



## **Substituting a Bond to Remove a Mechanic's Lien: An Overview of The New Amendment to the Illinois Mechanics Lien Act**

by Eric P. Sparks

At the start of this year, a new provision of the Illinois Mechanics Lien Act became effective. 770 ILCS 60/38.1 (2016). Section 38.1 of the Act allows for certain parties to substitute a court-approved surety bond as collateral in place of the mechanic's lien against the affected real estate, allowing litigation over the merits of a mechanic's lien claim to proceed against the principal and surety under the substitute bond. This amendment is a major development in the history of Illinois' Mechanics Lien Act, and it may simplify the sale or refinancing of real estate which would otherwise be encumbered by mechanic's lien litigation. It is sure to be an important topic for lenders, land owners, developers, and the construction industry.

Like all provisions of the Mechanics Lien Act, Section 38.1 is complex – and it is likely that there will be contested disputes over its application in the near future. Some notable features of the new provision are: (i) contractors, in addition to owners, can apply to substitute a bond (such as when a general contractor's subcontractor has filed a mechanic's lien claim on a project); (ii) even before any litigation on a lien claim has commenced, a petition can be filed to substitute a bond; and (iii) once a substitute bond is approved by the court, then the lien claimant's action to foreclose its mechanic's lien is replaced by an action on the surety bond against the bond's principal and surety. This last feature may aid a land owner to exit from the mechanic's lien litigation, if its general contractor has applied to substitute the bond, since Section 38.1 allows for the dismissal of all other parties to the lien claim after the bond is approved. Similarly, where an owner's property is mortgaged, an owner might provide an exit for its lender from any mechanic's lien litigation, by obtaining an approved bond.

As one can imagine, where the competing interests of land owners, architects, engineers, general contractors, trade subcontractors, suppliers, and laborers are at stake, this amendment to the Mechanics Lien Act bears the marks of a legislative contest. Two striking features which indicate the attempt to balance the competing interests of land owners and the construction industry are: (i) the substitute bond must be set for an amount equal to 175% of the amount of the lien claim, and (ii) the 'prevailing party' in the litigation over the merits of the mechanic's lien claim will be entitled to its reasonable attorney's fees (roughly). (If there is no application to substitute a bond for a lien, the Mechanics Lien Act treats the potential recovery of a party's attorney's fees quite differently.) Indeed, special attention is required here because the term 'prevailing party' is unusually defined under the amendment. Section 38.1 defines a lien claimant to be a 'prevailing party' only if it wins a judgment for at least 75% of its lien claim, whereas the bond principal is considered the 'prevailing party' if the lien claimant wins a judgment for 25% or less of its lien claim. The intent of this graded scale may have been to encourage the early

settlement of both very strong and very weak lien claims, although the scheme might be too complicated to benefit anyone in practice.

The new amendment to the Mechanics Lien Act is sure to be featured prominently in new construction projects in Illinois, as well as in sales and refinancing of real estate. If you would like to know more about how this new law may affect your business, please contact Eric P. Sparks at Gould & Ratner LLP.

Eric P. Sparks, Partner  
Gould & Ratner LLP  
[esparks@gouldratner.com](mailto:esparks@gouldratner.com)



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