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Illinois Legislative Watch: Bonding of Liens and the (Possible) Demise of Independent Counsel

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Construction at Much

Of the many statutory changes that circulated around Springfield this year, two are of particular interest. The first legislative change of note — which was passed by both houses of the ***99th Illinois General Assembly*** on May 31, 2015, and is awaiting the governor's signature — adds to the ***Illinois Mechanics Lien Statute*** (the Act) a section on lien bonds related to liens on private property. A vast majority of the states already have statutes that govern the use of a bond to replace the real property as security for the lien. Illinois, however, is one of only a few states that, until now, did not.

The legislation is intended to streamline mechanics lien disputes by minimizing the number of parties involved in the dispute, including eliminating lenders and the priority disputes that tend to delay and complicate these matters. The lien bond statute delineates the parameters of the company that can provide a bond, thus helping to protect the lien claimant from the possibility that the bonding company will not be able to satisfy its obligations. The lien bond statute also provides that the lien bond shall be posted for 175% of the value of the lien.

While the legislation was not intended to change any other aspects of the Act, a compromise inserted an attorneys' fee provision that owners will want to consider before they decide to proceed with a bond.

The second legislative change, which as of this writing is still at the proposal stage, involves what is commonly referred to as "Peppers Counsel." In 1976, in ***Maryland Cas. Co. v. Peppers*****,** 355 N.E.2d 24, the Illinois Supreme Court recognized that when a conflict of interest arises between an insurer and its insured, the insured is entitled to choose its own attorney. As a result, when the insurer accepts coverage of a claim under a reservation of rights, the insured is not required to accept the lawyer assigned by the insurer. Instead, the insured can choose its own lawyer and the insurer is still obligated to pay for the cost of defending the insured. Moreover, if the insurer accepts coverage of any part of the lawsuit, the insurer is required to defend all claims in the lawsuit.

SB1296, however, seeks to change these rights. In defining what constitutes a conflict of interest, the new legislation appears to carve out responsibility for defending claims for which coverage is denied (i.e., eliminating their obligation to defend all claims when any part of the lawsuit is covered). The would-be revised definitions also create significant ambiguity in what creates the conflict that gives rise to the insured's right to choose its own counsel (i.e., the proposed statute provides that the mere

issuance of a reservation of rights is not a “significant and actual conflict of interest”).

Moreover, if a conflict arises that triggers the insured’s right to independent counsel, the insurer is provided the right to provide the insured with a list of three attorneys who are independent from the insurer’s approved law firm panel, and the insured must choose its “independent counsel” from that list of three provided by the insurer.

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