Perfecting a Mechanics Lien: What You Need to Do it Right

Two seasoned attorneys offer practical tips to help you perfect mechanics liens on behalf of your contractor clients against Illinois real estate and avoid pitfalls that can lead to errors – and malpractice claims.

The Mechanics Lien Act, with its long history and layers of interpretive caselaw, requires care and attention. At least 25 percent of the lien claims prepared by others that we have reviewed contain defects that could make them unenforceable and could result in malpractice claims.

This article will help you avoid some of those pitfalls. It describes the information you need to gather, notices you must serve, and claims you must file on behalf of your contractor and subcontractor clients so they can perfect liens to secure money owed them for the work done to improve privately owned real estate in Illinois.

By Howard M. Turner and Michael T. Nigro

Background: strict or liberal construction?

The Mechanics Lien Act Section 39 provides that it is to be liberally construed as a remedial act.[1] But the courts have strictly construed the requirements for perfecting a lien.[2] Once the lien is perfected, the remedies are construed liberally.[3]

1. 770 ILCS 60/39.
2. *Tefco Const. Co., Inc. v. Continental Community Bank and Trust Co.*, 357 Ill.App.3d 714, 718, 829 N.E.2d 860, 863 (1st Dist. 2005).
3. *First Federal Savings & Loan Association of Chicago v. Connelly*, 97 Ill.2d 242, 246, 454 N.E.2d 314, 319 (1983).

However, the rule of strict construction is applied primarily to protect third parties, especially mortgagees, judgment creditors, subsequent purchasers, and other lien creditors who are not in the chain of contract between the lien claimant and the owner. Because a lien recorded under section 7 is intended to be enforceable against these third parties, the requirements for a recordable claim for lien are construed strictly.[4]

On the other hand, a subcontractor's notice of claim for lien under section 24 is primarily for making the subcontractor's lien enforceable against the owner and the parties in the chain of contract between the owner and the subcontractor. The requirements for this notice of lien are generally construed more liberally.[5] In any event, it is the better practice to do the work as strictly in conformity with the Act as possible.

What you need to do the job right

Time. To properly perfect a mechanics lien you need time to get the necessary information, prepare the documents, and serve and record the required notices and claims for lien. You should try to get your clients to let you start working no later than 60 days after the last day of their work or the last day on which they have furnished material or rental equipment.

Information you will need or should have. Information that is either essential or useful to perfecting a mechanics lien includes (a) both a legal and common description of the real estate and the PIN number, (b) the names and addresses of the owner or owners of record, (c) the names and addresses of all mortgagees, (d) the names and addresses of the architect and the superintendent in charge of either the building or the construction project, (e) a copy of all written contracts between your client and others for work done on the real estate, (f) the correct names of the parties to your client's contract, and (g) evidence of your client's last delivery or last day of work. This means the last delivery or the last lienable work that is billable.[6]

Information from your client

Where the work was done. You want to lien the property where the work was done or your client's material was ultimately installed or its rental equipment used. You can usually get that address from your client. This will be a starting point to obtain title information on the property. It might complicate things if the material was delivered to the customer's place of business instead of the work site, but if it was identified as being for a particular project and was actually used in construction, you can still claim a lien.[7]

The contract and its terms. A written contract will in most instances reveal the names of the parties, but you need to verify that the names in the document are the actual legal names of the parties. A lien claim can be invalidated if you use the wrong name.[8] Check the secretary of state's and county clerk's records for registration under the Assumed Name Act.

If your client or the other party to the contract is a corporation, limited partnership, or limited liability company, make sure that the party in question was legally authorized, according to the secretary of state's records, to use the name appearing in the contract. If not, you may have to carefully investigate to determine what the entity's legal name actually was.

The contract also usually states the price and when the work is to be completed. You should obtain copies of all change orders or additional contracts between the same parties for work on the same property. You should also obtain a statement from your client showing how the amount due is calculated. This will usually reveal whether there were extra orders or new contracts.

Generally, newly contracted work between the same parties for the same property is treated as an extra to the original contract. Therefore, the amount due for this additional work should be included within the same claim for lien.[9] You need to carefully determine if there was extra work or new contracts between the same people for work on the same property. Failure to include extra work might prevent you from making a claim for lien for it.

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Note the date of the contract and when it was purportedly signed or, in the case of oral contracts, when it was agreed. If there are different dates, you might have to investigate to determine what the actual date was. You will need to state the date in your recorded claim for lien. While an error in the date rarely invalidates the claim for lien,[10] it may prevent you from claiming for work done before that date. If your lien claimant client has a contract with the owner, a wrong date may subordinate or invalidate his lien against a lender-mortgagee.

The identity of the owner of record, lender, architect and construction manager or superintendent. Often, your client has copies of the plans and specifications for the project. These documents probably identify the architect and may help you identify the owner of record, the lender, the construction manager, and superintendent. The written contract, payout applications, and waivers of lien required for payouts may

4. *Mutual Services, Inc. v. Ballantrae Development Co.* 159 Ill.App.3d 549, 553-554, 510 N.E.2d 1219, 1222 (1st Dist. 1987).
5. *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.*, 225 Ill.App.3d 851, 855-56, 587 N.E.2d 623, 626-27 (4th Dist. 1992).
6. For a discussion of the definition of "lienable work," *see* Mechanics Liens in Illinois, § 3, Pt. III, Ill. Inst. For Cont. Legal Educ. (2010).
7. *Burgoyne v. Pyle*, 261 Ill.App. 356 (1st Dist. 1931).
8. *Bale v. Barnhart,* 343 Ill.App.3d 708, 713-14, 798 N.E.2d 750, 754-55 (4th Dist. 2003); *Candice Co., Inc. v. Ricketts*, 281 Ill.App.3d 359, 666 N.E.2d 722 (4th Dist. 1996); *Ronning Engineering Co., Inc. v. Adams Pride Alfalfa Corp.*, 181 Ill. App.3d 753, 537 N.E.2d 1032 (4th Dist. 1989).
9. *Illinois Malleable Iron Co. v. D. G. Brennan* 174 Ill.App. 38, 40-41(1st Dist 1912); *Weil v. Bomash,* 237 Ill.App. 544, 547-549 (1st Dist. 1925).
10. *Lyons Federal Trust & Savings Bank v. Moline National Bank*, 193 Ill.App.3d 108, 549 N.E.2d 933 (3d Dist. 1990).

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also furnish this information, thus saving you a lot of time.

Evidence of the last day of work. Clients are often confused about what their last day of work really is. You need to obtain the evidence and examine it.[11]

You're looking for the last billable material or work. Repair of your client's defective work or replacement of defective material does not count.[12] Many a lien has been defeated because it included an incorrect last date of work. Insist on seeing actual delivery tickets, work records, and invoices.

Try to get your clients to let you start working no later than 60 days after the last day of their work.

Determining the last date for rental equipment can be tricky. No Illinois cases specify whether the last date for rental is the last date the equipment was used on the job or simply the last date the equipment was on the job.[13] Take the conservative approach and obtain the best information from your client on both of these dates. Assume that the court will find the last date of actual use to control. However, if 90 days have passed from the last date of actual use but not the last date the equipment was on the job, plead that date in your notice.

Special requirements for condominiums. If the property is a condominium, the amount of the lien may have to be allocated among the individual units. First, calculate the value of the work done on each individual unit.

Second, determine the value of the work on the common elements. This lien amount must be allocated to the individual units based upon their percentage interests in the common elements. (This information should be available from the declaration of condominium). The value of the work done on an individual unit plus the unit's pro-rata share of the value of the work on the common elements is the amount allocated to the individual unit.

Third, state a last date of work for each unit, since mixing stale liens with good liens will avoid all the liens.[14] However, if work is performed only on the common elements, it will have one last date of work.[15]

Information from the public records

You will need to search the recorder's records to (1) obtain a legal description of the property, (2) determine who is the owner of record, and (3) determine who are the lenders who have recorded mortgages that are not released. If the property is a condominium development, you will also need the names of all of the owners of the individual units.

In Cook County. In Cook County, if you have an address, you can search the assessor's records and usually obtain the P.I.N. (Permanent Index Number) for the property. Using this information, you can search the recorder's records and obtain an online tract search. This usually gives information about recorded documents affecting the property, including deeds and mortgages. You can then order copies of these documents and obtain the legal description for the property, the identity of the owner of record, and the identity of mortgagees of unreleased mortgages.

Sometimes the assessor's records will not have an entry for the particular address. This can happen for several reasons. One is that the address the assessor uses is different from the one commonly used. Another, in the case of new construction, is that the property has been divided for tax purposes and separate addresses and/or PIN numbers are now given to the pieces. However, the recorder of deeds has a map department that can help you locate the PIN for property when it cannot be easily obtained from the assessor's online records.

Another way of accessing title information in Cook County is by typing in the name or part of the name of the party you believe is or was the owner of record. In new developments, the property owner is often a limited liability company who is also the developer, and its name is often disclosed either in your client's contract, the plans, or the payout documents.

In other counties. Most county recorders have a digital online system that gives you some access to title records. These vary greatly, as do charges for using them. Most allow you to get title information based on PIN numbers. You can usually obtain the PIN numbers from township assessors or the applicable building department and use the PIN to access the county recorder's title records. Some systems allow you to obtain information if you know the lender or a former owner.

Tract searches from title companies and services of other private entities. A common approach is to hire the services of a title company to either do a tract search or provide minutes of foreclosure for a mechanics lien. Minutes of foreclosure are expensive, but should be considered if the claim is large. The tract searches of title companies and other commercial companies that provide similar services are not always accurate. If they make a mistake, the lien may not only be invalid, but as the attorney who employed the company, you may be responsible for their errors if a court finds either that the title searcher was your agent or that you were guilty of negligent misrepresentation in recommending it to your client.

The liability of a title company for a tract search is usually limited to a certain dollar amount. If you get information from a title company or other third party, make some effort to check its accuracy.

Addresses of owners and mortgagees. Once you have the names of the owner of record, the architect, the construction manager or superintendent, and the mortgagees whose mortgages have not been released, you need to verify their addresses. In the case of corporations, limited liability companies, and limited partnerships, you should first check the secretary of state's business record files. You can generally find owners and architects that way. But in addition, and especially for lenders, check the Internet for their addresses.

After that, call and verify that they are actually at the address your research indicates. You won't need the addresses of individual condominium owners because

11. For a discussion of what kind of evidence can be used to prove delivery, *see* Mechanics Liens in Illinois, § 9.11, Ill. Inst. For Cont. Legal Educ. (2010).

12. *P.H. Broughton & Sons, Inc. v. Muller & Allen Realty Co.*, 40 Ill.App.3d 776, 353 N.E.2d 30 (4th Dist. 1976); *Cyclonaire Corp. v. ISG Riverdale, Inc.*, 378 Ill.App.3d 554, 561, 882 N.E.2d 684, 690 (1st Dist. 2007).

13. 770 ILCS 60/1.2

14. *First Federal Savings & Loan Ass'n,* 97 Ill.2d at 249, 454 N.E.2d at 318-319.

15. *Argonne Constr. Co. v. Moore*, 29 B.R. 731, 732 (N.D. Ill. 1983).

you can serve them through their condominium association.[16]

Preparing notices under sections 24, 21, and 5

Any of three types of notices may be required to preserve and perfect a mechanics lien claim.

A subcontractor is required to serve a notice of claim for lien under section 24[17] of the Act unless his contractor has properly listed him on a sworn statement given to the owner under section 5 of the Act.[18] Unless you have proof positive that such a sworn statement has been given to the owner correctly stating your client's name and address, trade, contract amount, and amount owed, you should assume that a sworn statement has not been given.

You should serve a section 24 notice within 90 days after the subcontractor's last day of work on the owner of record and on each mortgagee of an unreleased mortgage. To the extent that the owner pays out pursuant to a valid sworn statement and supporting waivers, the owner is protected from any liens.[19] So the earlier you send a section 24 notice, the more likely you alert the owner and mortgage company before a crucial payment is made and that your lien will be valid.

If the property is an owner-occupied single-family residence, the subcontractor may also be required to serve notices on the occupant under sections 5 and 21 of the Act. The notices must be served within 60 days after the subcontractor first furnishes work labor or material. But if one of these notices is not served and the subcontractor serves a section 24 notice, the lien is valid to the extent the owner-occupant has not been prejudiced by payments made before he or she received the notice.[20]

Preparing and serving the section 24 90-day notice. Section 24 has a statutory form of notice. The statutory form does not have to be used, but it is a safe harbor. The section 24[21] form is as follows:

> To (name of owner): You are hereby notified that I have been employed by (the name of contractor) to (state here what was the contract or what was done, or to be done, or what the claim is for) under his or her contract with you, on your property at (here give substantial description of the property) and that there was due to me, or is to become due (as the case may be) therefor, the sum of $.....
>
> Dated at ..... this ..... day of ....., ...
>
> (Signature).....

The notice must be served upon the "owner of record or his agent or architect, or the superintendent having charge of the building or improvement and to the lending agency, if known…." Because it is sometimes not easy to serve the "owner of record" it is a good practice to also serve the architect and the superintendent. The courts have held that if a mortgage is recorded, the mortgagee is the lending agency and should be served.

The "owner of record" is the one who owns the property when the notice is served[22] and not necessarily the owner when the contract for improvement was made. In the case of a condominium development, the condo owners are all "owners of record." They should be listed in the notice by name individually, but the notice may be served upon the condominium association, which is then required to send a copy of the notice to each condo owner within seven days.[23]

The statute says that the notice may be served "by registered or certified mail, with return receipt requested, and delivery limited to addressee only, to or personally served."[24] Unfortunately the post office does not provide for "delivery limited to addressee only," but does allow "restricted delivery" if you name a person. Thus when serving a corporation or land trustee, the notice must name and must be served on a representative of the corporation.

Service by "restricted delivery, return receipt requested" is sufficient according to the applicable case law, as long as the notice is actually served.[25] Actual proof from the Postal Service of mailing and receipt of the notice by the party to whom it is addressed may be required if the party to be served denies receipt of the notice.[26]

The statute also states, "For purposes of this Section, notice by registered or certified mail is considered served at the time of its mailing."[27] Because notice by registered or certified mail is served at the time of mailing, you should send the notices by registered or certified mail, and also serve personally if possible. Since architects usually have business offices, it is sometimes easier to serve them than the owners of record. When sending out notices, the best practice is to serve anyone and everyone who could possibly be a lawful recipient of such a notice.

If you do not have the real estate description, use the common address description. While it might be a little risky, there are cases that authorize common descriptions in section 24 notices.[28]

While the statute does not specifically require it, you should include the allocation of the amount among condominium units as an attachment to the section 24 notice. Although section 24's requirements tend to be construed liberally, it is still wise to strictly follow its provisions in preparing and serving a section 24 notice.

If you learn within the 90-day period that any statement in your section 24 notice needs to be corrected (i.e. identity of any party, the legal description, the date of the contract and the last date of work), prepare and send out an amended notice in the same manner as the original.

Preparing notices to the owner occupant under section 21 and section 5. Section 21 of the Act requires subcontractors to give notice to the occupant of an owner-occupied single-family dwelling within 60 days after the subcontractor first starts performing work or furnishing materials. The statute requires that the notice state (1) the name and address of the subcontractor (2) the date he or she started working or delivering materials (3) the type of work done or to be done, or the type of materials delivered or to be delivered, and (4) the name of the contractor requesting the work.[29] The notice must also contain the following warning in at least 10-point bold type.

> **NOTICE TO OWNER**
>
> **The subcontractor providing this notice has performed work for or delivered material to your home improvement contractor. These services or materials are being used in the improvements to your residence and entitle the subcontractor to file a lien against your residence if the services or materials are not paid for by your home**

16. 765 ILCS 605/18.4(r).
17. 770 ILCS 60/24.
18. 770 ILCS 60/5.
19. 770 ILCS 60/27; *Sanaghan v. Lawndale National Bank*, 90 Ill.App.2d 254, 264, 232 N.E.2d 546, 551 (1st Dist. 1967).
20. 770 ILCS 60/5; 770 ILCS 60/21.
21. 770 ILCS 60/24.
22. *Edward Electric Co. v. Automation, Inc.*, 164 Ill.App.3d 547, 551, 518 N.E.2d 172, 175 (1st Dist. 1987).
23. 765 ILCS 605/18.4(r).
24. 770 ILCS 60/24.
25. *Watson v. Auburn Iron Works, Inc.*, 23 Ill.App.3d 265, 272, 318 N.E.2d 508, 513-14 (2d Dist. 1974).
26. *National City Mortg. v. Hillside Lumber, Inc.*, 2012 IL App (2d) 101292, 966 N.E.2d 1076.
27. 770 ILCS 60/24.
28. *Weil v. Bomash*, 237 Ill.App. at 548; *c.f. Nelson v. Urban*, 236 Ill.App. 447, 456 (1st Dist. 1925).
29. 770 ILCS 60/21.

improvement contractor. A lien waiver will be provided to your contractor when the subcontractor is paid, and you are urged to request this waiver from your contractor when paying for your home improvements.[30]

The notice must be served either personally or by certified mail, return receipt requested upon the occupant or the occupant's agent. Notice by certified mail is considered served when mailed.

This provision has been generally construed strictly against the homeowner. If the notice is not served, the lien is invalid only to the extent the owner has been prejudiced by payments it made to the contractor before receiving a notice of lien.[31] While not exactly on point, one case has held that where the owner has moved into a hotel so the work could be done, the property is not "owner-occupied"[32] so a notice might not have to be served under these circumstances. The form of notice requirements have been construed liberally in favor of the subcontractor.[33]

Section 5 of the Act requires the prime contractor, to provide a similar but more detailed notice to the owner occupant. Section 5 requires the following statements in the notice:

"THE LAW REQUIRES THAT THE CONTRACTOR SHALL SUBMIT A SWORN STATEMENT OF PERSONS FURNISHING LABOR, SERVICES, MATERIAL, FIXTURES, APPARATUS OR MACHINERY, FORMS OR FORM WORK BEFORE ANY PAYMENTS ARE REQUIRED TO BE MADE TO THE CONTRACTOR."[34]

However, here again failure to provide the notice has been held not to invalidate the lien but to protect the owner to the extent it has been prejudiced by the notice not being served.[35] Usually by the time the matter is turned over to an attorney to enforce, it is too late to serve either the notice required by section 5 or the notice required by section 21.

Conclusion

Perfecting mechanics lien requires care and attention. While part of the work can be done by paralegals, ultimate responsibility rests with you. Treat each filing accordingly. ■

30. *Id.*
31. *Crawford Supply Co. v. Schwartz*, 396 Ill.App.3d 111,120, 919 N.E.2d 5, 12 (1st Dist. 2009).
32. *Pittman v. Manion*, 212 Ill.App.3d 342, 347-348, 570 N.E.2d 1169, 1173 (5th Dist. 1991).
33. *A.Y. McDonald Manufacturing*, 225 Ill.App.3d at 855-56, 587 N.E.2d at 626-27.
34. 770 ILCS 60/5(b)(ii).
35. *Crawford Supply,* 396 Ill.App.3d at 123, 919 N.E.2d at 14-15.

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