

August 2015

## CONSTRUCTION LEGAL ALERT

### **REMOVING CLOUD OF TITLE, BUT ADDING CLOUD OF ADDITIONAL LIABILITY**

On January 1, 2016, the latest addition to the Illinois Mechanics Lien Act (the “Act”), Section 38.1, will take effect. Section 38.1 of the Act will permit an owner (or other person liable for payment of a lien claim, such as a general contractor) to substitute an eligible surety bond for the lien filed on the property. Illinois Public Act 099-0178. For owners and their lenders, Section 38.1 provides clean title as the lien will be discharged from the property and substituted with the assets of the bond. For lien claimants, Section 38.1 should also be viewed as a positive addition to the Act, as claimants will no longer have to proceed through the lengthy foreclosure process to collect on their lien claims as the bond will be readily available to satisfy any final judgment awards (the surety is required to provide a bond in an amount equal to 175% of the amount of the lien claim). That is, however, only part of the story.

While there may be benefits to owners and claimants to bond over the liens, bonding over a lien carries with it **mandatory** attorney’s fees to the “prevailing party” in litigation. The Act defines the lien claimant as the prevailing party when it recovers at least 75% of the amount of the lien claim, and the owner (or other principal under the bond) as the prevailing party when the lien claimant is awarded a judgment that is less than 25% of the lien claim. If the lien claimant is deemed the prevailing party, the principal under the bond and its surety are jointly and severally liable for the lien amount *and the attorney’s fees* (limited to any amounts remaining on the face of the bond after payment of the claim and interest). In other words, owners (or other principals under the bond), who probably were not in privity with the lien claimants—and even if so probably did not have a contractual prevailing party provision—now face contingent attorney’s fees liability to lien claimants. If, on the other hand, the principal under the bond is deemed the prevailing party, the principal may collect attorney’s fees against the lien claimant limited to 50% of the amount of the lien claim.

We note that the Act treats non-bond claims differently and only imposes attorney’s fees upon a determination that either the lien claimant was “without just cause or right” in filing the lien claim or that owner was “without just cause or right” in failing to pay the lien claim.

In brief, the option to bond over a lien is something of a double-edged sword: while it offers potential benefits to owners (or other principals under the bond) and lien claimants alike, it also presents potential liability of attorney's fees, even in situations of no contract or contractual right to prevailing party fees.

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## **Contact**

Clients that have questions regarding the subject matter of this Legal Alert are welcome to contact Daniel Dorfman (312-662-4609) ([ddorfman@hwhlegal.com](mailto:ddorfman@hwhlegal.com)).

## **Information**

The text of Illinois Public Act 099-0178 can be found [here](#).

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