

June 2016



Substance

Illinois Mechanical & Specialty Contractors Association





Greetings IMSCA Members

Tom Morton,
IMSCA President



The Webster's dictionary defines compromise as "an agreement or a settlement of a dispute that is reached by each side making concessions". This is something our legislators in Springfield need to brush up on. During the months of January through April, the legislature was only in session 15 days. The atmosphere in Springfield is one of mistrust and a lot of finger pointing. Legislators are not willing to sit down and try to come up with a plan. If the representatives or senators do not do what their party leaders demand of them they, are ostracized and do not receive any support for their initiatives. They are being asked to support issues that may negatively affect their constituents and are receiving no justification to explain what they are doing or not doing.

I attended IMSCA's Lobby Day in Springfield, thank-you to all of you who attended. The outlook for the state having a budget before the November election is not good because neither side is willing to or understands the word compromise. Louie and Jessica have been working hard to get our initiatives passed and still need our help to contact all our representatives when the bills come up for a vote. Please watch out for their emails in the future. It is great to go down with us to lobby in Springfield but even better,

and just as helpful, to take the time and drop off our information and say hello to your representatives at their home office. If you can't find the time to do that at least send them an email. When they finally pass a budget the State will need to raise revenue and hopefully cut some spending. Having a voice in Springfield now more than ever is vital to the protection of our businesses. If you were not able to purchase a raffle ticket for our recent IMSCA-PAC raffle, please consider just making a donation of \$50.00 to IMSCAPAC. Having access to our elected officials is vital to making sure the state does not pass laws that negatively affect us. As you all know this has happened in the past and will continue to happen unless we have someone watching out for us.

It would be foolish to run your business without insurance to protect it from unforeseen issues. Donating to IMSCAPAC is insurance for your business from the unforeseen consequences of laws that can have a large negative impact on the construction industry. If we could get all our members to donate even \$50.00 it would have a tremendous impact on our ability to help protect us. I know we all can afford \$50.00 so please consider donating this year. Have a successful summer. ♦



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Construction
Employers*



IMSCA
Illinois Mechanical & Specialty Contractors Association



Matthew is a partner in the Chicago office of Arnstein & Lehr LLP. Mr. Bryant focuses his practice on construction and commercial litigation and dispute resolution. He has represented owners, architects, engineers, contractors, and subcontractors in lawsuits relating to construction defects, mechanics liens, bond claims, delay claims, change order disputes and fraud. wmbryant@arnstein.com



James is a partner in the Chicago based law firm of Arnstein & Lehr LLP. He serves as chair of the firm's Construction Practice Group. Mr. Rohlfsing is a Martindale-Hubbell AV rated attorney, whose practice is focused in the areas of construction law and business litigation. He is the editor and a chapter author of the West Publication *Illinois Construction Law Manual*. jtrholfing@arnstein.com

Modified Law Not Enough to Protect Lien Rights

by W. Matthew Bryant and James T. Rohlfsing

IMSCA drafted, promoted and successfully passed an amendment to section 34 of the Illinois Mechanics Lien Act that became effective in 2013. Section 34 of the Act permits property owners to make a written demand on lien claimants to either file suit to enforce within 30 days or, alternatively, release their mechanics lien claims. In common parlance – “put up or shut up.” The amendment that passed in 2013 tightened up the notice provision so a lien claimant would know what needed to be done so as not to lose lien rights. The amendment was a big help for contractors who, in the past, could easily overlook the notice and lose their rights. The new requirement provides:

- (b) A written demand under this Section must contain the following language in at least 10 point bold face type: “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.”

Unfortunately, a recent case demonstrates that lien claimants must still be wary of section 34 and carefully preserve their mechanics lien

rights, even with the new protection. The federal district court in Chicago pointed out the need to observe state lien law requirements even when suing to enforce a lien in federal court. In *Faith Technologies, Inc. v. Arlington Downs Residential, LLC*, no. 15 C 7903 slip op. (U.S.D.C. – N.D.Ill., Feb. 26, 2016), an electrical contractor and the owner disputed whether the contractor was entitled to payment for its work because of delays in completion of the electrical work. The contractor recorded a lien against the property for the amount it claimed it was due for its work. The owner won the “race to the courthouse” and filed its complaint against the contractor in federal court on September 8, 2015. The owner alleged among other things that the court should declare the lien invalid because the electrical contractor was not entitled to payment.

Two days after filing its suit, the owner sent the contractor a separate notice under Section 34 of the Illinois Mechanics Lien Act. The notice required the electrical contractor to file suit to enforce its lien within thirty days or else forfeit the lien. The owner sent this notice with a copy of the

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An Ounce of Prevention is Worth a Kilo of Corybantic Cure

by Steven N. Malitz

Jethro and Wally owned Twisted Mechanical Contractors for 20 prosperous years, on a “hand-shake deal.” Jethro started an unrelated, non-competitive business – a plumbing company. Claiming that Jethro deserted Twisted, Wally barred Jethro from Twisted, eliminated his compensation, canceled his benefits and emptied the business bank accounts. Jethro then sued Wally to dissolve Twisted so he could start his own mechanical contracting business, without Wally.

Unfortunately, the partnership agreement for Twisted was oral. 20 years of harmony resulted in disaster. No more combined family parties for Wally and Jethro. Costly litigation may very well have been avoided with the following inexpensive steps taken at the beginning of the business with the assistance of an attorney:

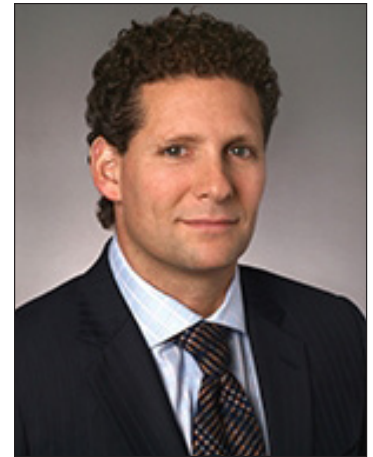
1. Forming a corporation or limited liability company for tax benefits and creditor protection. (Your lawyer can assist you in deciding which entity is right for your business)
2. Shareholders Agreement (for a corporation) or operating agreement (for a limited liability company), with provisions relating to (a) ownership percentage for each owner; (b) buy-sell in case one partner wants to sell, becomes disabled or dies; (c) valuation of the business in case of sale; (d) wind-up/dissolution—who gets paid in what order; (e) fiduciary duties owed by each owner to each other and the business; (f) deciding deadlock

issues if the partners cannot decide on major business issues; and, (g) rights of the partners to engage in other entrepreneurial activities.

3. Stock certificates evidencing ownership and number of shares owned by each shareholder (for a corporation).
4. By-laws setting forth the rights and powers of shareholders, directors and officers, and how those in charge are elected. By-laws also help settle any disputes among the owners.
5. Resolutions or consents reflecting and authorizing the involvement of business owners, in this case Jethro, in other businesses, or otherwise documenting other, general business decisions made from time to time in their construction business.

Although litigation finally resolved all issues between Jethro and Wally, the emotional and financial cost was great. Consider drafting or updating the agreement with your fellow partner. Not only will it help to resolve litigation with less expense, but, more importantly, good documentation will minimize the likelihood of litigation in the first place by letting the business owners know in advance what they are permitted to do and what the consequences will be of their actions.

We would be happy to send you a checklist with the basic terms in any shareholder agreement or operating agreement. Documentation creates business freedom! ♦



Steve is an attorney with the Chicago-based law firm of Arnstein & Lehr LLP. He represents subcontractors, twisted and untwisted, and other business owners. snmalitz@arnstein.com



Jessica Newbold
IMSCA Legislative
Consultant

Legislative Update

We hoped by the time June 1st rolled around, we would be able to report the Illinois General Assembly completed their work and met their planned May 31st adjournment deadline with an approved budget. Just like last year, that is not the case. For the second year in a row, lawmakers failed to pass a budget and will return to Springfield for “continuous session” while Illinois remains the only state without an operating budget. The distrust between Democrats and Republicans, and Speaker Madigan and Governor Rauner and now between the House and Senate continues to swell.

A week ago, Senate President Cullerton suggested passing a “stopgap” spending proposal that would get the state through the current fiscal year, and six months into FY 17; which would allow schools to start on time in the fall, and provide some funding to social service providers still waiting for payment – without it being tied to Governor Rauner’s proposed Turnaround Agenda reforms. The idea was quickly rejected by Republican leadership and Governor Rauner. However, in the final days of session with the budget clock ticking loudly – that is exactly what Governor Rauner suggested should be done. It was met with a simple “we won’t pass that today” response from Speaker Madigan who further stated such a plan should be assigned to one of the budget working groups for further discussion.

Last week, House Democrats pushed an unbalanced budget through its chamber – a budget Governor

Rauner cited as being \$7 billion out of balance. The House Democrat budget bill was sent to the Senate where it was soundly defeated Tuesday night. Some statehouse insiders believe the Senate Democrats were tired of being run roughshod by Speaker Madigan, and refused to vote for a budget that was going to be vetoed by the Governor. The Senate approved its own stand-alone bill to pay for K-12 education that would have ensured schools open on time this fall. However, the House overwhelmingly rejected the Senate’s bill.

Governor Rauner stated the Democratic controlled House and Senate’s budget failure is an attempt to build pressure for a post-election income tax hike. The Governor has pointed out many times the Democrats are unwilling to pass needed reforms to help rein in state spending – they merely want to appropriate state spending and worry about how it will be paid for later. Governor Rauner argued his stopgap plan stands in contrast to what Democrats voted on because his plan would keep state services running through the rest of 2016 without a tax hike by using money that is already available. Rauner’s plan also called for a stand-alone K-12 budget, allocated \$600 million for higher education, \$450 million for a variety of other programs including food for prisons, utility payments for state facilities, among other items. In addition, his plan called for authorizing spending that does not come out of general state taxes; which would include public works construction

projects that have been sitting idle since June 30, 2015.

So what happens next? The unfortunate reality is our state is being held hostage by those we elect to make these important decisions and conduct the business of our state. Everyone is impacted by the lack of a budget and the continued partisan fighting – not just social service providers, higher education institutions, schools and vendors – but all of us. Rep. Jack Franks recently stated “Both sides suffer under the delusion that it’s OK that real people get hurt as long as the other side gets blamed for it.” It’s possible Senate President Cullerton and his members will decide to fully embrace Governor Rauner’s stopgap budget bill, in which case pressure for Speaker Madigan to get on board will be intense. However, this will require Governor Rauner and Republican legislators to put away some of their own issues in order to find common ground with Senate Democrats. In other words, the budget impasse and overall dysfunction in Springfield could last a long time.

Regardless of legislators’ inability to come to a budget agreement, they did consider legislation important to the construction industry. Here’s a quick round up of issues important to IMSCA:

SB 2450 (Althoff/Nekritz)

SB 2450 amends the IL Mechanics Lien Act by extending the time period to file a mechanics lien on a commercial project from 3 to 5 years. This legislation contains a 5-year sunset provision. IMSCA successfully passed this legislation in 2012, although at that time it included a 3-year sunset provision. The law is set to expire this year. SB 2450 seeks to extend it for another 5 years. SB 2450 unanimously passed both chambers. It will soon be sent to the Governor for his approval.

SB 241 (Haine/Hoffman)

SB 241 was a late in the game effort of the design and construction industry – spearheaded by the American Institute

of Architects (AIA-IL) to address the abuses of performance contracting in school construction. SB 241 sought the following objectives:

Make a direct connection between utility cost savings and energy modifications.

- Limit the maximum contract term to 10 years; prioritizing upgrades with fast paybacks while limiting taxpayer exposure.
- Ensure inspection of plans and specifications according to school building codes, designed and built by those licensed to do the work.
- Give schools the right to review the performance of vendors over the life of a contract and let the public see where their resources are going.

SB 241 unanimously passed the Senate, but stalled in the House when it was picked up by Representative Jay Hoffman who is supported by performance contracting companies. The positive result of our work on this bill was opening legislators’ eyes to the abuses involved in this type of alternative contracting. Many Senators had no idea this construction model is used by school districts and local governments, and readily agreed this type of construction needs to be reined in for the benefit of taxpayers. The design and construction industries will continue working on this issue in the future.

SB 3277 (Steans)

The IL Chamber of Commerce introduced this legislation in an effort to expand the use of Public Private Partnerships (P3) to local governments. SB 3277 was the result of nearly a year’s worth of meetings between state agencies, the design and construction industries, and many other interested parties. The interested groups involved in the P3 discussions continued to have many questions regarding the use of the P3 model and were never able to fully come to an agreement on bill language. SB 3277 was introduced, and due to

the continued discussions, the sponsor, Senator Heather Steans, decided it was best not to run the legislation this year. Governor Rauner touted P3 expansion earlier this year as part of his proposed procurement reforms, so we expect continued conversations about implementing expanded P3 models. P3 sounds good in theory, but once you begin drilling down in to the details – many questions arise. P3 will continue to be on IMSCA’s radar screen and your lobbying team will remain active in future discussions.

SB 584 (Cullerton)

Procurement reform was at the top of most legislators’ and Governor Rauner’s priority lists this year. Multiple versions of procurement reform legislation was introduced throughout session. SB 584 was amended and became the latest version of procurement reform. SB 584 was the product of Senators Don Harmon - (D) and Pam Althoff - (R) who stated SB 584 is a compilation of the best parts of all previous procurement reform bills that were introduced. SB 584 included many good provisions, but it also included increasing the small purchase threshold (no-bid) to \$100,000.00, which triggered opposition from IMSCA. The design and construction industry coalition successfully lobbied for the inclusion of an amendment to address this, which removed our opposition. SB 584 wasn’t considered by the full Senate prior to the May 31st deadline. As budget negotiations continue, we expect procurement reform to remain a part of that conversation and we will continue to stay engaged as legislation moves forward.

SB 2964 (Harmon/Hoffman)

SB 2964 amends the Prevailing Wage Act and states prevailing wage shall not be less than the rate that prevails for similar work performed under collective bargaining agreements in the

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Jason is a partner in the Arnstein & Lehr Chicago office. He is the chair of the Employment & Labor Practice Group, as well as a member of the firm's Litigation Group. Mr. Tremblay focuses his practice in employment and commercial litigation. In the commercial area, he represents parties in a broad range of complex business and tort litigation matters, including matters involving breach of contract, breach of fiduciary duty, fraud, interference with contract, shareholder disputes and insurance coverage.

DOL Announces Final FLSA Overtime Regulations

by E. Jason Tremblay

On Wednesday, May 18, 2016, the U.S. Department of Labor's (DOL) Wage and Hour Division released its final updated FLSA overtime regulations. While some of the changes were expected, there are a number of surprises.

First, the new salary threshold for exempt executive, administrative and professional employees will be \$47,476.00 per year (or \$913.00 per week). That is more than double the current \$455.00 per week but less than the original proposal, which would have boosted the minimum annual salary threshold to over \$50,000.00 per year.

Second, the salary basis test has also been amended to clarify that employers may use nondiscretionary bonuses and incentive payments (such as commissions) to satisfy up to 10% of the new salary threshold. This may allow certain employees who do not have an annual salary of at least \$47,476.00 to still satisfy one of the overtime exemptions.

Third, in another deviation from the initially proposed regulations, the final regulations require an update of the salary threshold every three years, as opposed to every year, as originally

proposed by the DOL.

Fourth, the final regulations also increase the "highly compensated employee" (HCE) exemption to an annual salary threshold of \$134,004.00, an upward adjustment from what was anticipated to be an annual threshold of \$122,148.00.

Finally, these new regulations will take effect on December 1, 2016, which will provide employers a longer period of time to comply with them, as prior indications were that the final regulations would take effect in July 2016.

In light of the foregoing, all employers must immediately analyze whether current "exempt" employees will satisfy the new FLSA regulations and, if not, develop FLSA-compliant pay plans for employees who have previously been treated as exempt but who will now not be exempt under the new overtime regulations.

Should you have any questions regarding the final FLSA regulations, or should you need assistance complying with the regulations, please do not hesitate to contact E. Jason Tremblay at 312-876-6676 or your designated Arnstein & Lehr LLP attorney. ♦

Modified Law Not Enough to Protect Lien Rights

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complaint it had filed two days before, and the notice complied with the new stricter requirements contained in section 34.

Under federal court pleading rules, a defendant can have up to sixty days (instead of thirty days) to file an answer and counterclaim to a complaint if it waives formal “service of summons”. The electrical contractor agreed to waive service of summons. A little more than fifty days after the contractor received the demand to file suit, it filed a denial of the owner’s claim, and also for the first time filed

its own counterclaim for the court to enforce the lien.

In the absence of the demand to commence suit, the electrical subcontractor’s counterclaim to enforce its lien would have been timely. However, the extension of time to file an answer and counterclaim under the federal court rule did not extend the separate state-law requirement to commence suit within thirty days. The court held that the contractor had forfeited its lien for failure to commence its suit within thirty days of the state-law demand

under section 34 to commence suit, even though the answer and counterclaim had been timely under the federal rules. The court dismissed the electrical contractor’s lien claim.

Where a contractor seeks to use the remedy of a mechanics lien, it must pay particular attention to the requirements of the Illinois Mechanics Lien Act, including amended section 34. Failure to meet those requirements may result in the lien being unenforceable, even if the action might otherwise be timely under federal procedural rules. ♦

Legislative Update

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locality provided that the agreements cover at least 30% of the workers. SB 2964 further states that if collective bargaining agreements do not exist in the locality, the Department of Labor shall require prevailing wage to be paid. SB 2964 applies to public works performed without a written contract. The Department of Labor will also be required to publish prevailing wages and schedules on its website. SB 2964 passed both chambers and has been sent to the Governor for his approval. Governor Rauner actively lobbied against this legislation so it is doubtful he will approve it.

HB 4670 (Thapedi)

HB 4670 was IMSCA’s most recent effort seeking retainage reform. We expected our bill to be received with opposition from the usual suspects including the Illinois Bankers Association and Illinois REALTORS®, however, it was met with an overwhelming amount of opposition – including opposition from the construction industry, the Capital

Development Board, the Department of Central Management Services and IDOT. We successfully moved the bill out of committee prior to the committee deadline with the agreement we would bring the bill back to committee with an amendment to remove opposition. IMSCA staff continued discussions with the opponents and were very close to coming to an agreement with the Capital Development Board. Unfortunately, we were unable to agree on amendment language prior to the amendment filing deadline. We think there may be some movement from some of the opposition groups. However, the real opposition is from the Illinois Bankers Association and Illinois REALTORS®. These two groups will simply oppose any legislation that removes or caps retainage in contract negotiations. We will continue to work on language throughout the year and will re-address retainage in the future.

HB 1290 (Currie)

HB 1290 was a troublesome proposal, as it would have allowed employees

to file liens on their employers’ personal property if the employer failed to pay the employee wages or other compensation. HB 1290 is an initiative of advocacy groups such as Raise the Floor whose mission is to empower workers in low-wage industries. The National Federation of Independent Business (NFIB) spearheaded talks with Leader Currie regarding the potential disastrous impact this legislation could have on Illinois’ business community. Leader Currie was convinced not to move the legislation this year.

Your IMSCA lobbying team would like to thank all of our IMSCA members for your support and assistance this legislative session. We called on many of you for your expertise and opinions on many of these proposals, and also depended on your participation in our Calls to Action. Your support and interest is appreciated. We will continue to monitor many of these issues as the Illinois legislature remains in “continued session”. ♦



Louis Giordano
Executive Vice President,
IMSCA

The State of our Dysfunctional State

I suspect that most of you are aware that Illinois' state government is completely dysfunctional. The question is, why? To find the answer, let's look back one or two years. First, the Illinois General Assembly passed a temporary tax increase in 2012. The increase was passed with the intention to pay down the \$4.5 billion debt the state had accrued over past years. Second, lawmakers passed a pension reform bill aimed at reducing the unsustainable debt arising from the rich retirement program that had existed for years. Since that time, the social service budget was expanded to add additional recipients, as well as some new services. This social service increase ate up the majority of the \$4.5 billion that was supposed to reduce the state debt. The 2012 temporary tax increase expired in December of 2014, and there was a new Governor taking office. The General Assembly has a veto proof Democrat majority in both chambers, and the new Governor is Republican.

Governor Rauner campaigned on a platform of what has become known as the "Turnaround Agenda". Once elected, Governor Rauner set out to remove prevailing wage from government jobs, reform workers compensation and establish term limits. In his zest to pass these reforms, the

governor tied negotiations on the FY 2016 budget to passage of his proposed reforms. The leadership of the General Assembly has resisted tying the budget to non-budget reforms and stand firm that the budget shouldn't be tied to any other issues. As a result, on July 1st the state will have operated without a budget for one entire year. The courts have ruled that social services must be paid out at the rate established before the tax increase lapsed. In addition, there is a court order stating the state must pay employees during this lapse period. Lastly, the Illinois Supreme Court ruled the pension reform legislation unconstitutional - eliminating any potential savings expected from its implementation.

As the spring session started there was some, if little, hope there would be a thaw in budget negotiations and a compromise would eventually be reached. Unfortunately, that hasn't been the case. As a result, there have been several emergency bills passed that helped keep some government functions running. These emergency budget bills passed only because of the chaos that would have been created by closing colleges and universities, as well as numerous problems within the Department of Corrections.

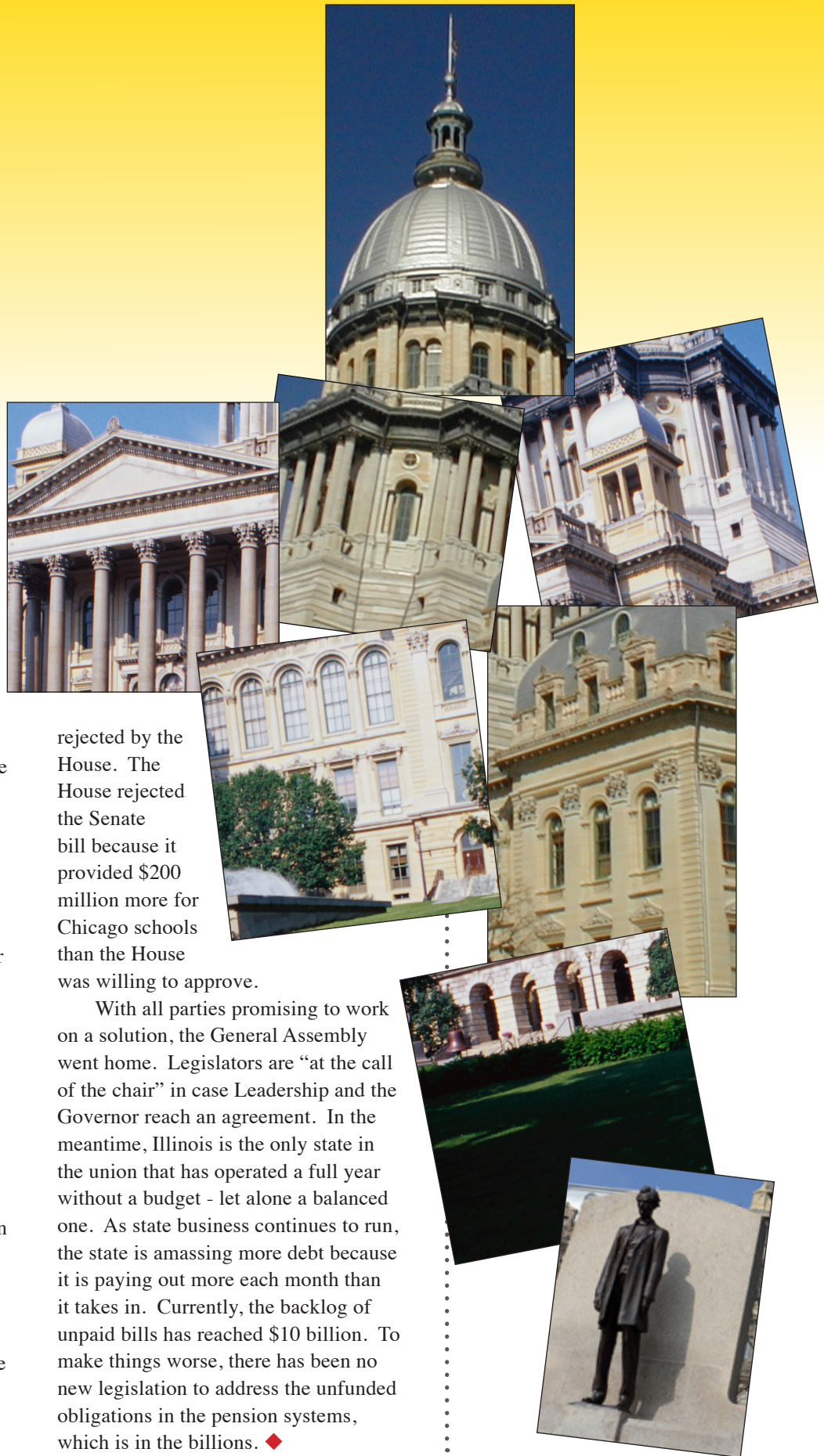
During the 5 months of this session, there was no indication that

things would change. Both sides claimed they were doing the best for the state by pushing their separate agendas. Although the rank and file members were getting anxious for a resolution to the standoff, leadership has held firm in staking out their opposition to the Governor's agenda. The negative political environment has reached the point where even run-of-the-mill ordinary legislation, has lacked consideration. Scheduled session days were routinely canceled, which caused the actual days both chambers worked to drop to less than 40 days in 5 months. The Illinois General Assembly only met a total of 8 days for the months of January, February and March.

In the last week of session, the House passed a budget bill that was sent to the Senate for consideration. But - the Governor and Senate Democrats believed the House bill was \$7 billion out of balance, which resulted in the Senate voting down the measure in the final days of session. In a final attempt to work around some issues, the Governor indicated he would accept a short term budget to get the state through the election - but that effort wasn't considered. Then, the Senate's final effort included passage of a school funding bill that would allow schools to open on time was

rejected by the House. The House rejected the Senate bill because it provided \$200 million more for Chicago schools than the House was willing to approve.

With all parties promising to work on a solution, the General Assembly went home. Legislators are "at the call of the chair" in case Leadership and the Governor reach an agreement. In the meantime, Illinois is the only state in the union that has operated a full year without a budget - let alone a balanced one. As state business continues to run, the state is amassing more debt because it is paying out more each month than it takes in. Currently, the backlog of unpaid bills has reached \$10 billion. To make things worse, there has been no new legislation to address the unfunded obligations in the pension systems, which is in the billions. ♦



THANK YOU

for your support!

The 2016 IMSCA-PAC raffle drawing was a HUGE success – thanks to the generous support of our members!

IMSCA staff would like to send a big thank you to everyone who supported our 2016 fundraising effort. With your continued generosity and support, we raised \$16,820.00 for IMSCA-PAC! We would also like to congratulate our 2016 raffle winners! Those taking home prizes this year include:



Bears/Hilton gift card:
Craig Martin of Frost Electric Co., Inc.



Blackhawks/Hilton gift card:
MCA Chicago



Bass Pro Shops gift card:
Chad Fricke of FJ Murphy & Son



Eataly/Wine: Illinois Chapter NECA

Thank you again for making 2016 a successful fundraising year for IMSCA-PAC!