

Avoiding Surprise and Prejudice to Lien Claimants

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The Illinois Mechanics Lien Act, 770 ILCS 60/1 *et. seq.* (the "Act"), is designed to provide a remedy to contractors, subcontractors and suppliers who furnish labor or materials for nonpayment. The Act seeks to carefully balance the rights of property owners against those who furnish work on credit; it aims to not surprise an owner with an unwarranted lien, while not prejudicing a contractor's ability to pursue payment through a lien against the property. After all, their work and materials, and those of their subcontractors and suppliers, have enhanced the value of the property and benefited the owner.

One section of the Act, which has fallen out of balance and is in need of a minor repair is section 34. This section provides that a demand may be served on a party asserting a lien, who must then move to foreclose his lien within 30 days or lose his right to do so – "fish or cut bait." The purpose of this section is to permit an owner, or others with an interest in real property, to force the issue of the validity of a lien claim already filed, and to clear any potential cloud created by a lien against the owner's property. Section 34 is an important protection for owners who are troubled by unenforceable or invalid liens, allowing them to quickly and easily dispose of them with a simple notice. Essentially, it serves a valuable purpose and should remain the law in Illinois.

Unfortunately, while other sections of the Act specify both the contents and form for a written notice affecting lien rights, section 34 provides little guidance about what must be included in a demand or what form it must take. In an effort to understand legislative intent, some court decisions have carried the remedy too far and decided that even notices and other documents making no mention of section 34 or of a requirement to take action within 30 days may cause a surprising loss of lien rights. Unfortunately, this has resulted in contractors and subcontractors losing the right to enforce valid and just liens because they are unaware that steps must be taken within 30 days to preserve the lien. Thus, though a contractor or subcontractor has carefully followed all of the sometimes difficult steps necessary to properly perfect a mechanics lien claim under Illinois law, the lien is subject to unexpected forfeiture based on an ambiguous and misunderstood notice.

Illinois courts have liberally construed section 34 to terminate a claimant's lien rights, even though the notice served makes no reference to section 34 or to the consequences if a suit is not promptly filed to enforce the lien. See, *Vernon Hills III Ltd. Partnership v. St. Paul Fire and Marine Ins. Co.*, 287 Ill.App.3d 303, 678 N.E.2d 374 (2nd Dist. 1997). This has created an unfair trap for unsophisticated lien claimants.

At least one Illinois trial court recently decided that when a lien claimant was served with merely a summons and complaint in a mortgage foreclosure case, all lien rights were lost because the unknowing recipient did not file an answer to the lawsuit within 30 days. Neither the summons nor the complaint gave any warning that the lien would be lost if an answer was not filed within that time. The trial court seems to have based its decision, at least in part, on the appellate court case of *Charter Bank and Trust of Illinois v. Edward Hines Lumber Co.*, 233 Ill.App.3d 574, 599 N.E.2d 458 (2nd Dist. 1992). Though the holding in that case did not directly support the trial court's ruling, other language in the opinion gave implied support. The appellate court held that a mechanics lien claimant did not forfeit its lien by failing to file a counterclaim to foreclose it within 30 days after receipt of summons in a mortgage foreclosure suit brought by a mortgagee. But, in explaining its ruling, the court wrote:

The plain language of the section requires that "[u]pon written demand * * * requiring suit to be commenced * * * or answer to be filed in a pending suit, suit shall be commenced or answer filed within 30 days thereafter." (Ill.Rev.Stat.1989, ch. 82, par. 34.) The summons required only that Hines file an answer within 30 days. It is not disputed that Hines received the summons on March 14 and filed an answer on April 12. Hines complied with the statute. Nothing in section 34 specifies any particular content for the answer which is filed. More importantly, nothing in the language of the section required that Hines assert its lien within 30 days when the summons required only the filing of an answer. When Hines filed its answer April 12, it did all that was required to preserve the lien.

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Id., 233 Ill.App.3d at 578. Based on the foregoing discussion, the *Charter Bank* court apparently construed section 34 of the Act to require that an answer to the complaint had to be filed within 30 days, or the lien would have been unenforceable. Therefore, mechanics lien claimants need to be concerned that not filing an answer to a complaint within 30 days will cause their lien to be forfeited.

To remedy this imbalance, the Act should require notices under section 34 to alert lien claimants to the necessity of responding to the notice within 30 days and notify them that if they do not respond, their right to enforce their lien will be forfeited. The following simple addition to section 34 would cure most of the surprise prejudice to contractors:

A written demand under this section must contain the following language in at least 10 point boldface type: "Failure to respond to this notice within 30 days of receipt, as required by section 34 of the Illinois Mechanics Lien Act, shall result in forfeiture of the referenced lien."

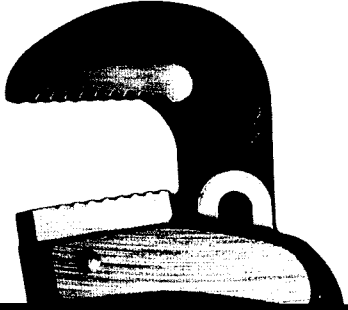
This modest change to section 34 will not burden or otherwise jeopardize the rights of honest owners who are merely seeking to clear clouds on title, but it will minimize harm to lien claimants who, without such warning, might be surprised to lose their right to be paid for their work. It would not be difficult for owners and others seeking to clear title to comply with this new requirement. A simple letter to lien claimants would still suffice to trigger section 34 and eliminate the liens of any claimants who did not immediately enforce their rights. Generally, the law disfavors a loss of such important rights due to ignorance or inadvertent mistake. The rights of contractors who have enhanced an owner's property with their own hard work and materials should not be lost by surprise tactics or ambiguous notices – that does not serve the ends of justice. Therefore, section 34 of the Mechanics Lien Act should be amended to add the above warning to section 34 notices to lien claimants.

Feel free to contact James Rohlfing with any questions or suggestions about the above at jrohlfling@ROlaw.net.



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