ILLINOIS STATE BAR ASSOCIATION
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Building Knowledge

The newsletter of the Illinois State Bar Association's Section on Construction Law

Editor's note

BY SAMUEL H. LEVINE

Stan Wasser is chair of the Construction Law Section Council and an experienced construction attorney. Although his article is geared to younger lawyers considering practicing in construction law, the article is relevant to all attorneys interested in the multiple disciplines of construction law. Stan is with Feldman Wasser, Springfield, Illinois. He has spent more than 25 years as an attorney in construction matters.

Howard Turner is the author of Turner on Mechanics Lien, the authoritative handbook on Mechanics Liens. He writes about the complex issues of forum selection and choice of law in our mobile society. Howard Turner is of counsel

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Why construction law?

BY STANLEY N. WASSER, FELDMANWASSER, SPRINGFIELD, IL

I am writing this article for law student members and young lawyers who may be considering practicing in the field of construction law. If you are interested in problem solving, or if you are interested in the various legal dynamics that factor in for the design, construction, and claim stages of a construction project, then you should consider a practice in the field of construction law. The field of construction law offers a smorgasbord of practices and practice issues. There is never a dull moment.

Construction law is a field that brings in to play many legal disciplines. You certainly will need to master many principles of contract law for the relationship and obligations of the parties involved in a construction project are most assuredly set out in written contracts. To the extent that they are not, then you will be dabbling in the legal principles bearing upon implied conditions, oral contracts, unjust enrichment, or quasi-contracts. Sometimes what looks like a construction contract issue is in fact a sale of goods issue, as when, for example, the construction contractor is purchasing equipment from a supplier. For those whose interest is tort law, you will find that design professionals owe duties of care to those who they interact with and their liability is negligence based. And, of course, you will oftentimes find yourself wrestling with a *Moorman* doctrine issue and its exceptions.

If you like transactional work, you

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Editor's note

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to Nigro, Westfall & Gryska where he concentrates his practice in mechanics liens, construction and related transactional and litigation matters.

Paul Peterson writes about the myriad problems arising out of Section V of the Illinois Mechanics Lien Act and sworn statements. Paul is Vice President and Senior Underwriter for the Fidelity Family of Title Insurers and a member of the ISBA Construction and Real Estate Section Council. ■

Why construction law?

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can draft contracts for owners, design professionals, general contractors, subcontractor or suppliers. Or you can wrestle with privately available form contracts from AIA, EJCDC, AGC, or Consensus Docs. You can also counsel your client through the various public body contracts with their voluminous standard conditions such as those issued by the Illinois Department of Transportation or the Illinois Capital Development Board. You may also find yourself assisting your clients in Public Private Partnership ("P3") construction projects.

There are also numerous statutory codes that come into play in the construction field. Some if you like dealing with statutory based matters, the field of construction law has a lot to offer. For example, there is the Illinois Mechanics Lien Act; the Public Construction Bond Act; the various prompt payment acts; the Prevailing Wage Act; the Illinois Home Repair and Remodeling Act, the Illinois Procurement Code, the Steel Products Procurement Act, the Illinois Residential Building Code Act; and the Illinois Building and Construction Contract Act.

Perhaps you like to prosecute or defend personal injury cases. Well, many arise out of construction projects. You may need to understand the dynamics of construction law in order to understand the circumstances of the project in which the injury arose. That may lead you into the labyrinth of the Construction Contract Indemnification for Negligence Act or of OSHA regulations.

Perhaps you like insurance based issues. Construction law offers that to you also. From coverage issues to what constitutes an insurable "occurrence" to additional insured rights and obligations. There is also the transaction side of drafting insurance provisions for construction contracts.

In the area of public construction contracts, there are issues relating to the granting, modifying, suspension or termination of prequalification of contractors; and to bid disputes.

Since construction projects are built on real estate, you may find yourself working with real estate developers in helping them plan their real estate development and construction projects. So, you will get your feet wet with real estate law. The same is true for condominium projects.

Oftentimes construction projects have federal funding and thus federal laws regarding Davis Bacon requirements and federal Disadvantaged/Minority/Female enterprise contract requirements will be implicated. With federally assisted procurement you may find yourself practicing under federal acquisition laws and before federal contract boards.

Construction claims take on a myriad of scenarios, all of which require the practitioner to bring their legal expertise to bear. Claims could be simple, like whether

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the work at issue is or is not an extra. There are delay claim issues that require you to master and apply the no-damage-for-delay doctrine and its exceptions. There are claim issues that are based on complex scheduling issues. There are claims that require that you wrestle with consequential damage waivers. There can be liquidated damage claims.

For those interested in alternative dispute resolution, construction issues often time end up in arbitration and mediation forums. Here you get to apply your expertise under not only the Illinois Arbitration Act and the Illinois Mediation Act, but also the Federal Arbitration Act.

Most interesting of all is that you will learn about many, many things that you may never have dealt with before, such as: roof flashing; wet well sump designs; concrete testing; roller compacted concrete; cleanrooms; and Disadvantaged/Minority/Female enterprise contract goals and set asides.

A construction law practice will often have you working with expert witnesses in many fields.

If labor law is your interest, there are interesting labor law issues related to construction projects, such as jurisdictional disputes; gating systems; grievances; project labor agreements; and picketing.

For projects requiring performance of payment bonds, you will enter the mystical world of suretyship.

Lastly, and unfortunately, construction law can lead you at times into the fields of state and federal civil and criminal false claims, state and federal mail and wire fraud claims; and other violations of criminal laws that deal with construction related issues. See for example Article 33 of the Illinois Criminal Code.

The satisfaction that comes with a construction practice can be gratifying. You may have assisted in bringing a project to fruition. You may have assisted your client in navigating a difficult claim. You may have assisted in negotiating a resolution to a difficult dispute that minimizes the harm to your client and preserves future business relations for your client. You get to meet some very smart and enjoyable people who toil in the construction industry and make our lives better. And you can one day look in to a mirror and say that you can now understand how to read a set of plans and specifications.

I hope that I have whetted your interest to delve into the field of construction law. Good luck and I hope to see you as a member of the ISBA Construction Law Section Council. ■

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Choice of law, choice of forum, and public policy

BY HOWARD M. TURNER

This article discusses the validity of forum selection and choice of law clauses in contracts, and particularly in construction contracts. The question is whether and to what extent forum selection and choice of law provisions in construction contracts can be made void and unenforceable by statute. This article specifically considers the validity, applicability, and effect of The Illinois Building and Construction Act, 815 ILCS 665/10 including when it is preempted by the Federal Arbitration Act. The Illinois Building and Construction Act in 815 ILCS 665/10 states:

> A provision contained in or executed in connection with a building and construction contract to be performed in Illinois that makes the contract subject to the laws of another state or that requires any litigation, arbitration, or dispute resolution to take place in another state is against public policy. Such a provision is void and unenforceable.

Forum selection and choice of law are separate issues. *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839, ¶ 69; *Brandt v. MillerCoors, LLC,* 2013 IL App (1st) 120431, ¶ 15.

In his opinion in *Dancor,* The Hon. Robert B. Spence, Judge, discusses the validity of forum selection and choice of law provisions in contracts when faced with a statute declaring them invalid. In a footnote at 2016 IL App (2d) 150839, ¶¶ 80-81, he indicates that the Illinois Building and Construction Act, 815 ILCS 665/10, is valid and enforceable. This article is based, in large part, on Judge Spence's discussion in *Dancor*. The opinion is well written, well reasoned, and should be studied.

I. Forum Selection

A forum selection clause may be voided if it violates fundamental Illinois public policy. A forum selection clause in a contract is *prima facie* valid and should be enforced unless the opposing party shows that enforcement would contravene a strong public policy of the State. *Maher & Associates, Inc. v. Quality Cabinets,* 267 Ill. App. 3d 69, 75, 203 Ill. Dec. 850, 640 N.E.2d 1000 (2nd. Dist 1994). The forum selection clause in a contract is *prima facie* valid, and courts should enforce it unless the opposing party demonstrates that enforcement "will be so gravely difficult and inconvenient that [the opposing party] will for all practical purposes be deprived of [its] day in court." *Calanca v. D & S Manufacturing Co.,* 157 Ill. App. 3d 85, 87–88, 109 Ill. Dec. 400, 510 N.E.2d 21 (1st Dist. 1997) (quoting *The Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 18, S.Ct. 1907, 32 L.Ed.2d 513 (1972)); *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839, ¶ 69.

Courts consider the following factors in determining whether a forum selection clause is unreasonable: (1) the law governing the formation and construction of the contract; (2) residency of the parties; (3) location of execution and performance of the contract; (4) location of the parties and witnesses; (5) the inconvenience to the parties of any particular location; and (6) whether the parties bargained for the clause. *Brandt v. MillerCoors, LLC*, 2013 IL App (1st) 120431, ¶ 13; *Calanca,* 157 Ill. App. 3d at 88, 109 Ill. Dec. 400, 510 N.E.2d 21; *Maher & Associates, Inc. v. Quality Cabinets,* 267 Ill. App. 3d 69, 74, 640 N.E.2d 1000, 1004 (2d Dist. 1994); *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839, ¶ 69.

Forum selection will be applied as per the contract unless (1) the State named in the contract has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or (2) application of the contractual choice of forum would be contrary to the fundamental policy of the State not named in the contract, and that State has a materially greater interest in the issues of the case than the State named in the contract. *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839, ¶ 76; *Old Republic Insurance Co. v. Ace Property & Casualty Insurance Co.,* 389 Ill. App. 3d 356, 363, 329 Ill. Dec. 432, 906 N.E.2d 630 (1st Dist. 2009). State interests and State regulatory concerns should be considered. See Restatement (Second) of Conflict of Laws § 187, cmt. g (1971).

815 ILCS 665/10 by its terms invalidates any clause in any contract for building and construction work to be performed in Illinois that requires the contract (a) to be governed by the law of another State or (b) to be enforced in a proceeding to take place in another State. It states that such contractual provisions are contrary to Illinois public policy. When the legislature, by enacting a statute, declares the public policy of the State, the judicial branch must defer to that pronouncement. *Maher & Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 75, 640 N.E.2d 1000, 1005 (2d Dist. 1994); *English Co. v. Nw. Envirocon, Inc.,* 278 Ill. App. 3d 406, 410, 663 N.E.2d 448, 451 (2d Dist. 1996).

In *Dancor*, the Plaintiff brought suit in Kane County, Illinois pursuant to the forum selection clause in the parties' contract. The claims apparently grew out of a construction project in New York. The Kane County Circuit Court had held that section 757 of the New York General Business Law (N.Y. Gen. Bus. Law § 757 (McKinney 2012)), which declares void and unenforceable any choice of law or forum selection provision requiring application of another state's law to a New York construction contract, applied. The circuit court found that section 757 applied to the contract between Dancor and FXR and that consequently the forum-selection clause was void and unenforceable. The Appellate Court held that section 757 of the New York General Business Law is a fundamental public policy in New York that construction contracts for New York construction projects be litigated in New York. It therefore held that the forum selection clause in the contract was void and unenforceable. *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839, ¶ 79.

In the First Appellate District, in order to invalidate a contractual forum clause, the statute must, by its terms, explicitly declare that such a clause is contrary to public policy. In *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 19, 24 N.E.3d 307, 313–14, appeal denied, 32 N.E.3d 673 (Ill. 2015), the Appellate Court First District criticized *Maher* and said that a statute which merely states that "protecting sales representatives is fundamental public policy in Illinois" will not invalidate a forum selection clause.

II. Choice of Applicable Law

Choice of law considerations arise only if there is an actual conflict of law among the states with an interest in a particular dispute. *Allianz Insurance Co. v. Guidant Corp.,* 373 Ill. App. 3d 652, 658, 312 Ill. Dec. 51, 869 N.E.2d 1042 (2nd Dist.). An actual conflict exists if application of one state's law will yield a different result than the application of another's, that is, if it will affect the outcome of the dispute. *Id.; Gleim v. Roberts,* 395 Ill. App. 3d 638, 639, 335 Ill. Dec. 648, 919 N.E.2d 367 (2nd Dist. 2009); *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839, ¶ 72.

Illinois generally follows the Restatement (Second) of Conflict of Laws (1971) in making choice of law decisions. *Hall v. Sprint Spectrum L.P.,* 376 Ill. App. 3d 822, 825, 315 Ill. Dec. 446, 876 N.E.2d 1036 (5th Dist. 2007); *Dancor Const., Inc. v. FXR Const., Inc.*, 2016 IL App (2d) 150839, ¶ 72; *Maher & Associates, Inc.,* 267 Ill. App. 3d at 76, 203 Ill. Dec. 850, 640 N.E.2d 1000. Section 187(2) of the Restatement states:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied … unless either:
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. Restatement (Second) of Conflict of Laws § 187(2) (1971).

The public policy of a State is determined by its constitution, legislative enactments, and judicial decisions. See *Hall,* 376 Ill. App. 3d 826.

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 821-822, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the United States Supreme Court stated:

> Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair…When considering fairness in this context, an important element is the expectation of the parties.

Dancor Const., Inc. v. FXR Const., Inc., 2016 IL App (2d) 150839, ¶ 81 points out that Illinois has adopted a public policy similar to New York's in adopting 815 ILCS 665/10 that provides that a clause that subjects a construction contract to the laws of another state or that requires any litigation, arbitration, or dispute resolution to take place in another state is against public policy.

There is good reason for this policy. Illinois construction law, especially mechanics lien law, is significantly different from the laws of other States. It is peculiar and parochial. The Illinois Supreme Court has said so. See *Hoyer v. Kaplan,* 313 Ill. 448, 455, 145 N.E. 243, 245 (1924). The Seventh Circuit has expressed doubt that mechanics lien suits can be filed in Federal Court. *Sexton Mfg. Co. v. Singer Sewing Mach. Co.,* 194 F. 56, 56–59 (7th Cir. 1911). Section 9 of the Mechanics Lien Act states that suit should be brought "in the circuit court in the county where the improvement is located." 770 ILCS 60/9. This would also seem to preclude filing suit in the U.S. District Court, but not removal to the U.S. District Court.

III The Federal Arbitration Act

The Federal Arbitration Act 9 U.S.C.A. § 2 (West) provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Federal Arbitration Act (FAA) applies to construction contracts for Illinois construction projects where the contract (a) was made in interstate commerce or concerns a maritime transaction, and (b) contains both an arbitration clause and a choice of law or forum clause. In those cases, The FAA preempts the Illinois Building and Construction Act and requires that the contract be enforced in accordance with its terms. See *R.A. Bright Const., Inc. v. Weis Builders, Inc.*, 402 Ill. App. 3d 248, 255, 930 N.E.2d 565, 571–72 (3d Dist. 2010). *R.A. Bright Const., Inc.* holds that when a contract involves interstate commerce, the Federal Arbitration Act applies and preempts 815 ILCS 665/10. Therefore, in those situations where the contract provides for arbitration in a contract involved in interstate commerce, the public policy of Illinois embodied in the Statute is preempted and arbitration occurs in the place provided for in the contract.

Conclusion

In most situations, 815 ILCS 665/10 is enforceable in accordance with its terms. However, if the contract contains both an arbitration clause and a choice of forum clause, and the Federal Arbitration Act applies, 815 ILCS 665/10 is preempted by Federal law and is not enforceable. ■

The sworn contractor's and subcontractor's statements

BY PAUL PETERSON, V.P. & SENIOR UNDERWRITER, FIDELITY FAMILY OF TITLE INSURERS

As summarized below, an owner who is paying for lienable services, labor or material in Illinois must first obtain a statutory sworn contractor's statement and hold back for, pay or ascertain payment of amounts disclosed as due subcontractors or run the risk of paying more than the contract amount.[1] The statutory statements required by the Act call for a certification that the statement lists all parties providing lienable services, labor or material, their names and addresses and their balance due or to become due.[2] However, the affidavit required by title companies has an expanded certification calling for certifications of the type of work, contract amount, the amounts previously paid, and amount this draw. Those additional columns can help an examiner spot omitted parties, monitor cost changes and sufficiency of funds, confirm prior payments and know what is to be paid on the current draw. A similar sworn statement included on the bottom portion of title company lien waiver forms can be required of subcontractors. Establishing a proper payment defense is nice but minimizing the risk of having to assert that defense is better.

Obligations and rights when making construction payments

The Illinois Supreme Court in *Weather-Tite, Inc. v. University of St. Francis*[3] recently discussed an owner's obligations and rights when making construction payments. It held that an owner had a statutory obligation to

a) require a sworn statement from the contractor disclosing the names, addresses and amounts due or to become due of all parties hired by the contractor prior to payment to the contractor; and

b) hold back for or pay the amount due shown on the sworn statement or a notice from the subcontractor[4] to the subcontractor[5] or to ascertain payment of those amounts.

Contractors who refuse to furnish a statutory affidavit can lose their lien rights.[6] Subcontractors must furnish a similar statement when requested by the owner.[7] An owner who complies with the statutory payment requirements can limit the amount paid to the amount, including extras, due to the contractor[8] as shown on the sworn statement. An owner who pays the contractor without holding back, paying directly or ascertaining payment of subcontractors will lose its payment defense and can be required to pay for the same work, first to the contractor and then to the disclosed subcontractor that the contractor did not pay. In W*eather-Tite*,[9] when the contractor was paid the full amount of the final draw and did not pay the subcontractors their final draw, the owner paid for the same work twice by paying the subcontractors their final draw.

These statutory requirements are read into any construction contract in Illinois.[10]

Title company sworn contractor's statements

A review of a title company sworn contractor's statement shows the statement is much more than a sworn statement with a list of names, addresses and balances due or to become due.

In the various title company sworn statements of contractor and subcontractor, the general contractor certifies under oath the entity he represents, his authority on behalf of that entity, who he contracted with, what property the certification relates to, his knowledge of the project, and then the statutory requirements that these all parties furnishing labor and/or materials, their names and addresses, their trades, their contract status and their balance due or to become due. That statement is notarized.[11]

The information required for each contractor or subcontractor is much more extensive than the statutory requirement of just the names, addresses and balance due the listed subcontractors. The purpose of the additional information is to allow the construction disburser to try to find the omitted subcontractor by using trade lists, monitoring project costs together with with the contract amounts, tracking retention and prior paids, ascertaining what has been or should be paid subcontractors this draw, and setting forth the statutory amounts due or to become due. The following information must be provided with respect to each subcontractor:

- Its name and address (statutory);
- The kind of work or material which the subcontractor is providing (if required trades are not listed, you may have an omitted subcontractor who can later lien the job);
- The total amount of the subcontract, including extras and credits (If the contract amounts increase over time, is there a large enough contingency in the loan or does the owner need to provide extra funds?);
- The amount of retention, including the current amount, being held back from the current draw request (How much has been earned but held back to guarantee future performance?);
- The amounts, if any, that have been previously paid to the subcontractor

(Does this amount equal the amount actually paid?);

- The amount, if any, that the subcontractor should receive as part of the current payment; and
- The remaining balance due to the subcontractor, which figure will include any retention (statutory).

Title company lien waivers have sworn contractor/subcontractor statements

An owner or its agent may ask a subcontractor for a sworn statement setting forth all parties that it has hired to provide lienable services, labor or material and the amount due or to become due those parties.[12] While such a statement is not mandatory,[13] a subcontractor who refuses to furnish it has no right against the owner or contractor until it is furnished and has its lien subordinated to the liens of all other creditors.[14] A prudent owner, however, will ask for a sworn statement from the subcontractors since the cost of materials bought by subcontractors is generally at least a third of the subcontractor's contract amount.

A review of title company forms in Illinois will not produce a form labeled Subcontractor's Sworn Statement. This is because the subcontractor's sworn statement is the bottom portion of the title company's form of lien waiver. Note that the affidavit used in the lien waiver form is often labeled "Contractor's Affidavit." Where a trade is dealing with an owner who is letting construction contracts directly or through a construction managers acting as an agent of the owner, the trade is legally deemed a contractor since it is in privity with the owner. It is not always clear whether the trade is legally a contractor or a subcontractor. Thus, the affidavit form needs to meet the requirements of both a contractor's and a subcontractor's affidavit.

Many of the subcontractors provide a certification along the lines of "All material taken from fully paid stock and delivered to the job site in my own truck;" however, this language does not conform to the statute since it does not provide the name and address of any supplier.[15] Hence the title company's requirement that the subcontractor's certification include a list of the names and addresses of its principal suppliers. Before one accepts such a certification, one should consider the reasonableness of the certification and the amount of material that was likely purchased by the subcontractor.

Conclusion

The Illinois Mechanics Lien Act attempts to balance the rights of the owner, who wants to pay just the contract amount, and the subcontractors and suppliers, who want to get paid for the work that they have done and material that they have furnished. The act tries to force the owner to demand certifications identifying who the affiant has hired and their contract status before payment to the contractor and to pay, hold back for or ascertain payment of those subcontractors. The requirements of the act are not known to most owners. Most owners want the money disbursed to the contractors quickly so the job will hopefully get completed on time. Balancing the desire to obtain good statutory documentation and the need to get the parties paid so the job gets done is not well understood and is not an easy job. ■

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1. The summary is more fully discussed in *The Illinois Sworn Contractor's Statement : An Owner's Defense and an Owner's Obligation* by Paul Peterson, ISBA Construction Law Section Council Building Knowledge newsletter, May, 2012.

2. 770 ILCS 60/5 for contractors, who are trades and suppliers in privity with the owner and 770 ILCS 60/22 for subcontractors, who are trades or suppliers not in privity with the owner. Note that section 22 does not require addresses. However, it is prudent to get addresses since it is not always clear if a trade is a contractor or a subcontractor.

3. Weather-Tite, Inc. v. University of St. Francis, 909 N.E.2d 830, 233 Ill.2d 385 (IL 2014)

4. 770 ILCS 60/21 provides: "But where the contractor's statement, made as provided in Section 5, shows the amount to be paid to the sub-contractor, or party furnishing material, or the sub-contractor's statement, made pursuant to Section 22, shows the amount to become due for material; or notice is given to the owner, as provided in Sections 24 and 25, and thereafter such sub-contract shall be performed … then, and in any of such cases, such sub-contractor or party furnishing or preparing material, regardless of the price named in the original contract, shall have a lien therefor to the extent of the amount named in such statements or notice."

5. 770 ILCS 60/27 provides: "When the owner or his agent is notified as provided in this Act, he shall retain from any money due or to become due the contractor, an amount sufficient to pay all demands that are or will become due such sub-contractor, tradesman, materialman, mechanic, or worker of whose claim he is notified, and shall pay over the same to the parties entitled thereto.* * *Any payment made by the owner to the contractor after such notice, without retaining sufficient money to pay such claims, shall be considered illegal and made in violation of the rights of the laborers and sub-contractors and the rights of such laborers and sub-contractors to a lien shall not be affected thereby, but the owner shall not be held liable to any laborer and sub-contractor or other person whose name is omitted from the statement provided for in Sections 5 and 22 of this Act."

6. *Malesa v. Royal Harbour Management Corp.,* 187 Ill.App.3d 655, 543 N.E.2d 591 (2nd Dist. 1989), appeal denied 129 Ill.2d 564, 550 N.E.2d 557

7. 770 ILCS 60/24

8. 770 ILCS 60/21(d) provides: "In no case, except as hereinafter provided, shall the owner be compelled to pay a greater sum for or on account of the completion of such house, building or other improvement than the price or sum stipulated in said original contract or agreement, unless payment be made to the contractor or to his order, in violation of the rights and interests of the persons intended to be benefited by this Act…"

9. *Weather-Tite, Inc. v. University of St. Francis, supra.*

10. *Deerfield Electric Co., Inc. v. Herbert W. Jaeger & Associates, Inc.,* 1979, 74 Ill.App.3d 380, 392 N.E.2d 914.

11. Note that the contractor's certification in the AIA G702 Application and Certification for Payment certifies that the work conforms to the contract, the contractor has earned the amount requested and if the contractor was paid the prior draw, the contractor paid whomever he was supposed to pay whatever they were supposed to receive for the work paid for in the prior draw. The court in *Deerfield*, *supra*, held the G702/703 did not comply with the statute, the owner was required to not pay until it got a statement that complied with the statute, and since the contractor refused to furnish anything other than the G702/703, the contractor was in breach of the statutory requirements read into its contract and was not entitled to enforce its mechanics lien claim.

12. 770 ILCS 60/22.

13. *Contractors' Ready-Mix, Inc. v. Earl Given Construction Co., Inc.*, 242 Ill.App.3d 448, 611 N.E.2d 529 (4th Dist.1993).

14. 770 ILCS 60/22.

15. *Fred C. Kramer Co. v. LaSalle National Bank*, 36 Ill.App.2d 406, 184 N.E.2d 739 (1st Dist. 1962).

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