

2015 CONSTRUCTION LAW SUMMIT

POWERED BY *BRUNER & O'CONNOR ON CONSTRUCTION LAW*

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Illinois Case Law Updates

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Overview

▶ Legislative Updates:

- ▶ 770 ILCS 60/38.1 - Bonding over Mechanics Liens
- ▶ 765 ILCS 605/1 - Condominium Property Act Amendments

▶ Case Law Updates:

- ▶ *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC, et. al.*, 2015 IL App (1st) 123452, 1st Dist. September 30, 2015
- ▶ *Cincinnati Insurance Company v. Northridge Builders, Inc.*, 2015 WL 5720256, N.D. Ill. September 30, 2015

Bonding Over Mechanics Liens

- ▶ 770 ILCS 60/38.1 – Bonding over Mechanics Lien Claims
- ▶ Effective January 1, 2016, Public Act 99- 178 (HB 2635), adds Section 38.1 to the Mechanics Lien Act to permit the substitution of a surety bond in lieu of real property.
- ▶ By shifting the focus of mechanics lien litigation from the subject real property to the proceeds of a surety bond, owners may refinance construction loans or sell newly constructed homes and commercial developments free and clear of mechanics lien claims.
- ▶ How does it work?

Bonding Over Mechanics Liens

- ▶ Who Qualifies as an Applicant?
 - ▶ Section 38.1 defines “applicant” to mean:
 - ▶ An owner, another lien claimant, a party holding an interest in the property,
 - ▶ A condominium or homeowners association, or
 - ▶ Any person, including an owner, who may be liable for the payment of the lien claim,-- e.g., former owner, condominium association, homeowners association, contractor, or subcontractor.
- See 770 ILCS 60/38.1(a)(1).

Bonding Over Mechanics Liens

- ▶ What Steps Must the Applicant Take?
 - ▶ Obtain A Surety Bond. Section 38.1 provides a lengthy definition of an eligible surety bond, including:
 - ▶ The surety must meet certain solvency criteria including having an A rating or better with no modifier and a class IX or better (>250 million).
 - ▶ The bond must equal 175% of the lien claim (excluding attorney's fees and interest).
 - ▶ Payee of bond is the lien claimant.
See 770 ILCS 60/38.1(a)(2).

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- ▶ **File the Application.** Applicant's petition must include:
 - ▶ name and address of the applicant (and attorney), if any;
 - ▶ name and address of the lien claimant;
 - ▶ If there is a pending foreclosure, lien claimant's attorney of record or, if no foreclosure, the name of preparer of the mechanics lien;
 - ▶ The name and address of the owner of record of the subject property or the name and address of a relevant condominium association or homeowners association;
 - ▶ The legal description and common address of the subject property;
- (cont'd)

Bonding Over Mechanics Liens

- ▶ A copy of the recorded mechanics lien claim (if there is no pending foreclosure;
- ▶ A copy of the proposed surety bond;
- ▶ A certified copy of the surety's certificate of authority; and
- ▶ An undertaking by the applicant to replace the bond if the proposed original bond ceases to be an eligible surety bond.

See 770 ILCS 60/38.1(c).

Bonding Over Mechanics Liens

► When and Where Is the Petition Filed?

- If there is no pending lien foreclosure suit, the applicant files the petition with the clerk of the circuit court for the county in which the real property is located at any time after becoming aware of the lien claim.
- If there is a pending lien foreclosure suit (by complaint or counterclaim), then the applicant must file the petition in the ongoing proceeding within five months after the filing of the complaint or counterclaim.
See 770 ILCS 60/38.1(c).

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► What Happens After Filing A Petition?

- Notice. Applicant must send notice, by personal service or certified mail, to all persons identified in the petition (including their attorneys of record in any lien claim foreclosure action).
- The notice must include:
 - a copy of the petition; and
 - a statutory form which advises the recipient:
 - objections to the petition must be filed within 30 days of service or within 33 days of certified mailing; and
 - if there are no objections, then an order will be entered.

Bonding Over Mechanics Liens

- ▶ **No Objections; Ex Parte Order.** If no objections are filed within the 30/33 days, the Court enters an ex parte order:
 - ▶ Substituting the eligible surety bond for the property subject to the lien claim; and
 - ▶ Substituting the lien claimant's right to recover on the bond for any remedies against the property.

See 770 ILCS 60/38.1(e).

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- ▶ **Objections; Hearing.** If timely objections are filed, the applicant notices the matter for a hearing.
 - ▶ There is only one issue that must be determined at the hearing is whether the proposed surety bond is an eligible surety bond.
 - ▶ If the court finds that the proposed bond is an eligible surety bond, then the court shall enter an order identical to the ex parte order.
See 770 ILCS 60/38.1(f).

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- ▶ **Post-Order Steps.** Once the Court enters the substitution order, the applicant.
 - ▶ Send copies of the order to all persons identified in the petition or who have appeared in relevant foreclosure proceedings; and
 - ▶ Record a copy of the order, together with an executed copy of the approved surety bond.
- See 770 ILCS 60/38.1(g).

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► After the Bond Is Approved:

- As a result of the Court's order, the lien is lifted from the real property.
- Liability of the principal and surety is capped at the amount of the bond. See 770 ILCS 60/38.1(d).
- All parties besides bond principals and sureties are dismissed. See 770 ILCS 60/38.1(h).
- Litigation is limited; no issues of priority or enhancement.

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Bonding Over Mechanics Liens

- ▶ The principals and sureties defenses:
 - ▶ Validity of mechanics lien claim
 - ▶ Amount due under line claim
 - ▶ Defenses of picnic pal of bond
 - ▶ Defenses of owner at time of contract; proper payment defenses
 - ▶ No new defenses because of surety.
See 770 ILCS 38.1(j).

- ▶ Bond substitution may be necessary. See 770 ILCS 60/38.1(k).

Bonding Over Mechanics Liens

- ▶ **Attorney's Fees: 770 ILCS 60/38.1(a)(5)**
 - ▶ Statutory scheme for payment – not just your ordinary prevailing party standard.
 - ▶ Recovery of 75% and above for the Mechanics lien claimant provides for attorney's fees to the Mechanics lien claimant.
 - ▶ Recovery of 25% or less for the Mechanics lien claimant provides for attorney's fees to the Principal.
 - ▶ No attorney's fees for recovery in the middle.
 - ▶ Attorney's fees are paid out of the bond.
 - ▶ Claim is amount per Section 24 notice, lien or amended lien per Section 7 or amount of claim named in suit. "Claim" excludes attorney's fees and interest.

Bonding Over Mechanics Liens

- ▶ Intentions of this attorney's fee scheme –
 - ▶ Claimant incentivized to make claim amount not excessive.
 - ▶ Principal incentivized to pay undisputed amounts before lien is filed.

Questions?

Condominium Act Amendments

- ▶ 765 ILCS 605/1 - CONDOMINIUM ACT AMENDMENTS ENACTED.
 - ▶ Prohibits owner approval levels necessary to sue developer.
 - ▶ Prohibits requiring mediation or arbitration in declaration.
 - ▶ Is this provision enforceable?
 - ▶ Appears to violate the FAA and IL arbitration act;
 - ▶ These are issues we are addressing in a case right now on appeal.

Case Law Updates

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