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THE LEGAL *quarterly*

ADDRESSING THE LEGAL NEEDS AND CONCERNS OF UNION CONTRACTORS
IN THE ILLINOIS RESIDENTIAL CONSTRUCTION INDUSTRY

Greetings! This is the first issue of The Legal Quarterly, a brand new feature offered by UCI. As you all know, UCI is becoming well recognized within the home building industry as the place to go to locate the best residential builders in Southern Illinois.

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It is as clear that in order to meet the needs of our members, UCI must provide more and must do more for its members. At the monthly meetings, members get together, exchange ideas, learn about new products and services and enjoy the benefits of getting to know other like-minded individuals in the building trades. The monthly meetings give us a chance to stop working our bodies, and allow us to share problems and discuss solutions that seem common to us all.

As General Counsel to UCI, it is my responsibility to assist UCI with educating its membership so that each member can be safe from unnecessary and avoidable legal problems. However, it is clear to me that Union Contractors have already taken many steps at providing legal fortresses for themselves and their families. All union contractors promote and maintain drug free work places. All union contractors participate in OSHA training programs to insure that carpenters who are required to work in hazardous places with hazardous materials can do so safely. All union contractors have embraced the philosophy that safety pays.

However, I have also learned that while every contractor will pay for harnesses, hard hats, eye and ear protection, few contractors are willing to pay an attorney to evaluate their business structure. Only a few contractors have taken advantage of laws providing increased protection of business owners through the formation of a limited liability company. Few owners hold their own personal property in a way that provides ironclad protection from liens, garnishment or lawsuit. Every one of you know that an ounce of prevention is worth a pound of cure. Its far easier to replace one or two torn shingles than to replace an entire roof deck. This quarterly newsletter is that ounce of prevention. Read this, keep this and refer to it when you have a

INSIDE: A Little Something About MECHANICS LIENS

A Little Something About MECHANICS LIENS

As most contractors know, one way to increase your chances of being paid for your work on a job is to file a mechanic's lien on the property that you improved or worked upon. The lien serves as notice to any potential buyer or lender that no transaction involving this property can take place without satisfying or adjudicating (having a trial regarding) the lien at issue. While just about anyone with access to a form can actually record a lien, the real question is whether a lien should be filed and if so whether a court will enforce the lien once its been filed.

A contractor who seeks to use the Mechanics Lien Act (770 ILCS 60/1, et seq) must show compliance with Section 5 of the Act. That provision makes it the legal duty of the contractor to give the owner (and the owner to demand of the contractor) a statement in writing, "under oath or verified by affidavit, of the names and addresses of all parties furnishing materials, and labor and of the amounts due or to become due to each." In easy language, a contractor who fails to provide a Section 5 affidavit is not entitled to pursue a mechanics lien. An example of a Section 5 affidavit appears on Page 3 of this newsletter.

Assuming that the Section 5 affidavit has been delivered, the other requirements of a mechanics lien are that the filing party:

- (1) be a contractor,
- (2) have a written or an oral contract with the owner or the owners representatives,
- (3) performed construction that improved the owner's property,
- (4) performed the work required under the contract,
- (5) can show that whatever work not performed was excused because of the circumstances,
- (6) can prove that a proper lien claim was timely filed, and
- (7) that a lawsuit was timely filed to foreclose the mechanics lien.

Subcontractors have additional requirements as it relates to filing lien claims, and you should talk with an attorney about what to do if you are a material provider or a subcontractor.

The timelines that must be followed are as follows:

Liens must be filed in the county where the property is located within four months after completion of your work. 770 ILCS 60/7 (Punch list repair work typically does not count, what court's look for is the date you believe you substantially completed the job .)

Suits to enforce the lien must be filed within two years after completion of your work. 770 ILCS 60/7 A lien that has not been foreclosed within 2 years is unenforceable.

To qualify as a proper filing, a lien must be (1) in writing, (2) be made under affidavit of the contractor or its agent, (3) describe the work that was performed, (4) a statement showing what is due, after giving credit for all payments made, and (5) provide a description (legal preferred) of the land subject to the lien.

My general advice is that if a client has indicated that they are unhappy with the work that has been performed, do not record a lien. Recent changes to the Lien Act allow a court to award attorney fees to a party that has wrongfully pursued a lien claim, and current indications are that in the Madison and St. Clair County areas, the courts are more likely to side with the property owner then the builder. This does not mean that you should not file for arbitration (if included in your contract), a small claims action or a full blown breach of contract lawsuit. Filing a lien suit unnecessarily exposes you to the possibility of paying the owner's attorneys fees, and the slight advantage that is obtained from having a lien is not worth the exposure.

On the other hand, if the debt that is owed is simply a result of a lack of money, then by all means, record the lien and protect your claim.

A few more things to know about liens, and why you may want to get an attorney to help you:

- Because liens affect title and transferability of property, the courts require strict compliance with the procedures with the Illinois Mechanic's Lien Act. The Act, referred to legally by its citation, 770 ILCS 60/1 , et seq., is a fairly complex set of laws and full compliance is difficult even for experienced lawyers.
- The rule of strict compliance applies to (1) the nature of the work for which the right to lien exists; (2) the timing, contents, and method of delivery of the notices required to be given by subcontractors to perfect their liens; (3) the timing and contents of the claim for lien under §7 of the Act; and (4) the time period within which suit to enforce the lien must be brought. It has also been applied to the requirements of providing contractor's sworn statements
- The burden of proving that each required element on which the lien depends has been satisfied is on the contractor seeking to enforce the lien.
- A subcontractor who 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 Act has been held to have no lien rights for its materials delivered. However, if the notice is given after 60 days by the subcontractor it can preserve the lien, but only to the extent that the owner has not been prejudiced by payments made before receipt of the notice.
- If a provision in a contract indicates that a contractor waives the right to file a lien, that provision is invalid in Illinois.

