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A Need for Statutory Control of Mechanics' Lien Waivers in Illinois

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NOTES AND COMMENTS

A NEED FOR STATUTORY CONTROL OF MECHANICS' LIEN WAIVERS IN ILLINOIS

The construction industry has not been a static segment of the business world. It has progressed in terms of technology and financing. The financial relationship between the subcontractor, the general contractor and the owner has undergone significant changes in recent years. These changes have modified the traditional financial relationship between these parties. The traditional financial relationship consists of the subcontractor looking to the general contractor for payment and the general contractor making such payment from his own funds. The general contractor, in turn, looks to the owner for payment and the owner makes such payment from his resources.

During recent years the traditional financial relationship of these parties has become increasingly more difficult to maintain. This is primarily due to the difficulty encountered by the general contractor in having sufficiently large sums of money available to pay the subcontractor. The general contractor has found himself in the position of having to borrow large sums of money in order to make payments to the subcontractor. Such borrowing entails significant expense for the general contractor. Many general contractors attempt to conduct their businesses without taking out construction loans which would provide funds for such payments. While in such a situation, the general contractor is undercapitalized in the sense that he is unable to meet his financial obligations. The result of eliminating the general contractor's fund is to leave only one source from which both the general contractor and the subcontractor can be paid—the owner's resources. In such a modified financial relationship, a flow of money from the owner to the general contractor and then to the subcontractor is a necessity if both are to be paid according to their respective contracts.

While the financial relationship between the parties has undergone change, the legal relationship between the same parties has remained unchanged. The legal relationship between the general contractor and the subcontractor is controlled by the subcontract. The legal relationship between the general contractor and the owner is controlled by the general contract. Such contractual relationships create no rights and liabilities between the owner and the subcontractor. These two parties often remain strangers and often do not communicate with one another. By virtue of mechanics' lien laws, however, a legal relationship is created between the owner and the subcontractor. The mechanics' lien laws create a right in the subcontractor to proceed against the property or funds of the owner in order to receive payment due on the subcontract.

The mechanics' lien laws have given the subcontractor an effective means of compelling payment. The owner is faced with the possibility of having his property sold in order to satisfy a foreclosed mechanics' lien. It is natural that

the owner would respect the effectiveness of the mechanics' lien laws and would take every precaution to insure that such liens were not placed upon his property or funds and, if they should be, that the liens are not foreclosed. The owner is not necessarily protected by simply making payments to the general contractor as they become due. The owner's property and funds may still be subject to the subcontractor's mechanics' lien. For this reason, the owner usually demands that the general contractor present lien waivers from the subcontractor at the time payment is made to the general contractor.

When the traditional financial relationship exists between the three parties, the owner is justified in demanding lien waivers from the subcontractor. This justification is based upon the premise that the subcontractor has been paid by the general contractor prior to the time payment is sought by the general contractor. The custom of demanding and receiving lien waivers became established during the time when the traditional financial relationship was the only existing relationship.[1]

However, when the general contractor began to undercapitalize, conflicts arose among the parties. Because the general contractor could not pay the subcontractor, the subcontractor was hesitant to execute a lien waiver. If the subcontractor refuses to execute a lien waiver, then the flow of money from the owner will not begin. It is often the case, however, that the subcontractor is persuaded by the general contractor to execute a lien waiver in order to induce the owner to start the flow of money. Such persuasion is based upon the economic position of the subcontractor; he cannot pay his own bills without money and he depends upon the general contractor for the contracts to sustain his business.

Once the subcontractor has executed a lien waiver, the flow of money can begin. However, as the cases to be discussed indicate, the flow of money from the owner does not always run its entire course. For reasons of insolvency,

[1] It is customary in Illinois to use a standard form of lien waiver. Several forms are available but these forms do not differ in substance. The form and substance of these standard forms are as follows:

TO WHOM IT MAY CONCERN:

WHEREAS, the undersigned has been employed by _____ to furnish _____ for the premises owned by _____ and known as _____ and legally described as _____.

THEREFORE, the undersigned for and in consideration of $_____, and other good and valuable consideration, the receipt whereof is hereby acknowledged, does hereby waive and release any and all lien or claim of lien under the statutes of the State of Illinois relating to mechanics' liens on the above described premises and improvements thereon and on the moneys or other considerations due or to become due from the owner, on account of labor or services or materials heretofore furnished, or which may be furnished hereafter by the undersigned for the above described premises.

Dated this _____ day of _____, 19__.

_____ (SEAL)

See George E. Cole Legal Forms, No. 363P (Complete Waiver), No. 364P (Partial Waiver); Chicago Title and Trust Company Form 1550 (Final Waiver).

higher priorities or simple dishonesty, the flow of money often ends with the general contractor. The subcontractor remains unpaid. In order to obtain the payment due him, the subcontractor will either sue the general contractor on the subcontract or will proceed in accordance with the mechanics' lien law.

In the latter event, the success of the subcontractor's suit depends upon his ability to prove that he is entitled to a mechanics' lien upon the owner's property or funds. The legal effect of the lien waiver executed by the subcontractor is the crux of the suit. The arguments put forth by the subcontractor and the owner in this proceeding have become stereotyped. The subcontractor argues that the lien waiver is a contract and that the validity of the waiver is dependent upon the principles of contract law. The subcontractor argues that, as a contract, the waiver must be supported by a consideration.[2] He then points out that because he has not been paid there is a lack or failure of consideration.

The owner does not view the lien waiver as a contract. He argues that the subcontractor has voluntarily executed a document purporting to be a waiver of a mechanics' lien and that he has a right to rely upon the document as being valid. The owner then argues that he has relied upon the document in making payment to the general contractor. For this reason, the owner argues that the subcontractor is estopped to deny that he had in fact waived his right to a mechanics' lien.[3]

Both the subcontractor and the owner are able to present Illinois case law which supports their respective arguments. For the purposes of discussion, it is convenient to separate the case law on this subject into two broad categories: the contractual point of view and the estoppel point of view.

The Contractual Point of View

The two leading cases in Illinois which tend to support the subcontractor's contention that a lien waiver is a contract requiring consideration are *Kelly v. Johnson*[4] and *Duncanson v. Chicago Title and Trust Company*.[5] In *Kelly*, a subcontractor challenged the constitutionality of the Illinois Mechanics' Lien Act then in force on the grounds that a section of the statute permitted a general contractor and owner to agree in the general construction contract that no mechanics' liens would be assessed against the owner's property or funds. The statute provided that a general contract could validly express such a lien waiver

[2] For a discussion concerning the need for consideration to support a mechanics' lien waiver, see Kratovil and Rohde, *Mechanics' Lien Waivers and the Requirement of Consideration*, 14 DePaul L. Rev. 243 (1965).

[3] In Illinois, all subcontractor's suits brought under the Mechanics' Lien Act must be brought against both the general contractor and the owner. In suits involving the legal effect of a lien waiver, the general contractor generally remains silent and the owner is the only active defendant. *See*, Ill. Rev. Stat. ch. 82, § 28 (1969).

[4] Kelly v. Johnson, 251 Ill. 135, 95 N.E. 1068 (1911).

[5] Duncanson v. Chicago Title and Trust Company, 188 Ill. App. 551 (1st Dist. 1914), *sub nom* Chapman v. Richey.

which would be binding upon the subcontractors. The Illinois Supreme Court held that, as applied to the facts in the *Kelly* case, the statute was unconstitutional in that the general contractor and the owner had attempted to modify the original general contract by a lien waiver after the subcontractors had entered into the subcontracts. The court held that the modifying agreement was fully effective to waive the mechanics' lien rights of those subcontractors who entered subcontracts after the execution of the waiver agreement and had knowledge of the agreement. As to those who entered subcontracts prior to the waiver agreement, their right to liens was not affected. In discussing the right of the general contractor and the owner to modify their original contract, the court said:

> Clearly, if a lien can be waived in the original contract it can be subsequently waived, for a valuable consideration, as between the original parties. The right to modify a contract as between the original parties, so long as there are no intervening rights, involves the exercise of the same power as does the execution of the original contract.[6]

The *Kelly* case has been viewed by some as standing for the proposition that all mechanics' lien waivers must be supported by a valuable consideration.[7] Such an interpretation appears to extend the logic of the decision beyond recognition. The court simply stated that the parties to an original contract can agree to modify the terms of that original contract and that, in order for the modifying agreement to be binding, it must be supported by a consideration.

In the *Duncanson* case, the Illinois appellate court was called upon to decide whether certain lien waivers contained in receipts signed by the lien claimants were valid. The claimants were contractors who had contracted directly with the owner for the improvements on the owner's property. In this case, the court took the point of view that the lien waivers were agreements between the parties and, therefore, had to be supported by consideration in order to be binding as upon the parties. It appears that the court considered the waivers as recitations that the construction contracts were fully performed and all payments required by the contracts had been made. The court held that because there had been no bona fide dispute as to the sums of money owed the claimants, the lien waivers were not supported by consideration and were, therefore, ineffective.[8]

When viewing mechanics' lien waivers as contracts, the fact that the document is sealed is of legal significance. An early case illustrating this point is *Dymond v. Bruhns*[9] wherein the Illinois Appellate Court held that lien claims by a general contractor and a subcontractor were effectively waived by a sealed lien waiver. The court stated that the presence of a seal upon the instrument

[6] 251 Ill. 135, 139, 95 N.E. 1068, 1070 (1911).
[7] *See* Kratovil and Rohde, *supra* note 2.
[8] 188 Ill. App. 551, 554 (1st Dist. 1914).
[9] 101 Ill. App. 425 (1st Dist. 1902).

precluded an attack of lack of consideration. The seal imported a consideration.[10]

The reasoning of the *Kelly*, *Duncanson* and *Dymond* cases were solidified into an apparently enduring rule of law in *H. G. Wolff Co. v. Gwynne*.[11] In this case, a subcontractor challenged the effectiveness of a lien waiver executed by him. The subcontractor argued that he had received only partial payment and that notwithstanding the presence of a seal, there was a want of consideration so as to render the lien waiver ineffective. The Master in Chancery and the trial court agreed with the claimant's argument but the appellate court reversed. In so reversing, the court rested its decision solely upon the presence of the seal. The court did not express an opinion as to whether or not consideration was necessary for a valid lien waiver. It merely stated that a lien waiver could not be challenged for want of consideration when the lien waiver was a sealed document. In summary, the court said:

> Where, therefore, one solemnly declared by a document under his hand and seal that he waives his right to a particular form of remedy, offered by the lien statute, he is not entitled to repudiate it on the ground that he was given no consideration therefor.[12]

Since being rendered in 1927, the *Wolff Co.* decision has remained the law in Illinois and has been expressly approved as recently as 1969.[13] In 1951, one author wrote:

> Since the decision in *Wolff Co. v. Gwynne*, it seems settled that a waiver under seal cannot be challenged for lack of consideration even as between the parties thereto, and even though the lien claimant has received less than the amount due him, as to which there is no bona fide dispute.[14]

The significance of the seal is manifest in lien waiver controversies. It is the presence of the seal which precludes a resolution of the case on the issue of consideration. However, in a case involving an unsealed lien waiver, as in the *Duncanson* case, it would seem proper to raise the issue of lack or failure of consideration. No recent cases involving unsealed lien waivers have been reported. This is no doubt due to the common use of the standardized mechanics' lien waiver forms.

In 1951, the Illinois General Assembly enacted a statute which abolished the use of private seals.[15] The statute has had no effect, however, upon the

10 *Id.* at 429.

11 246 Ill. App. 86 (1st Dist. 1927).

12 *Id.* at 91.

13 Capital Plumbing & Heating Supply Co. v. Snyder, 104 Ill. App. 2d 431, 244 N.E.2d 856 (4th Dist. 1969).

14 LOVE, ILLINOIS MECHANICS' LIENS, ¶ 176 (2d ed. 1951).

15 The use of private seals on written contracts, deeds, mortgages or any other written instruments or documents heretofore required by law to be sealed, is hereby abolished, but the addition of a private seal to any such instrument or document

common practice of including private seals upon the various forms of legal documents. Such is the case with lien waivers. The statute has not been construed, as yet, on its own merit although references have been made to it by the Illinois courts. It may well have been this statute which compelled the rewording of the *Wolff Co.* decision in the recent case of *Capital Plumbing & Heating Supply Co. v. Snyder.*[16] In this case, the court paraphrased the *Wolff Co.* decision as follows: "It [the *Wolff Co.* case] held that one is not entitled to repudiate a lien waiver on the ground of inadequate consideration."[17] The fact that the court did not make reference to a seal may be significant. If the holding in the *Capital Plumbing* case is strictly adhered to in subsequent Illinois decisions, it would seem that the courts would be recognizing that a lien waiver has a contractual aspect but that the issue of consideration cannot be raised regardless of the fact that the lien waiver is sealed or not.

There are other characteristics of a lien waiver which are recognized and enforced as though the waiver were a contract. As in the case of contracts, the executed document is held to be a manifestation of the intent of the parties signing the document. For this reason, the courts look to the terms of the document, in this case a lien waiver, to determine the intent of the parties. Thus, if a lien waiver is valid, it will be binding according to its terms.[18] If the terms of the waiver indicate that the waiver is being executed for a particular purpose only or that the waiver is intended to be less than absolute and is to be operative only if certain conditions are fulfilled,[19] the courts will enforce the waiver in accordance with such expressed intentions.[20]

The Estoppel Point of View

There are various forms of conduct which have been held to be sufficient to estop a mechanics' lien claimant from denying that he has acted in a manner

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shall not in any manner affect its force, validity or character, or in any way change the construction thereof.

Ill. Rev. Stat. ch. 30, § 153b (1969).

For a discussion of the legal effect of the presence of a seal on a document prior to the 1951 statute see Comment, 1949 Ill. L.F. 115. For discussions of the effect of the statute itself see Note, 1954 Ill. L.F. 113 and Grigsby, *Private Seals Abolished,* 40 Ill. B.J. 383 (1952). It appears, by the better reasoning, that the effect of the statute will not be to abolish the actual use of private seals nor to abolish the legal effect of using a seal. The statute provides that documents which, prior to 1951, required a seal to be operative no longer require a seal in order to be operative. A strict construction of the terms of the statute seems appropriate.

[16] 104 Ill. App. 2d 431, 244 N.E.2d 856 (4th Dist. 1969).

[17] 104 Ill. App. 2d 431, 439, 244 N.E.2d 856, 860 (4th Dist. 1969).

[18] Decatur Lumber Co. v. Crail, 350 Ill. 319, 183 N.E. 228 (1932); G. Chicoine v. John Marshall Bldg. Corp., 77 Ill. App. 2d 437, 222 N.E.2d 712 (2d Dist. 1966); Northbrook Supply Co. v. Thumm Const. Co., 39 Ill. App. 2d 267, 188 N.E.2d 388 (2d Dist. 1963); Dymond v. Bruhns, 101 Ill. App. 425 (1st Dist. 1902).

[19] Stolze Lumber Co. v. Oglesby, 266 Ill. App. 569 (4th Dist. 1932). *See* Salomon-Waterton Co. v. Union Asbestos & Rubber Co., 263 Ill. App. 583 (1st Dist. 1931).

[20] Decatur Lumber Co. v. Crail, 350 Ill. 319, 183 N.E. 228 (1932).

inconsistent with an existing right to a mechanics' lien.[21] Here, we are concerned with the legal effect of an executed lien waiver, not as a contract but rather as a course of conduct. It is the act of executing the lien waiver and delivering it to some third party on which we focus our attention.

In discussing this aspect of a lien waiver, it is necessary to keep in mind that one party, the subcontractor, has acted in a manner as to represent to third parties that he has a particular intent with regard to his right to a mechanics' lien. The lien waiver is a representation of the fact that certain money or other consideration has been received and that the waivor will not attempt to exercise any rights conferred by the mechanics' lien statute against certain property or funds.[22]

> By custom it is generally intended to notify all persons interested in the premises or in the moneys due under a construction contract that they may safely proceed without fear of lien claim from the particular contractor to the extent of the waiver.[23]

Thus, if an owner relies to his detriment upon a lien waiver, the subcontractor can be estopped from denying the truth of the representations contained within the waiver.[24]

Any detrimental reliance or change of position occasioned by a lien waiver must be justified by reason of its terms. The terms of the waiver will be strictly construed and any ambiguity will be resolved against the waivor.[25] As mentioned above, if any special purpose, limitation or condition is expressed in the waiver, such qualifications will be given effect. Thus, it has been held that a party executing what purports to be an absolute, unqualified waiver of mechanics' lien should not be heard to say that it was not intended to be a waiver but merely an inducement for payment of money from the owner.[26] The legal effect of an express lien waiver by way of estoppel is evident.

The right to a mechanics' lien is not the only right which can be extinguished by executing a lien waiver. Another right which may be jeopardized through estoppel is that of proceeding against the surety on a performance bond. Most of the cases involving a performance bond concern mandatory bonds which are executed when public contracts are involved. However, the the reasoning expressed in such cases is equally applicable to private contract cases.

By statute in Illinois, the mandatory performance bond will be deemed to

21 57 C.J.S. *Mechanics' Liens*, § 230 (1948).

22 Bowers v. Jarrel, 201 Ill. App. 256 (1st Dist. 1918).

23 Capital Plumbing & Heating Supply Co. v. Snyder, 104 Ill. App. 2d 431, 438, 244 N.E.2d 856, 860 (4th Dist. 1969).

24 104 Ill. App. 2d 431, 244 N.E.2d 856 (4th Dist. 1969).

25 *See* Decatur Lumber Co. v. Crail, 350 Ill. 319, 183 N.E. 228 (1932).

26 P.A. Lord Lumber Co. v. Callahan, 181 Ill. App. 323 (1st Dist. 1913).

provide that the principal (the general contractor) will faithfully perform the contract with the public organization and that all moneys due persons under contracts with the principal will be paid. A right to sue on the bond is also granted to persons having contracts with the principal.[27] When the principal construction contract involved is with the state or a political subdivision thereof, a subcontractor has a right to a mechanics' lien on the public funds allocated for the construction project upon which he works.[28] The question now arises whether or not a lien waiver as to the funds will have any effect upon the statutory right to proceed against the surety on the performance bond when in fact the subcontractor has not been paid. The Illinois courts have consistently held that the lien waiver not only extinguished the right to a mechanics' lien but that the waiver also extinguished the right to proceed against the surety.[29]

The reasoning of the court decisions in this area is best exemplified by two recent cases; *Board of Education v. Hartford Acc. & Ins. Co.*[30] and *Chicago Bridge & Iron Company v. Reliance Ins. Co.*[31] In the *Board of Education* case, the court said:

> [B]y reason of the relationship of the parties here as surety and assured, [the surety] had a right exercisable at any time, to pay plaintiff's claim and to be subrogated thereby to its rights of lien against public moneys in the hands of the School District. By extinguishing this right through the delivery of partial waivers certifying payment, which induced the release of public moneys, as the plaintiff intended, plaintiff is estopped by its own conduct, pro tanto, from recovering against [the surety].[32]

In the *Chicago Bridge* case, the court was confronted with essentially the same factual situation as found in the *Board of Education* case and followed the reasoning of that case while quoting with approval the above excerpt. Both of these cases rest upon the principle that an assured who voluntarily gives up a security for his debt thereby releases the surety from its liability on the bond and is estopped from any action against the surety. By such conduct, the surety has been prejudiced in that it no longer has a right to a mechanics' lien to which it could be subrogated in order to recover the moneys paid to the assured or the moneys it had a right to pay the assured at any time.[33]

Reference To Lien Waivers In The Illinois Mechanics' Lien Act[34]

The Illinois Mechanics' Lien Act refers to lien waivers in sections 1, 21, and 21.01. Section 1 provides in part:

[27] Ill. Rev. Stat. ch. 29, §§ 15-16 (1969).
[28] Ill. Rev. Stat. ch. 82, § 21 (1969).
[29] *See, e.g.*, Alexander Lumber Co. v. Aetna Co., 296 Ill. 500 (1921).
[30] 60 Ill. App. 2d 320, 208 N.E.2d 51 (3d Dist. 1965).
[31] 105 Ill. App. 2d 91, 245 N.E.2d 127 (1st Dist. 1969).
[32] 60 Ill. App. 2d 320, 324, 208 N.E.2d 51, 54 (3d Dist. 1965).
[33] 50 Am. Jur. *Suretyship* § 109 (1944).
[34] Ill. Rev. Stat. ch. 82, §§ 1-39 (1969).

> The taking of additional security by the contractor or sub-contractor is not a waiver of any right of lien which he may have by virtue of this Act, unless made a waiver by express agreement of the parties.[35]

This provision reflects both the contractual and estoppel points of view of a lien waiver. It recognizes that an agreement can be made between parties whereby the right to a lien is waived. This provision also recognizes that the taking of security could be considered sufficient grounds to hold that a party is estopped to deny that the taking of security was a waiver of his right to a mechanics' lien. The taking of additional security by a contractor had been held by the Illinois courts to amount to a waiver of the right to a mechanics' lien.[36] Section 1 expressly overrules such case law.

Section 21 of the Act provides in part:

> If the legal effect of any contract between the owner and contractor is that no lien or claim may be filed or maintained by any one, such provision shall be binding; but the only admissible evidence thereof as against a sub-contractor or material man, shall be proof of actual notice thereof to him before any labor or material is furnished by him; or proof that a duly written and signed stipulation or agreement to that effect has been filed in the office of the recorder of deeds of the county or counties where the house, building or other improvement is situated, prior to the commencement of the work. . . .[37]

This provision views the lien waiver as a contract. The waiver is contractual as between the owner and the general contractor. When the subcontractor has notice of the waiver and then proceeds to furnish labor, he has, in a sense, become a party to the initial lien waiver. The notice requirement is intended to protect the subcontractor from secret waivers between the owner and the general contractor. This provision is not unconstitutional by virtue of the *Kelly* case. It was the lack of such a notice requirement in the 1911 Mechanics' Lien Act which formed the basis of the *Kelly* decision.[38]

Section 21.01 of the Act provides in part:

> Any contractor, or if the contractor is a corporation any officer or employee thereof, who with intent to defraud induces a sub-contractor, as defined in Section 21, to execute and deliver a waiver of lien for the purpose of enabling the contractor to obtain final payment under his contract and upon the representation that the contractor will, from such final payment, pay the subcontractor, and who willfully fails to pay the subcontractor in full within 30 days after such final payment shall be fined not less than $200 nor more than $5,000, or imprisoned in a penal institution other than the penitentiary not less than 60 days nor more than one year, or be imprisoned in the penitentiary for not

[35] Ill. Rev. Stat. ch. 82, § 1 (1969).

[36] *See* Cosgrove v. Farwell, 114 Ill. App. 491 (1st Dist. 1904); Davidson, The Mechanics' Lien Law Of Illinois, ¶ 236 (1922).

[37] Ill. Rev. Stat. ch. 82, § 21 (1969).

[38] 251 Ill. 135, 95 N.E. 1068 (1911).

> less than one year nor more than 2 years or both so fined and imprisoned.[39]

This section indicates that the General Assembly was aware that lien waivers were being executed as inducements for payment. However, the legislature chose to make provision only for such waivers as were executed as the result of fraud and were executed to induce final payment. The fact that the legislature provided severe penalties for such fraudulent conduct indicates that it appreciated the fact that the subcontractor is stripped of his rights granted under the Act by executing the lien waiver.

Summary Of Present Illinois Law

The Illinois Mechanics' Lien Act does not provide a basis upon which cases involving the legal effect of mechanics' lien waivers can be resolved except in very few restricted situations. The Act has no provision directly applicable to the situation discussed herein. It appears that the Illinois courts, in resolving the cases which are not directly governed by the Act, will first determine if the rights and interests of third parties have been adversely affected by reliance upon the executed lien waiver. If such reliance is present, the courts decide the controversy upon the theory of estoppel. If no detrimental reliance is present, the courts will then determine if the lien waiver is sealed. If the waiver is sealed, then any issue as to consideration cannot be raised. If the waiver is not sealed and no third party's rights and interests have been adversely affected, then it seems that the controversy may be decided by the principles of contract law.

Recommended Legislative Action

The subcontractor who executes a lien waiver as an inducement for payment after having diligently and in good faith fully performed his contract has found no relief within the framework of the Mechanics' Lien Act or from the Illinois courts. The courts have based their decisions upon sound principles of law. However prone the courts may be to permit the subcontractor to retain his rights under the Mechanics' Lien Act, the theory of estoppel cannot be ignored. If the waivers were held to be void or of no effect, for whatever reason, the owner would be subjected to the possibility of having to pay twice for the construction. Such a result could not be tolerated.[40] On the other hand, it seems harsh to subject the subcontractor to the loss of valuable rights granted to him by the legislature because of the questionable conduct of the general contractor. One should not be too quick to criticize the subcontractor who has succumbed to the economic realities of his business. It would be difficult to rationalize permitting a subcontractor to lose what economic leverage he gains by virtue of the Mechanics'

[39] Ill. Rev. Stat. ch. 82, § 21.01 (1969).

[40] Payment in excess of the original contract price is strictly prohibited as a result of a mechanics' lien suit. Ill. Rev. Stat. ch. 82, § 21 (1969).

Lien Act simply because he has yielded to the economic pressures from which he was intended to be protected by the Act.

The Illinois General Assembly is presently studying the Mechanics' Lien Act in an effort to determine whether the Illinois law of mechanics' liens accurately reflects the current financial methods and transactions within the construction industry.[41] It is hoped that the General Assembly will modify the present Mechanics' Lien Act to take account of the modified financial relationship between the subcontractor, the general contractor and the owner.

It would seem advisable that legislation be enacted which would provide a procedure whereby the use of mechanics' lien waivers as inducement for payment would be controlled and thereby resolve the dilemma in which the subcontractor finds himself. A procedure could be incorporated which would utilize the duty placed upon the owner under Section 27 of the Act. Section 27 provides in part:

> 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 subcontractor, tradesman, materialmen, mechanic, or workman of whose claim he is notified, and shall pay over the same to the parties entitled thereto.[42]

By providing that a lien waiver executed as an inducement for payment from the owner would act as notice to the owner of the fact that the subcontractor has not been paid by the general contractor, the owner would then be under a duty to pay the money due the subcontractor directly to the subcontractor. Such a procedure would not unduly burden the owner nor give an undue advantage to the subcontractor. It would permit the parties to act in accordance with the economic realities of their respective positions.

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[41] By P.A. 76-798 app. Aug. 15, 1969, the Illinois General Assembly created a Mechanics' Lien Commission. This commission is charged with making a thorough examination and evaluation of the present Illinois law of mechanics' liens.

[42] Ill. Rev. Stat. ch. 82, § 27 (1969).