



**Julia J. Smolka**

## Lien on Me: The Commercial Real Estate Broker's Lien Act

The real estate market is hot! Interest rates are low. So is inventory. With parties rushing to strike deals, when is a commission earned by a broker? On a commercial transaction, a broker could be out tens of thousands of dollars - and more if there is a dispute. Broker's listing agreements are typically well written form contracts which address when a

commission is earned. There is another powerful tool that allows brokers to attach a lien to a commercial property for earned, but unpaid commissions and that could halt a sale. Illinois allows real estate brokers to place liens for earned commissions on commercial real estate as a way to force payment when a seller or buyer attempts to circumvent payment to the broker. The act is known as the Commercial Real Estate Broker Lien Act, 770 ILCS 15 et. seq. How does this Act work?

**Step 1: Does the Broker Have A Lien?** The Act specifically defines what properties are covered. Under section 5, **Commercial Real Estate** is defined as any real estate located in Illinois other than (i) real estate containing one to six residential units, (ii) real estate on which no buildings or structures are located, or

*Continued on page 2*



**Karuna S. Brunk**

## The PRO Act and What It Means for Employers

On March 9, 2021, the U.S. House of Representatives passed a sweeping pro-union reform law that, if enacted, would dramatically change the dynamics between employers and workers. The Protecting the Right to Organize Act (the "PRO Act") was previously introduced in the House but not debated in the Senate. Now it has reappeared as a priority of the Biden Administration.

In essence, the PRO Act's purpose is to overhaul the National Labor Relations Act ("NLRA") to strengthen labor unions and make it easier for workers to organize. If enacted, the PRO Act would bring numerous changes, including:

- Effectively invalidating state "right-to-work" laws so that unionized workplaces could require the payment of union dues as a condition of employment - Employees who refuse to pay union dues could be subject to termination pursuant to "union security" clauses in collective bargaining agreements. While this might not affect Illinois employers because Illinois is not a right to work state, it will affect 27 other states, including Wisconsin.
- Legalizing secondary strikes and boycotts such that neutral third parties would be subject to picketing and boycotts associated with labor disputes at other companies.
- Broadening the definition of "employee," making it difficult for

*Continued on page 2*



**Paul S. Motin**

## Common Myths About Wills and Why Nearly Everyone Should Have One

Most people do not like to think about their mortality. Unless one can be convinced there is great benefit to planning for the inevitable demise, he or she will think up any excuse for not having a Will or other estate planning documents prepared. Unfortunately, there are many misconceptions about the estate planning pro-

cess and the probate process that follows. Until these myths are dispelled, the person will believe, often wrongly, that he or she does not need or should not have a Will.

**Myth 1: I Don't Have Enough Assets.** While some attorneys don't like to admit it, it's true that not everyone needs a Will. State law will determine methods for administering your estate, for distributing your assets, and for appointing someone to take care of your children. However, in many cases, State law will not result in the same outcome as what is desired. A valid Will can make certain that your intentions are followed and it can make handling your assets after your death much easier.

*Continued on page 3*



**Jonathan R. Ksiazek**

## Illinois to Enact New Limits on Criminal History Consideration for Employment Decisions and Equal Pay Requirements

On March 23, 2021, Governor Pritzker signed Illinois Senate Bill 1480, titled the Employee Background Fairness Act, into law. SB 1480 contains three new provisions that will impact employers in Illinois effective immediately. The first big change for employers in SB 1480 involves additional

steps when evaluating job applicants who have a criminal record. SB 1480 amends the Illinois Human Rights Act to require employers to determine whether there is either a substantial relationship between the conviction and the position sought. This evaluation must include a consideration of whether the employment position offers the opportunity for the same or a similar offense to occur and whether the circumstances leading to the conviction will recur in the employment position. The determination further must consider whether the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the public. SB 1480 describes several factors employers must consider in making this determination.

Under SB 1480, if an employer determines that they will not be able to hire an individual based on their criminal record, the employer must give notice to the affected individual, engage in an interactive process, and consider information provided by the applicant about why the conviction should not be considered or be dispositive.

*Continued on page 2*

**Lien on Me**

*From page 1*

(iii) real estate classified as farmland under the Property Tax Code.

Next, whether the broker has a lien depends on whether the broker has earned his or her commission under a written instrument signed by either the owner, buyer, or tenant. That written instrument is typically a listing agreement, lease, or sales contract. For the broker to have earned his or her commission, he or she has to produce a ready, willing and able buyer or tenant.

A prospective purchaser of realty will be considered ready, willing, and able to buy if he has agreed to purchase the property and has sufficient funds on hand or if he is able to command the necessary funds with which to complete the purchase within the time allowed by the offer. A broker who shows they produced a prospective purchaser who agreed to the sellers' terms, who was continuously willing to purchase during the time of the relevant negotiations and became able to execute a contract upon the agreed terms at a reasonable time subsequent to the initial negotiations, has made a case to recover the commission.

**Step 2: Perfecting the Broker's Lien.** If the broker has the right to record a lien, the Act describes what needs to be in the lien notice - names of the owner, description of the property, amount of lien and real estate broker's license number. It has to be signed and verified. To perfect the lien, the client has to record a lien in the Recorder's office of the county where the property is located. Thereafter, the broker shall send notice to the owner. Strict compliance is required, or the broker lien is not enforceable. So, ideally, if the broker sees the writing on the wall that the parties are trying to avoid paying the commission, he or she can record their lien prior to the closing. It forces the title company to holdback funds, as it would for any other lien.

**Step 3: Foreclosing the Lien.** The Act operates similar to the Illinois Mechanics Lien Act. The broker has to strictly comply with the statute, and has to file a foreclosure complaint within 2 years after recording the lien. An owner can make a 30-day counter demand to file suit. In the event the suit is not instituted within the 30 days of owner's demand, then the broker's lien will be extinguished as matter of law. The Act also allows for recovery of attorney's fees and costs to the prevailing party.

**Experience Pointers.** From my experience of having filed both broker lien actions and mechanics lien actions, the procedural steps are very similar. So are the pitfalls if you fail to follow the statute precisely. Defending these actions are very similar. Strict compliance to the dates, notices, and forms of the documents in this statute is necessary,

or the foreclosure complaint will be dismissed. If you are a commercial real estate broker, or if you have a commercial property and have questions, please call us. ■

**The PRO Act**

*From page 1*

workers to be classified as independent contractors. This could open the door for these workers to collectively organize. It also narrows the definition of "supervisor" to make it more difficult to exempt management employees from union coverage. More employers will also be considered "joint employers" even if they do not exercise direct control over another business' employees. This will substantially increase the risk of litigation for many franchised businesses.

- Allowing "interest arbitration" by which, if an employer and union cannot reach agreement on the terms of an initial collective bargaining agreement, a federal arbitrator would decide the wages, benefits, and other relevant terms of the union agreement.

- Bringing back the Obama-era "quick" election rule allowing a union to hold elections only a few days after filing for recognition with the National Labor Relations Board ("NLRB") - This severely shortens an employer's time to prepare for elections, thereby increasing the likelihood of a unionized workforce. The PRO Act also gives the NLRB discretion to allow unions to determine the functions of election proceedings.

- Dramatically increasing fines and penalties associated with unfair labor practices, including civil fines of \$50,000 for each unfair labor practice, \$10,000 for each violation of an NLRB order, requiring the re-hire of employees in discharge cases (mandatory injunctions), and personal liability for company directors and officers.

These changes are merely the "tip of the iceberg." It is unclear whether the PRO Act can overcome a Republican filibuster in the Senate. However, all private employers should be aware that the Biden Administration generally has instituted more union-friendly policies. Many may assume that the NLRA and the PRO Act only affect employers with existing collective bargaining agreements and relationships with labor unions. **This is not the case – all private employers are affected because the NLRA impacts employee handbooks, employee contracts, and day-to-day communications with employees about wages and discipline, regardless of whether the employer is a union shop.** As such, employers should evaluate and reconsider their labor relations policies in anticipation of a more labor-friendly political climate. ■

**New Limits**

*From page 1*

This meeting must take place before a final decision is made to disqualify the applicant. In event that the employer disqualifies a candidate based on their criminal record after this meeting, it must provide additional information to the employee regarding the reasons for its decision.

Next, SB 1480 amends the Illinois Business Corporation Act to require each domestic or registered foreign corporation required to file an EEO-1 report to file with the Illinois Secretary of State information regarding the gender, race, and ethnicity of the corporation's employees as part of its corporate reporting obligations. The Secretary of State will publish the gender, race, and ethnicity data of each corporation's employees on the Secretary of State's website. Employers will have to meet this new obligation starting on January 1, 2023.

SB 1480 also requires private employers with more than 100 employees to obtain an "equal pay registration certificate." To obtain this certificate, an employer must provide the gender, race, and ethnicity data of its employees to the Illinois Department of Labor as well as the total wages paid to each employee during the prior calendar year.

The employer also must submit a statement signed by a corporate officer, legal counsel, or other authorized agent for each county in which the business has a facility or employees representing that a) the business is in compliance with Title VII, the Equal Pay Act of 1963, the Illinois Human Rights Act, the Equal Wage Act, and the Equal Pay Act of 2003; b) the average compensation for its female and minority employees is not consistently below the average compensation of its male and non-minority employees within each of the major job categories reported, accounting for certain factors; c) the employer does not restrict employees of one sex to certain job classification and makes retention and promotion decisions without regard to sex; d) wage and benefit disparities are corrected when identified; and e) the employer evaluates wages and benefits to ensure compliance with relevant statutes.

An employer who does not obtain a certificate or whose certificate is suspended or revoked after an IDOL investigation is subject to a mandatory civil penalty equal to 1% of "gross profits." Existing corporations must obtain certificates within three years after the effective date of SB 1480 while new corporations must obtain certificates within three years after commencing operations. Recertification is required every two years. ■

**D&L continues to monitor new employment law developments as they arise. Please call one of our experienced labor attorneys to discuss proactive changes to the law.**

## Myths About Wills *From page 1*

To determine whether a person needs a Will, it's important to realize what will occur if no Will exists. For purposes of this discussion, assume you are married, have two young children (one from that marriage and a stepchild from your spouse's prior marriage) and are a resident of Illinois. Your total assets include your home (which you bought in your own name (not jointly) and which is worth \$400,000) plus \$300,000 in cash. Most people in this situation that I have worked with hope (and usually expect) that, upon their death, all of the assets will go to the surviving spouse. Unfortunately, Illinois' intestacy laws (and probably most states' laws) provide for a different distribution.

In Illinois, if a person dies without a Will and leaves a spouse and at least one child (and ignoring certain minimal allowances), the surviving spouse will be entitled to 50% of the decedent's estate. The decedent's child (but not the stepchild) will be entitled to the remaining 50%. This can be problematic as the results of the example show: You had a total of \$700,000 in assets. Your surviving spouse is entitled to \$350,000 and your child is entitled to the remaining \$350,000. With the house being worth \$400,000, your spouse cannot receive the house outright from the spouse's share. This could result in your surviving spouse having to buy out part of your child's share and none of the cash would go to your spouse. Alternatively, the house could be split between the spouse and child as tenants-in-common; though, this is cumbersome, especially if the house needs to be refinanced or sold in the future.

An additional problem that results is that a Guardian of the Estate for the child will likely need to be appointed by the Court to manage the child's share until the child attains age 18. The Guardian of the Estate will need to file annual reports and annual accountings with the Court on an annual basis.

There are "Will Substitutes" which will control over intestacy laws (and over Wills, too) which may be used to avoid the intestacy distribution rules. These include holding assets in joint tenancy or tenancy by the entirety, trusts, "Transfer on Death Instruments" ("TODI"), and "Pay on Death" or "Transfer on Death" designations on bank and investment accounts. In the above example, the harshness could be somewhat avoided by placing all of the assets in joint tenancy. This would result in all of your joint assets going to the surviving spouse. Upon that spouse's death, the assets would pass to your spouse's surviving children (although, note that a probate will still

be necessary upon the surviving spouse's death if the designations are not changed). However, as discussed in the following paragraphs, Will Substitutes might cause inequities if no children survive both you and your spouse. Another "problem" with Will Substitutes is that a person cannot be certain that he or she will outlive the intended beneficiary. A Will can determine where the assets will go if the beneficiary dies first.

Illinois law provides that, if you have no surviving spouse, your assets will be divided evenly between your children (but not a stepchild) with the descendants of a deceased child taking the child's share. If you have no surviving children or descendants, your parents and siblings take your assets. If none of these relatives exist, then the assets pass to other, more distant, relatives.

The result of these rules may be very harsh. Let's say you amassed a small (or great) fortune, were married recently and have no children. If you die, your assets pass to your spouse. If your spouse then dies without a Will, those assets will pass to your spouse's family, with your family receiving nothing, regardless of what may have been intended. Short of having a trust prepared, or very careful use of Pay-on-Death, Transfer on Death and TODI designations, this result will not be avoided without a Will.

In addition to being able to determine the distribution of your assets, a Will should ease the burden of the probate process. Assets could easily be tied up for a year or, quite often, much longer. A clearly drafted Will can definitely help. The Will can name your Executor (the person who handles the affairs of the probate estate), can nominate a person to be the guardian for your minor children, can instruct the Executor as to what to do with certain properties (e.g., should certain assets be sold or should they be transferred directly to the children?), can eliminate any statutory bond that may otherwise be required, and can even create trusts or make distributions according to a written formula so that estate taxes may be minimized.

It is usually best to have a Will. The cost of a simple Will is usually not prohibitive. In the event of a probate, just having the Executor named in the Will and providing in the Will that a surety bond is not necessary will usually save more than the cost of the Will. [I caution against attempting to prepare a Will yourself (even if done with a computer program). Qualified estate planning attorneys are much more able to spot problem areas than a form book or computer program; plus, there are certain formalities required by law regarding, for example, the signing of the Will, the revocation of prior Wills and the terminology to be used. Because of the increased possibility of a Will contest, having an incorrectly worded Will can often cost much more to

administer than if there were no Will at all.]

**Myth 2: If I Do Not Have a Will, the State Takes My Assets.** Generally, this is untrue. Other than Court filing fees, if you have any living relatives that can be located (and that will accept your assets), the closest relation to you will take your assets. Only if you have no relatives at all will the State take your assets.

There is a Federal Estate Tax for people dying with more than \$11.7 million (as of January 1, 2021) and Illinois has an Estate Tax for people dying with more than \$4 million. Having Wills or other estate planning can often reduce these taxes significantly, if not eliminate them altogether.

**Myth 3: If I Have a Will, I will Avoid Probate.** Having or not having a Will has no direct effect on whether an estate must go through the court probate process. What is most important is the amount and type of assets owned by the decedent. The primary purposes of probate are to determine the validity of a Will, if any, to determine the proper distribution of assets (whether by the terms of a Will or by intestacy laws), to properly retitle the assets to the recipient's name, and to settle any and all claims and debts against the decedent and the estate.

"Probate" does not usually affect "non-probate" assets, such as joint tenancy property, life insurance payable to a named beneficiary, trust assets, assets held in a Pay-on-Death or Transfer on Death designated account, TODI property, etc., and thus, if these are the only assets owned, a probate will generally not be necessary. In addition, if a decedent has \$100,000 or less of probate assets (other than real property), a probate may be avoided by using a Small Estate Affidavit. If probate assets exceed \$100,000, and if assets must be retitled, probate will almost always be necessary. In addition, anytime the decedent owns real estate in his own name at the time of death, some form of probate proceeding will be necessary to transfer ownership.

Having a Will might have an indirect effect on whether an estate must be probated. If you have two children, no debts and \$150,000 worth of assets that don't need to be retitled (e.g., cash, jewelry, equipment, furniture, etc.). You want two-thirds to go to one child and one-third to go to the other and you have a Will which states this. When you pass away, each child's share is readily determinable. If neither child wants to contest the Will, and if the children are certain that no creditors exist, they could agree between themselves to distribute the assets according to the Will without going to court.

**Conclusions.** With few exceptions, most people who own assets worth more than \$100,000 or any real estate should have a Will. The benefits of having a Will almost always outweigh the small cost involved. ■



# DI MONTE & LIZAK LLC

216 Higgins Road  
Park Ridge, IL 60068



*An experienced, multi-practice law firm working as a team to provide practical counsel and quality services.*



# DI MONTE & LIZAK LLC

## What's Inside...

Lien on Me: The Commercial Real Estate Broker's Lien Act  
*By Julia J. Smolka*  
*See front page ►*

Common Myths About Wills and Why Nearly Everyone Should Have One  
*By Paul S. Motin JD, LLM, CPA*  
*See front page ►*

The PRO Act and What It Means for Employers  
*By Karina S. Brink*  
*See front page ►*

Illinois to Enact New Limits on Criminal History Consideration for Employment Decisions and Equal Pay Requirements  
*By Jonathan R. Ksiazek*  
*See front page ►*

## PRACTICE AREAS

- Litigation and Appeals • Real Estate Development and Land Use •
- Construction and Mechanic's Liens • Corporate and Business Governance •
- Estate Planning and Probate • Elder Law • Creditors' Rights and Bankruptcy •
- Employment and Human Resources • Banking and Finance • Tax •

*To order additional copies of this publication, please contact MaryLeslie Naker at (847) 698-9600 or [mnaker@dimontelaw.com](mailto:mnaker@dimontelaw.com).*

While the Newsletter is intended only to provide information of general interest to our clients and their advisors, under the Rules of the Supreme Court of Illinois, or the rules of other jurisdictions, this publication may be regarded as advertising. Information contained herein should not be considered as individual legal advice or legal opinion. You are urged to consult your D&L attorney regarding your own legal situation and any specific legal questions you may have.