



REAL PROPERTY

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Constructing a bridge between the Home Repair and Remodeling Act and the Illinois Mechanics Lien Act

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Wouldn't it be great if you could demand from a contractor working on your home, a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties the contractor hired who are furnishing labor, services, and/or materials, and of the amounts due or to become due to each? Wouldn't it be great if you could demand such a sworn statement from the contractor before being required to make any payments to that contractor? Wouldn't it also be great if a subcontractor were required to give you a notice which reminded you to request lien waivers from subcontractors who are paid? In that way, you would not be surprised by liens of subcontractors, and you would better be able to track the costs and payouts on the project.

Guess what? All of these rights and requirements do exist under section 5 of the Illinois Mechanics Lien Act (770 ILCS 60/5).

The problem is, homeowners are not aware of these statutory provisions, and contractors generally ignore these provisions in the context of residential construction projects which tend to be more informal and which generally do not involve attorneys or title companies who might otherwise oversee the payment process.

In this context, a group of real estate and construction attorneys serving as members of the ISBA Real Estate Law and Construction Law section councils gathered to address the problem. This group included a range of attorneys with varying perspectives representing homeowners, contractors, subcontractors, and title companies. We sought to examine whether there was something about the Contractor's Sworn Statement forms that perhaps dissuaded or prevented their use and proliferation in the context of residential construction.

Two observations that our group had were that title companies use a variety of "Contractors Sworn Statement" forms and that the language used in the forms is a little cumbersome and confusing. We thought that perhaps a simplified or user-friendly sworn statement might be the ticket to increasing its use and popularity. However, (1) the task of "spreading the word" about such a form seemed overwhelming and unattainable, (2) title companies were not likely going to change their form, and (3) the prospect of amending the 100+ year old Mechanics Lien Act was not a realistic goal.

Enter the Home Repair and Remodeling Act ("HRRA"). The HRRA is a relatively underused consumer protection-oriented statute that seeks to inform homeowners of their rights and responsibilities when engaging a contractor to work on their homes. The HRRA itself states that its intention is as follows:

"The General Assembly recognizes that improved communications and accurate representations between persons engaged in the business of making home repairs or remodeling and their consumers will increase consumer confidence, reduce the likelihood of disputes, and promote fair and honest practices in that business in this State." (815 ILCS 513/5).

This is a laudable goal. However, in order to achieve this goal, it is critical that the HRRA accurately inform consumers about their rights and remedies under the Illinois Mechanic's Lien Act. Our group concluded that it did not and that the HRRA, itself, was in need of a repair and remodel.

Section 20 of the HRRA requires that a contractor involved in the business of home repair and remodeling provide a homeowner with a "Home Repair: Know your Consumer Rights" brochure for any contract over \$1,000. (815 ILCS 513/20). Paragraph 10 of this brochure was statutorily required to read as follows:

"(10) Remember, homeowners should know who provides supplies and labor for any work performed on your home. Suppliers and subcontractors have a right to file a lien against your property if the general contractor fails to pay them. To protect your property, request lien waivers from the general contractor."

This warning was incomplete. It failed to advise the homeowners of their statutory rights and obligations under the Mechanics Lien Act with regard to Contractor's Sworn Statements.

Our ISBA section councils, with the consultation and input of various construction industry trades, the Chicago Volunteer Legal Services legal clinic, the City of Chicago and the Illinois Attorney General's office, drafted an amendment to replace Section (10) of the HRRA with language that would better define the rights and responsibilities of the owner and contractor in regards to using Contractor's Sworn Statements.

The new version states:

(10) Before you pay your contractor, understand that the Mechanics Lien Act requires that you shall request and the contractor shall give you a signed and notarized written statement (known as a "Sworn Statement") that lists all the persons or companies your contractor hired to work on your home, their addresses along with the amounts about to be paid, and the total amount owed after the payment to those persons or companies.

Suppliers and subcontractors have a right to file a lien against your home if they do not get paid for their labor or materials. To protect yourself against liens, you should demand that your contractor provide you with a Sworn Statement before you pay the contractor. You should also obtain lien waivers from all contractors and subcontractors if appropriate. You should consult with an attorney to learn more about your rights and obligations under the Mechanics Lien Act.

Disclaimer: The contents of this paragraph are required to be placed in the pamphlet for consumer guidance and information only. The contents of this paragraph are not substantive enforceable provisions of the Home Repair and Remodeling Act and are not intended to affect the substantive law of the Mechanics Lien Act. Remember, homeowners should know who provides supplies and labor for any work performed on your home. Suppliers and subcontractors have a right to file a lien against your property if the general contractor fails to pay them. To protect your property, request lien waivers from the general contractor.

The above language comprised what was known as HB 4268, and this bill was passed and subsequently signed into law by the Governor on August 3, 2018.

It was surprisingly difficult to craft this amendatory language in a manner that would be acceptable to all the various entities and concerns who weighed in. The challenge was to inform consumers about the general source of their rights (i.e. the Mechanics' Lien Act) while not appearing to provide incomplete legal advice to consumers. Indeed, the Mechanics' Lien Act is a large and complex law which itself is the subject of a great many judicial decisions. The distillation of its contents into a few sentences is simply not possible or advisable in a consumer protection-oriented brochure.

Similarly, there was an overall concern that the changes to the HRRA could be viewed as an attempt to modify the provisions in the Mechanics Lien Act. For example, a violation of the HRRA can constitute consumer fraud, but the failure to provide a contractor's sworn statement does not constitute consumer fraud under the terms of the Mechanics Lien Act. This is the reason for the rather unusual "disclaimer" language at the end of the provision which indicates the amendatory language is "not intended to affect the substantive law of the Mechanics Lien Act."

At the end of the day, it is hoped that homeowners will start to recognize the need to hire an attorney to help them when contracting to have major work done which could result in a lien being placed on their home by an unhappy contractor.

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