrichment.** 655 N.E.2d at 1071, citing *Hill Behan Lumber Co. v. Marchese,* 1 Ill.App.3d 789, 275 N.E.2d 451, 453 (2d Dist. 1971).

The court added:

> **Moreover, one is not unjustly enriched by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution. No person is unjustly enriched unless the retention of the benefit would be unjust. 66 Am Jur 2d *Restitution And Implied Contracts* § 3 (1973). There is nothing in this case to demonstrate that either [**the owner or general contractor**] were unjustly enriched. Merely because Season suffers a loss because of the bankruptcy of [**the subcontractor with which it had contracted**], does not mean that [**the owner or general contractor**] was unjustly enriched.** *Id.*

Theories of unjust enrichment and quantum meruit therefore will not allow a claimant to circumvent the requirements of the Mechanics Lien Act. In limited instances, these theories may be applicable to an award of damages when there has not been substantial performance or compliance with the contract. Rather than foreclose completely a defaulting contractor from recovery for its work, a court generally will permit it to recover some amount under a theory of quantum meruit or unjust enrichment. *See Howard v. Jay,* 203 Ill.App.3d 539, 561 N.E.2d 274, 148 Ill.Dec. 968 (4th Dist. 1990); *W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.,* 132 Ill.App.3d 260, 477 N.E.2d 513, 87 Ill.Dec. 536 (1st Dist. 1985); *Brewer v. Custom Builders Corp.,* 42 Ill.App.3d 668, 356 N.E.2d 565, 1 Ill.Dec. 377 (5th Dist. 1976).

Thus, in a case in which the appellate court found failure to perform substantially, it remanded the case to the trial court to determine the value of services rendered by the general contractor and to prorate the amount so due among subcontractors who had perfected their liens. *Folk v. Central National Bank & Trust Company of Rockford,* 210 Ill.App.3d 43, 567 N.E.2d 1, 153 Ill.Dec. 286 (2d Dist. 1990).

Note, moreover, that if a contractor is found not to have substantially completed the contract because of its breach, it will constitute a forfeiture of its lien rights and may recover only under a quantum meruit theory. *Fieldcrest Builders, Inc. v. Antonucci,* 311 Ill.App.3d 597, 724 N.E.2d 49, 243 Ill.Dec. 740 (1st Dist. 1999).

The doctrine of quantum meruit may be applied to permit a contractor who has failed to comply with municipal ordinances in the construction of the project to recover against the owner. Although a municipal ordinance that is applicable to the contract by operation of law becomes an implied term of the contract, it has been held that as long as the ordinance neither precludes recovery nor provides for a remedy in the form of an absolute defense in the underlying contract action between the contractor and the owner, failure to obtain a building permit will not prevent the contractor from recovering on a contract or quantum meruit basis for services rendered as long as no harm is caused to the public welfare. *Duncan v. Cannon,* 204 Ill.App.3d 160, 561 N.E.2d 1147, 149 Ill.Dec. 451 (1st Dist. 1990); *Lavine Construction Co. v. Johnson,* 101 Ill.App.3d 817, 428 N.E.2d 1069, 57 Ill.Dec. 389 (1st Dist. 1981); *Excellent Builders, Inc. v. Pioneer Trust & Savings Bank,* 15 Ill.App.3d 832, 305 N.E.2d 273 (1st Dist. 1973); *South Center Plumbing & Heating Supply Co. v. Charles,* 90 Ill.App.2d 15, 234 N.E.2d 358 (1st Dist. 1967).

The amount of damages for a quantum meruit claim may vary. "When a builder does not substantially perform under a contract, he is limited to claiming damages under a theory of *quantum meruit*. These damages are equal to the reasonable value of his services minus the amount of damages suffered by the buyers." *Fieldcrest Builders, supra,* 724 N.E.2d at 60, quoting *Evans & Associates, Inc. v. Dyer,* 246 Ill.App.3d 231, 615 N.E.2d 770, 778, 185 Ill.Dec. 900 (2d Dist. 1993) (reversing judgment for contractor on its mechanics liens claims and remanding for trial court to consider damages under quantum meruit). *See also Folk, supra,* 567 N.E.2d at 3 (concluding that contractor had not substantially performed its contract and its workmanship was of poor quality). In *Mor-Wood Contractors, Inc. v. Ottinger,* 205 Ill.App.3d 132, 562 N.E.2d 1247, 150 Ill.Dec. 444 (2d Dist. 1990), the contractor was awarded virtually full recovery. Conversely, in *Deerfield Electric Co. v. Herbert W. Jaeger & Associates, Inc.,* 74 Ill.App.3d 380, 392 N.E.2d 914, 30 Ill.Dec. 149 (2d Dist. 1979), the contractor performed to the point of disagreement between the owner and the contractor. The contractor's position in the dispute was rejected by the appellate court, and the contractor was thus held to be in breach of its contract. The case was remanded to the trial court to determine damages. In the meantime, the partially completed building that was the subject of the contract and the disagreement between the two parties was demolished by the owner. On retrial, the general contractor was awarded nothing more than the resale value of windows it had installed in the now demolished building. *Herbert W. Jaeger & Associates v. Slovak American Charitable Ass'n,* 156 Ill.App.3d 106, 507 N.E.2d 863, 107 Ill.Dec. 710 (2d Dist. 1987).

For the claimant to receive an award under unjust enrichment or quantum meruit, it obviously must be properly included in the complaint.

> **It is well established that a cause of action for breach of contract implied in law must allege that one party knowingly and voluntarily received benefits from another; that the benefits were related to an obligation or duty of the recipient; and that it would be inequitable for the recipient to retain the benefits without payment. . . . To be factually sufficient, a complaint must plead substantial allegations of fact which bring the claim within the legally recognized cause of action. [**Citations omitted.**]** *United States Fidelity & Guaranty Co. v. Continental Casualty Co.,* 198 Ill.App.3d 950, 556 N.E.2d 671, 675, 145 Ill.Dec. 53 (1st Dist. 1990).

Additionally, later appellate caselaw has further clarified the permitted scope of quantum meruit claims. *See Archon Construction Co. v. U.S. Shelter, L.L.C.,* 2017 IL App (1st) 153409, 78 N.E.3dd 1067, 413 Ill.Dec. 791. In *Archon,* the defendant contracted with the plaintiff to install a sanitary sewer system in a subdivision in the City of Elgin. 2017 IL App (1st) 153409 at ¶2. The contract required the plaintiff to conduct a videotaping of the interior of the completed system. The city had to approve the final system, as it would own it after completion. *Id.* The plaintiff performed its own videotaping of the system, as required by the contract, and submitted it to the city. 2017 IL App (1st) 153409 at ¶19. The city, not satisfied with the plaintiff's videotaping, conducted its own. *Id.* The city's videotape revealed deficiencies in the sewer system that needed to be repaired before the city would accept the system. 2017 IL App (1st) 153409 at ¶20. The plaintiff made the repairs called for by the city and then demanded payment from the defendant. 2017 IL App (1st) 153409 at ¶21. The defendant refused, and the plaintiff filed suit, eventually dismissing all claims based on its contract and going to trial solely on its quantum meruit claim. 2017 IL App (1st) 153409 at ¶22.

The plaintiff's recovery and its ability to pursue quantum meruit rested squarely on whether its contract with the defendant governed the work for which it sought payment. 2017 IL App (1st) 153409 at ¶36. The trial and appellate courts held that it did. The plaintiff claimed that its contract with the defendant required it to install PVC pipe and that the contract was silent as to the city's repair demands prior to acceptance that required ductile iron pipe. 2017 IL App (1st) 153409 at ¶47. The court took a broader view. The plaintiff's contract was "the installation of an acceptable sanitary sewer system." *Id.* The plaintiff's claim sought payment for costs to repair and replace portions of the system in order to obtain the city's approval. The plaintiff could not "avoid the effect of the general rule that the law will not imply a contract where an express contract already exists between the parties on the same subject matter." *Id.*

The court's holding may seem harsh, but it also specifically points out that the plaintiff was not without a remedy. The plaintiff's contract provided that "[a]ny additional work items not listed will be completed on negotiated price or [time and materials]." 2017 IL App (1st) 153409 at ¶48. "This only underscores that if [the plaintiff] had a remedy at all in this case, it was a claim for 'extra work' through the written contract, not a *quantum meruit* theory." *Id.* However, the plaintiff dismissed its contractual extras claim and only tried its quantum meruit claim, presumably, the court noted, because it lacked sufficient evidence to sustain the contractual claim. 2017 IL App (1st) 153409 at ¶50. This did not change the fact that a contractual remedy was the only claim available to the plaintiff as a matter of law. 2017 IL App (1st) 153409 at ¶51. As such, the judgment against the plaintiff was affirmed.

Extras that fall outside of the contract's scope may be recoverable under quantum meruit, provided the claimant is able to prove the elements set forth in *Watson Lumber Co. v. Guennewig,* 79 Ill.App.2d 377, 226 N.E.2d 270 (5th Dist. 1967). *See Stark Excavating, supra,* 2012 IL App (4th) 110357 at ¶34 (summary judgment against subcontractor on quasi-contractual claim for extras reversed when issues of fact existed pertaining to *Watson Lumber* elements).

The general practice is to include quantum meruit as a separate, alternative remedy. There is no recovery in quantum meruit if there is a written contract. It is, however, appropriate to plead quantum meruit in mechanics lien cases as an alternative remedy for precisely the reason that the contractor recovered under that theory in *Fieldcrest Builders, supra.*

E. [12.11] Constructive Trusts

As a general rule, absent agreement, a fiduciary relationship, or wrongful acts on the part of the party receiving money in connection with a construction project, courts will not impose a constructive trust for the benefit of any of the various parties in the chain of payments when the money has been received by one party but has not been disbursed by that party to the next party down the tiers of contracts.

The constructive trust theory has been asserted by subcontractors in connection with funds received by the general contractor or an upper-tier subcontractor and not disbursed to the subcontractors. It also has been asserted by general contractors and upper-tier subcontractors to recover funds paid to the next lower-tier subcontractor when such contractors or upper-tier subcontractors, together with their payment bond surety, were held liable to a subcontractor or supplier who was not paid by the next lower-tier subcontractor whom they had already paid.

The general rule governing the circumstances under which a constructive trust may be imposed was reiterated by the Supreme Court in *Suttles v. Vogel,* 126 Ill.2d 186, 533 N.E.2d 901, 904 – 905, 127 Ill.Dec. 819 (1988):

> **"A constructive trust is one raised by operation of law as distinguished from a trust created by express agreement between the settlor and the trustee." (*Perry v. Wyeth* (1962), 25 Ill.2d 250, 253, 184 N.E.2d 861.) A constructive trust is created when a court declares the party in possession of wrongfully acquired property as the constructive trustee of that property . . . because it would be inequitable for that party to retain possession of the property. . . .**
>
> **A constructive trust is generally imposed in two situations: first, where actual or constructive fraud is considered as equitable grounds for raising the trust and, second, where there is a fiduciary duty and a subsequent breach of that duty. . . . A constructive trust may also arise when duress, coercion or mistake is present. . . . Some form of wrongdoing is a prerequisite to the imposition of a constructive trust. . . .**
>
> **A constructive trust will not be imposed unless the complaint makes specific allegations of wrongdoing . . . such as fraud, breach of fiduciary duty, duress, coercion or mistake. Furthermore, the grounds for imposing a constructive trust must be so clear, convincing, strong and unequivocal as to lead to but one conclusion. [**Citations omitted.**]**

1. [12.12] Sureties

In federal surety subrogation cases, it is said that labor and material suppliers involved in public construction are a group specially protected by statute. They enjoy a priority of their claims over a general contractor's general creditors, assignee, or lender. *Kennedy Electric Co. v. United States Postal Service,* 508 F.2d 954 (10th Cir. 1974); *Jacobs v. Northeastern Corp.,* 416 Pa. 417, 206 A.2d 49, 53 – 54 (1965); *Reliance Insurance Co. v. United States,* 15 Cl.Ct. 62 (1988); *Great American Insurance Co. v. United States,* 492 F.2d 821, 824 – 826 (Ct.Cl. 1974). The claims of labor and material suppliers engaged in public construction "must be satisfied before the contractor and his general creditors are entitled to the funds." *Ram Construction Co. v. American States Insurance Co.,* 749 F.2d 1049, 1054 (3d Cir. 1984). Funds in the hands of the owner are not even property of the contractor's bankruptcy estate until the claims of the labor and material suppliers or the surety that has paid them have been satisfied. *Id.; In re Dutcher Construction Corp.,* 378 F.2d 866, 870 (2d Cir. 1967). *See also Pearlman v. Reliance Insurance Co.,* 371 U.S. 132, 9 L.Ed.2d 190, 83 S.Ct. 232 (1962).

However, sureties do not enjoy this same status under state law. In *Brandt v. Uptown National Bank of Moline,* 212 Ill.App.3d 621, 571 N.E.2d 531, 156 Ill.Dec. 747 (3d Dist. 1991), the general contractor (Brandt Construction) sought to impose a constructive trust on retainage money it paid to a subcontractor (DeVolder Brothers Roofing Contractors) for work performed pursuant to two federal contracts to renovate two buildings at the Rock Island Arsenal. The subcontractor deposited the funds in its checking account with its bank (Uptown National Bank of Moline) to pay the

suppliers on the project. The bank, however, exercised its right of setoff on DeVolder's checking account to cover debt owed to the bank on a demand note, and DeVolder could not pay one of its suppliers on the project, Owens-Corning Fiberglas. Because the project involved federal contracts, Brandt was required to post payment bonds under the Miller Act. Owens-Corning prevailed against Brandt's surety on the Miller Act payment bond. Brandt was, in turn, liable to the surety for the amount paid to Owens-Corning under the indemnification provisions in the bond agreements. Brandt then brought the action that was the subject of this appeal against Uptown to recover the amount paid Owens-Corning plus punitive damages. Count I alleged that Uptown wrongfully applied the funds to an unrelated debt and that Uptown's actions were contrary to law. Count II alleged promissory estoppel, and Count III alleged a breach of fiduciary duty. The general contractor, Brandt, argued that because Uptown knew that the funds were derived from the particular project, it was under an obligation to see that the funds were applied to the debts owed by DeVolder's suppliers before the funds could be applied to the non-project-related debt owed to the bank. The trial court found for the bank on all three counts, and the appellate court affirmed. The appellate court stated:

> **[T]he money deposited in the DeVolder Roofing checking account was not held in trust either actual or constructive. There was no written agreement stating that the funds deposited in the checking account were held in trust. Despite this seminal fact, the plaintiffs contend that Owens-Corning was the equitable owner of the funds because DeVolder Roofing was indebted to Owens-Corning, and Uptown had knowledge of this fact. We find this contention to be with out merit. Should the plaintiffs' reasoning be carried to its logical conclusion, any debtor of a party who has a checking account would be deemed to have an equitable ownership in the funds in that account, thus limiting a bank's right to setoff.**
>
> **In sum, under the facts of this case . . . Uptown was under no legal obligation to pay Owens-Corning or see that Owens-Corning was paid from the funds deposited by DeVolder Roofing. Uptown was under no obligation to see that DeVolder Roofing's debts to third parties were satisfied before it applied the funds to cover the obligation under the demand note.** 571 N.E.2d at 534 – 535.

With respect to which federal rather than state law generally governs, there was no discussion by the *Brandt* court of the federal law or of a reason why Illinois law should dictate a different result.

The fact situation in *Brandt, i.e.,* when the upper-tier contractor or its statutory payment bond surety is liable to a lower-tier subcontractor or supplier even though it paid the intermediary subcontractor, is not unique to Miller Act cases. The same result would be obtained under the so-called "Illinois Baby Miller Act," *i.e.,* the Public Construction Bond Act. *See City of Chicago, ex rel. Charles Equipment Co. v. United States Fidelity & Guaranty Co.,* 142 Ill.App.3d 621, 491 N.E.2d 1269, 96 Ill.Dec. 809 (1st Dist. 1986); *Decatur Housing Authority, ex rel. Harlan E. Moore & Co. v. Christy-Foltz, Inc.,* 117 Ill.App.3d 1077, 454 N.E.2d 379, 73 Ill.Dec. 519 (4th Dist. 1983); *Housing Authority of County of Franklin, Illinois, ex rel. Smith-Alsop Paint & Varnish Co. v. Holtzman,* 120 Ill.App.2d 226, 256 N.E.2d 873, 880 (5th Dist. 1970). This result is an exception to the well-settled maxim of surety law that the liability of the surety cannot exceed that of its principal and that payment and performance by the principal extinguish the liability of the surety. It is a result dictated by public policy.

> **[**T**]he Bond Act provides a separate and alternative remedy to that afforded by section 23 of the Mechanics' Liens Act. . . . The purpose of sections 1 and 2 . . . of the Bond for Public Works Act is to protect payment to contractors and materialmen for whom no right of mechanics' lien exists against a public body, and to regulate claims against public monies. . . . Unlike section 23 of the Mechanics' Liens Act, which limits the amount of a claimant's recovery to the sum still due its immediate contractor at the time the notice of lien is served . . . recovery under the Bond Act is limited only by the total amount of the bond, which is provided by a surety. [**Citations omitted.**]** *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill.App.3d 828, 564 N.E.2d 1280, 1296 – 1297, 151 Ill.Dec. 618 (1st Dist. 1990).

See also Charles Equipment, supra, 491 N.E.2d at 1272.

Thus, under both the Miller Act and the Bond Act, payment by the contractor to the subcontractor does not extinguish the contractor's payment bond surety's obligation to the sub-subcontractors and suppliers of the subcontractor. Under the agreements between the contractor and the surety by which such bonds are obtained as well as under the common law of indemnity concerning surety bonds, the contractor is liable to the surety for the amount for which the surety is liable to others.

2. [12.13] Contractors

Another situation in which the constructive trust theory is asserted is in the case of unpaid subcontractors of a paid general contractor or upper-tier subcontractor.

In *Carey Electric Contracting, Inc. v. First National Bank of Elgin,* 74 Ill.App.3d 233, 392 N.E.2d 759, 30 Ill.Dec. 104 (2d Dist. 1979), the court declined to find a constructive trust because there was no fiduciary relationship between the general contractor and its subcontractors and their rights were limited to their contractual remedies. In *Carey Electric,* the City of Elgin had entered into a contract with Benchmark, a general contractor, for a public works project. According to the contract, Benchmark was to be paid in five separate installments. As is customarily the case, to receive payment, Benchmark had to submit waivers executed by its subcontractor waiving mechanics lien rights on work done pursuant to the requested payment. As Benchmark was not paid by the city until 30 to 45 days after payment was requested, it borrowed money from the First National Bank of Elgin (FNBE) to cover expenses in the interim and assigned a security interest in the city's payment to the bank. The city made the progress payment checks payable jointly to Benchmark and FNBE.

When the fifth payment from the city to Benchmark became due, the subcontractors had still not been paid for work done pursuant to the fourth payment. Benchmark delivered checks to them but requested they not deposit the checks until it received the next draw. The subcontractors agreed and executed their waivers of lien necessary for Benchmark to receive the fifth draw. The city delivered a check in the amount of the fifth draw made out to Benchmark and FNBE. The checks to the subcontractors arrived at the bank before the check from the city and were returned unpaid by FNBE for insufficient funds. When the city's check was deposited into the bank, it offset the check against the amount owed by Benchmark. Benchmark was unable to finish the project and

subsequently became bankrupt. The appellate court held that giving the subcontractors checks in advance of depositing the funds did not constitute fraud. The court also found that there was no confidential or fiduciary relationship between Benchmark and its subcontractors. The court stated that the relationship between a contractor and its subcontractors was a contractual relationship to be governed by the terms of the contract. As a consequence, the court found that there was no constructive trust in the funds in favor of the subcontractors.

It should be noted that knowingly giving a bad check is generally not considered to be a false statement. *See In re Scarlata,* 979 F.2d 521, 525 (7th Cir. 1992) ("a check is not a factual assertion at all"; check "serve[s] only to direct the drawee banks to pay the face amounts to the bearer"), quoting *Williams v. United States,* 458 U.S. 279, 73 L.Ed.2d 767, 102 S.Ct. 3088, 3091 (1982). The conflict in *Carey Electric, supra,* is not unique; in most public works contracts, submission of lien waivers by the subcontractor is a condition precedent to payment to the general contractor. *See, e.g., J.M. Process Systems, Inc. v. W.L. Thompson Electric Co.,* 218 Ill.App.3d 350, 578 N.E.2d 264, 267, 161 Ill.Dec. 137 (1st Dist. 1991). Moreover, by waiving their lien rights, they also waive their rights under the statutory payment bond. *See, e.g., Chicago Bridge & Iron Co. v. Reliance Insurance Co.,* 46 Ill.2d 522, 264 N.E.2d 134 (1970); *Board of Education of Bourbonnais School District No. 53, Kankakee County, Illinois, ex rel. Anning-Johnson Co. v. Hartford Accident & Indemnity Co.,* 60 Ill.App.2d 320, 208 N.E.2d 51 (3d Dist. 1965); §1.32 of this handbook.

In *East Peoria Community High School District No. 309 v. Grand Stage Lighting Co.,* 233 Ill.App.3d 481, 601 N.E.2d 976, 176 Ill.Dec. 278 (3d Dist. 1992), the court focused on the absence of the bank's knowledge of the use of the funds in denying a constructive trust in favor of the subcontractor. Tousley-Iber agreed to be the construction manager of various improvements on high school buildings in the East Peoria Community High School District. In June 1987, Grand Stage Lighting Co. and Tousley-Iber entered into a contract under which Grand Stage agreed to perform stage renovation work for $144,614. After September 1987, Tousley-Iber's bank became concerned about Tousley-Iber's financial situation. In November 1987, Tousley-Iber deposited a check from the school district for $124,787.83 and requested the bank's approval to write checks to its subcontractors on the funds received from the school project. It submitted a cash-flow analysis to the bank, however, that showed the entire amount owed to Tousley-Iber was less than it owed to its subcontractors. The bank then informed Tousley-Iber that, pursuant to its right of setoff, it was removing the sum of $179,650.39 from Tousley-Iber's general business account to apply to the debt Tousley-Iber owed the bank.

Thereafter, Grand Stage made demand on the school district and Tousley-Iber for payment of $145,949, which was refused by both. It then served Tousley-Iber and the school district with its notice of claim of lien and later filed an amended third-party complaint against the bank to impose a constructive trust on the funds that the bank had set off, alleging that the bank's setoff was wrongful because it knew that Grand Stage had an interest in the money received from the school district. The bank's motion to dismiss was denied, and the parties filed cross-motions for summary judgment. The trial court granted the bank's motion. The appellate court affirmed. In denying an equitable trust, the court focused on the fact that there was no evidence that the bank had knowledge of the purpose of the funds and that Grand Stage's argument, taken to its logical conclusion, would allow any debtor to assert an equitable lien for its creditors, thus limiting the bank's right of setoff.

Conversely, the court did impose a constructive trust against funds set off by the contractor's bank lender in *Gluth Brothers Construction, Inc. v. Union National Bank,* 166 Ill.App.3d 18, 518 N.E.2d 1345, 116 Ill.Dec. 365 (2d Dist. 1988); however, in that case, the party seeking to impose the trust was a partner of the contractor who was relying on a written instrument containing an applicable trust provision. In *Gluth Brothers Construction,* the plaintiffs, Gluth Brothers Construction and Wayne E. Zimmerman, had entered into a joint venture agreement with Valley Engineering to enter into a contract with the City of Elgin for a public works project. The joint venture agreement provided, in pertinent part:

> **TRUST FUNDS: All monies contributed by the parties to this Joint Venture and all monies received as payment under the Construction Contract are hereby designated as trust funds and shall remain such until the Construction Contract shall have been fully completed and accepted by the Owner, until all obligations of the parties hereto have been paid, otherwise discharged, or provided for by adequate reserves and until the profits, if any, shall have been distributed to the members of the Joint Venture. Such reserves shall likewise be treated as trust funds until they have served the purposes for which they were created.** 518 N.E.2d at 1347.

In October 1981, the joint venture wrote a check from an account held with the defendant bank payable to Valley Engineering in the amount of $195,609.56. Valley Engineering deposited the check into its account with the defendant bank. At the time, Valley Engineering was indebted to the bank in an amount of approximately $280,000, and the bank set off the funds on deposit in the Valley Engineering checking account to satisfy the indebtedness that Valley Engineering owed to it. Valley Engineering subsequently defaulted on its obligation and filed for relief under the bankruptcy laws. The plaintiffs brought the instant suit. A bifurcated trial was held to determine liability and damages. The evidence showed that the president of the bank when the incidents took place had discussed the Elgin project with officers of Valley Engineering, who had requested and received funding for Valley Engineering's participation in the project from the bank. He had received a copy of the joint venture agreement and had insisted on a change in it to permit the bank to take an assignment of Valley Engineering's interest as collateral, but he did not ask that the trust paragraph be eliminated from the joint venture agreement. The bank president testified that he had received Valley Engineering's income and expense sheets concerning the project and that he knew that the only source from which the $195,000 deposit could have come was the joint venture. At the close of the trial on liability, the trial court found that the defendant bank had wrongfully set off the funds in Valley Engineering's account.

The appellate court in *Gluth Brothers Construction* affirmed the trial court on the issue of liability. The court first determined that the standard of proof required to impose a constructive trust was that of clear and convincing evidence, relying on *Ray v. Winter,* 67 Ill.2d 296, 367 N.E.2d 678, 682, 10 Ill.Dec. 225 (1977), and that the trial court's finding of liability was supported adequately by the record. 518 N.E.2d at 1350. The court next addressed the question of the relationship of the parties required to establish a constructive trust. The defendant argued that, to establish a constructive trust, one must either establish actual fraud or prove a fiduciary relationship and subsequent abuse of that relationship. The *Gluth Brothers Construction* court disagreed. Quoting *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.,* 114 Ill.2d 278, 499 N.E.2d 1319, 1326, 102 Ill.Dec. 306 (1986), the court stated:

A constructive trust is an equitable remedy that may be imposed to redress unjust enrichment caused by a party's wrongful conduct. . . . Where property has been acquired wrongfully, the party in possession may be declared to be a constructive trustee of the property if it would be unjust for that party to retain it. The constructive trust arises by operation of law, and the constructive trustee's sole duty is to transfer title and possession to the beneficiary. . . . Some form of wrongful or unconscionable conduct is a prerequisite to the imposition of a constructive trust. As the court in *Ray*[*,*** *supra,*] explained, "Constructive trusts are divided into two general classes: one in which actual fraud is considered as equitable grounds for raising the trust, and the other, where there exists a fiduciary relationship and subsequent abuse of such relationship." . . . Similarly, duress, coercion and mistake have been grounds for imposing a constructive trust. [**Citations omitted.**]** 518 N.E.2d at 1351.

The *Gluth Brothers Construction* court went on to hold:

Clearly, under the foregoing statement imposition of a constructive trust is not limited to cases in which there is fraud or breach of a fiduciary relationship. The court recognizes that "duress, coercion and mistake have been grounds for imposing a constructive trust." ([*Hester, supra,*] 114 Ill.2d at 293, 102 Ill.Dec. 306, 499 N.E.2d 1319.) Yet, we do not believe that this enumeration of reasons is exclusive of others. Rather, what we focus on is the court's requirement that there is a wrongful acquisition of property and that it would be unjust to allow the acquiring party to retain it. . . . We also find that this view is in accord with this court's holding in *County of Lake V. X-Po Security Police Service, Inc*. (1975), 27 Ill.App.3d 750, 327 N.E.2d 96, a case decided prior to *Hester,* wherein this court stated:

> **"It is an elemental principle of law, applied in both law and equity courts, that where one person has received money or its equivalent, which belongs to another, under such circumstances that in equity and good conscience he ought not to retain it, recovery will be allowed. . . ." (*X-Po Security Police Services, Inc.,* (27 Ill.App.3d at 755, 327 N.E.2d 96.)**

Quoting *In re Estate of Ray* (1972), 7 Ill.App.3d 433, 439, 287 N.E.2d 144, the court continued:

> **"While it is true that a constructive trust may arise out of fraud or the breach of a confidential relationship, the extent of their utilization is by no means restricted to those grounds. A court of equity will raise a constructive trust, even where there is no fraud, whenever the circumstances of the transaction are such that the person who takes the legal estate may not enjoy the beneficial interest therein, as against the other party to the transaction, without violating some established principle of equity. . . ." (27 Ill.App.3d at 755, 327 N.E.2d 96.)**

. . . "[I]n order to establish the constructive trust . . . [i]t is sufficient if, in fact, the party has received money properly belonging to another under circumstances that in equity he ought not be allowed to retain it." 27 Ill.App.3d at 755, 327 N.E.2d 96. [Citations omitted.**]** 518 N.E.2d at 1351.

The *Gluth Brothers Construction* court held that the defendant bank was not entitled to the funds it set off because the defendant was aware that the funds were being held in trust for the plaintiffs. It rejected the bank's argument that it had a secured interest in the funds pursuant to its security agreement with Valley Engineering, holding that the bank had a security interest in the funds belonging to Valley Engineering, not those that Valley Engineering held as trustee for the joint venture because Valley Engineering had no equitable interest in those funds.

The appellate court reversed and remanded the trial court's award of damages, however. At the close of the trial on liability and a hearing on damages, the trial court entered the following award (518 N.E.2d at 1349):

1.	**Claims and bills paid by plaintiff:**	**$221,167.11**
2.	**Labor and Materials furnished by Gluth:**	**64,470.00**
3.	**Labor and materials furnished by Zimmerman:**	**48,743.75**
4.	**Interest on above amounts from date bills paid and date labor and materials billed (at 5% per annum):**	**84,513.22**
5.	**Additional Interest on $195,609.56 from [**date of setoff**] at [**defendant bank's**] Prime Rate (less 5% on said amount awarded in paragraph 4):**	**72,455.70**
	TOTAL:	**$491,349.78**

It also awarded the plaintiffs attorneys' fees under former §2-611 of the Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* because the defendant bank had stated in a pleading that it had not received a copy of the joint venture agreement, when in fact it had. The appellate court held that the plaintiffs were entitled to an award of $195,609.56, the amount wrongfully set off by the bank. The plaintiffs also were entitled to prejudgment interest and the award of attorneys' fees under the circumstances. It reversed the award of the remaining damages awarded by the trial court, however, on the following basis:

> **The record reveals no evidence which shows that plaintiffs incurred damages in excess of the setoff. In order to do so, plaintiffs would have had to show that Valley was unable to perform the contract due to defendant's action. Yet, this does not appear from the record. . . . Additionally, to receive the damages that they did, plaintiffs would have had to show that they incurred expenses greater than they would have incurred had Valley remained a viable entity. In the hearing on damages, plaintiffs only showed the amounts that they paid out. They did not establish that the joint venture would not have incurred those expenses had Valley remained in business.** 518 N.E.2d at 1352 – 1353.

3. [12.14] Bankruptcy

A contractor's bankruptcy can present other issues:

> **Frequently where insolvency of an obligor has intervened, it is important to determine whether he was a debtor out of whose estate a mere dividend can be recovered, or a trustee from whose estate specific property can be taken. . . . In all of these cases the**

> **better reasoned decisions hold that if the obligor is to meet his obligation out of particular property he is probably intended to be a trustee of that property, but if he is to perform his duty by the use of any property in his hands which is convenient to him then he is probably intended to be under contract duties only.** *Limperis v. Material Service Corp.,* 415 F.Supp. 65, 68 – 69 (N.D.Ill. 1976), quoting George Gleason Bogert, HANDBOOK OF THE LAW OF TRUSTS §27 (1973).

In *Limperis,* the trustee in the contractor's bankruptcy sought to recover funds paid by or on behalf of the contractor to a material supplier, Material Service Corporation (MSC), within the four-month period preceding bankruptcy. MSC answered and moved for summary judgment, asserting that the trustee had no claim to the funds. MSC contended that it received the funds pursuant to a constructive trust created by the express terms of the agreement between the owner-developer, Tishman-Adams, and the contractor, Morris Handler. The Tishman-Adams contract expressly stated that the funds received on the project by Handler constituted trust funds for the benefit of the contractor's subcontractors. The contract further provided that the contractor hold harmless and indemnify the owner against the claims of its subcontractors and permitted the owner-developer to withhold payment from the contractor in the event of the contractor's failure to perform its obligations under the contract. In addition, once MSC became aware of a "no-lien" provision in the Tishman-Adams-Handler contract, it requested a meeting of the three to facilitate regular and timely payment for materials to be delivered to the jobsite. At the meeting, it was agreed that, out of each monthly draw contemplated by the contract, a separate check would be issued by Tishman-Adams payable to the order of Handler for paying for materials furnished by MSC. While the check was in the possession of Tishman-Adams, Handler would endorse the check payable to the order of MSC. Tishman-Adams then would notify MSC that it had a check ready to deliver, and MSC would pick up the check at Tishman-Adams' office. Under the facts of the case, the court determined that the funds paid to MSC were the result of a constructive trust.

Similarly, in *Tonyan Construction Co. v. McHenry State Bank (In re Tonyan Construction Co.),* 28 B.R. 714, 725 (Bankr. N.D.Ill. 1983), the court found that the subcontractors were the "beneficial owners of the funds" that the contractor had received based on lien waivers and that the bank did not have a superior right of setoff against the funds received by the general contractor. The court held

> **that on principles of equity and justice, the funds deposited into [**the general contractor-debtor**]'s general account should be impressed with a trust to the extent of . . . the total of funds paid pursuant to the [**subcontractor's**] waivers. These funds were released to [**the general contractor-debtor**] for the specific purpose of paying the two subcontractors to whom they were due and would not have been released but for the waivers of lien. Debtor was acting merely as the conduit for the funds between [**the owner**] and the subcontractors. . . . It should also be observed that § 21.01 of the Illinois Mechanics Lien Act . . . provides criminal penalties for a general contractor's fraudulent failure to pay funds due to subcontractors. While there is no fraudulent intent here on the part of Debtor, the provision nevertheless lends support to a finding that the subcontractors are the beneficial owners of the funds. [**Citations omitted.**]** 28 B.R. at 724 – 725.

Conversely, the bankruptcy court for the Northern District of Illinois in *In re T. Brady Mechanical Services Inc.,* 133 B.R. 441, 446 (Bankr. N.D.Ill. 1991), reviewed several subcontractor lien claims, determined that they were not valid and that there was no factual basis to assert a constructive trust, and declined to follow *Tonyan Construction, supra.* The *T. Brady Mechanical Services* court held that "[t]he Bankruptcy Code makes the issue of equitable liens irrelevant. Under § 544(a), the Trustee, or in this case the Debtor, assumes the status of a hypothetical lien creditor. As such, it can defeat any lien which is unperfected on the date of filing. An equitable lien is just such an unperfected security interest." *Id.* The court also distinguished *Tonyan Construction* and *In re H.G. Prizant & Co.,* 257 F.Supp. 145 (N.D.Ill. 1965), on the grounds that in both cases the owners actually paid funds to the contractor for payment to the subcontractor. The courts impressed trust funds in the contractor's hands. The *T. Brady Mechanical Services* court further noted that, in the case sub judice, the debtor never received funds from the prime contractor for payment to the lien claimants; therefore, there was nothing on which to impress a trust. The court also noted that even if *Tonyan Construction, supra,* could be read to support a constructive trust, Illinois law was controlling and requires wrongdoing to impose a constructive trust. To impress a constructive trust, there must be at least a wrongdoing greater than the nonpayment of a monetary debt or being omitted from a sworn statement. The burden is on the party who wants the trust imposed.

The Northern District did find that a constructive trust was warranted in *H.G. Prizant, supra.* The *H.G. Prizant* court held that a subcontractor's mechanics lien was not destroyed once the funds were paid over to the general contractors, who then promptly filed a Chapter 11 proceeding under the Bankruptcy Code. Debtor H.G. Prizant, as a general contractor, entered into a contract with the Chicago Industrial District (CID) to construct portions of the Ford City Shopping Center. Powers Regulator, a subcontractor to Prizant, furnished work and materials to Prizant in the sum of $59,441.80. On August 16, 1965, Prizant issued its check to Powers in the amount of $25,000 for work performed. The check was postdated to August 27, 1965, and, in return for the check, Powers issued a waiver of its mechanics lien rights on the real estate on which the project was located. Powers entered into the transaction on Prizant's assurances that it did not have sufficient funds to compensate Powers on that date and that such money could be obtained from CID only if Powers executed a waiver of lien. On August 27, 1965, Prizant informed Powers that while the waivers had been furnished to CID, the money had not yet arrived and Powers should not deposit the check. It was thereafter agreed that as soon as the funds became available, Prizant would issue notice to Powers. Additional phone calls were made in which Prizant reaffirmed this position, and the payout agent for the financing bank was notified of the arrangement. On September 9, 1965, the payout agent delivered a check to Prizant in the amount of $30,435, which Prizant deposited in its account. Two and one-half hours later, the payout agent notified Powers of the delivery of the check. The following morning, Prizant was notified that the check to Powers would not be honored inasmuch as it had instituted Chapter 11 proceedings the preceding afternoon. The court held that Powers had an equitable lien on the funds disbursed by CID in reliance on its waiver of lien against the real estate, even in the hands of the debtor-in-possession:

> **While it is clear that [**Powers**], at the urging of Prizant, waived its mechanic's lien against the real estate [**(770 ILCS 60/1)**] on which the construction project was located, so as to effect payment from C.I.D., there is no indication that any waiver whatsoever was made by [**Powers**] as to the lien he retained, as a subcontractor, over the funds**

> **due his general contractor pursuant to [**770 ILCS 60/21**]. Said statute, operating independently, provides that a subcontractor "shall have a lien for the value (of services and materials furnished to the contractor) . . . as against the creditors of the contractor . . . on the moneys or other considerations due or to become due from the owner under the original contract."** 257 F.Supp. at 146 – 147.

The court next distinguished a waiver of lien on the real estate from a waiver of lien on the funds due or to become due from the owner to the general contractor and held that the lien on the funds due to the general contractor had not been waived and was not lost simply because the funds had been turned over to the general contractor.

The court went on to state:

> **Alternatively, on the facts presented to this Court, we are prepared to impress an equitable lien or trust upon said funds. Where, as here, funds are turned over to a debtor for the special purpose of paying same to a third party to whom they are due, a court of equity is free to act to achieve the intended result. . . .**
>
> **In the instant action . . . the funds were delivered to [**Prizant**] with the intention that same were to be used to satisfy [**Powers'**] claims. Indeed, were it not for [**Powers'**] waiver, a condition of payment by C.I.D., the monies would never have been forwarded at all. [**Prizant**] should not now be permitted to retain control of those funds, interest in which never properly vested in it. The prior rights of [**Powers**], as demonstrated by the uncontested factual findings should not be defeated by [**Prizant**]'s self-serving deposit of same into its personal bank account. [**Prizant**], as a conduit, served merely as an agent charged with the delivery of $25,000 to [**Powers**]. . . . Its failure to so deliver will not defeat [**Powers'**] rights to the benefit of unsecured creditors, those creditors having never relied upon the funds in issue when entering into transactions with [**Prizant**]. [**Citation omitted.**]** 257 F.Supp. at 147 – 148.

Although not a constructive trust case, the problem of subcontractors giving waivers of lien to receive payment was recognized by the court in *Lampi v. Hundman Lumber Mart Co. (In re Lampi),* 152 B.R. 543 (C.D.Ill. 1993). There, the district court affirmed the bankruptcy court's ruling that a debt was nondischargeable under 11 U.S.C. §523(a)(6) when the general contractor obtained a lien waiver by issuance of a postdated check and thereafter tendered the lien waiver at a closing, knowing that the material supplier would lose its lien position and that the check could not be funded from the proceeds of the sale. The debtors, a husband and wife, operated a small construction business. They purchased materials totaling $18,296.45 from Hundman Lumber for the construction of a single-family residence. They found a buyer for the residence and set a closing date of December 11, 1989. Because a lien waiver from Hundman would be necessary to close the transaction, the contractor issued a check for $18,296.45 to Hundman, postdated to December 14, 1989, and Hundman tendered its mechanics lien waiver. Before the closing but after obtaining the lien waiver, the contractor realized that there was not enough money to pay the lumber company. The contractor also knew that if it tendered the lien waiver to the title company, the lumber company would lose its secured position. Nevertheless, the contractor delivered the lien waiver. As a result, Hundman lost its lien on property that would have been superior to the mortgage and would

have been paid first in any suit to foreclose that mortgage. The contractor made partial payments to Hundman shortly after the closing of the real estate sale. Hundman brought suit against the contractor for the remainder and received a judgment against the contractor in the amount of $10,718.11. The contractor petitioned for protection from creditors under Chapter 7 of the Bankruptcy Code. Hundman filed a complaint in bankruptcy court seeking to have its debt declared nondischargeable. The bankruptcy court found that the debtors acted willfully and maliciously because they knew when they tendered the lien waiver that Hundman's debt would not be paid and that it would lose its lien priority to collect that debt and held that the debt to Hundman was nondischargeable. The district court affirmed.

> **Section 523(a)(6) does not discharge an individual debtor from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity[.]" In order to establish a case under § 523(a)(6), the complainant must prove three elements: "1) a willful and malicious act; 2) done without cause or excuse; 3) that leads to harm."** ***In re Cerar,*** **84 B.R. 524 (Bkrtcy.C.D.Ill.1988),** ***aff'd,*** **97 B.R. 447 (C.D.Ill. 1989). . . . The debtor need not act with ill will or malevolent purpose toward the injured party. . . . Where a creditor is deprived of its collateral by an act of the debtor, that act is deemed both willful and malicious. . . .**
>
> *** * ***
>
> **In the case at bench, it is clear that Defendants knew that their act of tendering Hundman's lien waiver without first satisfying its debt would cause financial injury. Defendants knew that Hundman would lose its lien — and consequently — its priority position in receiving satisfaction of its debt. . . . Consequently, the Court finds that the bankruptcy court did not err when it concluded that Defendants acted willfully and maliciously. [**Citations omitted.**]** 152 B.R. at 545 – 546.

See also In re Scarlata, 979 F.2d 521 (7th Cir. 1992); *In re Thomas,* 729 F.2d 502 (7th Cir. 1984); *Condict v. Condict (In re Condict),* 71 B.R. 485 (N.D.Ill. 1987).

By P.A. 90-208 (eff. July 25, 1997), the Illinois legislature passed a constructive trust statute as part of the Mechanics Lien Act, which may help remedy a few of the problems in the chain of payments in construction projects. More could be done, however, not the least of which would be to impose personal liability on the people diverting funds from subcontractors. The statute states:

> **§ 21.02. Construction Trust Funds.**
>
> **(a) Money held in trust; trustees. Any owner, contractor, subcontractor, or supplier of any tier who requests or requires the execution and delivery of a waiver of mechanics lien by any person who furnishes labor, services, material, fixtures, apparatus or machinery, forms or form work for the improvement of a lot or a tract of land in exchange for payment or the promise of payment, shall hold in trust the sums received by such person as the result of the waiver of mechanics lien, as trustee for the person who furnished the labor, services, material, fixtures, apparatus or machinery, forms or form work or the person otherwise entitled to payment in exchange for such waiver.**

(b) How trust moneys held; commingling. Nothing contained in this Section shall be construed as requiring moneys held in trust by an owner, contractor, subcontractor, or material supplier under this Section to be placed in a separate account. If an owner, contractor, subcontractor, or material supplier commingles moneys held in trust under this Section with other moneys, the mere commingling of the moneys does not constitute a violation of this Section.

(c) Violation of this Section. Any owner, contractor, subcontractor, or material supplier who knowingly retains or used the moneys held in trust under this Section or any part thereof, for any purpose other than to pay those for whom the moneys are held in trust, shall be liable to any person who successfully enforces his or her rights under this Section for all damages sustained by that person. 770 ILCS 60/21.02.

III. [12.15] ASSIGNMENT

Section 8 of the Mechanics Lien Act expressly provides that all liens or claims for lien under the Act shall be assignable and that suits to enforce such liens may be maintained in the name of the assignee. 770 ILCS 60/8. The courts consistently have permitted the assignee of a mechanics lien to maintain the suit to foreclose it in its own name. *Boyer v. Keller,* 258 Ill. 106, 101 N.E. 237 (1913); *Huebner v. Kornajzer,* 259 Ill.App. 540 (1st Dist. 1931); *Balchunas v. Novicki,* 257 Ill.App. 157 (1st Dist. 1930); *Central Lime & Cement Co. v. Leyden-Ortseifen Co.,* 245 Ill.App. 48 (1st Dist. 1927); *Chaffin v. Nichols,* 211 Ill.App. 109 (4th Dist. 1918); *Builders Supply & Coal Co. v. Eggmann,* 190 Ill.App. 572 (4th Dist. 1914). *See also United Cork Cos. v. Volland,* 365 Ill. 564, 7 N.E.2d 301 (1937).

An assignee is entitled to include its own claim as contractor with the claim of another contractor assigned to it. *Builders Supply & Coal, supra; Chaffin, supra.*

Section 8 also applies to the claim on a bond of a municipal construction contractor furnished by it for the protection of those furnishing labor or material on the work; such a claim is assignable. *Chaffin, supra.*

The general theory as to suits by assignees is that the suit is to be maintained by the real party in interest, suing in its own right and for its own benefit. *Balchunas, supra.*

Even before the present Mechanics Lien Act, courts held that the original contractor that, with the consent of the owner, assigned a contract to a subcontractor as security and later had it reassigned to itself would not thus lose its lien rights. *Weber v. Bushnell,* 171 Ill. 587, 49 N.E. 728 (1898).

An original contractor on a public improvement (which does not have lien rights against the public funds because it has a direct contract right) may not assign a claim to third persons and thus defeat the rights of its subcontractors; they still may perfect their liens and thus become entitled to payment from the municipality in preference to the assignees of the original contractor. *Spalding Lumber Co. v. Brown,* 171 Ill. 487, 49 N.E. 725 (1898). *See also Town & Country Bank of*

Springfield v. James M. Canfield Contracting Co., 55 Ill.App.3d 91, 370 N.E.2d 630, 12 Ill.Dec. 826 (4th Dist. 1977). Similarly, with respect to private improvements, the subcontractor, by §21 of the Mechanics Lien Act, is given a lien "on the moneys or other considerations due or to become due from the owner under the original contract" as against the original contractor's assignees (770 ILCS 60/21(a)); when the subcontractor perfects that lien, it relates back to the date of the original contract and thus takes precedence over the rights of assignees of the original contractor.

The recorded lien claim and complaint must correctly identify the party contracting to perform the work and the assignee of the claim, particularly if the rights of a third-party purchaser are involved. *Candice Co. v. Ricketts,* 281 Ill.App.3d 359, 666 N.E.2d 722, 217 Ill.Dec. 53 (1st Dist. 1996). In *Candice Co.,* the assignee of the general contractor's contract recorded a claim stating that it, instead of the contractor, had entered into the contract with the owners of the property. The court held the lien claim unenforceable against a purchaser of the property for failure to provide an accurate description of the contract forming the basis of the claim as required by 770 ILCS 60/7.

IV. [12.16] COPARTNERS OR JOINT CLAIMANTS

Section 22 of the Mechanics Lien Act provides:

> **Whenever, after a contract has been made, the contractor shall associate one or more persons as partners or joint contractors, in carrying out the same, or any part thereof, the lien for labor, services, material, fixtures, apparatus or machinery, forms or form work furnished by a sub-contractor to such contractor and his partners or associates, as originally agreed upon, shall continue the same as if the sub-contract had been made with all of said partners.** 770 ILCS 60/22.

Consistent with this section, if one partner withdraws from the firm and a new member is brought in, then the subcontractor's 90-day notice properly should name the new members of the firm as the original contractors. *I. Lurya Lumber Co. v. Bernstein,* 168 Ill.App. 77, 80 (1st Dist. 1912).

Because an owner has no lien rights for improving its own property, it follows that a copartner-owner or an owner-joint venturer has no lien rights either. *See Fitzgerald v. Van Buskirk,* 16 Ill.App.3d 348, 306 N.E.2d 76 (2d Dist. 1974).

In *Sorg v. Crandall,* 233 Ill. 79, 84 N.E. 181 (1908), the court held that two contractors who were not copartners but who were nevertheless jointly requested to redo a portion of the work, as to which they were acting as arbitrators, might file a claim jointly.

While §3 of the Mechanics Lien Act, 770 ILCS 60/3, treats spouses as copartners for contract purposes, that section does not affect the requirements of serving notice that states that each spouse is entitled to his or her own notice. Matrimony is not the equivalent of partnership for purposes of notice. Compare §3 with the result in *Fettes, Love & Sieben, Inc. v. Simon,* 46 Ill.App.2d 232, 196 N.E.2d 700 (1st Dist. 1964).

V. [12.17] DEATH

Section 10 of the Mechanics Lien Act provides: "Suits may be instituted under the provisions of this act in favor of administrators or executors." 770 ILCS 60/10. Therefore, an administrator or executor of the estate of a contractor may file suit. Section 10 expressly provides that "in suits instituted under the provisions of this act, the representatives of any party who may die pending the suit shall be made parties." *Id.* If one of the potential or actual defendants dies, then his or her administrator or executor is to be made a party defendant. See 735 ILCS 5/2-1008(b).

If the administrator or executor institutes a proceeding to sell real estate to pay the debts of the decedent, he or she may make a mechanics lien claimant a party defendant, and the judgment entered in that proceeding may dispose of the latter's lien rights. *Bauer v. Benton State Bank,* 258 Ill.App. 332 (4th Dist. 1930).

VI. [12.18] FIRE OR OTHER DESTRUCTION

Because the mechanics lien attaches as of the date of the contract for the improvement, the total or partial destruction or removal of the building or improvement by fire or other calamity does not destroy or affect the lien. *Paddock v. Stout,* 121 Ill. 571, 13 N.E. 182 (1887); *Sontag v. Brennan,* 75 Ill. 279 (1874); *Schwartz v. Saunders,* 46 Ill. 17 (1867); *Ellett v. Tyler,* 41 Ill. 449 (1866); *Gaty v. Casey,* 15 Ill. 189 (1853); *Chicago Smokeless Fuel Gas Co. v. Lyman,* 62 Ill.App. 538 (1st Dist. 1895). The occurrence of the fire before completion of the improvement will not prevent the enforcement of the lien for the labor or material furnished before that time. *Sontag, supra; Elgin Lumber Co. v. Langman,* 23 Ill.App. 250 (2d Dist. 1887) (dictum).

Note that if materials are furnished, it is not necessary that they be installed before the fire or other destruction for the plaintiff to have a valid lien for their value. In *Kupferschmid, Inc. v. Rodeghero,* 139 Ill.App.3d 975, 488 N.E.2d 305, 94 Ill.Dec. 479 (3d Dist. 1986), the plaintiff entered into a contract with the partner-contract purchaser of the owner under which the plaintiff agreed to furnish a barn cleaner, cow pen paneling, tie stalls, clamps, thermostats, and fans, which were to be installed in a new, metal, airy barn to be constructed on the owner's property. The plaintiff delivered the materials to the property. With the exception of the barn cleaner, which was placed outside the barn then under construction, the materials were placed inside the barn on a dirt floor. The materials, with the exception of the thermostats and fans, were to be installed in a concrete floor. Checks to pay for the materials were returned due to insufficient funds.

In *Kupferschmid,* fire destroyed approximately 75 percent of the barn. At the time of the fire, one fan had been installed, and the other materials remained on the dirt floor and were exposed to the elements. The barn cleaner, which had been left outside, was also exposed to the elements. The plaintiff removed the materials from the property with the exception of the one fan that was destroyed because of the fire and a number of clamps that were lost in the mud of the dirt floor. What was recovered was eventually resold in its damaged condition. The plaintiff then brought suit to foreclose its mechanics lien against the property for its estimated loss of $8,888.12.

The trial court in *Kupferschmid* ruled that the items furnished by the plaintiff were fixtures and, therefore, had to be incorporated into the building before the plaintiff could have a valid lien. Furthermore, because the plaintiff had recovered the items from the defendant before the filing of a claim for mechanics lien, the plaintiff, under §4 of the Mechanics Lien Act, 770 ILCS 60/4, was estopped from asserting any claim for lien. The appellate court reversed, holding that the delivered items were materials, not fixtures, and that the plaintiff's removal and resale of the materials did not destroy the plaintiff's lien rights. The appellate court noted:

> **The material furnished defendants in September, 1981, was not the same material recovered by the plaintiff in March, 1982. The fire and subsequent exposure to the elements which resulted in damage to the material delivered by the plaintiff constituted a partial incorporation of the material into the structure. [**Section**] 4 of the Act allows the contractor to enforce his lien for the value of what has been done, and the court shall adjust his claim and allow a lien accordingly. The difference between the salvage value of the material recovered and the contract price we hold to be lienable under the facts of this case. . . .**
>
> **The plaintiff in good faith furnished material to the defendants and in good faith recovered the damaged material to mitigate his damages thereby reducing defendants' liability for the material furnished. In keeping with the principles of equity and the purpose of the Act, we hold the language in [§]4 allows the plaintiff to recover the material furnished without forfeiting his mechanic lien remedies. [**Citations omitted.**]** 488 N.E.2d at 307 – 308.

If the improvement is partially destroyed and the debris is sold, under the prior Acts, courts held that the lien attaches to the proceeds of the sale of such debris. *Paddock, supra; Gaty, supra.* The same result may occur today.

If the building is destroyed entirely by fire and there is a question of priority between the mechanics lien claimant and a prior mortgagee, in view of the fact that the latter has a priority as to the value of the land, under prior Acts courts held that nothing remains for the lien claimant to subject the lien to except the equity of redemption of the owner. *Condict v. Flower,* 106 Ill. 105, 119 (1882).

If the mortgagee receives the proceeds of an insurance policy that protects its interest, then the lien claimant may not have a claim as against the insurance money, although it would have such a claim if the owner of the property had obtained the insurance policy in his or her own name to protect only the owner's interest. *Elgin Lumber, supra.* In the latter situation, the court would apply the rule that the lien that applies to the realty applies to the proceeds derived from the disposition of that realty.

VII. [12.19] FORMER ADJUDICATION

If a mechanics lien claimant was made a party defendant to an administrator's proceeding to sell the realty to pay debts, was served, and defaulted and if the judgment in that proceeding found

that the lien claimant was not entitled to a lien, then that judgment is a bar to any subsequent suit by that lien claimant to enforce its lien rights. *Bauer v. Benton State Bank,* 258 Ill.App. 332 (4th Dist. 1930).

See also Goldstein v. Weisberg, 258 Ill.App. 228 (1st Dist. 1930), as to the effect of a former judgment of mortgage foreclosure on the rights of a lien claimant sued therein as an unknown owner.

In *Rockwood Sprinkler Co. v. Phillips Co.,* 265 Ill.App. 267 (1st Dist. 1932), a plaintiff whose intervening petition to foreclose its mechanics lien was disposed of in a prior foreclosure suit later filed an action at law. The defendant pleaded that the decree in the foreclosure suit was res judicata and that the plaintiff's suit was barred by estoppel by verdict. The court rejected both contentions and held as follows:

a. Because the remedies of a lien claimant are cumulative (see §1.17 of this handbook), the failure to maintain the lien suit did not deprive the lien claimant of its right to bring the action at law on the contract.

b. The defendant, having been dismissed from the foreclosure suit before the entry of the decree therein, could not claim the benefit of it as res judicata.

c. The doctrine of estoppel by verdict did not apply.

On this point, the *Rockwood Sprinkler* court said:

> **"An estoppel by verdict is but another branch of the doctrine of *res judicata,* and it rests upon the same principle of law [—] that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction cannot again be controverted. When this doctrine is applied to a single question or point arising in the course of litigation which has finally been adjudicated it is designated as an estoppel by verdict, and the same question or point cannot again be litigated between the same parties in the same or any other court at law or in chancery, and neither party, nor their privies, will be permitted to allege anything inconsistent with the finding upon that question." . . . (*Chicago Title & Trust Co. v. National Storage Co.,* 260 Ill. 485, [**103 N.E. 227, 233 (1913)**].) To assert estoppel by verdict it must appear that the defendant could have been prejudiced by a finding in the mechanic's lien proceedings. "The doctrine of *res judicata* is, that a point once adjudicated by a court of competent jurisdiction may be relied upon as conclusive upon the same matter, as between the parties or their privies, in any subsequent suit, in the same or any other court, at law or in chancery. But the doctrine has no application against or in favor of anyone not a party or privy. No one not a party to the judgment can claim the benefit of it." . . . *People v. Amos,* 246 Ill. 299, [92 N.E. 857, 859 (1910)]. [Citations omitted.] 265 Ill.App. at 277.**

But compare this with the result in *Consol Builders & Supply Co. v. Ebens,* 24 Ill.App.3d 988, 322 N.E.2d 248 (2d Dist. 1975), in which a contractor tried to split its cause of action into two cases — one for extras and the second for the balance of the contract price — but was barred by res judicata from bringing the second case.

VIII. [12.20] GENERAL SETTLEMENT

Under §30 of the Mechanics Lien Act, if there are several liens on the "same premises, and the owner or any person having such a lien" on the property becomes concerned that there is not a sufficient amount left owing to the contractor to pay all potential lien claims resulting from the construction of the improvements, the owner or any one or more persons having such a lien may file a complaint or petition in the circuit court of the proper county, praying for a general settlement. 770 ILCS 60/30.

In a suit under §30, the necessary parties are (a) the contractor, (b) all the lien claimants, and (c) all persons interested in the premises. *Hacken v. Isenberg,* 288 Ill. 589, 124 N.E. 306 (1919). The parties to this proceeding shall prosecute it "under like requirements as are directed in section 11 of this Act." 770 ILCS 60/30. Any lien claimant omitted from this suit may intervene by way of intervening petition and counterclaim. See §8.3 of this handbook.

Section 30 provides that all parties who are "duly notified of" the suit and nevertheless fail to establish their claim shall be precluded from subsequently asserting liens against the property. 770 ILCS 60/30.

The common occasion for the filing of a suit of this nature is when the owner is confronted with subcontractors' liens that may exceed the amount of the owner's existing indebtedness to the original contractor. Section 30 therefore provides that if the amount the court finds to be due to the original contractor is insufficient to pay all subcontractors, then that amount first shall be used to pay the wage claims and then shall be used to pay the lien claims pro rata. If the amounts thus found to be due are not paid, the premises may be sold as in the ordinary mechanics lien suit. The owner may not complain of the finding as to the amount due from the original contractor to a subcontractor as long as it does not challenge the findings as to the amount due from the owner to the original contractor; if that amount is correctly found, then the manner of its distribution between the original contractor and the subcontractors is immaterial to the owner. *Geweke v. Hilsinger,* 177 Ill.App. 467 (1st Dist. 1913).

A suit filed under §30 is in the nature of an action in interpleader (*Gilbert v. Croshaw,* 178 Ill.App. 10 (1st Dist. 1913)) rather than a separate cause of action or true interpleader. *Nelson v. Urban,* 236 Ill.App. 447 (1st Dist. 1925). Under certain circumstances, an owner might desire to file a true interpleader rather than a suit under §30; this has been done in several instances by municipalities that were in the position of owners to which numerous subcontractors' liens were being presented. *Spalding Lumber Co. v. Brown,* 171 Ill. 487, 49 N.E. 725 (1898); *City of Staunton v. Cole & Fauber,* 254 Ill.App. 377 (3d Dist. 1929). These interpleader suits may have been instituted by municipalities under the assumption that §30 does not apply to a municipality, as it contains no reference to them. (Although there is authority to the effect that §23 of the Mechanics Lien Act, 770 ILCS 60/23, stands alone, courts more than occasionally have referred to other sections of the Act for assistance in deciding cases involving lien rights in public fund cases.)

It has been held that, in a suit under §30, the "same strict formality in pleading is not required as in other proceedings in law or equity." *Geweke, supra,* 177 Ill.App. at 470 – 471. In *Nelson,*

supra, the court upheld an informal complaint under this section even though criticizing its form. Caution in this regard, however, is highly recommended. *See, e.g., Well Done Heating & Sheet Metal,* 112 Ill.App.3d 438, 445 N.E.2d 451, 68 Ill.Dec. 3 (1st Dist. 1983); *Norman A. Koglin Associates v. Valenz Oro, Inc.,* 176 Ill.2d 385, 680 N.E.2d 283, 223 Ill.Dec. 550 (1997).

The term "owner" in §30 includes a landlord against whose estate the tenant's original contractor and subcontractors are claiming liens; the tenant may institute a suit for general settlement under this section. *Hacken, supra,* 124 N.E. at 308. "The words 'the owner' in section 30 have the same meaning as they do in section 1, and have reference to [anyone] having such an estate, right, or interest as aforesaid, whether his estate, right, or interest be one in fee, for life, for years, or for any other interest." *Id.*

It should be noted, however, that a downstream party does not necessarily have a right to all of the funds due the general contractor from the owner. The First District Appellate Court, in a case of first impression, construed §30's language: "the amount due from the owner to the contractor." In *GX Chicago, LLC v. Galaxy Environmental, Inc.,* 2015 IL App (1st) 133624, 38 N.E.3d 60, 395 Ill.Dec. 183, the court held that the foregoing language is limited to the immediate upstream contractor when liens are asserted by lower-tier subcontractors lacking privity with either the owner or the owner's general contractor. Due to this limitation, the court found that the owner and general contractor did not owe more than the remaining contract amount due the defendant.

IX. [12.21] MERGER

A contractor's lien is not necessarily released or merged by accepting a deed to an undivided one-half interest in the property at issue when the conveyance is provided pursuant to a transaction to enable the owner to get a loan and complete the building. *Blatchford v. Blanchard,* 160 Ill. 115, 43 N.E. 794 (1895). Whether a mechanics lien claim or other encumbrance is extinguished by acquiring the estate or title against which the lien is asserted depends on the intention of the claimant in such an acquisition. The lien claim may be merged in the superior title and thus extinguished if (a) it appears that the lien claimant intended to rely exclusively on the newly acquired title or (b) no evidence of the lien claimant's intention appears and it is a matter of indifference to the lien claimant whether the lien is kept alive. *Id.*

X. [12.22] MISTAKE

Section 2 of the Mechanics Lien Act provides that a contractor

> **furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work for the erection of a building, or structure, or improvement, by mistake upon land owned by another than the party contracting as owner, shall have a lien for such labor, services, material, fixtures, apparatus or machinery, forms or form work upon such building, or structure or improvement, and the court, in the enforcement of such lien, shall order and direct such building, structure or improvement to be separately sold under its judgment, and the purchaser may remove the same within such reasonable time as the court may fix.** 770 ILCS 60/2.

The lien based on the erection of a building or improvement on the wrong property, *i.e.,* under a mistaken notion as to the ownership, thus is restricted to the building or improvement thus constructed; it does not attach to the land itself. It has been said that §2 applies only to the situation in which a building is erected wholly on the wrong tract of land through mistake. *Donkle & Webber Lumber Co. v. Rehrmann,* 310 Ill.App. 17, 33 N.E.2d 709 (3d Dist. 1941).

It has even been suggested, by way of dictum, that the right to assert a lien against a building or improvement placed on an owner's land without his or her knowledge or consent and solely by mistake should be restricted "to improvements which could be removed without destroying their value or injuring the lands upon which they were erected." *Beaudry v. Bell,* 250 Ill.App. 468, 472 (1st Dist. 1928). This suggestion seems well founded, and the court should either find that the improvement is capable of being removed without such injury or destruction or provide in the judgment that it may be removed only if no such injury or destruction is occasioned. The burden of proving that the subject building in a mechanics lien suit is in fact on the land owned by the defendant is on the party asserting the claim. This requirement is reasonable inasmuch as the claimant must prove all of the elements on which a mechanics lien depends to establish its claim. *Condee, Inc. v. Chrisman,* 38 Ill.App.3d 729, 348 N.E.2d 461 (4th Dist. 1976).

Filing suit in the wrong county also does not necessarily vitiate the lien. In *Holland Asphalt Paving Co. v. Bank Building & Equipment Corporation of America,* 57 Ill.App.3d 751, 373 N.E.2d 501, 15 Ill.Dec. 155 (5th Dist. 1978), a subcontractor, Holland Asphalt and Paving, filed a complaint in the Circuit Court of Madison County seeking a personal judgment against the contractor and owner and seeking to foreclose its mechanics lien. Both defendants filed an answer. More than two years after the completion of the work, both defendants filed motions to dismiss, alleging that the complaint was not filed in the county where the real estate was located as required by §9 of the Mechanics Lien Act, 770 ILCS 60/9. Upon motion of the plaintiff, the trial court transferred the cause to the Circuit Court of St. Clair County, which, after hearing, entered a judgment against both defendants and entered a judgment of foreclosure against the owner of the property. The owner appealed. The appellate court affirmed, holding, among other things, that filing suit in the wrong county did not work a hardship on or prejudice any party. Furthermore, the defendants had timely notice of the suit, filed their answer within the prescribed time, and participated in several motions heard in Madison County.

XI. [12.23] NOVATION

The essentials of a valid novation are (a) a previous valid obligation, (b) a valid new agreement of all the parties in interest, (c) extinguishment of the old contract, and (d) validity of the new contract. *Kiefer v. Reis,* 331 Ill. 38, 162 N.E. 157 (1928), illustrates one set of facts under which one agreement between the owner and the contractor may be substituted for another and the obligation of the owner to an original contractor may be changed, at least in part, to an obligation directly to the subcontractors. A novation also may be effective to change the identity of the member of the contracting copartnership. *I. Lurya Lumber Co. v. Bernstein,* 168 Ill.App. 85 (1st Dist. 1912).

XII. [12.24] REMOVAL OF MATERIAL FROM SITE

Section 36 of the Mechanics Lien Act provides that an owner, contractor, subcontractor, or other person who purchases materials on credit and who represents that they are to be used in a designated building and thereafter removes them to any other building or disposes of them for any purpose, without the written consent of the seller and with intent to defraud the seller, shall be guilty of a Class A misdemeanor. 770 ILCS 60/36.

Section 4 of the Mechanics Lien Act, 770 ILCS 60/4, permits the material supplier or subcontractor who has furnished materials to the site to remove the materials that have not been incorporated into the project from the site in the event of breach by the owner.

In the case of default or abandonment of the contract by the owner, the contractor or subcontractors who have furnished material that has not been incorporated in the improvement shall have the right to remove it under §4. Section 21 of the Mechanics Lien Act, 770 ILCS 60/21, provides that if the default or abandonment is that of the original contractor (rather than that of the owner, which is governed by §4), then the subcontractor may remove the material not yet incorporated in the improvement.

The court in *Hinkle v. Creek,* 113 Ill.App.2d 454, 251 N.E.2d 111 (4th Dist. 1969), considered the question whether the statutory right to remove materials or fixtures is to be deemed a duty. In *Hinkle,* the plaintiff lien claimants argued that Republic Steel, which had fabricated and furnished steel to the jobsite, had the obligation to remove and recover the material for other sales. Republic argued that it was unlikely that the material could be resold and that if it were to pick up the steel, it would lose its lien rights, citing *R. Haas Electric & Mfg. Co. v. Springfield Amusement Park Co.,* 236 Ill. 452, 86 N.E. 248 (1908). Rejecting the plaintiff's contention, the court held: "No authority is cited that suggests that the materialman's election under [§]4 is to be raised to the status of a duty to another lien creditor." 251 N.E.2d at 114.

There is also authority for the proposition that if the material is removed and resold to mitigate damages but at a loss, a lien will obtain for the deficiency. See the discussion of *Kupferschmid, Inc. v. Rodeghero,* 139 Ill.App.3d 975, 488 N.E.2d 305, 94 Ill.Dec. 479 (3d Dist. 1986), in §12.18 above. *Kupferschmid* reaches a logical and equitable result. Under the reasoning of *Kupferschmid,* the material supplier is not penalized by forfeiting lien rights as a result of actions taken to mitigate the defendant's damages.

XIII. [12.25] SUBROGATION

Bondholders who pay off subcontractors' lien claims pursuant to an order of the federal district court are subrogated to the rights of the subcontractors to sue the surety company on the completion bond given to the owner by the original contractor. *Cherry v. Aetna Casualty & Surety Co.,* 372 Ill. 534, 25 N.E.2d 11 (1939).

The other edge of the sword, however, is seen in the cases holding that a subcontractor who waives lien rights also waives rights to recover under the bond. See §§1.31 and 1.32 of this handbook for a more complete discussion of this topic.

The court in *Manhattan State Bank v. C.J. Moritz, Inc.,* 238 Ill.App. 103 (2d Dist. 1925), held that a bank that advances money to a subcontractor on a public improvement for the purpose of enabling it to pay labor and material bills does not thereby become subrogated to the subcontractor's rights under §23 of the Mechanics Lien Act, 770 ILCS 60/23.

When a trust deed provides that the mortgagor should not suffer any mechanics liens against the premises, the mortgagee has a right to pay off a lien and is therefore subrogated to the rights of the lien claimant. *Hibernian Banking Ass'n v. Chicago Title & Trust Co.,* 217 Ill.App. 36 (1st Dist. 1920).

In *Detroit Steel Products Co. v. Hudes,* 17 Ill.App.2d 514, 151 N.E.2d 136 (4th Dist. 1958), a mortgagee received lien rights equal in priority to lien claimants whose liens attached to the premises before the mortgage at issue was recorded under a theory of subrogation. The bank holding the mortgage was not entirely a free agent in the matter because it was faced with a $5,000 overdraft in the owner's account, which the owner was apparently unable to cover. The bank then agreed to make a loan to the owner of $10,000 and to take a first mortgage of the premises to secure the loan. As a part of disbursing the excess over the $5,000 overdraft, the bank learned of claims of two material suppliers and disbursed $2,900 in satisfaction of those claims. The opinion did not reflect whether the material suppliers' claims were supported by perfected liens, and the bank did not require either assignment or waiver of their claims. The trial court's decision was reversed in part on grounds relating to the doctrine of enhancement as described in §16 of the Mechanics Lien Act, 770 ILCS 60/16.

In *Detroit Steel Products,* the appellate court affirmed the trial court's ruling that, to the extent mortgage proceeds were used to pay and satisfy lien claims, the bank was entitled to a priority equivalent to that of lien claimants whose rights attached before the mortgage was recorded. The court addressed the argument that the bank acted as a mere volunteer:

> **Here no prejudice to Gaskins or other materialmen resulted since, but for the mortgage, they would have been required to share the sale proceeds with the materialmen whose claims were paid. To deny subrogation would be to grant "an unearned enrichment" to Gaskins by the reduction of outstanding claims. Equity does not look to the technical niceties of procedure but is concerned with ultimate consequences. To permit the bank to stand in the shoes of the claimants to the extent they received loan proceeds takes nothing from Gaskins or the other claimants to which they were otherwise entitled.**
>
> **In Home Savings Bank v. Bierstadt, 168 Ill. 618, 624, 48 N.E. 161, 162, the court stated an exception to the "volunteer rule" raised by Gaskins: "It is the agreement that the security shall be kept alive for the benefit of the person making the payment which causes the right of subrogation to exist, because it takes away the character of a mere volunteer." Here the bank's expectation that it was discharging all prior liens was clear. It was wrong, and to that extent loses the desired priority. But it nonetheless is not rendered a "mere volunteer" as to the whole of its mortgage.** 151 N.E.2d at 139 – 140.

XIV. [12.26] WATERCRAFT

Section 37 of the Mechanics Lien Act provides that an architect, contractor, or subcontractor furnishing services, labor, or material for building, altering, repairing, or ornamenting a boat, barge, or other watercraft shall have a lien thereon for the value of such services, labor, or material to the same extent and enforceable in the same manner as if the contract related to "a house or other building." 770 ILCS 60/37. *See Bull v. Mitchell,* 114 Ill.App.3d 177, 448 N.E.2d 1016, 70 Ill.Dec. 138 (3d Dist. 1983).

13 Attorneys' Fees and §17 of the Mechanics Lien Act

MICHAEL J. TORCHALSKI
Torch Legal
Cary

I. [13.1] INTRODUCTION

Prevailing parties may recover attorneys' fees under §17 of the Mechanics Lien Act, 770 ILCS 60/0.01, *et seq.,* in limited circumstances that require specific judicial findings. Section 17 conditionally permits, but does not require, awards of attorneys' fees. 770 ILCS 60/17. Claims for mechanics liens typically include requests for attorneys' fees. Construction contracts often contain prevailing party attorney's fee provisions. Thus, the recovery of attorneys' fees is always an issue in construction and mechanics lien litigation.

Construction is inherently problematic. Owners sued by contractors almost always have reasons not to pay in full (*e.g.,* problems with the work; claims for extras; overcharges; punch lists; and disagreements with the contractor over any of the foregoing). In litigation, such issues can be developed, supported, and construed as just cause and prevent the award of attorneys' fees to a contractor.

II. [13.2] SECTION 17 OF THE MECHANICS LIEN ACT

§17. Costs.

*** * ***

(b) If the court specifically finds that the owner who contracted to have the improvements made failed to pay any lien claimant the full contract price, including extras, without just cause or right, the court may tax that owner, but not any other party, the reasonable attorney's fees of the lien claimant who had perfected and proven his or her claim.

(c) If the court specifically finds that a lien claimant has brought an action under this Act without just cause or right, the court may tax the claimant the reasonable attorney's fees of the owner who contracted to have the improvements made and defended the action, but not those of any other party.

(d) "Without just cause or right", as used in this Section, means a claim asserted by a lien claimant or a defense asserted by the owner who contracted to have the improvements made, which is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. 770 ILCS 60/17.

The key phrase that appears three times in §17 is "without just cause or right," defined in §17(d) as "not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." 770 ILCS 60/17(d). That is virtually the same standard courts apply for imposing sanctions against litigants.

III. [13.3] AWARDS OF ATTORNEYS' FEES — GENERALLY

Trial courts have considerable discretion with respect to awards of attorneys' fees:

> **"Generally, a trial court's decision to award attorney fees is not reversed absent an abuse of discretion."** ***Guerrant v. Roth,*** **334 Ill.App.3d 259, 262, 267 Ill.Dec. 696, 777 N.E.2d 499 (2002), citing** ***Pietrzyk v. Oak Lawn Pavilion, Inc.,*** **329 Ill.App.3d 1043, 1046, 263 Ill.Dec. 932, 769 N.E.2d 134 (2002);** ***Mirar Development, Inc. v. Kroner,*** **308 Ill.App.3d 483, 485, 241 Ill.Dec. 815, 720 N.E.2d 270 (1999) (normally an award of attorney fees "will not be reversed on review unless the court abused its discretion"). "The rationale for this standard is that a party challenging a trial court's decision regarding attorney fees is actually challenging the trial court's discretion in determining what is reasonable."** ***Guerrant,*** **334 Ill.App.3d at 262–63, 267 Ill.Dec. 696, 777 N.E.2d 499, citing** ***Pietrzyk,*** **329 Ill.App.3d at 1046, 263 Ill.Dec. 932, 769 N.E.2d 134.** *Peleton, Inc. v. McGivern's, Inc.,* 375 Ill.App.3d 222, 873 N.E.2d 989, 992 – 993, 314 Ill.Dec. 59 (1st Dist. 2007).

IV. [13.4] SPECIFIC FINDINGS UNDER §17 OF THE MECHANICS LIEN ACT

Sections 17(b) and 17(c) of the Mechanics Lien Act require specific judicial findings for a party to be awarded attorneys' fees. 770 ILCS 60/17(b), 60/17(c). Trial courts have discretion with respect to findings, particularly with respect to the award of attorneys' fees. A trial court's decision of whether to award attorneys' fees is a matter within its discretion and will not be disturbed absent an abuse of that discretion.

Thus, in *Central Illinois Electrical Services, L.L.C. v. Slepian,* 358 Ill.App.3d 545, 831 N.E.2d 1169, 294 Ill.Dec. 844 (3d Dist. 2005), even though the trial court ruled in favor of a contractor with respect to the enforcement of its mechanics lien, the court nonetheless found that the contractor had not proven that it was entitled to an award of attorneys' fees under §17 of the Mechanics Lien Act. Following recitation of the specific findings requirements in §17, the appellate court held that the decision not to award attorneys' fees to the successful mechanics lien claimant was within the sound discretion of the trial court.

V. [13.5] PREVAILING PARTY DOCTRINE

Courts adjudicating claims for attorneys' fees in construction and mechanics lien litigation have also applied the prevailing party doctrine. In *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership,* 325 Ill.App.3d 276, 757 N.E.2d 1271, 259 Ill.Dec. 136 (5th Dist. 2001), a concrete contractor filed a complaint for the foreclosure of a mechanics lien, and the property owner filed an answer and a counterclaim. At trial, the contractor was awarded $938 on its mechanics lien claim, and the owner was awarded $26,145 on its counterclaim. The court found that the owner was the sole prevailing party and awarded the owner $13,532 in attorneys' fees and $3,730.77 in costs:

> **A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit.** ***Grossinger Motorcorp,***

> ***Inc. v. American National Bank & Trust Co.,* 240 Ill.App.3d 737, 753, 180 Ill.Dec. 824, 607 N.E.2d 1337, 1348 (1992). A party that receives judgment in his favor is usually considered the prevailing party. *Tomlinson v. Dartmoor Construction Corp.,* 268 Ill.App.3d 677, 687, 206 Ill.Dec. 371, 645 N.E.2d 376, 383 (1994).** 757 N.E.2d at 1275.

The award of attorneys' fees and expenses in *J.B. Esker* was based on the contract. Section 17 of the Mechanics Lien Act is not mentioned in the appellate opinion.

Expounding on the prevailing party doctrine:

> **A successful litigant is still considered the prevailing party under a fee-shifting provision even if the judgment amount is below the amount claimed. [***J.B. Esker, supra,* 757 N.E.2d at 1276 – 1277**]; *Pennsylvania Truck Lines, Inc. v. Solar Equity Corp.,* 882 F.2d 221, 228 (7th Cir. 1989) (interpreting Illinois law). The fact that a litigant is not successful on all claims does not alter the right to attorney fees, and the prevailing party is entitled to all reasonable attorney fees. [***J.B. Esker, supra,* 757 N.E.2d at 1275 – 1277.**] However, when the dispute involves multiple claims and both parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party and an award of attorney fees to either is inappropriate. *Brown & Kerr, Inc. v. American Stores Properties, Inc.,* 306 Ill.App.3d 1023, 1035, 240 Ill.Dec. 117, 715 N.E.2d 804 (1999); *Raffel v. Medallion Kitchens of Minnesota, Inc.,* 139 F.3d 1142, 1147 (7th Cir. 1998) (interpreting Illinois law).** *Powers v. Rockford Stop-N-Go, Inc.,* 326 Ill.App.3d 511, 761 N.E.2d 237, 240, 260 Ill.Dec. 393 (2d Dist. 2001).

Because construction litigation may include multiple claims, defenses, and counterclaims, it can be difficult for a litigant to be considered the prevailing party. That was the result in *Superior Structures Construction, Ltd. v. Parkway Bank & Trust Co.,* 2011 IL App (1st) 111266-U, in which, after a four-week trial involving over a dozen witnesses and over 100 exhibits, a contractor obtained a $182,598 judgment on its mechanics lien. The contractor filed a posttrial motion for the award of attorneys' fees on its mechanics lien and breach-of-contract claims. The trial court denied the motion and "supplied no reasoning in denying Superior's request." 2011 IL App (1st) 111266-U at ¶51.

On appeal, without drawing a distinction between the statutory-based claim and the contract-based attorneys' fees claim, the court applied the prevailing party doctrine:

> **We disagree with Superior that it can readily claim "prevailing party" status based on the trial court's judgment. Superior had a contract initially worth $375,000. All-Pro had paid Superior $260,000 of that $375,000. If everything had gone as planned, which seldom does in a construction contract, Superior would have been owed $115,000 under the contract. Instead, Superior sent AllPro a final bill for more [**than**] three times that — $396,825 which was also more than the original contract was worth bringing the total charges to $771,825 for excavation work. The trial court factually determined that Superior's largest claims for: 1) $20,000 more as the original contract price; 2) $110,000 for additional earth moving; 3) $25,000 in general contract costs; and 4) a $40,000 delay expense claim were without merit. Those four claims alone by**

> **Superior amounted to $195,000 in overcharges. If Superior had not billed for these charges which the trial court did find to be unwarranted billing, it is doubtful that the parties would have been embroiled in such extensive, hotly-contested factual disputes resulting in prolonged litigation. . . . In any event, given its track record at trial for amounts recovered versus the amounts claimed, Superior can hardly be deemed the prevailing party.** 2011 IL App (1st) 111266-U at ¶47.

The appellate court went on to find that "there are plenty of reasons in the record to deny such a request" for attorneys' fees, including failure of the contractor to provide evidentiary support for attorneys' fees at trial or even to quantify the amount thereof. 2011 IL App (1st) 111266-U at ¶51.

Thus, when a mechanics lien is contested and defended with bona fide grounds for denial or reduction of the lien, then an attorneys' fees award seems unlikely, under either the "without just cause or right" standard in §17 of the Mechanics Lien Act (770 ILCS 60/17) or the prevailing party doctrine.

VI. ATTORNEY'S FEE AWARDS TO CONTRACTOR — SECTION 17(B)

A. [13.6] Amounts Undisputedly Owed To Contractor

When an owner does not pay an undisputed portion of amounts owed to a contractor, then the contractor is entitled to an award of attorneys' fees. In *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC,* 391 Ill.App.3d 533, 909 N.E.2d 294, 330 Ill.Dec. 581 (1st Dist. 2009), the managing partner for the owner testified that he agreed that at least $47,562.19 was owed to the subcontractor at the time when all payment was being withheld. The owner's counsel also acknowledged in oral argument that they knew that the subcontractor was owed an undisputed amount of $47,562.19. Yet the defendants paid nothing on that amount and offered no reasonable explanation for withholding payment on an amount that was not in dispute. Referring to the "without just cause" standard in §17 of the Mechanics Lien Act (770 ILCS 60/17), the appellate court held that "it is clear that O'Connor was entitled to attorney fees" and remanded the case to the trial court for hearing on that issue. 909 N.E.2d at 300.

Likewise, in *Roy Zenere Trucking & Excavating, Inc. v. Build Tech, Inc.,* 2016 IL App (3d) 140946, 65 N.E.3d 340, 408 Ill.Dec. 118, two subcontractors were awarded judgments for their subcontract amounts but were denied recovery for extra work in change orders that were submitted to the contractor but not approved by the owner, as required by the terms of their subcontracts.

The trial court denied the subcontractors' attorneys' fees; however, on appeal the court held that the subcontractors were entitled to recover some attorneys' fees. The trial court found that the evidence established that the plaintiffs' work was completed on time and in a workmanlike manner. The court held that, while the owner had just cause not to pay the extra work in the mechanics lien claims, the owner did not have just cause or right not to pay the balance of the original subcontract price:

> **Here, the trial court held the evidence failed to establish any reason why defendant should not have paid the underlying subcontract amounts. Indeed, the court held that**

> **the evidence established that plaintiffs' work was completed on time "and was done in a workmanlike fashion." Defendant, however, failed to satisfy its duty to pay for the work as defined in the subcontracts. The record establishes defendant was "without just cause or right" to withhold payment to plaintiffs.**
>
> **We acknowledge that the trial court found plaintiffs were not entitled to "extras." However, section 17(b) does not require that the owner fail to pay the full lien claim without cause, just the full contract price and those extras included in the contract. Stated another way, the fact that defendant may have had "just cause or right" not to pay the unapproved extras portion of the lien claim does not preclude plaintiffs' right to receive attorney fees for failure to pay the "full [sub]contract price." Therefore, we find that the trial court abused its discretion in failing to award attorney fees to plaintiffs. We remand for calculation and imposition of attorney fees.** 2016 IL App (3d) 140946 at ¶¶56 – 57.

Thus, owners should pay amounts indisputably due contractors and subcontractors in order to avoid liability under §17(b) of the Mechanic Lien Act.

Even when an owner admits liability for lienable work, a trial court has discretion to deny a contractor attorneys' fees under §17 of the Act when the mechanics lien improperly included claims for the lienable work and for non-lienable items. In *RB Services & Hauling, LLC v. Hunter 1011-1012 Hillcrest, LLC,* 2018 IL App (2d) 170985-U, ¶19, the court distinguished the *O'Connor Construction* and *Roy Zenere* decisions:

> **To be sure, *O'Connor Construction* and *Roy Zenere* suggest that the court essentially *must* award fees when the lienor has made only good faith, colorable claims and the lienee has failed to pay without just cause or right. If that is so, does that mean that the court actually lacks discretion to deny fees? We think not. Rather, that discretion will generally come into play in cases in which the lienor, despite being the prevailing party, has acted improperly in some way. This case is in that category. [**Emphasis in original.**]**

The trial court's denial of attorneys' fees was affirmed on appeal.

B. [13.7] Attorneys' Fees Denied Even Though Contractor Prevailed

In *Central Illinois Electrical Services, L.L.C. v. Slepian,* 358 Ill.App.3d 545, 831 N.E.2d 1169, 294 Ill.Dec. 844 (3d Dist. 2005), even though the trial court ruled in favor of a contractor as to enforcement of the mechanics lien, the court nonetheless found that the contractor had not proven that it was entitled to an award of attorneys' fees under §17 of the Mechanics Lien Act (770 ILCS 60/17). Following recitation of the specific findings requirements in §17, the appellate court held that the decision not to award attorneys' fees to the successful mechanics lien claimant was within the sound discretion of the trial court.

Although a contractor prevailed on its mechanics lien action (but not for extra work), "misunderstandings and/or disagreements" with the owners over the scope and quality of

construction and the division of responsibilities resulted in a finding that the owners did not act without just cause or right by withholding final payment from a contractor. *Gerlick v. Powroznik,* 2017 IL App (1st) 153424-U, ¶¶45 – 46 (Rule 23):

> **Based on our review of the record, the trial court's denial of Gerlick's request for section 17 attorney fees was not erroneous. Although the trial court ruled in favor of Gerlick on its breach of contract and mechanics lien claims, the record suggests that there were certain misunderstandings and/or disagreements between the parties regarding the scope and quality of Gerlick's work and the division of responsibilities, *e.g.,* which party was responsible for obtaining the permits. The trial court's finding that the Powrozniks' defenses were not "without just cause or right" did not constitute an abuse of discretion.**
>
> **The cases cited by Gerlick are distinguishable. For example, in *O'Connor Construction Co. v. Belmont Harbor Home Development, LLC,* 391 Ill. App. 3d 533, 540 (2009), the trial court refused to award attorney fees to a subcontractor under section 17 of the Act. The appellate court noted that the defendants acknowledged that they owed a certain amount to the subcontractor and had offered no reasonable explanation for withholding payment on the undisputed amount. *Id.* at 541. The appellate court thus remanded the matter for the trial court to conduct a hearing on the fee issue. *Id.* Unlike in *O'Connor Construction,* the Powrozniks potentially had a good-faith basis, albeit ultimately erroneous, for failing to make the final payment to Gerlick. The trial court was in the best position to observe the conduct and demeanor of the parties. *See, e.g., Best v. Best,* 223 Ill. 2d 342, 350 (2006). Under such circumstances, we cannot conclude that the trial court abused its discretion in denying Gerlick's request for fees pursuant to section 17 of the Mechanics Lien Act.**

Thus, a "potentially" good-faith reason for failing to make final payment, even if ultimately erroneous, can shield owners from liability for a contractor's attorneys' fees.

If a contractor files an improper mechanics lien that includes claims for lienable work and non-lienable items, then denial of attorneys' fees is within the discretion of the court. *RB Services & Hauling, LLC v. Hunter 1011-1012 Hillcrest, LLC,* 2018 IL App (2d) 170985-U, involved a mechanics lien that included lienable asphalt work and non-lienable dumpsters. The contractor conceded that its inclusion of dumpster charges in its lien filing had no basis in law. The owner admitted liability for the asphalt work. The trial court ruled that the contractor had a valid lien for the asphalt work but denied the contractor attorneys' fees on the principle that a party is bound by the mistakes or negligence of its counsel:

> **RB starts from a position of low plausibility: it seeks attorney fees in the face of its admission that its attorney acted unreasonably by including improper claims in its lien filing. . . .**
>
> * * *
>
> **. . . Therefore, although RB's former counsel filed the improperly inflated claim for a mechanic's lien, we treat the action as RB's.** 2018 IL App (2d) 170985-U at ¶¶15, 19 n.1.

The trial court's denial of attorneys' fees was affirmed on appeal.

C. [13.8] Only Original Owner Liable

Under §17(b) of the Mechanics Lien Act (770 ILCS 60/17(b)), a lien claimant's attorneys' fees may be taxed only against the original owner of the property and may not be included in or enforced by a judgment of foreclosure against subsequent purchasers of the property:

> **Under the plain language of section 17(b) of the Lien Act, Action's attorney fees can be taxed only against Neumann, not the Subsequent Purchasers. In granting the Subsequent Purchasers' motions for partial summary judgment, the trial court recognized that it could not tax the Subsequent Purchasers with Action's attorney fees under section 17(b) of the Lien Act. Moreover, after trial, the trial court specifically stated that it was taxing Action's attorney fees on Neumann. However, by including Action's attorney fees in the foreclosure decrees, the trial court effectively taxed those attorney fees on the Subsequent Purchasers in violation of section 17(b) of the Lien Act. Neumann no longer had an interest in the properties and had defaulted in each case. As such, the foreclosure decrees placed the Subsequent Purchasers in a position where they had to either pay Action's attorney fees or have their homes subjected to judicial sale.** *Action Plumbing Co. v. Bendowski,* 402 Ill.App.3d 681, 934 N.E.2d 35, 39, 343 Ill.Dec. 35 (2d Dist. 2010).

Accordingly, attorneys' fees relating to a mechanics lien cannot be included in a judgment of foreclosure against subsequent purchasers.

Under the same reasoning, a contractor's attorneys' fees were denied lien priority against a mortgagee in *Thyssenkrupp Elevator Corp. v. Community Investment Corp.,* 2012 IL App (2d) 101172-U (Rule 23), citing and relying on *Action Plumbing, supra.*

VII. [13.9] ATTORNEY'S FEE AWARDS TO OWNER — SECTION 17(C)

Owners were awarded attorneys' fees in an "egregious case" of constructive fraud when the contractor prerecorded a mechanics lien containing patently false statements of completion and balance due "supported" by affidavit of the contractor's president. *Father & Sons Home Improvement II, Inc. v. Stuart,* 2016 IL App (1st) 143666, ¶12, 52 N.E.3d 581, 402 Ill.Dec. 660. The court awarded the owners $13,675 in attorneys' fees pursuant to §17(c) of the Mechanics Lien Act (770 ILCS 60/17(c)). The court also awarded the mortgagee attorneys' fees of $26,291 as a sanction pursuant to Illinois Supreme Court Rule 137. On appeal, the contractor did not contest liability for attorneys' fees of the owners (thereby conceding that its lien enforcement action was brought "without just cause or right"). The contractor only contended that the attorneys' fees award to the owners was excessive.

The appellate court found that the owners' petition for attorneys' fees was supported by detailed information identifying the responsible attorneys, their expertise and hourly rate, and the details of all the relevant work involved in the case. The contractor, on the other hand, failed to include transcripts from the court hearing awarding attorneys' fees to the owners. Accordingly, the

appellate court presumed that trial court, "*relying on its experience and knowledge, carefully reviewed [the owners'] petition for attorney fees and found this petition as reasonable,*" and affirmed the judgment awarding attorneys' fees to the owner. [Emphasis added.] 2016 IL App (1st) 143666 at ¶49.

The court also affirmed the attorneys' fees award to the mortgagee, upholding the trial court's finding of five separate violations of S.Ct. Rule 137 by the contractor, including filing pleadings that incorporated by reference the patently false assertions of the mechanics lien.

A restaurant owner prevailed against a mechanics lien claimant and was awarded attorneys' fees and costs under §17(c) in *Bara Chicago, LLC v. Big Cheese Wrigleyville, LLC,* 2022 IL App (1st) 201314-U. The case involved two invoices/proposals created by the claimant, the first of which was dated September 9, 2013. The owner created a spreadsheet of job charges and payments that "precisely tracked" the original September 9, 2013, invoice/proposal, and showed final payment to the contractor on April 4, 2014. 2022 IL App (1st) 201314-U at ¶13. The restaurant opened for business on April 4, 2014, and the owner's representative testified that construction work was completed by the restaurant's opening day.

Soon after the restaurant opened, the Chicago Transit Authority instituted an eminent domain case. The contractor prepared a second invoice/proposal, dated December 15, 2013, to "improve [the parties'] respective positions in obtaining compensation from the CTA." 2022 IL App (1st) 201314-U at ¶11. A mechanics lien, based on the amount of the December invoice/proposal, was recorded on August 15, 2014. At trial, there was no evidence that the contractor performed any construction work after April 4, 2014.

The trial court found that the contractor failed to prove that it completed the work after April 15, 2014, and thus failed to comply with the statutory requirement in §7 of the Mechanics Lien Act to either record its lien claim or bring an action to enforce the lien within four months of completion of the work. The court entered judgment for the owner and against the contractor on all counts. The trial court granted attorneys' fees and costs to the owner based on the affirmative defense of constructive fraud. The court also found that the contractor, with the intent to defraud, fabricated and backdated the December 2013 invoice/contract with across-the-board inflated line-item costs shortly before recording the lien claim for the sole purpose of posing evidence to extract an additional $98,640 payment from the owner, far in excess of the $169,210 actual contract price.

The trial court awarded attorneys' fees and costs to the owner under §17(c) of the Act, finding that the filing of a mechanics lien claim based on the fabricated and backdated December invoice was without just cause or right, which was affirmed on appeal.

VIII. [13.10] CONCLUSION

Recovery of attorneys' fees under §17 of the Mechanics Lien Act is difficult and roughly analogous to obtaining court-ordered sanctions against a litigant. Section 17 authorizes awards of attorneys' fees only under limited circumstances, *e.g.,* when a mechanics lien claim or defense is asserted "without just cause or right," which is defined in the statute as "not well grounded in fact and warranted by existing law." 770 ILCS 60/17(d). Specific judicial findings are required on those issues.

Requests for the award of attorneys' fees are addressed to the discretion of the court.

When amounts are indisputably owed to a contractor and not paid, then attorneys' fees have been awarded under §17(b) of the Mechanics Lien Act, except when the contractor acted improperly by including claims for lienable work and for non-lienable items in its claim for lien. More often, due to the myriad of claims, defenses, and counterclaims often asserted in construction litigation, it can be difficult to convince a court that a claim or defense is "not well grounded in fact." See 770 ILCS 60/17(d). When litigation is concluded with mixed results, it can be difficult for any party to be found to be the prevailing party entitled to an award of attorneys' fees.

Section 17(b) of the Mechanics Lien Act expressly limits liability for a contractor's attorneys' fees to the original owner. Consequently, a mechanics lien claimant cannot include attorneys' fees in a judgment of foreclosure against the subsequent purchasers of liened property or against a mortgagee.

Section 17(c) of the Mechanics Lien Act permits prevailing owners to recover attorneys' fees from contractors who assert mechanics lien claims "without just cause or right," particularly in cases in which constructive fraud is manifest. 770 ILCS 60/17(c).

14 Forms

JENNIFER L. JOHNSON
Zanck, Coen, Wright & Saladin, P.C.
Crystal Lake

I. [14.1] MECHANICS LIEN INFORMATION STATEMENT — PUBLIC PROJECT

Date: _____

MECHANICS LIEN INFORMATION STATEMENT
PUBLIC PROJECT

I. Property

A. Project Address: _____

B. Public Agency: _____

C. Contract Identification No.: _____

II. Contract

A. Oral: _____ Written: _____

B. With Whom: _____

C. Contract is with [owner**] [**general contractor**] [**construction manager**] [**subcontractor**].**

D. Date of Contract: _____

E. Work/Materials Provided: _____

III. Parties

A. Public Agency: _____

B. Construction Manager: _____

C. General Contractor: _____

D. Subcontractor: _____

E. Material Supplier: _____

F. Architect: _____

G. Bond Co./Bond No.: _____

IV. Claim

A. Original Contract Price: **$_____**

B. Extras To Contract: **(+) _____**

C. Credits/Deductions from Contract: **(–) _____**

D. Total Price (A + B – C): **$_____**

E. Payments to Date: **(–) _____**

F. Balance due as of [date**]:** **$_____**

V. Limitations

A. Last Waiver Furnished: Partial _____ Final _____

Date: _____, for period ending [date**].**

B. Date Work Commenced/Material First Delivered on Base Contract: _____

C. Date Work Commenced/Material First Delivered: _____

D. Date Work Completed/Material Last Delivered on Base Contract: _____

E. Date Work Completed/Material Last Delivered on Extras: _____

II. [14.2] MECHANICS LIEN INFORMATION STATEMENT — PRIVATE PROJECT

Date: _____

MECHANICS LIEN INFORMATION STATEMENT
PRIVATE PROJECT

I. Client

A. Name: _____

B. Phone: _____

C. Address: _____

D. File No.: _____

E. Matter No.: _____

II. Property

A. Project Name: _____

B. Project Address: _____

C. County: _____

D. PIN: _____

E. Legal Description: _____

III. Ownership

A. Owner: _____

1. This Date: _____

2. Contract Date: _____

B. Occupant: _____

1. This Date: _____

2. Contract Date: _____

IV. Contract

A. Oral _____ Written _____ Purchase Order _____

B. With Whom: _____

C. Contract is with [owner**] [**general contractor**] [**construction manager**] [**subcontractor**].**

D. Date of Contract: _____ **Copy Attached: Yes _____ No _____**

E. Nature of Contract: _____

V. Parties

A. Owner: _____

Address: _____

B. Construction Manager: _____

Address: _____

C. General Contractor: _____

Address: _____

D. Subcontractor: _____

Address: _____

E. Sub-Subcontractor: _____

Address: _____

F. Architect: _____

Address: _____

G. Lender: _____

Address: _____

H. Title Co.: _____

File No.: _____

Address: _____

I. Escrowee: _____

Escrow No.: _____

Address: _____

J. Bond Co.: _____

Address: _____

Bond No.: _____

VI. Claim

A. Original Contract Price: **$_____**

B. Extras To Contract: **(+) _____**

C. Credits/Deductions from Contract: **(–) _____**

D. Total Price (A + B – C): **$_____**

E. Payments to Date: **$_____**

F. Balance due as of [date**]:** **$_____**

VII. Limitations

A. Last Waiver Furnished: Partial _____ Final _____

Date: _____, for period ending [date**].**

B. Date Work Commenced/Material First Delivered on Base Contract: _____

C. Date Work Commenced/Material First Delivered on Extras: _____

D. Date Work Completed/Material Last Delivered on Base Contract: _____

E. Date Work Completed/Material Last Delivered on Extras: _____

F. Representative or Client Authorized To Sign Lien: _____

G. 60 days' notice served on (owner-occupied, single-family residence only) _____

_____.

VIII. Limitation Workup

A. Subcontractors' Notice (90 days from completion):

January	**_____**	**April**	**_____**	**July**	**_____**	**October**	**_____**
February	**_____**	**May**	**_____**	**August**	**_____**	**November**	**_____**
March	**_____**	**June**	**_____**	**September**	**_____**	**December**	**_____**

Notice of claim served on _____.

B. [Contractor**] [**Subcontractor**] [**General contractor**] Claim Recorded (four months from completion):**

January	**_____**	**April**	**_____**	**July**	**_____**	**October**	**_____**
February	**_____**	**May**	**_____**	**August**	**_____**	**November**	**_____**
March	**_____**	**June**	**_____**	**September**	**_____**	**December**	**_____**

Claim must be served by _____.

C. Foreclosure action must be filed two years from completion.

By: _____

III. [14.3] ORIGINAL CONTRACTOR'S CLAIM FOR LIEN — PRIVATE PROJECT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The lien claimant, _____, of [address**], hereby files a claim for a Mechanics Lien against [**owner (Owner)**] [**the person or entity authorized by the owner to make the contract**], of [**city, state**], who [**owned the following described premises**] [**was authorized by the owner of the following described premises to make a contract on the owner's behalf**]:**

[insert legal description and/or street address**]**

on [date**], and states:**

1. That on [date**], the lien claimant made [**an oral**] [**a written**] contract with [**Owner**] to furnish [**and install**] _____ for the building being [**erected**] [**remodeled**] [**repaired**] for the sum of $_____.**

2. That the lien claimant furnished extra labor and material to the premises [for the agreed sum of**] [**to the value of**] $_____ and completed this project on [**date**].**

3. That on [date**], the lien claimant [**completed all work required to be done by the contract**] [**completed work to the value of $_____**] [**completed delivery of materials to the value of $_____**].**

4. That Owner is entitled to receive credits on account of the above in the sum of $_____.

5. That the balance due and owing to the lien claimant is the sum of $_____, for which amount the lien claimant hereby claims a Mechanics Lien on the premises, land, and improvements.

_____
[Claimant**]**

By: _____
[Title**]**

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The affiant, _____, being first duly sworn on oath, deposes and says that [he**] [**she**] is the [**position title**] of _____, the lien claimant, that [**he**] [**she**] has read the foregoing notice and claim for lien and knows the contents thereof, and that all the statements contained therein are true.**

_____
Affiant

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

[NOTE: When proposing to cover more than one lot or parcel in a single claim, the appropriate amount should be allocated to each lot or parcel and the completion date for each provided. Also, it should be noted that the Mechanics Lien Act was amended effective January 1, 2006, to include "labor, services, material, fixtures, apparatus or machinery, [and] forms or form work" as lienable items. See 770 ILCS 60/1(b).**]**

IV. [14.4] NOTICE OF CLAIM OF SUBCONTRACTOR OR MATERIAL SUPPLIER (770 ILCS 60/24)

[Based on the language provided by 770 ILCS 60/24.**]**

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

TO: [owner's and lending agency's names and addresses**]**

You are hereby notified that _____, the undersigned, has been employed by [contractor**] to [**state what claimant was to do**] under its contract with you, on your property at [**legal description**], commonly known as [**address**], and that there is due the undersigned therefor the sum of $_____. The undersigned claims a lien therefor against the above described property, against your interest therein, and against any money or other considerations due from you to the contractor.**

Dated at _____, Illinois, this _____ day of _____, 20__.

_____
[Claimant**]**

By: _____
[Title**]**

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

_____, being first duly sworn on oath, deposes and says that [he**] [**she**] served the notice by delivering a true copy thereof to _____, at [**address**], on [**date**], at [**time**].**

_____

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

[NOTE: In Illinois, this notice

a. may be served any time after making a contract, within 90 days of completion thereof, or within 90 days of supplying extra labor or material (770 ILCS 60/24(a));

b. may be served personally or by registered or certified mail, return receipt requested, delivery limited to addressee only, and is effective from the date of mailing (*id.*);

c. may be served personally on the owner of record, the owner's agent or architect, or the superintendent having charge of the building or improvement and the mortgagee, if known (*id.;* a claimant is charged with notice of the mortgagee if a mortgage has been recorded);

d. is *not* necessary if the sworn statement of the contractor (770 ILCS 60/5) or subcontractor (770 ILCS 60/22) shall serve to give notice of the amount and to whom due, but if the amount is incorrect, the subcontractor or material supplier is limited as to the amounts set forth in such sworn statement (770 ILCS 60/24(a)); and

e. as it applies to nonresident owners of the county in which the improvement is made, is subject to 770 ILCS 60/25, which provides that if, on reasonable diligence, the owner, agent, architect, or superintendent cannot be found in the county or does not reside therein, in lieu of service of the notice, a verified notice may be filed in the office of the recorder and shall include (1) a brief statement of the contract or demand and (2) the balance due after allowing all credits.

Also, it should be noted that the Mechanics Lien Act was amended effective January 1, 2006, to include "labor, services, material, fixtures, apparatus or machinery, [and] forms or form work" as lienable items. See 770 ILCS 60/1(b).**]**

V. [14.5] NOTICE OF CLAIM OF SUBCONTRACTOR TO OWNER (770 ILCS 60/5 AND 60/21)

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

TO: [owner's name and address**]**

You are hereby notified that [claimant**], of [**address**], has been engaged and employed by [**contractor**], of [**address**], on [**date**], to [**state what claimant was to do**] and did, accordingly, on [**date**], start [**the work required to be done by the contract**] [**the delivery of the materials and supplies**] and will continue to [**do the work required to be done by the contract**] [**deliver the materials and supplies**] for the premises owned and occupied by you at [**address**]; and that the total contract price for the materials and supplies is $_____. The undersigned claims a lien therefor against the above described property, against your interest therein, and against money due from you to the contractor.**

Dated at _____, Illinois, this _____ day of _____, 20__.

_____
[Claimant**]**

By: _____
[Title**]**

[NOTE: Under 770 ILCS 60/21(c), the following language must be included in the notice in at least ten-point boldfaced type:

NOTICE TO OWNER

The subcontractor providing this notice has performed work for or delivered material to your home improvement contractor. These services or materials are being used in the improvements to your residence and entitle the subcontractor to file a lien against your residence if the services or materials are not paid for by your home improvement contractor. A lien waiver will be provided to your contractor when the subcontractor is paid, and you are urged to request this waiver from your contractor when paying for your home improvements.

Note also that, in Illinois, this notice, pursuant to 770 ILCS 60/5, must

a. be served personally on the owner or the owner's agent or served by certified mail, return receipt requested;

b. be addressed to the occupant or to the agent of the residence (WARNING: A signed return receipt is required or service may *not* be accomplished. This is in contradistinction to 770 ILCS 60/24, which provides that service is effected by mailing under that section's specified terms.);

c. be served within 60 days of first furnishing materials or labor; and

d. contain

    1. the name and address of the subcontractor or material supplier;

    2. the date the subcontractor or material supplier started to work or deliver materials;

    3. the type of work done or material delivered or to be done or delivered;

    4. the name of the contractor requesting the work; and

    5. the "NOTICE TO OWNER" warning set out above.

Notice by certified mail is considered served at the time of its mailing.**]**

VI. [14.6] SUBCONTRACTOR'S NOTICE AND CLAIM FOR LIEN TO PERSONS NOT FOUND OR NOT RESIDING IN COUNTY (770 ILCS 60/25)

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The claimant, _____, of [address**], hereby files its notice and claim for lien against _____ (Contractor), of [**address**], and _____ (Owner), of [**address**], and states:**

1. That on [date**], Owner owned the following described land in the County of _____, State of Illinois, to wit: _____, commonly known as [**address**], and _____ was Owner's contractor for the improvement thereof.**

2. That on [date**], Contractor made [**an oral**] [**a written**] subcontract with the claimant to [**state what claimant was to do**], and that on [**date**], the claimant [**completed all work required to be done by the contract**] [**completed work to the value of $_____**] [**completed delivery of materials to the value of $_____**].**

3. That Owner, or the agent, architect, or superintendent of Owner, (a) cannot, with reasonable diligence, be found in the county or (b) does not reside in the county.

4. That Contractor is entitled to credits on account thereof as follows:

[list**]**

leaving due, unpaid, and owing to the claimant, after allowing all credits, the sum of $_____, for which, with interest, the claimant claims a lien against Contractor and Owner on the land and improvements and on the money or other consideration due or to become due from Owner under the contract.

_____
[Claimant**]**

By: _____
[Title**]**

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The affiant, _____, being first duly sworn on oath, deposes and says that [he**] [**she**] is the [**position title**] of _____, the lien claimant, that [**he**] [**she**] has read the foregoing notice and claim for lien and knows the contents thereof and that all the statements therein contained are true.**

SIGNED this _____ day of _____, 20__.

_____
Affiant

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
Notary Public

VII. [14.7] SUBCONTRACTOR'S CLAIM FOR LIEN

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The claimant, _____, of _____, [address**], hereby files its notice and claim for lien against _____ (Contractor), of [**address**], and _____ (Owner), of [**address**], and any persons claiming to be interested in the premises herein, and states:**

1. That on [date**], Owner owned the following described land in the County of _____, State of Illinois, to wit: _____, commonly known as [**address**], and _____ was Owner's contractor for the improvement thereof.**

2. That on [date**], the contractor made [**an oral**] [**a written**] subcontract with the claimant to [**state what claimant was to do**] for and in the improvement, and that on [**date**], the claimant [**completed all work required to be done by the contract**] [**completed work to the value of $_____**] [**completed delivery of materials to the value of $_____**].**

3. That the contractor is entitled to credits on account thereof as follows:

[list**]**

leaving due, unpaid, and owing to the claimant, after allowing all credits, the sum of $_____, for which, with interest, the claimant claims a lien against Contractor and Owner on the land and improvements and on the money or other consideration due or to become due from Owner under the contract.

_____
[Claimant**]**

By: _____
[Title**]**

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The affiant, _____, being first duly sworn on oath, deposes and says that [he**] [**she**] is the [**position title**] of _____, the lien claimant, that [**he**] [**she**] has read the foregoing notice and claim for lien and knows the contents thereof, and that all the statements therein contained are true.**

SIGNED this _____ day of _____, 20__.

_____
Affiant

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
Notary Public

[NOTE: As to the owner only, this notice and suit must be filed within two years after completion of the contract or extra work or the furnishing of material. 770 ILCS 60/9.**]**

VIII. [14.8] CONTRACTOR'S AFFIDAVIT (770 ILCS 60/5)

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

To All Whom It May Concern:

The undersigned, _____, being duly sworn, deposes and says:

1. That [he**] [**she**] is [**position title**] of _____, who is the contractor for the _____ work on the building located at [**address**], owned by _____.**

2. That the total amount of the contract, including extras, is $_____, on which the contractor has received payment of $_____ prior to this payment.

3. That all waivers are true, correct, and genuine and delivered unconditionally, and that there is no claim, either legal or equitable, to defeat the validity of the waivers.

4. That the following are the names and addresses of all parties who have furnished material or labor or both for the work and all parties having contracts or subcontracts for specific portions of the work or for material entering into the construction thereof and the amount due or to become due to each, and that the items mentioned include all labor and material required to complete the work according to plans and specifications:

Names & Addresses	Labor/ Material Supplied	Contract Price	Amount Paid	Current Payment	Balance Due
Total					

5. That there are no other contracts for the work outstanding, and that there is nothing due or to become due to any person for material, labor, or other work of any kind done or to be done on or in connection with the work other than as above stated.

Signed this _____ day of _____, 20__.

_____
[Contractor**]**

By: _____
[Title**]**

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
Notary Public

[NOTE: For the owner's protection, when the contractor or subcontractor provides all of its own labor and materials, this form should contain a statement to that effect. For example, one or any combination of the following could be used:

- "All material taken from paid-up stock."
- "All labor provided and paid for by _____."
- "All material delivered to the jobsite in trucks owned by my company."

But see Ceco Steel Products Corp. v. Couri, 311 Ill.App. 297, 35 N.E.2d 810, 811 (2d Dist. 1941), in which the statement that "[a]ffiant further says that the materials used for said Edward Couri belonged to us and were our exclusive property, no one having any interest or claim therein, and that all of the labor was paid by us" was held not to be in compliance with the statute. The court held: "The affidavit is defective in not stating from whom [the contractors] purchased the material, and whether it had been paid for." *Id.***]**

IX. [14.9] SUBCONTRACTOR'S NOTICE TO OWNER — OWNER-OCCUPIED, SINGLE-FAMILY RESIDENCE (770 ILCS 60/5)

TO: **[**owner's name and address**]**

NOTICE TO OWNER

THE LAW REQUIRES THAT THE CONTRACTOR SHALL SUBMIT A SWORN STATEMENT OF PERSONS FURNISHING LABOR, SERVICES, MATERIAL, FIXTURES, APPARATUS OR MACHINERY, FORMS OR FORM WORK BEFORE ANY PAYMENTS ARE REQUIRED TO BE MADE TO THE CONTRACTOR.

The undersigned, _____, [position title**] of [**subcontractor**], of [**address**], hereby serves notice that, pursuant to a contract with [**general contractor**], [**subcontractor**] has provided or will provide the following to your residence at the above address:**

Material/Labor Provided	Date Provided	Contract Price	Amount Received on Contract

Total: $_____

Date: _____

_____
[Subcontractor**]**

By: _____
[Title**]**

[NOTE: The warning must be in at least ten-point boldfaced type. This notice must be either delivered personally to the owner or to the owner's agent or served by certified mail, return receipt requested, addressed to the occupant or to the agent at the residence. Service must be made within 60 days of first furnishing materials or labor.

WARNING: A signed return receipt is required or service may *not* be accomplished. This is in contradistinction to 770 ILCS 60/24, which provides that service is affected by mailing under that section's specified terms.**]**

X. [14.10] NOTICE AND DEMAND TO COMMENCE SUIT — PRIVATE PROJECT (770 ILCS 60/34)

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

TO: [lien claimant's, agency's, or attorney's name and address**]**

[Based on the language provided by 770 ILCS 60/24**]**

You are hereby notified and demand is hereby made on you, pursuant to 770 ILCS 60/34, to [commence proceedings**] [**file your answer or counterclaim (if suit is now pending)**], within 30 days of the date of the service of this notice and demand, to enforce your alleged claim for lien against the premises legally described, to wit:**

[insert legal description**]**

and commonly known as [address**], the claim having heretofore been filed in the office of the Recorder of _____ County on [**date**], as Document No. _____, or the lien shall be forfeited, pursuant to the aforesaid statute.**

FAILURE TO RESPOND TO THIS NOTICE WITHIN 30 DAYS AFTER RECEIPT, AS REQUIRED BY SECTION 34 OF THE MECHANICS LIEN ACT, SHALL RESULT IN THE FORFEITURE OF THE REFERENCED LIEN.

Dated at _____, Illinois, this _____ day of _____, 20__.

_____
[owner, lienor, or other interested person**]**

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

_____, being first duly sworn on oath, deposes and states that [he**] [**she**] served a true and correct copy of the above and foregoing Notice and Demand To Commence Suit on the named [**lien claimant, agent, or attorney**] by delivering a true and correct copy thereof to [**him**] [**her**] personally on [**date**].**

_____
Affiant

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

XI. [14.11] FINAL WAIVER OF LIEN — UNLIMITED AS TO TIME

FINAL WAIVER OF LIEN

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

To All Whom It May Concern:

Whereas the undersigned _____ [has**] [**had**] been employed by _____ to furnish [**labor**] [**materials**] [**labor and materials**] for the _____ work at the premises commonly known as [**address**], of which _____ is the owner;**

Now, therefore, the undersigned, for and in consideration of $_____ and other good and valuable consideration, the receipt whereof is hereby acknowledged, does hereby waive and release any and all liens or claims or rights of lien under the statutes of the State of Illinois relating to mechanics liens on the above described premises and improvements thereon and on the money or other considerations due or to become due from the owner on account of labor, services, material, fixtures, apparatus, or machinery and forms or forms work heretofore furnished or that may be furnished at any time hereafter by the undersigned for the above-described premises.

Dated at _____, Illinois, this _____ day of _____, 20__.

_____
[Waiving Party]

By: _____

CONTRACTOR'S AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

To All Whom It May Concern:

The undersigned, being first duly sworn, deposes and says:

1. That [he**] [**she**] is [**position title**] of _____, the contractor employed by _____ for the _____ work on the building located at [**address**] and owned by _____.**

2. That the total amount of the contract is $_____, on which [he**] [**she**] has received payment of $_____.**

3. That the following statement includes the names of all parties who have furnished or who have been contracted with by the affiant to furnish material or labor for the improvement and the amounts furnished by, contracted for, paid, due, and to become due each, and that the items mentioned include all labor and material required to complete the work according to plans and specifications:

Name & Address	Labor/Material Supplied	Contract Price	Amount Paid	Current Payment	Balance Due
Total Labor and Material To Complete					

All material (except as above listed) has been or will be furnished from [my**] [**our**] own stock and has been paid for in full.**

4. That there are no other contracts for the work outstanding, and that there is nothing due or to become due to any person for material, labor, or other work of any kind done or to be done on or in connection with the work other than as above stated; that all waivers are true, correct, and genuine and delivered unconditionally; and that there is no claim, either legal or equitable, to defeat the validity of the waivers.

_____
[Contractor**]**

By: _____
[Title**]**

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

[NOTE: All waivers must state the actual amount paid, and the affidavit must be completely filled out, signed, and sworn to before a notary public. Waivers from all material suppliers and subcontractors (labor and material) must be furnished.**]**

XII. [14.12] PARTIAL WAIVER OF LIEN — LIMITED TO AMOUNT PAID

WAIVER OF LIEN — PARTIAL

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

To All Whom It May Concern:

Whereas the undersigned has been employed by _____ to furnish [labor**] [**materials**] [**labor and materials**] for the _____ work, under a contract [**No. _____, dated (date),**] for the improvement of the premises described as [**address**], of which _____ is the Owner;**

Now, therefore, on this _____ day of _____, 20__, for and in consideration of the sum of $_____ paid simultaneously herewith, the receipt whereof is hereby acknowledged by the undersigned, the undersigned does hereby waive and release to the extent only of the aforesaid amount any lien rights to or claim of lien with respect to and on the above-described premises, the improvements thereon, and the money or other consideration due or to become due from the owner, by virtue of the contract, on account of labor, services, materials, fixtures, apparatus, or machinery furnished by the undersigned to or for the above-described premises.

_____
[Waiving Party**]**

By: _____
[Title**]**

[NOTE: If the waiving party has more than one contract on the premises, the contract should be described by number (if available), date, and the extent of the work.**]**

XIII. [14.13] WAIVER OF LIEN TO DATE — UNLIMITED AS TO AMOUNT

WAIVER OF LIEN TO DATE

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

To All Whom It May Concern:

Whereas the undersigned _____ has been employed by _____ to furnish [labor**] [**materials**] [**labor and materials**] for the _____ work at the premises commonly known as [**address**], of which _____ is the Owner;**

Now, therefore, the undersigned, for and in consideration of $_____ and other good and valuable consideration, the receipt whereof is hereby acknowledged, does hereby waive and release any and all liens or claims or rights of lien under the statutes of the State of Illinois relating to mechanics liens, on the above described premises and improvements thereon and on the money or other considerations due or to become due from the owner on account of labor, services, material, fixtures, apparatus, or machinery and forms or forms work heretofore furnished to this date by the undersigned for the above described premises.

Dated at _____, Illinois, this _____ day of _____, 20__.

_____
[Waiving Party**]**

By: _____
[Title**]**

CONTRACTOR'S AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

To All Whom It May Concern:

The undersigned, being first duly sworn, deposes and says:

1. That [he**] [**she**] is [**position title**] of _____, the contractor employed by _____ for the _____ work on the building located at [**address**] and owned by _____.**

2. That the total amount of the contract is $_____, on which [he**] [**she**] has received payment of $_____.**

3. That the following statement includes the names of all parties who have furnished or who have been contracted with by the affiant to furnish material or labor for the improvement and the amounts furnished by, contracted for, paid, due, and to become due each; and that the items mentioned include all labor and material required to complete the work according to plans and specifications:

Name & Address	Labor/Material Supplied	Contract Price	Amount Paid	Current Payment	Balance Due
Total Labor and Material To Complete					

All material (except as above listed) has been or will be furnished from [my**] [**our**] own stock and has been paid for in full.**

4. That there are no other contracts for the work outstanding, and that there is nothing due or to become due to any person for material, labor, or other work of any kind done or to be done on or in connection with the work other than as above stated; that all waivers are true, correct, and genuine and delivered unconditionally; and that there is no claim, either legal or equitable, to defeat the validity of the waivers.

_____
[Contractor**]**

By: _____
[Title**]**

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
Notary Public

[NOTE: All waivers must state the actual amount paid, and the affidavit must be completely filled out, signed, and sworn to before a notary public. Waivers from all material suppliers and subcontractors (labor and material) must be furnished.**]**

XIV. [14.14] AFFIDAVIT AS TO UNKNOWN OWNERS, UNKNOWN NECESSARY PARTIES, AND NON-RECORD CLAIMANTS (770 ILCS 60/11)

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
_____ COUNTY, ILLINOIS

_____,	**)**	
	)	
Plaintiff,	**)**	
	)	
v.	**)**	**Case No. _____**
	)	
_____,	**)**	
	)	
Defendant.	**)**	

AFFIDAVIT AS TO UNKNOWN OWNERS, UNKNOWN NECESSARY PARTIES, AND NON-RECORD CLAIMANTS

_____, being first duly sworn, states and deposes that [he**] [**she**] is one of the attorneys for Plaintiff in this cause. Your Affiant is over the age of 18 years, is authorized to act as an agent on behalf of Plaintiff, and is authorized and competent to prepare and present this Affidavit.**

Your Affiant states that, in addition to those persons designated by name in the Complaint, there are other persons who are or may be interested in this action and who have or claim some right, title, interest, or lien in, to, or on the real estate, or some part thereof, described in the Complaint. The name and address of each such other person is unknown to Plaintiff and to your Affiant and upon due and diligent inquiry cannot be ascertained. Therefore, all such other persons are made parties defendant to this action by the name and description of Unknown Owners.

Your Affiant further states that there are no Non-Record Claimants or Unknown Necessary Parties (pursuant to 770 ILCS 60/11(c)) of which Plaintiff or your Affiant has actual notice or knowledge. The name and present or last known place of occupancy or residence of any Unknown Necessary Party or Non-Record Claimant against the subject real estate are unknown to Plaintiff and your Affiant. This Affidavit is filed to bar all Unknown Necessary Parties and all Non-Record Claimants from any equitable right to redeem the property from the mechanics lien sought to be foreclosed without making the Non-Record Claimants or Unknown Necessary Parties named parties to this action.

By: _____

One of the Attorneys for _____

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
Notary Public

XV. [14.15] AFFIDAVIT FOR PUBLICATION

[Caption]

AFFIDAVIT FOR PUBLICATION

_____, being first duly sworn, states and deposes that your Affiant is one of the attorneys for Plaintiff in this action. Your Affiant is over the age of 18 years, is acting as Plaintiff's agent, and is duly authorized to make this Affidavit.

Your Affiant has made due and diligent inquiry to find the following Defendants to this action and to ascertain their respective places of residence, to wit: UNKNOWN OWNERS and UNKNOWN NECESSARY PARTIES (770 ILCS 60/11(c)) and NON-RECORD CLAIMANTS.

Upon due inquiry, such Defendants cannot be found. Process cannot be served on any of them. Upon diligent inquiry, the place of residence of any of them cannot be ascertained.

By: _____

One of the Attorneys for _____

Subscribed and sworn to before me this _____ day of _____, 20__.

_____
Notary Public

XVI. [14.16] NOTICE OF FORECLOSURE — LIS PENDENS

[Caption]

NOTICE OF FORECLOSURE — LIS PENDENS

I, _____, of the Firm of _____, attorneys for Plaintiff, do hereby certify that the above-entitled cause was filed on [date**], in the Circuit Court of _____ County, Illinois, and is now pending in that Court.**

1. The name of Plaintiff and the case number are identified above. The address of Plaintiff is [address**].**

2. The Court in which this action was brought is identified above.

3. The name of the titleholder of record is _____.

4. The real estate affected by this cause is legally described as follows:

[insert legal description]

PIN: _____ (the Property).

5. The common address or description of the location of the real estate affected by this cause is as follows: [address**].**

6. The Claims for Mechanics Liens that Plaintiff seeks to foreclose in this cause are identified as follows:

Name of Lienor: _____

Date of Recording: _____

Place of Recording: **Office of the _____ County Recorder**

Identification or recording number: _____

_____

Attorneys for _____

By: _____
One of Its Attorneys

XVII. [14.17] GENERAL CONTRACTOR'S COMPLAINT TO FORECLOSE MECHANICS LIEN

[Caption]

COMPLAINT FOR FORECLOSURE OF MECHANICS LIEN AND OTHER RELIEF

NOW COMES Plaintiff, _____, a[n] _____ corporation, by its attorneys, _____, and complains of _____ (Owner) and _____ (Lender), Defendants, and states as follows:

COUNT I
ACTION TO FORECLOSE ON MECHANICS LIEN

THE PARTIES

1. At all times hereinafter mentioned, Plaintiff was, and still is, a[n] _____ corporation [licensed] [registered] to do business in Illinois, with its principal place of business in _____, County of _____, State of _____, and engaged in the business or occupation of general contracting.

2. On information and belief, on [date], Owner owned in fee simple the real estate commonly known as _____, in _____, County of _____, State of _____, and more accurately described by the legal description attached hereto and incorporated herein by reference as Exhibit A.

3. On information and belief, Lender has an interest in the premises by virtue of a mortgage.

THE CONTRACTS

4. On or about [date**], Plaintiff entered into [**a written**] [**an oral**] contract with [**Owner**] [**Owner's Agent**] [**one whom Owner knowingly permitted to contract**]. A copy of the contract is attached hereto and incorporated herein by reference as Exhibit B. Pursuant to the terms of the contract, Plaintiff undertook and agreed to construct certain improvements on the premises as follows: provide _____ for the sum of $_____.**

PERFORMANCE OF PLAINTIFF

5. Plaintiff furnished all materials, fixtures, services, and labor required by the contract and completed all that was required of it by the contract on [date**].**

[6. From time to time during the performance of the contract by Plaintiff, at the special insistence and request of (Owner) (Owner's Agent) (one whom Owner knowingly permitted to contract), Plaintiff furnished extra and additional materials at and extra and additional labor on the premises of the value of $_____. Plaintiff completed all that was required of it for extra work on (date).**]**

[7.**] All of the materials, fixtures, services, and labor furnished by Plaintiff were delivered to and accepted by [**Owner**] [**Owner's Agent**] [**one whom Owner knowingly permitted to contract**] and constitute a permanent and valuable improvement of the premises.**

[8.**] Plaintiff has heretofore received payments on account of the contract in the amount of $_____, [**and Owner is entitled to credits on the account in the amount of $_____**], leaving a balance due to Plaintiff of $_____ as of [**date**].**

FAILURE OF PERFORMANCE BY OWNER

[9.**] Plaintiff has frequently requested Owner to pay the aforesaid balance due, but Owner has failed and refused, and still fails and refuses, to so pay. As a consequence, said balance remains unpaid.**

[10.**] As a result of such willful nonpayment, there is now due Plaintiff the sum of $_____, together with statutory interest from [**date**].**

[11.**] Pursuant to 770 ILCS 60/1, Plaintiff is entitled to and does claim a mechanics lien on the premises, materials, fixtures, apparatus, and machinery furnished by it for said amounts due Plaintiff.**

PERFECTION OF MECHANICS LIEN

[12.**] Attached hereto as Exhibit C and incorporated herein by reference is a true copy of Plaintiff's Original Contractor's Claim for Lien that was recorded with the _____ County Recorder on [**date**], as Document No. _____. Said Claim was recorded within four months after completion of all work or delivery of all materials by Plaintiff, in accordance with 770 ILCS 60/7.**

[13.**] Lender's interest in the premises described in Paragraph 3 of Count I is inferior to the rights of Plaintiff.**

[14.**] Unknown owners and non-record claimants may claim to have some interest in the premises as lien creditors, mortgagees, tenants, judgment creditors, encumbrancers, trustees, purchasers, or otherwise, the nature of which is unknown to Plaintiff; regardless of which, such interest, if any there be, is null and void as to the rights of Plaintiff.**

[15.**] There may be persons, in addition to those hereinbefore made Defendants, whose names are unknown, who do or may claim some right, title, interest, or lien in, to, or on the real estate herein described, or some part or parts thereof, as owners, heirs, devisees, assignees, contractors, subcontractors, and other lien claimants; but the names of any such persons are unknown to Plaintiff, and it therefore makes all such persons Defendants to this Complaint by the name and description of OTHER OWNERS AND LIENHOLDERS UNKNOWN, UNKNOWN NECESSARY PARTIES, and NON-RECORD CLAIMANTS.**

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

A. That an accounting be taken for the purpose of determining the amount due Plaintiff, whatever sum shall be found due to it upon the taking of proofs herein, including statutory interest from [date**], and its costs herein, by a short date to be fixed by the Court, and that execution issue thereon.**

B. That Plaintiff be decreed to have a first and prior lien, paramount and superior to all other rights, title, interests, or liens in or on the premises.

C. That a receiver be appointed for the premises to collect the rents, issues, and profits therefrom.

D. That, in default of payment of the sum found due Plaintiff, the premises be sold to satisfy said sum, including interest and costs and including the charges, costs, and expenses of such sale.

E. That, in case of a sale and the failure to redeem therefrom within the time allowed by law, all parties to this action and all persons claiming by, through, or under them may be forever barred and foreclosed from and of all rights and interests in and to the premises, including equity of redemption.

F. That, in case of a sale and the failure to redeem therefrom within the time allowed by law, a deed may be issued to the purchaser at said sale or [his**] [**her**] [**its**] assigns and upon the issuance of said deed grantees therein may be let into immediate possession.**

G. That in case the proceeds of such sale be insufficient to pay in full the amount due Plaintiff, including interest and costs and the charges, costs, and expenses of such a sale, a deficiency decree be entered against such of Defendants as may be found personally liable to pay the same, and that execution issues thereon.

H. That Plaintiff may have such other and further, or different, relief in the premises as the Court shall deem equitable and proper.

COUNT II
BREACH OF CONTRACT ACTION AGAINST OWNER

1 – 10. Plaintiff restates as Paragraphs 1 through 10, inclusive, of this Count II, Paragraphs 1 through 10, inclusive, of Count I.

WHEREFORE, Plaintiff prays that judgment be entered against Owner, for the sum of $_____, together with statutory interest from [date**], and its costs herein, and that execution issue thereon.**

COUNT III
ACTION FOR QUANTUM MERUIT AGAINST OWNER
(In the Alternative)

1 – 9. Plaintiff restates as Paragraphs 1 through 9, inclusive, of this Count III, Paragraphs 1 through 9, inclusive, respectively, of Count I.

10. That if this Court finds the contract to be unenforceable, Plaintiff alleges that it furnished materials, fixtures, services, and labor required by and at the specific request of [Owner**] [**Owner's Agent**] [**one whom Owner knowingly permitted to contract**] for use in connection with the improvement of the premises as set forth in Paragraph [**5**] [**6**]. Plaintiff completed work on [**date**].**

11. All of the materials, fixtures, services, and labor furnished by Plaintiff were delivered to, and accepted for, the said improvement by [Owner**] [**Owner's Agent**] [**one whom Owner knowingly permitted to contract**] and constitute a permanent and valuable improvement of the premises.**

12. All labor, fixtures, services, and materials furnished by Plaintiff to the premises were and are reasonably worth the sum of $_____. Payments on the account in the amount of $_____ have been received by Plaintiff. Thus, a balance due of $_____ is due and payable to Plaintiff as of [date**].**

13. Plaintiff has made numerous demands on Owner to pay to Plaintiff the amount due of $_____. Notwithstanding such demands, Owner has failed and refused, and still fails and refuses, to pay and reimburse Plaintiff therefor.

14. As a direct and proximate result of the foregoing facts, Plaintiff has suffered a loss in the amount of $_____.

WHEREFORE, Plaintiff prays that a judgment be entered on behalf of Plaintiff against Owner for $_____, plus interest thereon and the costs of this action, and that execution issue thereon.

Respectfully submitted,

_____, Plaintiff

By: _____
One of Its Attorneys

STATE OF ILLINOIS)
) ss.
COUNTY _____)

The affiant, _____, being first duly sworn on oath, deposes and says that [he**] [**she**] is the [**position title**] of _____, the lien claimant, that [**he**] [**she**] has read the foregoing complaint and knows the contents thereof, and that all the statements contained therein are true, except as to such matters alleged to be on information and belief, and as to those matters [**he**] [**she**] believes them to be true.**

_____

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

EXHIBIT A

Legal Description

Permanent Index Numbers: _____
Common Address: _____

XVIII. [14.18] JUDGMENT OF FORECLOSURE AND SALE

[Caption]

JUDGMENT OF FORECLOSURE AND SALE

This cause comes before the court for entry of Judgment of Foreclosure and Sale, and Plaintiff _____, by _____, its attorney; Defendant _____, by _____, its attorney; and Defendant _____, by _____, its attorney, have submitted to the jurisdiction of this Court.

[NOTE: It is important that complete names of the parties be used and, if a party is a corporation, partnership, land trust, or other legal entity, that the exact corporate (or other) name be specified and that the state where incorporated (or other appropriate data) be given.**]**

This cause came on to be heard on the complaint of Plaintiff and the answer of Defendants _____ and _____ together with the evidence, oral and documentary, submitted to this Court on the issues in this cause, and it appearing that _____ and _____, owners of the premises, were both served with summons on [date**], and that _____ was duly served [**with summons**] [**by publication**] on [**date**]; [**that the default of Defendant was entered on (date)**]; that the Court has jurisdiction of the subject matter thereof and of all of the parties hereto; and that due notice of the Motion for the entry of this Judgment of Foreclosure and Sale has been given to all parties entitled thereto, the Court, being fully advised in the premises, finds:**

1. That the equities in this case are with Plaintiff, that the material allegations in Plaintiff's complaint have been proved, and that Plaintiff is entitled to the relief sought and prayed for as set forth hereinafter.

2. That this Court has jurisdiction of the subject matter of this cause and of all of the parties hereto.

[NOTE: Here present every allegation of the complaint with a numbered corresponding finding of fact, for example:**]**

3. That on [date**], Defendants, _____ and _____, were, and are until this date, the owners of the following described premises, to wit: [**insert legal description of premises and street address**].**

4. That on [date**], Defendants entered into a contract with Plaintiff whereby Plaintiff was to furnish labor and certain building materials during the construction of certain improvements on the premises in question.**

[NOTE: If the plaintiff is a subcontractor, alter the findings to fit the allegations of the complaint and proofs, including the name of the general contractor, etc.**]**

5. That, pursuant to the contract, Plaintiff furnished labor and delivered the building materials, the last of which were delivered on [date**], to the value of $_____. [**If there are any extras, add language appropriate to the facts of the case.**]**

[NOTE: As between the general contractor and the owner, the contract itself establishes the value of the improvement. *See Ripperden v. Henry Absher Chevrolet, Inc.,* 1 Ill.App.3d 712, 274 N.E.2d 113 (5th Dist. 1971).**]**

6. That the labor and building materials became a permanent part of the building on the above described premises and constitute a permanent improvement thereon and enhanced the value thereof.

7. That on [date**], Plaintiff caused a claim for lien to be filed of record in the office of the _____ County Recorder, Mechanics Lien No. _____.**

[NOTE: If the plaintiff is a subcontractor, show the method and date of service of the subcontractor's notice. See 770 ILCS 60/24.**]**

8. That no payments have been made on account of the material or labor furnished by Plaintiff and that there is due Plaintiff the sum of $_____, plus interest at ten percent, from [date**]. [**This finding should be altered to reflect payments made.**]**

9. That, as a result of the proceedings herein, Plaintiff was required to expend the sum of $_____ for court costs, as itemized below, and that that sum should be allowed as an additional charge against the instant property:

[itemized costs**]**

10. That Defendant _____ has an interest in the property by reason of a certain mortgage dated [date**], and filed with the Recorder of _____ County, Illinois, on [**date**], as Document No. _____, which mortgage is prior and superior to the lien of Plaintiff.**

11. That there is now due and owing Plaintiff for principal, interest, and costs the following sums from Defendants:

Principal Balance Due .....**$_____**
Interest thereon at the rate of ten percent per annum from
[date of last work or delivery of materials**]**
to the date of this Judgment.....**$_____**
Total principal and interest due as of [date**]** .....**$_____**
Amount advanced for lien:

Filing claim for lien.....**$_____**
Filing fee.....**$_____**
Sheriff's fee .....**$_____**

Total .....**$_____**

12. That Plaintiff has a prior and superior lien on the premises as provided in the statute governing such cases, subject to the mortgage lien of _____.

13. That the rights and interest of Defendants _____ and _____ are subject, subordinate, and inferior to the lien of Plaintiff herein.

[NOTE: If enhancement has been alleged and proved, add an additional finding as follows:

14. That on (date of contract), the fair market value of the premises described herein, together with the improvements thereon, was $_____, and that the market value of the premises, with the improvements thereon, after completion of Plaintiff's work, including material thereon,

was $_____; that, accordingly, the fair market value of the premises has thus been enhanced in the amount of $_____ by virtue of Plaintiff's work and materials; and that the fair and reasonable value of the material and labor provided by Plaintiff (less all credits, if any) amounts to $_____, for which Plaintiff is entitled to a lien.**]**

[15.**] That by reason of the foregoing, Plaintiff is entitled to a lien on the premises hereinbefore described, for the amount found due to Plaintiff as aforesaid, under and by virtue of the Mechanics Lien Act codified at 770 ILCS 60/0.01, *et seq.***

[NOTE: If a money judgment is prayed for in addition to foreclosure, add the following to the findings:

(16.) That Defendants herein are indebted to Plaintiff in the sum of $_____, together with interest in the sum of $_____ to the date hereof, court costs in the sum of $_____, and expenses in the sum of $_____, making the total amount due to date of $_____.**]**

[NOTE: Add any other findings of matters alleged and proved.**]**

IT IS THEREFORE HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

A. That Plaintiff has a lien on the described premises for the amounts found to be due from Defendants _____ and _____, together with interest thereon from [date**], as aforesaid.**

B. That Defendants _____ and _____, or someone on their behalf [include the contractor if Plaintiff is a subcontractor**], pay to Plaintiff within _____ days from the date hereof the sum of $_____, together with interest thereon at the rate of ten percent per annum from the date of completion of the work, and also the costs of this suit in the sum of $_____.**

C. That if Defendants default in the payments herein described, then the premises, as improved, or as much thereof as may be sufficient to satisfy the amount due Plaintiff for principal and interest, the costs of this suit and other fees as aforesaid, disbursements, and commissions, and that may be sold separately without material injury to the parties' interests, be sold at public auction for cash to the highest bidder, in [location**], by the Sheriff of _____ County, at such time as [**he**] [**she**] shall prescribe, within 90 days from the date of the entry of this Judgment of Foreclosure and Sale.**

D. That the Sheriff

1. **shall execute this Judgment of Foreclosure and Sale; shall give public notice of the time, place, and terms of the sale by weekly publication for three successive weeks in a secular newspaper of general circulation, published in the city, the first publication thereof to be at least 20 days prior to the date of sale, with Plaintiff or any of the parties to this cause allowed to become the purchaser or purchasers at the sale; and may at [**his**] [**her**] discretion, for good cause, continue the sale from time to time, by public proclamation without further publication of notice;**

2. shall give to any purchaser a certificate of sale as required by law and shall cause a duplicate of such certificate to be recorded in the proper office;

3. shall retain, out of the proceeds of sale, [his**] [**her**] fees, disbursements, and commissions relating to the sale and see that all unpaid costs are paid to the persons entitled to receive them and then shall pay to Plaintiff or to _____, Plaintiff's attorney of record, the amount due under this Judgment of Foreclosure and Sale, with interest as aforesaid, and all taxable costs advanced by Plaintiff, if the remainder of proceeds be sufficient; if not sufficient, [**he**] [**she**] shall apply the remainder in satisfaction of the amount due as far as it will reach and report the deficiency; and if there is a surplus, [**he**] [**she**] shall deposit it with the Clerk of the Circuit Court of _____ County subject to further order of the Court; and**

4. shall file a Report of Sale and Distribution and obtain confirmation thereof by order of Court.

E. That if the premises so sold shall not have been redeemed within the time allowed by the laws of this State, as hereinafter set forth, the Sheriff or the Sheriff's successor in office, upon production of any certificate of sale as aforesaid by the purchaser or purchasers or his, her, its, or their heirs, successors, or assigns, shall execute to the legal holder or holders thereof a deed of conveyance of the premises in the certificate described.

F. That the period of redemption shall expire and terminate six months after the Sheriff's Sale and that thereafter Defendants in this cause and all persons claiming under them shall be forever barred and foreclosed from all right to redeem and claim an interest in and to said premises.

G. That upon the execution and delivery of the deed or deeds as aforesaid, the grantee or grantees or his, her, its, or their heirs, successors, or assigns be let into possession of the portion of the premises so conveyed, and that any of the parties of this cause who may be in possession of the premises, or any part thereof, and any person who since the commencement of this suit shall have come into possession under them, shall, upon production of the Sheriff's Deed and the service of a certified copy of this Judgment, surrender possession thereof to the grantee or grantees or his, her, its, or their heirs, successors, or assigns; and in default of so doing that an order of assistance may issue in accordance with the practice of this Court.

[NOTE: If a money judgment is prayed for in addition to foreclosure, add the following:

H. That judgment be and is hereby entered in favor of Plaintiff and against Defendants _____ and _____, jointly and severally, for the total sum of $_____ found to be due and owing to the date hereof, and that execution issue therefor.**]**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court expressly finds that this is a final order and that there is no just reason for delaying the enforcement of this Judgment or an appeal therefrom.

Dated at _____, Illinois, this _____ day of _____, 20__.

ENTER:

_____
JUDGE

XIX. [14.19] PUBLIC LIEN AND BOND CLAIM NOTICE

NOTICE OF LIEN CLAIM ON PUBLIC IMPROVEMENT
UNDER 770 ILCS 60/23 AND BOND CLAIM
UNDER 30 ILCS 550/1 AND 550/2

TO: See Attached Service List.

You are hereby notified as follows:

The undersigned, _____, of [address**], entered into a contract with [**general contractor**], to [**describe work performed or materials supplied**] according to plans and specifications for the project sometimes known as _____.**

The general contractor is _____, of [address**].**

The contractor by whom claimant was employed is _____, of [address**].**

The amount of the contract was $_____, plus extras, less payments and credits, leaving an unpaid balance due the claimant for the work completed by the claimant of $_____. Although demand has been made therefor, that amount remains unpaid, and the claimant claims a lien in that amount.

The public improvement is _____.

The bonding company is _____, and the bond number is _____.

The claimant does, therefore, claim a lien on all money, bonds, or warrants due or to become due the general contractor, and you are hereby notified to withhold payment to the general contractor in an amount sufficient to pay the amount for which a lien is claimed and further claims against the bond furnished by the general contractor to the public body.

This notice is given to you pursuant to 770 ILCS 60/23, as amended, relating to a lien against funds due or to become due contractors for public improvements, and 30 ILCS 550/1 and 550/2, as amended, relating to recovery by a subcontractor on the bond required by the public body.

_____
[Claimant**]**

By: _____
[Title**]**

XX. [14.20] RELEASE OF MECHANICS LIEN CLAIM — PRIVATE PROJECT

After recording, this instrument should be returned to:

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

RELEASE OF MECHANICS LIEN CLAIM

Pursuant to and in compliance with the Illinois statute relating to mechanics liens, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned, being the [position title**] of [**claimant**] does hereby acknowledge satisfaction or release of the claim for lien against _____ (Contractor), _____ (Owner), and _____ (Lender) for $_____ on the property commonly known as:**

[PIN**]**
[address**]**

and more specifically described by the legal description shown on Exhibit A attached hereto and incorporated herein, which claim was recorded in the office of the _____ County Recorder as Document No. _____.

IN WITNESS WHEREOF, the undersigned has executed this Release of Mechanics Lien Claim this _____ day of _____, 20__.

_____
[Claimant**]**

By: _____
[Title**]**

FOR THE PROTECTION OF THE OWNER, THIS RELEASE SHOULD BE FILED WITH THE RECORDER IN WHOSE OFFICE THE CLAIM FOR LIEN WAS FILED.

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

I, _____, a notary public in and for the County of _____, State of Illinois, do hereby certify that _____, duly authorized agent and [position title**] of [**claimant**], personally known to me to be the same person whose name is subscribed to the foregoing Release of Mechanics Lien Claim, appeared before me this day in person and acknowledged that [**he**] [**she**] signed, sealed, and delivered the Release of Mechanics Lien Claim as [**his**] [**her**] free and voluntary act and as the free and voluntary act of [**claimant**], for the uses and purposes therein set forth.**

GIVEN under my hand and notarial seal this _____ day of _____, 20__.

_____
Notary Public

My commission expires [date**].**

THIS INSTRUMENT WAS PREPARED BY:

XXI. [14.21] RELEASE OF PUBLIC FUNDS LIEN, BOND CLAIM, AND CONTRACT CLAIMS — PUBLIC PROJECT

RELEASE OF PUBLIC FUNDS LIEN, BOND CLAIM, AND CONTRACT CLAIMS

The undersigned, [claimant**], in consideration of the payment to it of $_____, the receipt and sufficiency of which are hereby acknowledged, hereby waives and releases the following claims in connection with the construction project known as [**public project**], Contract No. _____ and Specification No. _____, in _____, County of _____, State of Illinois (the Project), for which _____ was the Project owner's general contractor:**

1. **The bond claim in the amount of $_____ made pursuant to 30 ILCS 550/2 against _____ as Surety for [**general contractor**] on the Project made pursuant to the Notice of Bond Claim under 30 ILCS 550/2, which was served on [**public body**] on [**date**].**

2. **The claim for lien against public funds pursuant to 770 ILCS 60/23 made against [**public body**] on the Project pursuant to the Notice of Claim for Lien Against Public Funds in the Amount of $_____.**

3. **All other mechanics lien, contract, or bond claims that [**claimant**] had, or may have, against any or all of [**general contractor**], the Project, [**public body**], and [**surety**] and that arise out of or relate to this Project.**

Date: _____

_____
[Claimant**]**

By: _____
[Title**]**

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

The undersigned, a notary public in and for the County and State aforesaid, does hereby certify that _____, personally known to me to be the same person whose name is subscribed to the above Release of Public Funds Lien, Bond Claim, and Contract Claims, appeared before me this day in person and acknowledged that [he**] [**she**] is the [**position title**] of [**claimant**], that [**he**] [**she**] has been duly authorized by [**claimant**] to execute the above Release of Public Funds Lien, Bond Claim, and Contract Claims on behalf of [**claimant**], and that [**he**] [**she**] has signed and delivered the foregoing Release of Public Funds Lien, Bond Claim, and Contract Claims as the free and voluntary act of [**claimant**].**

Given under my hand and notarial seal this _____ day of _____, 20__.

_____
Notary Public

My commission expires [date**].**

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

_____, being first duly sworn on oath, deposes and states that [he**] [**she**] is the [**position title**] of Claimant, and as such is familiar with the contents of the foregoing notice; that the information contained in the notice is true and correct; and that there is due and owing to Claimant a balance for materials delivered to the construction job above described the sum of $_____.**

_____
[Title**]**

Subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

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References in this index are to section number.