

Amendment to Illinois Mechanics Lien Act Authorizes Bonding Over of Mechanics Liens Claims

January 19, 2016

As of January 1, 2016, an amendment to the Illinois Mechanics Lien Act, 770 ILCS. 60/38.1, allows parties with an interest in real estate to substitute an eligible surety bond for a claim for mechanics lien as security for real estate. The law will change the way many construction projects are handled in Illinois.

Illinois is the last state to enact a lien bond statute. The new law is probably the most complicated lien bond statute and far more protective of lien claimants than those in other states. The new law will facilitate clearance of claims for mechanics lien from title, payment of non-liening trades and facilitate construction projects moving forward while minimizing the cost of litigation. Of significance, the law will also permit an association to post an eligible surety bond in order to protect condominium and homeowners association owners from mechanics lien claims.

An owner, lender, other lien claimant, party having an interest in the property or a common interest community association such as a condominium association or a homeowners' association may apply for an eligible surety bond. The application for a bond is triggered by the filing of a petition to substitute a bond with the Clerk of the Circuit Court where the property is located. If there is a pending action to enforce a lien claim, an applicant may file the petition prior to five months after the filing of a complaint or counterclaim by a lien claimant enforcing its claim for lien. Service of the petition is by personal service or certified mail with return receipt requested to each person stated in the petition and his or her attorney of record in a pending action on the lien claim along with a notice of the filing of the petition.

The court will enter an order approving the bond if there is no objection within 30 days of service of the petition. The amount of the bond is 175% of the lien claim. A lien claim is defined by statute to exclude interest and attorney's fees. The surety must be a highly qualified surety defined as one with a current financial strength rating of not less than A with no rating modifier, a stable or positive outlook and financial size category of IX or better.

If an objection is filed within 30 days of service of the notice, the petitioner may move for a hearing to establish that the proposed surety bond is an eligible surety bond. If there is no objection to the petition, the court may issue the order approving the bond on the ex parte motion of the petitioner. Unlike some jurisdictions, the posting of the surety bond will not operate as a release or discharge of the lien.

The order approving the bond is sent to the lien claimant and all persons who received notice of the petition. The order and an executed copy of the bond are recorded. In addition, the bond on its face must specifically state:

"[T]hat the principal and surety thereunder submit to the jurisdiction of the Circuit Court of the county where the property being improved is located and that a final non-appealable judgment or decree entered in a proceeding in favor of the lien claimant based on the lien claim that is the subject of an eligible surety bond shall constitute a judgment against the principal and surety of the bond for the amount found due to the lien claimant, including interest and attorney's fees, limited as to the principal and surety to the full amount of the bond."

Upon the approval of the bond, the bond principal and surety become parties to the proceedings. Furthermore, all other parties to the lien claim count or counts may be dismissed. The result is that pending litigation is expedited and becomes less costly. The only claims which are adjudicated are those subject to the bond. If the construction lender is

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dismissed there is no claim of enhancement by the lender.

The bond stands as security for both the claim for mechanics lien and funds in the hands of the owner due to the contractor. Defenses against the claim on the bond are limited. The surety does not have the customary defenses found in payment and performance bonds. The only defenses allowed by the principal and surety are the validity of the mechanics lien claim, the amount due under the lien claim, defenses of the principal of the bond and defenses of the owner at the time of the contract upon which the lien arises.

One of the more interesting aspects of the statute is its attorney fees provision. The prevailing party is entitled to attorney fees. However, "prevailing party" is defined as the lien claimant if it is awarded a judgment equal to at least 75% of the amount of the lien claim and the principal if it is awarded a judgment equal to less than 25% of the lien claim. The attorney fees provision will encourage lien claimants to carefully consider including disputed claims for extras in their claims and caution owners or lenders from withholding payment to potential lien claimants in order to avoid payment of attorney's fees. The risks of attorney's fees may ultimately promote settlement.

Another issue is the willingness of a title company to insure a construction lender for draws between the recording of a lien claim and the entry of an order approving the statutory bond. The title company and surety industries are working on an interim bond to cover the period between the recording of the claim for lien and the approval of the statutory bond.

Another issue is the coordination of the eligible surety companies who may underwrite the bonds with the list of sureties approved by a court. This is especially the case in Cook County, Illinois, where the court publishes a list of approved sureties. Not all surety companies on the approved list of Cook County sureties meet the requirements of the new law.

The ability to bond over mechanic lien claims will change the way construction projects are handled in Illinois. Title companies will require lien bonds in order to disburse funds and clear mechanic lien claims from title. Lien claims will have less of an impact on a project moving forward. The resolution of lien claims will become less expensive and more efficient.

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