Here it is a new year, a new General Assembly, and new legislators from the 2012 elections. Unfortunately, we are still dealing with many of the same old issues, such as a state that is deeply in debt. It is uncertain when the pension and other issues causing our fiscal decline, will be discussed and resolved.

One thing is for certain, no matter what comes up in this Spring Session of the General Assembly, IMSCA will be on top of it, looking out for the interests of the subcontracting industry. For the last 45 years IMSCA has been the voice of our industry, working hard to protect our contractors. Our IMSCA staff is outstanding, and behind the leadership of our Executive Director Louie Giordano, we can rest assured that any legislative or regulatory issue having an impact on construction will be addressed.

Speaking of our staff, they are to be commended for the outstanding job they did with HB 3636, (overturning the Cypress Creek decision). Thank you to everyone who made legislative contacts on HB 3636, and especially to Jim Rohlfing for all the extra effort he put forth to make this happen. I am also happy to report HB 3636 was signed by Governor Quinn on February 11th and became effective immediately.

Mark your calendar now for the IMSCA Lobby Day on Tuesday, March 19th at the Statehouse Inn in Springfield. The day will include a special presentation on Illinois Pension Reform by State Representative Elaine Nekritz. Louie and Jessica will provide an update on current legislative issues that are important to the construction industry. We will then visit the Capitol to make contacts with our legislators and enlighten them on issues of importance to us. At the conclusion of Lobby Day, we will join with ICIC for a joint Legislative Reception at the Sangamo Club. Plan now to attend this event and make your voice heard.

As we move through this new legislative session, please keep attuned to what is happening at the Capitol. Louie and Jessica will identify issues that need our attention, and when they request that legislative contacts be made, please take the time to do so. This is your business, your livelihood, and your voice needs to be heard! The construction industry needs IMSCA now more than ever before. So, be aware, be active, be involved.

I wish all of you a safe, happy and prosperous 2013. In the coming year let us vow to work together as the great association we are, and move the Illinois construction industry ahead.
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Legislative Representation for over 2,000 Construction Employers
HB-3636: Reversing a Supreme Court ruling

On February 25, 2011, the Illinois Supreme Court issued a ruling, in LaSalle Bank, N.A. v. Cypress Creek that changed the priority of payments between lien claimants and lenders when a financially distressed property is sold at a foreclosure sale and there is not enough money to pay both. The Cypress Creek decision gave banks an ability to recover the vast majority of sale proceeds, and it significantly reduced the amount recoverable by mechanics lien claimants. Following that ruling, IMSCA led an effort to convince the Illinois legislature to pass HB-3636, a bill to amend Section 16 of the Mechanics Lien Act and restore mechanics lien rights that had existed since the 1840s. Against a well-financed opposition, HB-3636 passed the House and the Senate, and Governor Pat Quinn signed the bill into law on February 11, 2013, almost two years from the Illinois Supreme Court ruling.

A unique coalition leads to success

Louie Giordano, Executive Director of IMSCA commented that, in decades of representing subcontractors in Illinois, he had never witnessed a battle that had so completely united contractors, subcontractors, material suppliers, developers and unions to work together for the benefit of the entire industry. IMSCA presented testimony in support of the bill before the judiciary committees in both chambers and the banking industry presented counter testimony to oppose the measure at every turn. Ultimately, legislators were convinced that it simply wasn’t fair to expect contractors to finance the building of Illinois without affording them security that they would be paid for their work when they completed the project. To pass HB-3636, separate struggles occurred in the House and the Senate, first to explain a relatively obscure legal concept to busy legislators, and then to describe the damage done to the Illinois construction industry by the Cypress Creek decision. Material suppliers cautioned they would have to be paid in advance for materials if they weren’t protected by mechanics liens, which would stifle an already dormant construction industry. Contractors objected that banks would receive virtually all of the available funds leaving little or nothing for those who did the work and made the property more valuable. Subcontractors pointed out they had no ability to evaluate the credit worthiness of property owners, but banks, on the other hand, were well suited to judge the likelihood of a project’s success and obtain additional collateral and guarantees if a proposal was questionable. Union workers expressed their concern that if their employers were forced into bankruptcy, they weren’t going to get paid – they let their elected representatives know they didn’t want to be left standing in this game of musical chairs. Though bankers countered that they needed priority over lien claimants or they would be unwilling to lend money for construction, their argument was unconvincing because they had been giving construction loans for 150 years under the Mechanics Lien Act.

Legislative leadership to restore fairness in lien disputes

The bill obtained much needed help through the careful stewardship of two capable sponsors, Senator John Mulroe in the Senate and Representative Kelly Burke.
in the House. Both were readily conversant in the language of the bill, interviewed many contractors and tirelessly met with their colleagues to convince them that HB-3636 was good for the construction industry and the Illinois economy generally. Both were strong advocates in committee, on the telephone and on the floor when the bill came to a vote. They received strong support throughout the state from construction industry associations and their members. The bill finally squeaked out of the House with no votes to spare on January 7, 2013.

How HB-3636 benefits construction — effective immediately

The amendment to section 16 of the Mechanics Lien Act through the enactment of HB-3636 restores a balanced approach to dividing scarce sale proceeds between a bank and contractors who make property more valuable through their labor and materials. When there is a question as to how to allocate the funds from the sale of foreclosed property, the lenders (banks) are preferred to the extent of the value of the land and the lien claimants are preferred to the value of the improvements erected on the property. This means both lenders and lien claimants will often suffer when property is “under water”, but they will “share the pain,” rather than forcing lien claimants to bear the loss alone. This return to the prior law will encourage banks and lien claimants to work together to protect themselves against unscrupulous owners and ill-fated projects. Now, banks have more incentive to perform due diligence on a project before it begins and inspect job sites during the course of construction to prevent poorly planned projects that harm lenders and lien claimants. Lien claimants can do their part by following the procedures for obtaining and providing accurate and complete sworn statements as provided in the Mechanics Lien Act. Of course, contractors and subcontractors must still observe lien notice and filing requirements and protect themselves when necessary by filing mechanics liens when they are not paid in a timely manner.

The new amendments to section 16 become effective immediately. Thus, it is effective as of February 12, 2013 for all cases not finally adjudicated as of that date. This means that if a case is currently pending, it should be governed by section 16 as amended by the new law.

Notice requirement before lien is forfeited

Separately, HB-3636 also modified section 34 of the Mechanics Lien Act. This section permits owners and other lien claimants to make a written demand on anyone who had filed a mechanics lien to file suit or release the lien within 30 days; failure to comply results in forfeiture of the lien. HB-3636 merely requires a party sending the demand include in it a warning to the lien claimant that:

Failure to respond to this notice within 30 days after receipt, as required by Section 34 of the Mechanics Lien Act, shall result in the forfeiture of the referenced lien.

Some unsuspecting contractors and subcontractors had been losing their liens when they received a demand to file suit but didn’t take action for more than 30 days. This new law simply provides fair warning of the need to promptly take action.

These two enactments protect and help growth in the Illinois construction industry in these recovering economic times. The proper use of these safety measures will enhance the ability of the construction industry to continue to be a positive force for growth in the state of Illinois.
New Year...New Laws!

As of January 1, 2013 over 150 new laws became effective. These new laws vary from banning shark fins to amending the Illinois Mechanic’s Lien Act. Some of these new Public Acts may have an impact on your family or your business. Here is a sampling of those new laws listed by category that might be of most interest to you as a sub-contractor.

**Business**

**SB 3237**
Requires the City of Chicago to provide licensed plumbers with hard, plastic photo identification cards.

**Civil Law**

**SB 2847-P.A.097-093**
Allows for individual liability under the Equal Pay Act so a company cannot evade a judgement or award by dissolving itself.

**SB 3792-P.A.097-0966**
This legislation was an initiative of IMSCA. This legislation extends Mechanic’s Lien Rights from 3 years to 5 years on commercial projects.

**Consumers**

**HB3935-P.A.097-1039**
Establishes that loans made by an unlicensed lender is null and void, and the lender has no legal right to collect interest or repayment on the loan.

**HB4013-P.A.097-0924**
Requires recyclable material dealers to keep records of transactions containing copper to try to reduce the incidence of copper theft.

**HB5211-P.A.097-0822**
Eliminates unlawful bill cramming. Bill cramming is the practice of adding unauthorized charges to customers’ telephone bills by third-party vendors.

**Ethics**

**HB4687-P.A.097-0827**
Requires public bodies to provide notice and agendas to the public at least 48 hours prior to a meeting. This Act specifies that such agendas must include the general subject matter of any proposed ordinances or resolutions on the agendas.

**Higher Education**

**HB 4757-P.A.097-0899**
Provides dormitories more time to comply with the Fire Sprinkler Dormitory Act if they file a compliance plan with the Office of the State Fire Marshal.

**Labor**

**HB3782-P.A.097-0875**
Prohibits employers from asking job applicants to give them access to the applicants’ social networking accounts, such as Facebook.
HB5212-P.A.097-0964
Makes it easier for public bodies and other entities to notify contractors and subcontractors about prevailing wage.

Public Safety
SB2488-P.A.097-0830
Expands the ban for cell phone use in construction zones to include areas without reduced speed.

Revenue and Taxes
SB1566-P.A.097-1136
Creates and increases a number of fees to support the Department of Natural Resources, including a $2 surcharge on all Illinois license plates.

State Government
HB5632-P.A.097-0791
Establishes a monetary penalty for unemployment benefit fraud. Clarifies an employer is still responsible for back payments of unemployment benefits, even if there is a ruling against the employee, IF the employer did not respond to the DES in a timely fashion and has a habit of not responding in a timely fashion.

HB5656-P.A.097-0792
Allows all unused federal funds in the Capital Development Board’s Contributory Trust Fund to remain there and be used only for other capital projects.

Transportation
HB5101-P.A.097-0829
Prohibits drivers of commercial vehicles from texting or using handheld mobile phones while driving.

HB5180-P.A.097-0992
Requires the Illinois Department of Transportation to develop and publish a policy notifying the public prior to the commencement of any construction project that will result in a street or lane closure for longer than 5 consecutive business days.

SB3409-P.A.097-0763
Allows drivers involved in accidents to move their vehicles out of the way if no one was injured and the vehicles are still functional. This Act does not eliminate the requirement to exchange information and/or contact authorities.

We hope you find this list of new laws useful as you begin the New Year. More information on these new Public Acts can be found on the Illinois General Assembly website www.ilga.gov.
Before You Sign a Contract: Stop, Read, and Audit

The Illinois Appellate Court recently delivered a decision chock-full of important reminders for everyone who enters into contracts, particularly those in the construction industry. The decision—Asset Recovery Contracting v. Walsh—comes to us courtesy of the first subcontractor hired for demolition work on conversion of Chicago’s Palmolive Building from office space to a residential condominium.

The two principal, but certainly not the only, important reminders in this decision:

- Before you sign a contract: Stop! Read the terms. Audit them to ensure they’re still in harmony with your situation; and
- A contractor who agrees to a “no damage for delay” clause in their contract should expect only tepid prospects of success when later asking for extra money because the owner, another project participant, or something beyond anyone’s control, delays the work.

Backstory

The story starts as the demolition subcontractor starts work without a subcontract. As work progresses, things start to go awry. Tenants who were to relocate continue to occupy their premises, fire department safety orders delay and require re-sequencing of work, and the owner had trouble getting project financing. Although aware of these problems, the subcontractor still continues working without a subcontract. Meanwhile, lawyers representing the subcontractor negotiated subcontract terms opposite the prime contractor’s management and lawyers. About nine months after starting work, the subcontractor finally signed a subcontract. That subcontract:

- Bore an effective date about nine months before signing, around the time that the subcontractor started work and before problems and additional costs started to mount;
- Obliged the subcontractor to complete the demolition work for modestly more than their original bid;
- Allowed the prime contractor to unilaterally change the scheduling, sequence, and pace of the demolition work—without any change in price to defray additional costs of a change—as long as the prime contractor gave the subcontractor reasonable advance notice of the change;
- Featured three—yes, three—“no damage for delay” clauses:
  1. Denied any increase in price for additional costs imposed by delay, even for delay imposed by the owner or prime contractor;
  2. Incorporated terms from the prime contract into the subcontract that deny additional money for costs associated with delay, even if it’s the owner who imposes the delay; (3) Affirmed that the subcontractor isn’t entitled to additional money, or time in the schedule, for pre-subcontract delay, nor for future delays caused by problems that existed on the subcontract’s effective date.

- Included the subcontractor’s certification that: (1) the subcontractor is familiar with all of the facts and circumstances affecting the demolition work, (2) the schedule attached to the subcontract provides enough time to finish the demolition work, and (3) the price identified in the subcontract is sufficient for the subcontractor to finish the work for that price.

Delays intensified. Problems went from bad to worse. Ultimately, the subcontractor requested hundreds of thousands of dollars for extra costs imposed by delays, including the...
The court mentioned their long-standing observation that the date parties sign a contract is not necessarily the effective date of their contract. The date on the contract is ordinarily the effective date. And where the contract is signed later, its contractual terms relate back, and are effective from, the date reflected on the contract if that coverage is clear from the face of the contract. It was clear on the subcontract here. The subcontract bore a date and that is all it took;

- The court rejected the subcontractor’s suggestion that to apply before signing, a contract must expressly state that it takes effect at an earlier time. “We find no such limited holding,” the court replied. “This is not the law in Illinois.”;

- With the subcontract applying retroactively to pre-signing work, the subcontractor couldn’t escape the "no damage for delay" clauses' forestalling pursuit of money to defray the costs of pre-signing delays. Nor could the subcontractor avert the sufficient time and money certification from waiving claims for costs imposed by pre-signing delays.

The court summed it up: The subcontractor knew of all the delays, yet did not request a modification to the subcontract allowing for delay damages, but rather signed the subcontract and proceeded to work.

No Exceptions From No Damage For Delay

The subcontractor urged the court in vain to use implied contract terms and judicially created “no damage for delay” exceptions to navigate around the “no damage for delay” clauses.

- Intentional owner interference. The court found that though some owner acts and omissions contributed to the delays, they did not qualify as the kind of intentional interference that violates an implied promise—in the prime contract—that would exclude these delays from the “no damage for delay” clauses. Similarly, the subcontractor asked to apply a judicially-created exception for “active interference.” Other states apply this exception when one party actively interferes with the other’s performance. Under this exception, active interference subverts using a “no damage for delay” clause against the victim of the interference. The court observed that Illinois doesn’t recognize this exception, and they refused to adopt it.

- Delay beyond contemplation. This exception excludes from a “no damage for delay” clause delay that is beyond contemplation of the contracting parties when they entered into their contract. The court observed that when they entered into the subcontract, the subcontractor was aware of manifold delays in progress of their own work, and delays affecting the project at large. So, delays imposing additional costs on the subcontractor weren’t beyond contemplation. And so, the beyond contemplation exception didn’t apply.

- Delay duration unreasonable. This exception excludes delay that lasts too long from a “no damage for delay” clause. But the court held that the delays the subcontractor suffered weren’t so lengthy that they became unreasonable. And so, they didn’t apply this exception. Particularly, the court observed that before entering into the subcontract, the subcontractor had opportunities to avert lengthy delays, or at least cushion their blows, but didn’t seize those opportunities and must now live with the consequences.

The court summed it up in this remark: The subcontract identified the initial price, which the subcontractor bid for the project, and also provided for change order requests which the subcontractor used for additional costs. The subcontract, however, clearly barred delay damages. The subcontractor agreed to the clear terms of the subcontract which barred delay damages.

Lessons From The Asset Recovery Decision

- Prior work clause. If someone provides work before signing the contract, you’re better off addressing that issue privately in your contract. A “prior work” clause is often the best way to do that. This prior work clause piece explains how.

Audit before you sign. Before you put pen to paper, audit:
- Price, and what composes it, to ensure it’s enough;
- Deadlines to ensure you can still achieve them, and that they’re harmonious with those in the work sequence before you, the same time as you, and after you;
- Representations and certifications. Here you are representing or certifying that something is or isn’t. Once you represent or certify to those things, you usually have to live with them even if they’re not spot-on;
- Incorporation of terms from outside sources (e.g., other contracts, laws, policy manuals). You need to know if you’re bringing terms from somewhere else into your contract. Then you need to audit those terms to see what they say. And if there are terms you can’t accept, work to exclude them or limit how they apply under your contract;
- Limitations affecting your rights to get more time, more money—i.e., the “damage for delay” clause—or both, if things don’t go as planned. If categorical denials are too draconian, perhaps you can negotiate for limited or qualified rights to additional time, or additional money. This applies doubly for circumstances: (1) beyond your control, (2) you can’t reasonably foresee, or (3) too impractical to plan for in advance;
- Counterparty duties. Once you’ve audited the things on your side of the threshold, take the time to ensure that your counterparty is also obliged to perform as you expect them to.

This decision holds important lessons for everyone who enters into contracts, particularly building contractors, regardless of whether they contract for a one-car garage renovation or a multi-billion dollar corporate acquisition.
IMSCA experienced a very active legislative calendar during the 97th Illinois General Assembly. The energy of the IMSCA lobbying team was focused on passing HB 3636, the “Cypress Creek” legislation. Due to the contentious nature of HB 3636, IMSCA will not push major legislative initiatives in 2013. Instead, we will focus on resurrecting an issue that is of major concern to the Illinois construction industry – retention. In addition to retention, IMSCA will also address a new issue that has been brought to our attention - Apprentice Pay on Prevailing Wage jobs.

As you may recall, IMSCA introduced retention legislation during the 97th General Assembly that was ultimately defeated on the House floor. Retainage is a common practice in construction projects where a certain percentage of a contractor’s earned payment is withheld until project completion. Historically, retainage has been used by developers/owners, along with holding a surety bond, to ensure satisfactory completion of the project for which the contractor was hired. In the past, retainage amounts were tied to the amount of expected profit for the contractor and the implication was clear – if you don’t finish the work properly, you may lose your profit. When used properly, retainage can be an effective tool in the construction marketplace; however, retainage abuses have begun to appear and protections for contractors are needed.

Some of the most common retainage abuses include utilizing high retainage percentages as a cash-flow tool to avoid securing appropriate financing of the construction project. In essence, some developers/owners are using retainage as an “interest free loan”. In addition, it is not uncommon for some developers/owners to hold back an amount much higher than necessary to ensure completion of the project. Finally, we are seeing significant delays in payment. While retainage should be returned to a contractor along with final payment, it is not uncommon for retainage to be held for months or even years after project completion. The average wait time after project completion for general contractors averages 98 days, while the wait time for subcontractors averages 167 days. Contractors report they only receive their full retainage 90% of the time. For these reasons, IMSCA believes it is necessary to amend the Contractor Prompt Payment Act to cap retainage at 5%. Representative Pat Verschoore is sponsoring HB 1227, which will cap retainage at 5%. IMSCA lobbyists are currently working with Rep. Verschoore, Senator Sam McCann and the Illinois Association of REALTORS® to attempt to find agreeable language on this issue.

IMSCA lobbyists are also monitoring an issue concerning Apprentice Pay on Prevailing Wage jobs. It was recently brought to our attention that the Department of Labor released an opinion that all apprentices working on prevailing wage jobs should be paid full pension benefits. It is our understanding that some union contracts pay no benefits to apprentice’s, some pay a percentage of the pension benefits, while others pay them full pension benefits; the same as journeyman. IMSCA is interested in defining this issue instead of subjecting the construction industry to the interpretation of the Department of Labor. Representative Mike Tryon is sponsoring HB 1456 on behalf of IMSCA. This bill is a shell bill that will allow IMSCA to amend the Prevailing Wage Act to correct this potential problem. IMSCA is working on researching this issue and learning more about our options; but HB 1456 is ready if we find it is necessary to correct this issue legislatively.

In addition to these issues, IMSCA will also oppose any attempts to revive the Structural Work Act, and legislation involving bonding over. We have also heard rumors the Capital Development Board (CDB) is interested in introducing legislation eliminating multiple prime bidding on Illinois construction projects. If the CDB moves forward with such legislation, IMSCA will oppose it.

Your IMSCA lobbying team expects to meet opposition on our legislative initiatives during the upcoming legislative session. Please stay tuned for Calls to Action on these issues, and any others that may arise. It is helpful to our work at the Capitol when our members place phone calls, send emails and write letters expressing concerns and support for legislation. Your help in this area is appreciated and goes a long way in ensuring IMSCA’s continued success as the voice of the Illinois construction industry in Springfield.

I would also like to invite you to attend IMSCA’s Lobby Day on Tuesday, March 19 in Springfield. The day will include a special presentation on Illinois pension reform by State Representative Elaine Nekritz, a spring legislative session update, and you will have the opportunity to lobby your legislators and let your voice be heard on these important issues. We hope to see you there!
Register TODAY!

IMSCA Lobby Day

Tuesday March 19, 2013
The Statehouse Inn
101 East Adams Street
Springfield, IL 62701

Issues we will be discussing include a special presentation on Illinois Pension Reform by State Representative Elaine Nekritz.

Lobby Day activities will conclude with a joint IMSCA / ICIC Legislative Reception at the Sangamo Club, 227 E. Adams Street, Springfield, IL

Please make your voice heard and attend this important event.

Deadline to Register is MARCH 8, 2013

Please fill out the below information and return to IMSCA by fax 217. 523.1791 or email JGray@gcsconsult.com

Name: ________________________________________________________________________________________

Company: ________________________________________ Phone/Email: ___________________________________

Association: ____________________________________________________________________________________
IMSCA-PAC makes financial contributions to candidates who FIGHT FOR the Illinois construction industry.

IMSCA-PAC provided your IMSCA lobbying team with the necessary tools to successfully pass AND defeat amendments to the Illinois Mechanic’s Lien Act. IMSCA-PAC is FIGHTING FOR YOU!

To learn more about how IMSCA-PAC is fighting for you, please visit http://www.imsca.org/index.php/imsca-pac