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# Mechanics' Liens

DOUGLAS M. HALSEY\* AND ROBERT TISCHENKEL\*\*

*In 1977 and 1978 the Florida Legislature made extensive amendments to the Mechanics' Lien Law. The statute, however, remains intricate and elusive for builder, lawyer and lienor alike. The authors review the amendments and case law of the past two years and offer suggestions on how to avoid the many pitfalls of the statute. In addition, the article contains a section devoted to the equitable lien.*

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## I. INTRODUCTION

There can be no more confusing statute in Florida than the one on liens under Chapter 713. The frequent impracticality of its application in the field, coupled with ill conceived, confusing patchwork amendments, all topped off by conflicting appellate decisions, have all combined to make life miserable for judges, lawyers, legislators and the vitally affected construction and lending industries.<sup>1</sup>

The McDonalds of Jacksonville had to pay twice for their new aluminum siding. Had they known what lay ahead, they might have chosen to live with the rotted wood on the exterior of their home for another year. The McDonalds had hired "Mr. Exteriors" to replace the wood with aluminum which was to be bought on credit from a wholesale dealer by "Mr. Exteriors." The work was completed during the first week of August, 1976, whereupon the McDonalds paid "Mr. Exteriors" in full. A substantial portion of the sum was for payment of the debt to the wholesaler. "Mr. Exteriors" never paid the wholesaler.

On August 12, 1976, the wholesaler sent the McDonalds a notice to owner pursuant to section 713.06(2)(a) of the Mechanics' Lien Law.<sup>2</sup> On October 20, 1976, the McDonalds received a copy of the wholesaler's recorded claim of lien pursuant to section 713.08.<sup>3</sup> About one and one-half years later, the District Court of Appeal,

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1. American Fire & Cas. Co. v. Davis Water & Waste Indus., Inc., 358 So. 2d 225, 225 (Fla. 4th DCA 1978) (Letts, J.).

2. FLA. STAT. § 713.06(2)(a) (1975) (current version at *id.* § 713.06(2)(a) n.1 (1977)).

In 1977, the Florida Legislature amended numerous sections of chapter 713 of the Florida Statutes. 1977 Fla. Laws ch. 77-353. These changes became effective on July 1, 1978. *Id.* § 18. Because they did not take effect immediately, these changes were codified in the notes following the main text of the amended sections of the Florida Statutes (1977). For the convenience of the reader, citations to these amended sections will be indicated by the notation "n.1."

3. FLA. STAT. § 713.08 (1975) (current version at *id.* § 713.08 & n.1 (1977)).

First District, in *Adams v. McDonald*,<sup>4</sup> required the McDonalds to pay the wholesaler for the aluminum siding.

The court's ruling was founded upon the failure of the McDonalds to file a notice of commencement<sup>5</sup> and to obtain a contractor's affidavit<sup>6</sup> from "Mr. Exteriors."<sup>7</sup> Without filing the notice of commencement, the McDonalds could not "properly" pay their contractor.<sup>8</sup> They could have avoided improper payments by obtaining a contractor's affidavit to learn of any unpaid materialmen.<sup>9</sup> Having failed to do so, the McDonalds' payments to "Mr. Exteriors" did not exist in the eyes of the court.<sup>10</sup>

The double payment in *Adams* illustrates a pitfall of noncompliance with the Mechanics' Lien Law. The McDonalds had not been aware of their responsibility to comply with the statute. This prompted the First District to suggest that the legislature amend the statute so that a homeowner need not unwittingly incur the statute's wrath.<sup>11</sup> The legislature responded by amending section 713.02(5) of the Florida Statutes to exempt improvements for which the contract price is \$2,500 or less from liens of parties not in privity with the owner.<sup>12</sup> While this provision spares the homeowner from entangling himself in the Mechanics' Lien Law for a simple home addition, it may have an adverse effect upon subcontractors who deal with either the homeowner or the professional. A homeowner can now more easily reject the subcontractor's work, knowing that his property cannot be reached by a lien. Also, contractors could insulate the owner from liens by hiring different subcontractors to perform the same task so that no contract exceeds \$2,500.

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4. *Adams v. McDonald*, 356 So. 2d 864 (Fla. 1st DCA 1978).

5. FLA. STAT. § 713.13(1) (1975) (current version at *id.* § 713.13(1) & n.1 (1977)).

6. FLA. STAT. § 713.06(3)(d)(1) (1975) (current version at § 713.06(3)(d)(1) n.1 (1977)).

7. 356 So. 2d at 866.

8. FLA. STAT. § 713.06(3)(a) (1975).

9. If the McDonalds had received a contractor's affidavit which represented that all lienors had been paid, they might have had some protection against an omission by the contractor. Section 713.06(3)(d)(4) suggests that the owner may "rely" upon the contractor's affidavit if a lienor who is not identified in the affidavit has not sent timely notice to the owner. The owner should, however, discover and pay those lienors who have given proper notice but were omitted from the affidavit. FLA. STAT. § 713.06(3)(d)(4) (1975) (current version at *id.* § 713.06(3)(d)(4) n.1 (1977)). In *Adams*, the notice to owner was not sent until after the contractor had been paid. If "Mr. Exteriors" had given a false affidavit to the McDonalds, then the wholesaler would have lost on its suit to foreclose its lien under § 713.06(2)(a) (current version at FLA. STAT. § 713.06(2)(a) n.1 (1977)).

10. The court stated, "an owner pays the contractor at his peril when he does not file the notice of commencement or demand and receive from the contractor the affidavit . . . ." 356 So. 2d at 866-67.

11. 356 So. 2d at 866.

12. 1978 Fla. Laws ch. 78-397, § 1 (codified at FLA. STAT. § 713.02(5) (Supp. 1978)).

Because of the interrelated provisions in the statute, an amendment intended to rectify one problem invariably raises another. Thus, the statute has become so complex for members of the construction industry and their attorneys that even those persons aware of the problems find their attempts at compliance to be unsatisfactory. This article will summarize recent case law and statutory amendments in an effort to provide practitioners with a guide to the intricacies of the law.

## II. THE REQUIREMENTS OF A LIEN

### A. Notice to Owner

#### 1. THE PRIVITY CONCEPT

All lienors, except laborers,<sup>13</sup> who are not in privity with the owner must serve notice upon the owner as a prerequisite to the perfection of the lien.<sup>14</sup> Those lienors who are in privity with the owner may have a lien without serving a notice upon the owner.<sup>15</sup> A lienor not in privity who furnishes labor, services or materials and thereafter comes into privity with the owner is entitled to a lien for his work done after privity has been established.<sup>16</sup> Therefore, if a nonprivity lienor fails to serve proper notice, he may partially protect his interest by alleging and proving facts which establish the later existence of privity.<sup>17</sup>

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13. The notice to owner protects the owner from unanticipated liens. Laborers are excluded from this notice requirement because their liens are not apt to be burdensome to the owner. They will not work for long periods without pay and consequently will not have a large hidden claim. See *Morgan v. Goodwin*, 355 So. 2d 217, 218 (Fla. 1st DCA 1978). In *Morgan*, a subcontractor who failed to provide notice to the owner argued that he was a laborer by virtue of the nature of his work. The subcontractor was hired to level and grade the owner's land. He was paid by the hour, operated the heavy machinery and supervised only a few workers. However, he also furnished materials to the site: his own tractor and fuel for all the tractors. The statute's definition of laborer excludes one who furnishes materials, even when the materials are not incorporated into the improvement. FLA. STAT. § 713.01(6), (9) (1977). Thus, the court held that he more aptly fit the definition of subcontractor and thereby lost his right to claim a lien by not giving notice to the owner. 355 So. 2d at 219. For a further discussion of *Morgan*, see note 23 *infra*.

14. FLA. STAT. § 713.06(2)(a) n.1 (1977). See also 2 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS 1096 (1977). Professionals, such as architects and engineers, need never serve a notice to owner. FLA. STAT. § 713.03(3) n.1 (1977).

15. FLA. STAT. § 713.05 n.1 (1977).

16. *Id.*

17. Privity under the Mechanics' Lien Law need not be purely contractual in nature. Privity may be established by showing the owner's knowledge of and consent to the lienor's activities, combined with the owner's express or implied assumption of a contractual obligation. *Foley Lumber Co. v. Koester*, 61 So. 2d 634 (Fla. 1952); Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 414-15 (1977).

In *Tompkins Land Co. v. Edge*,<sup>18</sup> a subcontractor was hired to install water and sewer lines. When his contractor failed to pay him, he sent an untimely notice to the owner and filed a claim of lien. At trial, the subcontractor contended that the notice to owner was unnecessary as he had privity with the owner. The privity allegedly developed when the owner told the subcontractor that he had installed a fire hydrant in the wrong place, and it would have to be relocated. In reversing a finding of privity below, the District Court of Appeal, Fourth District, determined that a single encounter between the subcontractor and the owner was insufficient at law to create privity.<sup>19</sup> The court recited the factors needed to create privity.<sup>20</sup> The subcontractor should *routinely* communicate with the owner; the owner's knowledge of the subcontractor must lead to the owners express or implied assumption of contractual obligation.<sup>21</sup> Furthermore, as the subcontractor's relationship with the owner grows or intensifies, its dealings with the general contractor should wane.<sup>22</sup> Indeed, in establishing privity with the owner, it is best if the subcontractor has no dealings or agreements with the contractor.

The Mechanics' Lien Law exempts a narrow class of lienors from the general privity requirement. Under section 713.04 of the Florida Statutes, where a lienor performs services or furnishes materials for a subdivision improvement, he is entitled to a lien without first giving the owner notice.<sup>23</sup> In *American Fire & Casualty v. Davis Water & Waste Industries, Inc.*,<sup>24</sup> the District Court of Appeal, Fourth District, noted that section 713.04 is silent as to whether notice to owner is required.<sup>25</sup> The court held that notice to owner is

18. 341 So. 2d 206 (Fla. 4th DCA 1977).

19. *Id.* at 208.

20. *Id.* at 207 (citing *Foley Lumber Co. v. Koester*, 61 So. 2d 634 (Fla. 1952)).

21. *Id.*

22. *Id.*

23. FLA. STAT. § 713.04 (1977). This provision describes a subdivision improvement as, *inter alia*:

grading, leveling, excavating and filling of land . . . the grading and paving of streets, curbs and sidewalks, the construction of ditches and other area drainage facilities, and the laying of pipes and conduits for water, gas, electric, sewage and drainage purposes, and construction of canals, and shall also include the altering, repairing and redoing of all said things.

*Id.*

In *Morgan v. Goodwin*, 355 So. 2d 217 (Fla. 1st DCA 1978), the subcontractor lost in his bid for a claim of lien because he failed to give notice to the owner pursuant to FLA. STAT. § 713.06(2)(a) (1975). The subcontractor's work was the leveling and grading of land. Had the subcontractor alleged he was a subdivision improver under § 713.04, he probably could have prevailed.

24. 358 So. 2d 225 (Fla. 4th DCA 1978).

25. *Id.* at 226.

not necessary because the obligations of a subcontractor under section 713.04 are separate and distinct from those under section 713.06(2)(a).<sup>26</sup>

## 2. ELEMENTS OF THE NOTICE TO OWNER

The notice to owner should set forth the lienor's name and address and must provide a sufficient description of the real property involved. The notice should also delineate the services or materials furnished or to be furnished.<sup>27</sup> Notice must be served before commencing or not later than forty-five days from commencing to furnish services or materials.<sup>28</sup>

A serious misdescription of the property in a supplier's notice to owner caused the supplier to lose its claim of lien in *Continental Casualty Co. v. Associated Plastics, Inc.*<sup>29</sup> In *Continental*, the supplier described and gave the address of the adjacent property. As a result, the owner misfiled the notice in his own records and when the owner sold the property, the new owner had no knowledge of the notice until the claim of lien was filed. The supplier argued as precedent a case in which one small aspect of a street address mistakenly appeared in the notice.<sup>30</sup> In that case, it was suggested that a minor error was not fatal. The error, however, was fatal to the supplier's claim of lien in *Continental* because of the extent and effect of the misdescription.<sup>31</sup> Nevertheless, a question is raised by the new strict compliance guidelines of the Mechanics' Lien Law as

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26. *Id.* The court also noted that its decision conflicts with *Booth v. Lombardi, Inc.*, 309 So. 2d 51 (Fla. 2d DCA 1975). *Booth* is too terse an opinion to enable one to discern whether the court deemed the lienor's activities as falling outside of those described in § 713.04, or whether the silence of § 713.04 as to notice to owner directs adherence to § 713.06(2)(a).

Recognizing this conflict, the court in *American Fire* certified the as yet unanswered question to the Supreme Court of Florida. 358 So. 2d at 226. Meanwhile, the District Court of Appeal, First District, has followed the *American Fire* holding. *Baumgartner Constr. Co. v. Harrell*, 364 So. 2d 802 (Fla. 1st DCA 1978).

27. FLA. STAT. § 713.06(2)(a) n.1 (1977).

28. *Id.* Section 713.06(2)(a) goes on to state that the notice must be served "in any event before the date of furnishing the [contractor's] affidavit . . . or abandonment, whichever shall occur first." *Id.* This indicates that the lienor's 45-day period can be abbreviated if the contractor abandons the project. The lienor can best protect himself by filing his notice to owner immediately. A notice to owner can be given after a job is completed if it is timely and if the contractor has failed to furnish his affidavit pursuant to § 713.06(3)(d)(1). Such was the case in *Adams v. McDonald*, 356 So. 2d 864 (Fla. 1st DCA 1978); see text accompanying notes 4-9 *supra*.

29. 347 So. 2d 822 (Fla. 3d DCA 1977).

30. *Id.* at 824. The case was *Adobe Brick & Supply Co. v. Centex-Winston Corp.*, 270 So. 2d 755 (Fla. 3d DCA 1972).

31. In *Adobe Brick*, the mistaken address as given in the notice was "250 N.E. 174th Street." The correct address was "250 of 174th Street." 270 So. 2d at 757.

to whether a minor misdescription may be disregarded.<sup>32</sup>

A strict compliance standard may have caused another lien claim to perish in *Marson v. Comisky*.<sup>33</sup> The lienor in *Marson* identified himself as an individual in the notice to owner. In actuality, he supplied services and materials through a corporation which he owned with his wife. The lien claim was ruled defective, and a denial of summary judgment was reversed and remanded.<sup>34</sup>

### 3. 1977 AMENDMENTS

The 1977 amendment to section 713.06(2)(a) of the Florida Statutes has added a further notice obligation for certain classes of lienors. A subcontractor (or a materialman to a subcontractor) must serve a copy of the notice to owner upon the contractor. Failure to serve this copy will result in loss of the right to claim a lien.<sup>35</sup> Furthermore, a materialman to a subcontractor must serve a copy of the notice to owner upon the subcontractor or the subcontractor as a prerequisite to perfection of his lien.<sup>36</sup> With this amendment, the closest party not in privity with the lienor is informed of the lienor's presence and of his potential resort to the statute so that double payment may be avoided.

### 4. SERVICE OF NOTICE

Notice may be served as in the manner of serving process, *i.e.*, by actual delivery, by registered or certified mail, or if none of the above is feasible, then by posting at the site.<sup>37</sup> In *Bowen v. Merlo*,<sup>38</sup> service by regular mail was deemed to be permissible especially since the owner did receive the notice. The court based its holding upon a comparison of service by regular mail with actual delivery under section 713.18(1)(b) of the Florida Statutes.<sup>39</sup> The issue of what constituted effective service was again raised in *S & S Air Conditioning Co. v. Cantor*,<sup>40</sup> where the notice to owner was sent to the owners' attorney. The attorney had acted on behalf of the out-

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32. The court in *Adobe Brick* based its holding on a liberal reading of the Mechanics' Lien Law. The court determined that liberal construction was necessary both to protect materialmen and laborers and to carry out the remedial intent of the statute. *Id.* at 758. *But see* FLA. STAT. § 713.37 (1977).

33. 341 So. 2d 1040 (Fla. 4th DCA 1977).

34. *Id.* at 1040-41.

35. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(2)(a) (1977)).

36. *Id.*

37. FLA. STAT. § 713.18 (1977).

38. 353 So. 2d 668 (Fla. 1st DCA 1978) (per curiam).

39. *Id.* at 668-69.

40. 343 So. 2d 923 (Fla. 3d DCA 1977).



of-state owners in the purchase of the land; hence, the attorney's name and address appeared on the recorded deed at a post office address in care of the owners.<sup>41</sup> The court held that service was actually made on the owners as the notice was presumably mailed to them.<sup>42</sup> This is to be distinguished from a situation in which the notice is mailed to the wrong person—*e.g.*, an employee of a corporation rather than an officer.<sup>43</sup>

## B. Claim of Lien

### 1. PERFECTION OF THE LIEN

To perfect a lien and establish its priority, the lienor must record a claim of lien.<sup>44</sup> The statute lists the contents of the claim of lien<sup>45</sup> and states that the lien is sufficient if the claim substantially adheres to the form for a claim of lien given in the statute.<sup>46</sup> In *Mid-State Contractors, Inc. v. Halo Development Corp.*,<sup>47</sup> the lienor failed to follow the statutorily suggested claim of lien form in all respects. The lienor stated that the amount remaining to be paid was "between \$30,000 and/or \$56,000."<sup>48</sup> After a motion to dismiss was granted, the lienor amended its complaint to state that \$39,200 was owed. Nevertheless, the trial court again granted the motion to dismiss due to the failure of the lienor to include the specific amount remaining unpaid in his original claim of lien.<sup>49</sup>

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41. *Id.* at 924.

42. *Id.* at 926.

43. *Id.* When the owner designates a person in addition to himself to receive a copy of the notice, the lienor should comply, but failure to comply will not invalidate an otherwise valid lien. FLA. STAT. § 713.06(2)(b) (1977).

44. FLA. STAT. § 713.08(1) & n.1 (1977). After recordation the lienor has 15 days to serve the claim of lien. *Id.* § 713.08(4)(c) n.1.

45. The claim of lien should state the name of the lienor and the address where notices or process may be served on him; the name of the person who contracted with or employed the lienor; the labor, services or materials the lienor provided as well as the contract price or value thereof; a description of the real property; the name of the owner; the time when the lienor began and also last provided the service, labor or materials; the amount unpaid the lienor; and, for a person not in privity with the owner, the date and method of service on the owner. *Id.* § 713.08 & n.1. Section 713.08(1)(h) also requires that if the person claiming the lien is not in privity with the contractor or subcontractor, he must include in his claim of lien the method of service and a copy of the notice on that contractor or subcontractor. *Id.* § 713.08(1)(h) n.1.

46. *Id.* § 713.08(3) (1977).

47. 342 So. 2d 1078 (Fla. 2d DCA 1977).

48. *Id.* at 1079. In *Mid-State*, the court was construing FLA. STAT. § 713.08(1)(g) (1975), which has not since been amended. That provision requires the claim of lien to state "[t]he amount unpaid the lienor for such labor or services or materials." 342 So. 2d at 1079 (quoting FLA. STAT. § 713.08(1)(g) (1975)).

49. 342 So. 2d at 1079.

The District Court of Appeal, Second District, reversed on the ground that the claim of lien had "substantially" adhered to the statute under the test provided by section 713.08(3) of the Florida Statutes.<sup>50</sup> Furthermore, pursuant to section 713.08(4)(a) of the Florida Statutes, the court may within its discretion overlook any error in the claim if the error has not produced an adverse effect.<sup>51</sup> Halo had not proven any adverse effect and Mid-State had eventually pinpointed the exact amount due before an adverse effect could develop.<sup>52</sup>

By implication, *Mid-State* requires the lienor to specify the amount which remains unpaid. It appears that the court's sympathy toward the lienor's approximation of the amount unpaid in the original claim was due to the later specification in the amended complaint. This liberal treatment does not contravene the general policy of strict construction of the statute because of tolerance for the lienor which is built into sections 713.08(3) and 713.08(4)(a).<sup>53</sup>

The claim of lien may be recorded at any time during the course of work and not later than ninety days after the final furnishing of labor, materials or services.<sup>54</sup> In *Cross State Development v. Indepco Construction Co.*,<sup>55</sup> a lienor argued that the ninety-day period should begin to run from the day it removed its machinery from the job site.<sup>56</sup> The lienor had last furnished services more than ninety days prior to recording the lien but it had left unused machinery at the site. The claim of lien was filed within ninety days of the removal of the machinery. The court concluded that the storage of machinery is not tantamount to the furnishing of labor or services, and therefore the ninety-day period will begin to run when the lienor actually terminates work.<sup>57</sup>

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50. *Id.* at 1079-80.

51. *Id.* at 1080-81.

52. *Id.* at 1080. As in *Continental Cas. Co. v. Associated Plastics, Inc.*, 347 So. 2d 822 (Fla. 3d DCA 1977), and *Adobe Brick & Supply Co. v. Centex-Winston Corp.*, 270 So. 2d 755 (Fla. 3d DCA 1972), discussed notes 29-32 and accompanying text *supra*, the court's view of the seriousness of the error will probably be the dispositive factor in a determination of prejudice.

53. Whether a decision concerning a misdescription in the notice to owner could serve as precedent for a misdescription in the claim of lien is open for debate.

54. FLA. STAT. § 713.08(5) (1977). When the contractor defaults the lienor must file his claim of lien within 90 days of the default if the default occurred before the lienor completed his work at the site. *Id.*

55. 346 So. 2d 127 (Fla. 1st DCA 1977).

56. *Id.* at 128.

57. *Id.*

## 2. CLAIM OF LIEN FORM

A word of caution is in order for the practitioner who would rely upon the suggested claim of lien form in the statute without consulting the actual provisions of the statute. The suggested form was not changed to conform with the 1977 amendments.<sup>58</sup>

## 3. WAIVER OF LIEN

A lien may be waived before or after services or materials have been furnished.<sup>59</sup> In *First Atlantic Building Corp. v. Neubauer Construction Co.*,<sup>60</sup> the contract between owner and contractor contained language which was alleged to constitute a lien waiver.<sup>61</sup> The contract provided that the "Contractor will save and keep the building or buildings referred to in this Agreement and the lands upon which they are situated free from all Mechanic's Liens . . . by reason of his work or of any materials or other things used by him therein."<sup>62</sup> The court found the clause to be ambiguous and resolved the ambiguity against waiver.<sup>63</sup>

### C. Notice of Commencement

#### 1. ELEMENTS OF A NOTICE OF COMMENCEMENT

The owner's notice of commencement serves two purposes. First, only after the notice of commencement has been recorded may the owner make proper payments. All payments made prior to notice are deemed not to exist for lien purposes, and the owner remains liable to the lien claimant for those payments.<sup>64</sup> Second, the date of

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58. Reliance upon the form alone fails to reveal the amendments to FLA. STAT. §§ 713.08(1)(h), (2) (1977).

Section 713.08(1)(h) requires recordation of the date and method of service of notice to the owner whenever a lien is claimed by a person not in privity with the owner. Section 713.08(2) has since added the lienor's attorney to the class of those who may sign a claim of lien.

59. *Id.* § 713.20(2). A laborer, however, may only waive his lien to the extent of labor performed at the time of waiver. *Id.*

60. 352 So. 2d 103 (Fla. 4th DCA 1977).

61. *Id.* at 105.

62. *Id.*

63. *Id.* The rule that lien waivers must be specifically stated should also apply to partial waivers of lien for amount due, services or labor performed, or as to any part of the real property involved, as provided by FLA. STAT. § 713.20(3) (1977). A partial waiver is customary when progress payments are being made. When a false partial waiver is executed which leads the owner to believe that a payment has been made, the lien claimant will be equitably estopped from enforcing his lien. *Continental Cas. Co. v. Associated Plastics, Inc.*, 347 So. 2d 822 (Fla. 3d DCA 1977).

64. FLA. STAT. § 713.06(3)(a) (1977); 2 R. BOYER, *supra* note 14, at 1089.

recording of the notice acts as the effective date of the lien. Whenever filed, the lien will attach and take priority as of the date the notice was recorded.<sup>65</sup>

In addition to recording the notice of commencement, the owner must also post the notice at the improvement site.<sup>66</sup> Work on the improvement must start within thirty days after recording or the notice of commencement will become void.<sup>67</sup> The notice, however, is not needed for subdivision improvements made pursuant to section 713.04.<sup>68</sup>

The obligation to provide the notice of commencement is solely the burden of the owner.<sup>69</sup> In *MacIntyre v. Green's Pool Service, Inc.*,<sup>70</sup> a homeowner contracted with an architect for a remodeling job. The contract was a standard A.I.A. form, with modifications that were immaterial to the lawsuit. After the general contractor abandoned the job, leaving behind an army of unpaid subcontractors, the owner responded to a mechanic's lien form by filing a third-party complaint against the architect in negligence. Among the acts of negligence alleged was a failure to provide the notice of commencement. The court held that there was no showing that the duty to provide the notice had shifted to the architect, and that it was not the custom or practice in the business community for an architect to shoulder this responsibility.<sup>71</sup>

## 2. IMPROPER PAYMENTS

If the owner makes any payment of money before recording the notice of commencement, that payment will be considered improper

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65. FLA. STAT. § 713.07(2) (1977); 2 R. BOYER, *supra* note 14, at 1089. This is known as the "relation back" concept. The owner could choose to circumvent the relation back concept by not filing the notice of commencement. The claim of lien would then take priority as of the time of its recordation. FLA. STAT. § 713.07(2) (1977). By either delaying or omitting the filing of the notice of commencement, the owner could deliberately fix the priorities.

66. FLA. STAT. § 713.13(1) (1977). This provision outlines the information which should appear in a notice of commencement: legal description and address of the property; description of the improvement; name and address of the owner and contractor (and, in the event of a bond, the name and address of the surety and the amount of the bond); and the name and address of any person the owner designates to receive notices under the statute. The 1977 amendments, effective July 1, 1978, require the furnishing of the name and address of any person making a loan for the construction of the improvements. 1977 Fla. Laws ch. 77-353, § 14 (amending FLA. STAT. § 713.13(1) (1977)).

67. FLA. STAT. § 713.13(2) (1977).

68. *Id.* § 713.13(4).

69. *Id.* § 713.13(1). Presumably, the owner could, by contract, shift the duty to perform this obligation.

70. 347 So. 2d 1081 (Fla. 3d DCA 1977).

71. *Id.* at 1083.

and the owner may be liable beyond the contract price.<sup>72</sup> The recent case of *Tamarac Village, Inc. v. Bates & Daly Co.*<sup>73</sup> illustrates this potentially drastic consequence. In *Tamarac*, the owner paid the contractor \$15,315.08 of a contract price of \$79,725.00 before recording a notice of commencement.<sup>74</sup> The contractor abandoned the job and the owner completed the job at a cost of \$20,501.56 above the contract price. After abandonment and before renewing work, the owner also failed to file a notice of recommencement pursuant to section 713.07(4) of the Florida Statutes.<sup>75</sup> The District Court of Appeal, Fourth District, held that the owner's failure to file the two notices prevented him from defeating the lienor's claim.<sup>76</sup> Although the separate sums of \$15,315.08 and \$20,501.56 had been paid to the contractors, these sums were deemed not paid, and the owner remained liable to the lienor.

*Tamarac* is noteworthy for another reason. Not only did the owner fail to perform its obligations under the statute, but the lienor also violated the statute since notice was not given to the owner after abandonment. The court ignored the absence of notice to owner, suggesting that the owner's noncompliance excuses noncompliance by the lienor.<sup>77</sup>

The 1977 amendment would appear to require a different result. As amended, section 713.06(2)(a) of the Florida Statutes now reads: "The notice [to owner] must be served regardless of the method of payments, whether proper or improper . . ."<sup>78</sup> In this amendment, the legislature provided that the filing of the notice to owner and the recording of the notice of commencement are inde-

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72. FLA. STAT. § 713.06(3)(a) (1977).

73. 348 So. 2d 23 (Fla. 4th DCA 1977).

74. *Id.* at 24. The contract price refers to the amount agreed upon by the contracting parties as adjusted by any change in the scope of the work, defects in workmanship or other breaches of contract. If no price is agreed upon, then the contract price translates into the value of labor, services or materials covered by the contract as adjusted. FLA. STAT. § 713.01(3) n.1 (1977).

75. 348 So. 2d at 24-25.

When a contractor has abandoned the job and the owner wishes to complete the construction, he has two choices. He may pay the lienors either in full or pro rata in accordance with § 713.06(4) or he can proceed by filing a notice of recommencement. FLA. STAT. § 713.07(4) (1977). If the owner takes the latter course, he may offset the reasonable cost of completion from the value of the original contract once he has fulfilled the necessary notice requirements to prior lienors. See 1 S. RAKUSIN, *FLORIDA MECHANICS' LIEN MANUAL* ch. 14, at 17 (1974).

76. 348 So. 2d at 25.

77. *Id.*; see *Wool Wholesale Plumbing Supply*, 365 So. 2d 216 (Fla. 4th DCA 1978).

78. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(2)(a) (1977)). Both this provision and the previous version apply only to lienors who are not in privity with the owner. Lienors in privity need not give notice. FLA. STAT. § 713.05 (1977); see notes 13-17 and accompanying text *supra*.

pendent obligations (apart from the fact that the notice of commencement provides the lienor with information needed for the notice to owner). Yet, given the choice between having to penalize an owner or a lienor for failure to follow the statute, the Florida Legislature chose to penalize the lienor.<sup>79</sup> Still, the lienor does benefit from such exacting standards in cases where he seeks to gain priority over noncomplying co-lienors.

### 3. THE PROPER PAYMENTS PROVISION

Although the proper payments concept is inseparable from the operation of the notice of commencement, the proper payments concept appears in section 713.06 of the Florida Statutes,<sup>80</sup> which concerns liens of persons *not* in privity. This might lead an owner to conclude erroneously that he need not be concerned with proper payments, and hence a notice of commencement, with regard to persons with whom he *is* in privity. Therefore, the notice of commencement provision of section 713.13 of the Florida Statutes ought to be amended to incorporate the proper payments provision of section 713.06.

#### D. *The Contractor's Affidavit*

##### 1. WHEN AN AFFIDAVIT IS REQUIRED

The contractor must furnish the owner with an affidavit when the final payment under a direct contract is due.<sup>81</sup> The affidavit identifies unpaid subcontractors and thereby protects the owner from paying more than once for the same labor, service or material.<sup>82</sup> This affidavit must be delivered to the owner five days before the institution of a lien foreclosure action.<sup>83</sup> Section 713.06 of the Florida Statutes also requires a contractor's affidavit even if final payment

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79. While the provision does describe the means of payment to a materialman, it is primarily aimed at protecting the owner against unknown lienors and excessive loss. 1 S. RAKUSIN, *supra* note 75, ch. 8, at 9.

The 1977 change specifically eliminated the § 713.06(3)(c)4 "savings clause" and established failure to give timely notice as a complete defense against all lienors not in privity. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(2)(a) (1977)); see 1 S. RAKUSIN, *supra* note 75, ch. 8, at 10-11; notes 13-17 and accompanying text *supra*.

80. FLA. STAT. § 713.06(3) & n.1 (1977).

81. *Id.* § 713.06(3)(d)(1) n.1.

82. *Hardee v. Richardson*, 47 So. 2d 520, 524 (Fla. 1950) (construing FLA. STAT. § 84.06 (1941), predecessor to present § 713.06). The contractor's affidavit, where appropriate, shall state that some or all lienors have been paid. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(3)(d)(1) (1977)).

83. FLA. STAT. § 713.06(3)(d)(1) n.1 (1977).

does not become due because of a premature termination of construction.<sup>84</sup>

A problem addressed by the 1977 amendment to section 713.06(3)(d)(1) of the Florida Statutes,<sup>85</sup> was found in *Leader Mortgage Co. v. Rickards Electric Service, Inc.*<sup>86</sup> There, a contractor was employed under an oral contract to perform electrical work. The contractor quit the job when the owner breached. At that time (and later in the claim of lien and subsequent pleadings), the contractor alleged that the total outstanding balance of the contract was due. The owner contended that the failure to file the contractor's affidavit barred recovery. The contractor claimed that since construction was not completed and final payment not due, a contractor's affidavit was not necessary.<sup>87</sup> The court found this argument to be an "unacceptable paradox" in light of the demand for full and final payment and found for the owner.<sup>88</sup>

## 2. WHO MUST FILE

Only contractors need file an affidavit.<sup>89</sup> Those who are able to allege status as a subcontractor need not file before bringing an action.<sup>90</sup> On the other hand, a small business concern accustomed to being considered a subcontractor may find itself in the statutory role of contractor. In *Atlantic Gardens Landscaping, Inc. v. Boca Raton Land Development, Inc.*,<sup>91</sup> the owner also acted as contractor. Since plaintiff, a landscaping company, had contracted directly with the owner, it came under the statutory definition of "contractor" and was obliged to file a contractor's affidavit.<sup>92</sup> Thus, the lienor was not entitled to the protection usually accorded a subcontractor under the Mechanics' Lien Law.

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84. *Id.* This means that the contractor should furnish the affidavit not only in the case of an owner's breach but also when the contractor has abandoned the job.

85. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(3)(d)(1) (1977)).

86. 348 So. 2d 1202 (Fla. 4th DCA 1977).

87. *Id.* at 1204.

88. *Id.* at 1205.

89. FLA. STAT. § 713.06(3)(d)(1) n.1 (1977).

90. *Viyella v. Jackson*, 347 So. 2d 830 (Fla. 3d DCA 1977). See also note 86 *supra*.

91. 360 So. 2d 1278 (Fla. 4th DCA 1978).

92. *Id.* at 1279-80 (citing FLA. STAT. § 713.01(2) (1975)). This provision defines contractor as *inter alia*, a person other than a laborer or materialman who enters into a contract with the owner of real property for improving it.

Section 713.01(2) was similarly invoked in *Leader Mortgage Co. v. Rickards Elec. Serv., Inc.*, 348 So. 2d 1202 (Fla. 4th DCA 1977). In that case, a printed form had identified the company supplying electrical work as being a "subcontractor." Nevertheless, the court viewed the circumstances as grounds for holding the company to be a contractor under the statutory definition. *Id.* at 1205.

The need for a contractor's affidavit was again at issue in *Oppenheim v. Newport Systems Development Corp.*<sup>93</sup> In this case the party bringing the foreclosure action was an architect. The District Court of Appeal, Third District assumed, but did not hold, that the affidavit requirement applied to architects.<sup>94</sup> The law has since been changed to reach a different rule. A new amendment directed to professionals such as architects now reads: "No lienor under this section shall be required to serve . . . an affidavit concerning unpaid lienors as provided in [section] 713.06(3)."<sup>95</sup>

The 1977 amendments add a new class to those lienors who must file a contractor's affidavit. Except for laborers or materialmen, subcontractors who come into privity with the owner at any time must furnish an affidavit.<sup>96</sup>

A contractor who fails to provide an affidavit is not necessarily prohibited from alleging a lien. Case law has carved out an exception to furnishing the contractor's affidavit. If the contractor can establish facts that excuse compliance with section 713.06(3)(d)(1) of the Florida Statutes, then he may proceed with his action without having filed the affidavit.<sup>97</sup> This was acknowledged recently by the Third District in *Oppenheim*.<sup>98</sup>

In *Oppenheim*, a contractor<sup>99</sup> who failed to file the affidavit alleged that no unpaid subcontractors existed and that no one employed by him had an outstanding claim. The failure to furnish the affidavit was raised in the owner's answer, but the owner did not therein provide proof to contradict the contractor's allegations. The court stated that summary judgment would be premature since the factual issues would have to be resolved at trial.<sup>100</sup> The court's reasoning was based on the policy that the affidavit serves to protect the owner. The nonexistence of unpaid lienors is apparently the kind of circumstances where compliance would be excused because

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93. 348 So. 2d 328 (Fla. 3d DCA 1977).

94. *Id.* at 330.

95. 1977 Fla. Laws ch. 77-353, § 3 (amending FLA. STAT. § 713.03(3) (1977)).

96. *Id.* § 4 (amending FLA. STAT. § 713.05 (1977)).

97. See *Oppenheim v. Newport Sys. Dev. Corp.*, 348 So. 2d 328 (Fla. 3d DCA 1977); *Brown v. First Fed. Sav. & Loan Ass'n*, 160 So. 2d 556 (Fla. 1st DCA 1964) (citing former FLA. STAT. § 84.04(3) (1959)). The recent case of *Falovitch v. Gunn & Gunn Constr. Co.*, 348 So. 2d 560 (Fla. 3d DCA 1977), however, maintained that "strict compliance with the Mechanics' Lien Law is an indispensable prerequisite to seeking affirmative relief thereunder." *Id.* at 562.

98. 348 So. 2d at 330.

99. The contractor was an architect. See text accompanying notes 93-96 *supra*.

100. 348 So. 2d at 330. The Third District, however, indicated that if the defendant had responded with a motion to dismiss, the trial court could have dismissed the case. *Id.* at 329-30.



the owner would be in no danger of making double payment on the bill.<sup>101</sup>

### 3. 1977 AMENDMENTS

When the contractor's affidavit recites debts to lienors, the owner may bypass the contractor and pay the lienors directly if he gives the contractor ten days notice.<sup>102</sup> The 1977 amendment adds: (1) lienors who have not given notice and whose forty-five day notice period pursuant to section 713.06(2)(a) of the Florida Statutes has not expired may be paid (in full or pro rata) from any balance which may still be due the contractor; and (2) lienors who have not given notice and whose forty-five days have expired may not be paid.<sup>103</sup> This latter provision reflects stricter standard of construction which is in contrast with the prior relaxation of the notice requirement by case law.<sup>104</sup>

The 1977 amendment also altered a formerly well established rule. Prior to 1977, the owner had to withhold either the final payment or ten percent of the original contract price, whichever was larger, until receipt of the contractor's affidavit. Now the owner may only retain the final payment.<sup>105</sup>

#### E. *Delivery of Materials*

One who has furnished materials may have a lien when the materials are incorporated into the improvement.<sup>106</sup> A lien will also attach for materials supplied for construction but not remaining in the improvement and for the reasonable rental value of tools (except handtools) and machinery.<sup>107</sup> Delivery of materials is prima facie evidence that they were incorporated into the improvement.<sup>108</sup>

The materialman must introduce evidence at trial to show that the materials were delivered to the site. In *American Insurance Co. v. Coley Electric Supply Co.*,<sup>109</sup> the lower court's presumption of delivery was overturned by the District Court of Appeal, First Dis-

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101. *Cf. Atlantic Gardens Landscaping, Inc. v. Boca Raton Land Dev., Inc.*, 360 So. 2d 1278 (Fla. 4th DCA 1978) (noncompliance can be successfully pleaded).

102. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(3)(d)(2) (1977)).

103. *Id.*

104. See text accompanying notes 178-86 *infra*.

105. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(3)(d)(5) (1977)).

106. FLA. STAT. § 713.01(6) (1977).

107. *Id.*

108. *Id.*

109. 354 So. 2d 390 (Fla. 1st DCA 1978).

trict, since no testimony had been introduced to show delivery.<sup>110</sup> The burden of proof is clearly on the materialman.<sup>111</sup>

The statute provides for a notice of delivery where a project consists of six or more improvements or of one improvement valued at more than \$50,000.<sup>112</sup> In either case the materialman must deliver to a place other than the site of improvement. The seller and purchaser of the materials must execute and serve upon the owner a statutory "Notice of Delivery."<sup>113</sup> While the lienor must serve this notice on the owner, this does not obviate the requirement of serving the notice to owner pursuant to section 713.06(2) of the Florida Statutes.<sup>114</sup>

#### F. *Repossession of Materials not Used*

A person who wishes to repossess materials which have not been incorporated into an improvement has two courses of action: replevin and peaceable self-help.<sup>115</sup> A materialman chose replevin as a means to recover its materials in *National Steel Products v. Donald L. Myrick & Associates, Inc.*<sup>116</sup> This gave the District Court of Appeals, Second District, the opportunity to clarify the elements of a replevin action under section 713.15 of the Florida Statutes (1975).

In *National Steel* the owner made two payments, leaving an unpaid balance of \$27,502.44 for materials for the construction of a skating rink. The owner's bank dishonored his final payment. The improvement was abandoned and unincorporated materials were not removed from the site. Upon the materialman's suit to replevy, the owner first maintained that section 713.15 did not give the owner a right to replevy independent of Florida's replevin statute.<sup>117</sup> The court held that section 713.15 did afford a right to replevy without resort to chapter 78 of the Florida Statutes.<sup>118</sup>

The owner also argued that replevin could only be maintained after the materialman had refunded the owner's first two payments (the materialman had not so refunded those payments). The court

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110. The court suggested that evidence establishing that the materials are "specially fabricated for incorporation" will suffice. 354 So. 2d at 391.

111. *Id.*

112. FLA. STAT. § 713.09(2) (1977). The notice contains the cost of materials, the identities of the parties, the address of delivery and a description of the property being improved. *Id.*

113. *Id.* The service of notice will suffice to establish the fact of delivery at trial.

114. *Id.*

115. FLA. STAT. § 713.15 (1977).

116. 353 So. 2d 657 (Fla. 2d DCA 1977).

117. *Id.* at 659 (citing FLA. STAT. §§ 78.01-.21 (1975)).

118. *Id.* at 659.

focused on the wording of the last sentence of section 713.15 and concluded that a refund as a condition precedent to recovery applies only to a self-help repossession.<sup>119</sup> Refund is unnecessary when replevin is sought because a court can limit recovery to those materials for which there was no payment. In the self-help situation, however, there is nothing to ensure that the materialman does not repossess beyond the value due him.

### G. *Statement of Account*

The owner may demand a statement of account in writing from any lienor.<sup>120</sup> The statement shows the nature of the materials or services furnished in the past or to be furnished, as well as the amount paid, amount due or amount to become due.<sup>121</sup> Failure to provide this statement subjects the lienor to a loss of his claim of lien. Previously, the lienor had ten days in which to provide the statement. The 1977 amendments now give the lienor thirty days.<sup>122</sup> This change acts to ease the burden on a corporate lienor with an overworked bookkeeping department.

### H. *Duration of the Right to Claim a Lien*

The Mechanics' Lien Law version of a statute of limitations is found at section 713.22(1) of the Florida Statutes, and provides that an action to enforce a lien must be commenced no later than one year after the claim of lien is recorded.<sup>123</sup>

One court described section 713.22(1) as "not like an ordinary statute of limitations affecting merely the remedy, but it enters into and becomes a part of the right of action itself."<sup>124</sup> In that case, a subcontractor originally sought a money judgment against its contractor. Fifteen months after the claim of lien, the contractor filed a transfer bond. Nine months later, or two years after the claim of lien had been filed, the subcontractor sought to amend its complaint to enforce its claim of lien against the transfer bond. This was the first time that the subcontractor sought a remedy under the Me-

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119. *Id.* at 659-60.

120. FLA. STAT. § 713.16(2) (1977).

121. *Id.*

122. 1977 Fla. Laws ch. 77-353, § 8 (amending FLA. STAT. § 713.16(2) (1977)).

123. *Id.* § 9 (amending FLA. STAT. § 713.22(1) (1977)). This amendment now requires the filing of a notice of lis pendens in order to continue the effectiveness of the lien after the commencement of the action as against intervening creditors and subsequent bona fide purchasers. *Id.*

124. *Regal Wood Prods., Inc. v. First Wis. Nat'l Bank*, 347 So. 2d 643, 644 (Fla. 4th DCA 1977).

chanics' Lien Law, having sued previously in contract. The court held that regardless of whether the amendment related back to the original complaint, the lien was extinguished after one year and no lien action could survive.<sup>125</sup>

Under a different set of circumstances, the District Court of Appeal, Second District, construed section 713.22(1) liberally in *B & H Sales, Inc. v. Fusco Corp.*<sup>126</sup> The lienor filed its claim and later foreclosed against a corporation operating under the fictitious name of Sunshine Associates, Inc. When the identity of the true owner, the Fusco Corporation, was discovered a year and three months after the filing of the claim of lien, the lienor was permitted to amend to correct the misnomer. The court distinguished suing the wrong party from suing the correct party and seeking to rectify a misnomer, suggesting that in the former instance, an amendment would be barred by section 713.22(1).<sup>127</sup>

### I. Risk of Owner's Nonpayment

When the owner does not pay the contractor the contractor's duty to pay its subcontractor is called into question. Usually the contractor and subcontractor address the question of who shall bear the risk of the owner's default in their contract. In the absence of such language or where the language is ambiguous, the Florida appellate courts have rendered conflicting decisions.<sup>128</sup> Recently, in *Peacock Construction Co. v. Modern Air Conditioning, Inc.*,<sup>129</sup> the Supreme Court of Florida settled the matter by deciding that, absent a clear shift of risk to the subcontractor, the contractor remains liable. In this case, the contractor made written subcontracts which provided for final payment "within 30 days after the completion of the work included in this sub-contract, written acceptance by the Architect and full payment therefor by the Owner."<sup>130</sup> When the owner failed to pay the contractor, the contractor then refused to pay its subcontractors on the ground that payment from the owner was a condition precedent to their payment.

In finding for the subcontractor as a matter of law, the court

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125. *Id.* at 645.

126. 342 So. 2d 105 (Fla. 2d DCA 1977).

127. All of the defensive pleadings were in the name of Sunshine Associates, Inc. *Id.* at 106.

128. Compare *Edward J. Gerrits, Inc. v. Astor Elec. Serv., Inc.*, 328 So. 2d 522 (Fla. 3d DCA 1976) with *Peacock Constr. Co. v. Modern Air Conditioning, Inc.*, 339 So. 2d 294 (Fla. 2d DCA 1976).

129. 353 So. 2d 840 (Fla. 1977).

130. *Id.* at 841.

focused on the nature of the transaction. In the common subcontract transaction, the intent of the parties is that the subcontractor not bear the risk. This result is grounded upon the consideration that a subcontractor "must have payment for [its] work in order to remain in business."<sup>131</sup> While the same could be said for the contractor, the decision explicitly seeks to protect the nonprivity subcontractor, the person who has no leverage or control over the owner.<sup>132</sup>

Two months after handing down its decision in *Peacock Construction*, the Supreme Court of Florida took the next logical step in *Aetna Casualty & Surety Co. v. Warren Brothers Co.*<sup>133</sup> This case again involved Peacock Construction Company, but this time the litigant was Peacock's surety who issued a payment bond pursuant to section 713.23 of the Florida Statutes (1975). The contract contained the same ambiguous language as in the *Peacock Construction* case.<sup>134</sup> The court held that the surety stood in the contractor's place and was obligated to pay the subcontractor.<sup>135</sup>

### III. PRIORITIES

The mechanic's lien claimant frequently finds himself competing with another party claiming an interest in the property upon which he seeks to enforce his claim of lien. The competitor can be one of several parties asserting an interest in the property, including, for example, another mechanic's lien claimant or a mortgage lender. The priority to be accorded these competing interests depends in part upon the time of recordation of the asserted claim, the nature of the interest in the property and equitable considerations.

#### A. Priorities Under Section 713.07

Section 713.07(1) of the Florida Statutes provides that liens on subdivision improvements<sup>136</sup> and liens for professional services<sup>137</sup> shall attach at the time of recordation of the claim of lien and shall take priority as of that time. In *Baumgartner Construction Co. v.*

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131. *Id.* at 842.

132. The court went on to say that its decision should not be viewed as "anti-general contractor." The parties may shift the risk in a clearly expressed contractual clause. *Id.* at 842-43.

133. 355 So. 2d 785 (Fla. 1978).

134. See text accompanying note 130 *supra*.

135. 355 So. 2d at 788.

136. FLA. STAT. § 713.04 (1977).

137. *Id.* § 713.03 n.1.

*Harrel*,<sup>138</sup> the District Court of Appeal, First District, addressed the issue of whether section 713.07(1) "affords the first subcontractor to file a lien against a subdivision a higher priority than that of other claimants under the same contract who timely file their claims."<sup>139</sup> The court held, *inter alia*, that a subdivision lienor who first records his claim of lien takes priority over other lienors who later file.<sup>140</sup>

Section 713.07(2) of the Florida Statutes provides that the liens of persons in privity<sup>141</sup> and not in privity<sup>142</sup> shall attach and take priority as of the time of recordation of the notice of commencement, but in the event that a notice of commencement is not filed, then such liens shall attach and take priority as of the time the claim of lien is recorded.<sup>143</sup> Accordingly, when an owner files a notice of commencement, a lienor's claim of lien "relates back" to and attaches at the time that the notice of commencement was filed.<sup>144</sup>

In *Cleveland Trust Co. v. Ousley Sod Co.*,<sup>145</sup> the District Court of Appeals, Fourth District, construed the "relation back" concept of section 713.07(2). In that case a mortgage lender instituted foreclosure proceedings after a notice of commencement had been filed but before a mechanic's lien claimant had filed its claim of lien. The lien claimant argued that its claim of lien related back to the filing of the notice of commencement, thus entitling it to foreclosure on the property which the mortgage lender had acquired on default of the mortgage.

The court found, however, that the *lis pendens*,<sup>146</sup> which the mortgage lender had filed simultaneously with the institution of the foreclosure proceedings, barred the claim of lien from relating back to the filing of the notice of commencement. The court found section 713.07(2) and the relation back concept to be inapplicable and held that the *lis pendens* statute was dispositive.<sup>147</sup>

Section 713.07(3) of the Florida Statutes provides that any con-

138. 364 So. 2d 802 (Fla. 1st DCA 1978).

139. *Id.* at 804.

140. *Id.*

141. FLA. STAT. § 713.05 n.1 (1977).

142. *Id.* § 713.06 & n.1.

143. *Id.* § 713.07(2).

144. *See, e.g.*, *Miller Elec. Co. v. Sweeney*, 199 So. 2d 734 (Fla. 1967); *Palm Beach Bank & Trust Co. v. Lainhart*, 84 Fla. 662, 95 So. 122 (1923).

145. 351 So. 2d 58 (Fla. 4th DCA 1977).

146. FLA. STAT. § 48.23(1)(b) (1977), which provides:

(b) The filing for record of such notice of *lis pendens* shall constitute a bar to the enforcement against the property described in said notice of *lis pendens* of all liens including but not limited to federal tax liens and levies, unrecorded at the time of filing for record such notice of *lis pendens* . . . .

147. 351 So. 2d at 59-60.

veyance, encumbrance or demand recorded against real property prior to the attachment of a mechanic's lien shall take priority over such lien.<sup>148</sup> This section was applied to defeat a mechanic's lien in *Corry Construction Co. v. Hector Construction Cos.*<sup>149</sup> In December, 1972, Corry, a mechanic's lien claimant, furnished a notice to the owner, Will-O-Wick, Inc. In April, 1973, Will-O-Wick, Inc. transferred the subject property to Will-O-Wick Apartments, a limited partnership. Corry filed a claim of lien in May, 1973, erroneously naming Will-O-Wick, Inc. as the owner.

The court refused to allow Corry to enforce its claim of lien against the property owned by Will-O-Wick Apartments. The court found that Corry's lien had not attached to the property prior to the time Will-O-Wick, Inc. conveyed it to Will-O-Wick Apartments because the lien was filed more than one month after the conveyance.<sup>150</sup> Accordingly, under 713.07(3) the transferee of the property, Will-O-Wick Apartments, had priority over Corry's lien. Furthermore, Corry's claim could not be saved by the relation back doctrine, since no notice of commencement had been filed.<sup>151</sup>

## B. *The Mechanics' Lien Claimant Versus the Mortgage Lender*

### 1. SECTION 713.13(5)

Section 713.13(5) of the Florida Statutes provides that a claim of lien shall not relate back to the date of the recording of the notice of commencement to defeat the rights of any individual who acquired "title or any interest in real property from the owner" after one year from the date of recording the notice of commencement.<sup>152</sup> The issue of whether a mortgage constitutes "any interest in real property" within the meaning of section 713.13(5) has recently been decided by the District Courts of Appeal, Second and Fourth Districts.

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148. FLA. STAT. § 713.07(3) (1977).

149. 363 So. 2d 1125 (Fla. 1st DCA 1978).

150. *Id.* at 1127.

151. The record on appeal shows only that Corry filed a claim of lien on May 21, 1973. The record also contains copies of the warranty deed conveying the property in question from the corporate Will-O-Wick to the limited partnership. The deed bears a notation that it was filed and recorded in Escambia County on April 16, 1973, more than a month before Corry's claim of lien was filed. As a result, the limited partnership's interest was not subject to sale to satisfy Corry's claim. *Id.*

152. FLA. STAT. § 713.13(5), which provides:

Unless otherwise provided in the notice of commencement, any notice of commencement heretofore or hereafter recorded shall not be effective as to any person acquiring title or any interest in real property from the owner or under him after 1 year from the date of recording the notice of commencement.

In *Southern Colonial Mortgage Co. v. Medeiros*,<sup>153</sup> a mortgagee extended loans to the purchasers of two condominium units and recorded the mortgages in March and April, 1974. Portions of the loans were used to secure releases from the construction lender who had provided and recorded the original mortgage loan for the construction of the project in September, 1972. The notice of commencement on the construction project was recorded in May, 1973. Claims of lien were filed in August, October and November, 1974, and in January, 1975.<sup>154</sup>

When the condominium unit purchasers defaulted, the mortgagees initiated a foreclosure action and joined the lienors as defendants. The trial court found that the lienors' claims were superior to those of the mortgagees because the liens related back to the date of the notice of commencement which had been filed prior to the recording of the mortgages.<sup>155</sup>

On appeal to the District Court of Appeal, Fourth District, the mortgagees argued that they had acquired an interest in real property more than one year after the filing of the notice of commencement within the meaning of section 713.13(5), and were therefore entitled to priority over the lien claimants. The court rejected this argument and found that under Florida law, a mortgage does not convey title or create "any interest in real property."<sup>156</sup> The court noted that even if mortgages were defined as constituting any interest in real property, section 713.13(5) was nevertheless inapplicable to these mortgagees, since the mortgages were recorded within one year of the filing of the notice of commencement.<sup>157</sup>

The court was more receptive to the mortgagees' argument that they were entitled to priority over the lien claimants because they had become subrogated to the construction lender's rights to the extent that their mortgages had been used to secure releases from him. Since the construction lender's mortgage predated the recording of the liens, and since the mortgagees' loans paid off in full the construction lender's mortgage on each unit, the court agreed that the mortgagees should be given priority over the lien claimants to the extent that their mortgages were used to pay the construction lender.<sup>158</sup>

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153. 347 So. 2d 736 (Fla. 4th DCA 1977).

154. *Id.* at 737.

155. *Id.*

156. *Id.* at 738 (citing *United of Fla., Inc. v. Illini Fed. Sav. & Loan Ass'n*, 341 So. 2d 793 (Fla. 2d DCA 1977)); *accord*, *Acco, Inc. v. Biscayne Fed. Sav. & Loan Ass'n*, 352 So. 2d 884 (Fla. 4th DCA 1977).

157. 347 So. 2d at 738.

158. *Id.* at 738-39.



The dissent disagreed with the majority's construction of the scope of section 713.13(5), arguing that although a mortgagee does not acquire title to or an interest in land, this rubric of real property law should not be applied to section 713.13(5) of the Mechanics' Lien Law.<sup>159</sup> Indeed, the dissenting judge aptly demonstrated the anomalous result of the majority holding:

To suggest that the legislature intended that a property owner could not defeat the priority of mechanics lien holders by mortgaging his property, but could do so by the simple act of selling or leading it to those who, in turn, could about face and secure exactly the same financing, is, to say the least, unlikely.<sup>160</sup>

Other arrangements to obtain financing which entail the conveyance of any interest in real property exist, and could be used to circumvent the Fourth District's interpretation of 713.13(5).

Section 713.13(5) of the Florida Statutes received a similar construction in a case decided by the District Court of Appeal, Second District, six months earlier.<sup>161</sup> In that case, the owners of a condominium complex sold four units to purchasers within one year of the filing of a notice of commencement. The purchasers executed mortgages in favor of a mortgage lender who assigned them to Illini Federal more than one year after the notice of commencement was filed. United, a plumbing subcontractor, then filed its claim of lien against the condominium property.<sup>162</sup>

The Second District held that the assignment of the mortgages to the assignee more than one year after the notice of commencement was filed did not create an interest in real property within the meaning of section 713.13(5).<sup>163</sup> Consequently, the claim of lien related back to the notice of commencement and was given priority over the mortgages held by the assignee. The court noted that even if the mortgages were deemed interests in real property, the assignee had rights no greater than those of the assignor and the assignor had no rights superior to those of the lien claimant under section 713.13(5) because the assignor acquired the mortgages within one year of the filing of the notice of commencement.<sup>164</sup> Accordingly, the court found that the lien claimant's rights in the property were superior to those of the assignee of the mortgages.

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159. *Id.* at 740 (Letts, J., dissenting).

160. *Id.* at 741.

161. *United of Fla., Inc. v. Illini Fed. Sav. & Loan Ass'n*, 341 So. 2d 793 (Fla. 2d DCA 1977).

162. *Id.*

163. *Id.* at 794.

164. *Id.*

A special concurring opinion questioned the necessity of the decision of the court on the issue of whether a mortgage is any interest in real property within the contemplation of the Mechanics' Lien Law.<sup>165</sup> Judge Scheb concurred with the majority on the ground that an assignee of a mortgage stands in a position no better than its assignor, but he argued that the cases cited by the majority for the proposition that a mortgage is not an interest in real property should not be dispositive in a mechanic's lien case.<sup>166</sup>

It is apparent from both the dissenting opinion in *Southern Colonial* and the special concurring opinion in *United of Florida* that there is a lack of consensus as to what interests in real property constitute "any interest in real property" for purposes of section 713.13(5). The legislature should revise this section and specifically identify those interests in real property which are meant to fall within the ambit of section 713.13(5).

## 2. ESTOPPEL

Many of the considerations discussed in the Equitable Lien section of this article are applicable to situations where a lien claimant finds himself competing for priority with a mortgage lender who has instituted foreclosure proceedings against an owner in default. In 1978, the Supreme Court of Florida articulated the circumstances under which a mortgage lender would be equitably estopped from asserting the priority of its mortgage over the lien of a mechanic's lien claimant.<sup>167</sup>

In *Rinker Materials Corp. v. Palmer First National Bank & Trust Co.*<sup>168</sup> subcontractors furnished labor and materials to a construction project. During the course of construction the mortgagee of the construction loan (hereinafter Bank) made various assurances to the subcontractors: (1) that there were sufficient funds in the loan account to complete the project; (2) that they should continue to furnish labor and materials; (3) that there was no need to file mechanics' liens; and (4) that the Bank would do everything it could to see that the subcontractors continued to furnish labor and materials. When the subcontractors were not paid they filed liens and instituted foreclosure. In response, the Bank asserted the priority of

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165. *Id.* at 795. (Scheb, J., concurring specially).

166. *Id.*

167. See *Rinker Materials Corp. v. Palmer First Nat'l Bank & Trust Co.*, 361 So. 2d 156 (Fla. 1978).

168. *Id.*

169. *Id.* at 157.

its recorded mortgage.<sup>170</sup>

The trial court, finding that the subcontractors had relied on the Bank's statements, held that the Bank was equitably estopped from asserting the priority of its mortgage over petitioners' liens. The District Court of Appeal, Third District, reversed on the ground that since the Bank had made no statements which were fraudulent, untrue or misrepresentative, the Bank was not estopped from asserting the priority of its mortgage.<sup>171</sup>

On certiorari to the Supreme Court of Florida, the subcontractors argued that under *Gulf Shore Dredging Co. v. Ingram*,<sup>172</sup> equitable estoppel is based on general considerations of right and justice and does not require proof of fraud and misrepresentation.<sup>173</sup> The supreme court rejected the subcontractors' arguments and held that a party may successfully maintain a suit under the theory of equitable estoppel only where there is proof of fraud, misrepresentation or other affirmative deception.<sup>174</sup>

Although the result in the *Rinker* case appears to be harsh, it should be noted that the trial court found that the statements made by the Bank were neither fraudulent nor untrue. The *Rinker* case and *Indiana Mortgage & Realty Investors v. Peacock Construction Co.*,<sup>175</sup> are instructive nonetheless. The subcontractor should be vigilant in securing his statutory rights and not be mesmerized by the assurances of a construction lender which may later turn out to be ill-founded.<sup>176</sup>

### C. *The Crane Case and Priorities*

Section 713.06(2)(a) of the Florida Statutes requires a lienor to serve the owner of real property with a notice to owner within forty-five days from commencing to furnish services or materials.<sup>177</sup> Prior to July 1, 1978, a lienor who had failed timely to file a notice to owner was, under certain limited circumstances, still permitted to

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170.. *Id.*

171. *Id.* at 159.

172. 193 So. 2d 232 (Fla. 4th DCA 1966).

173. *Id.* at 234 (citing *Oates v. Prudential Ins. Co.*, 107 Fla. 224, 147 So. 418 (1932)).

174. 361 So. 2d at 159. The supreme court overruled *Gulf Shore Dredging*, 193 So. 2d at 232, and *North v. Culmer*, 193 So. 2d 701 (Fla. 4th DCA 1967), to the extent that they conflicted with its holding.

175. 348 So. 2d 59 (Fla. 2d DCA 1977).

176. In *Indiana Mortgage* the court said: "The mistaken observation that there seemed to be enough money left in undisbursed loan funds to complete the project falls short of what we contemplated as 'affirmative deception' . . ." *Id.* at 60-61.

177. FLA. STAT. § 713.06(2)(a) n.1 (1977). For a discussion of § 713.06(2)(a), see notes 14-23 and accompanying text.

recover on a pro rata basis by virtue of the "savings clause" in section 713.06(3)(c)4 of the Florida Statutes.<sup>178</sup>

In *Crane Co. v. Fine*,<sup>179</sup> the savings clause in section 713.06(3)(c)4 was construed in favor of an unpaid lienor listed in a contractor's final payment affidavit who had failed timely to file a notice to owner although he had served the notice within the time period prescribed for filing a claim of lien.<sup>180</sup> It was ruled that the unpaid lienor was entitled to a pro rata portion of any sums remaining due the contractor (or other person with whom the lienor was in privity) after all the lienors giving timely notice had been paid.<sup>181</sup>

The *Crane* rule worked in favor of the lienor who served the notice to owner in an untimely manner or who had simply failed to serve the notice to owner altogether. The operation of the *Crane* rule, however, did not adversely affect the owner, since he was accountable only to the noncomplying lienor to the extent of the amount he owed the individual with whom the lienor was in privity.<sup>182</sup> Numerous cases decided after *Crane* had applied the rule of

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178. Prior to its amendment, FLA. STAT. § 713.06(3)(c)(4) (1977) provided:

No person furnishing labor or material or both who is required to serve a notice under subsection (2)(a), and who did not serve such notice and whose time for such service has expired shall be paid because he is listed in an affidavit furnished by the contractor under this subsection until all lienors giving notice and lienors listed in such affidavit whose time for serving such notice has not expired have been paid in full. If there is a balance due the contractor after all of said lienors have been paid in full, any of said persons who failed to serve timely notice shall be paid in full or pro rata according to the amounts of their claims to the extent of such balance due the contractor; provided, this shall not be construed to permit any claim or demand whatsoever by said persons failing to serve timely notice against the owner.

179. 221 So. 2d 145 (Fla. 1969).

180. *Id.* at 152.

181. *Id.*

182. This assumes that the owner had fully complied with the statute. Prior to the amendment of § 713.06, if the owner had made improper payments either by failing to file a notice of commencement or by neglecting to secure a contractor's affidavit, the noncomplying lienor was permitted to enforce his lien against the owner.

For example, in *Tamarac Village, Inc. v. Bates & Daly Co.*, 348 So. 2d 23 (Fla. 4th DCA 1977), the owner made payments to the general contractor prior to recording its notice of commencement and, after the general contractor abandoned the project, made additional payments to complete construction without filing a notice of commencement for the recommenced construction as required by FLA. STAT. § 713.07(4) (1977). The court found that since those payments were improperly made and should have been retained by the owner, the lienor, who had failed to serve notice to owner within the time period prescribed by FLA. STAT. § 713.06(2)(a) (1977), was entitled to enforce his lien against the owner's property, to the extent of the amounts improperly paid.

In *Konsler Steel Co. v. Partin*, 356 So. 2d 264 (Fla. 1978), the owner failed to obtain a contractor's affidavit upon making the final payment. Under FLA. STAT. § 713.06(3)(d)(5) (1977), the owner was required to withhold final payment until he had received the contractor's affidavit. The Supreme Court of Florida held that the lienor, who had failed to serve a

that case to permit the noncomplying lienor to recover at least partially for materials or services furnished.<sup>183</sup>

The *Crane* rule has since been abrogated by statute.<sup>184</sup> In 1977, the legislature amended section 713.06 of the Florida Statutes to preclude any possible construction that failure timely to file a notice to owner will not bar a claim of lien but merely affect its priority.<sup>185</sup> Section 713.06(2)(a) now provides that the failure to serve the notice shall be a complete defense to payment by any person, except a person with whom the lienor failing to serve the notice has a contract. Section 713.06(2)(c)4 provides that if the notice to owner is not served in a timely manner, the lienor is not entitled to payment, even if he is listed in the contractor's affidavit.

The abrogation of the *Crane* rule has left the owner in a favored position. For example, suppose the owner of real property retains a general contractor for the construction of a building but fails to file a notice of commencement until two months later. When final payment is made to the general contractor, the owner does not obtain a contractor's affidavit. The general contractor subsequently becomes insolvent and makes no payments to his suppliers. Under section 713.06(3), the sums paid to the general contractor prior to the filing of the notice of commencement and the final payment made without obtaining a contractor's affidavit were "improper payments." But under the current Mechanics' Lien Law the owner,

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notice to owner within the time period prescribed in FLA. STAT. § 713.06(2)(a) (1977), was nevertheless entitled to enforce his lien to the extent of the amount that the owner should have retained until he received the contractor's affidavit.

If the factual situations in *Tamarac* and *Konsler* arose today, the lienors would not have a statutory mechanic's lien claim against the owners. As of July 1, 1978, FLA. STAT. § 713.06(3)(c) n.1 (1977) provides:

No person furnishing labor or material, or both, who is required to serve a notice under paragraph (2)(a), and who did not serve the notice and whose time for service has expired shall be entitled to be paid by the owner because he is listed in an affidavit furnished by the contractor under subparagraph (c)1.

Section 713.06(2)(a) now provides in pertinent part that "the failure to serve the notice shall be a complete defense to payment by any person, except a person with whom the lienor failing to serve the notice has a contract."

183. See, e.g., *Lopez Terrazzo & Tile, Inc. v. Cooper*, 302 So. 2d 784 (Fla. 3d DCA 1974); *Moretrench Corp. v. Bronson & Veal Enterprises, Inc.*, 262 So. 2d 206 (Fla. 4th DCA 1972).

184. *Crane* stands for two propositions: (1) a lien claimant who has failed to perfect his statutory mechanic's lien rights is not thereby precluded from establishing an equitable lien; and (2) a lienor who has failed timely to file a notice to owner but has served the notice within the time period prescribed for filing a claim of lien, is entitled to a pro rata portion of any sums remaining due the contractor (or other person with whom the lienor was in privity) after all the lienors giving timely notice have been paid. It is the second proposition which the legislature has specifically negated. A lienor who has failed timely to file a notice to owner might still be able to establish an equitable lien, but he would be required to prove the existence of "special and peculiar equities." See text accompanying notes 258-62 *infra*.

185. 1977 Fla. Laws ch. 77-353, § 5.

who has violated the provisions of the statute, is not liable to the lienor not in privity who has failed timely to file a notice to owner.

The 1977 legislative revision changed the status of the lienor who fails timely to file the notice to owner required by section 713.06(2)(a). Prior to the revision the lienor was entitled to a pro rata portion of any sums remaining due the contractor (or other individual with whom the lienor was in privity) after all the lienors who had given timely notice had been paid. The current law prevents any lienor not in privity with the owner who has not timely filed a notice of owner from obtaining any lien on undisbursed funds held by the owner.<sup>186</sup>

#### IV. PAYMENT BONDS AND TRANSFERS TO SECURITY

##### A. *Elements of a Payment Bond*

The owner may require the contractor to shield the owner from potential claims of lienors by furnishing a payment bond.<sup>187</sup> The payment bond must be "in at least the amount of the original contract price before commencing the construction of the improvement under the direct contract."<sup>188</sup> Thus, the surety is protected from liability for any "extras"<sup>189</sup> which the owner may authorize without the permission of the surety.<sup>190</sup> The bond is conditioned upon the contractor's prompt payment to all lienors under the contractor's direct contract.<sup>191</sup> The owner remains liable only for the liens of the contractor who furnished the bond.<sup>192</sup>

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186. FLA. STAT. § 713.06(3)(d)(2) n.1 (1977) does make provision for the lienor whose 45-day time period has not expired at the time the general contractor executes his final payment affidavit. The relevant passage provides:

Lienors listed in said affidavit not giving notice, whose 45-day notice time has not expired shall be paid in full or pro rata, as appropriate, from any balance then remaining due the contractor, but no lienor whose notice time has expired shall be paid by the owner or by any other person except the person with whom that lienor has a contract.

*Id.*

187. FLA. STAT. § 713.23 n.1 (1977). Under the prior statute, resort to a payment bond was not mandatory. *Houdaille Indus., Inc. v. United Bonding Ins. Co.*, 453 F.2d 1048, 1051 (5th Cir. 1972).

188. FLA. STAT. § 713.23 n.1 (1977).

189. In this context "extras" are any labor, services or materials authorized by the owner in addition to labor covered by the previous contract. *Id.* § 713.01(5).

190. See 2 RAKUSIN, note 75 *supra*, ch. 28, at 19.

191. FLA. STAT. § 713.23 n.1 (1977). Presumably, if the owner bypasses his contractor and makes a separate agreement with a subcontractor, the surety for the contractor is not liable to the subcontractor. See, e.g., *Cincinnati Ins. Co. v. Putnam*, 335 So. 2d 855 (Fla. 4th DCA 1976).

192. FLA. STAT. § 713.02(6) (Supp. 1978). A subcontractor does not have an action against the owner. *Cohen v. Lunsford*, 362 So. 2d 383 (Fla. 1st DCA 1978).

The owner's exemption under the payment bond was held in-  
 violate in *Hawaiian Inn, Inc. v. Dunn*.<sup>193</sup> Despite the existence of a  
 payment bond, a supplier of labor and materials attempted to fore-  
 close against the owner. The trial court properly dismissed this suit  
 since the action was not timely. Still, the supplier retained the  
 opportunity to assert its claim against the bond.<sup>194</sup> Thereupon, the  
 trial court reinstated the supplier's foreclosure action against the  
 owner. In holding that an owner's liability cannot be revived, the  
 District Court of Appeal, First District, maintained that the ex-  
 emption is "permanent, not transitory."<sup>195</sup>

The payment bond must be executed by a surety authorized to  
 do business in Florida.<sup>196</sup> A lienor has "a direct right of action on the  
 bond against the surety."<sup>197</sup> In *Alpha Electric Supply, Inc. v. F.*  
*Feaster, Inc.*,<sup>198</sup> a materialman supplied materials to a subcontrac-  
 tor in connection with a construction job where the contractor had  
 furnished a payment bond. The trial judge dismissed a count in the  
 materialman's complaint which sought judgment against the surety  
 on the payment bond. The ground for this ruling was that the mate-  
 rialman had failed to join the subcontractor as an indispensable  
 party. The District Court of Appeal, Second District, reversed, hold-  
 ing that joinder of the subcontractor was unnecessary.<sup>199</sup> The word  
 "direct"<sup>200</sup> not only links the lienor to the surety, it confirms the  
 exclusive liability of the principal and surety on a payment bond.

#### 1. HOW THE EXISTENCE OF A PAYMENT BOND ALTERS STANDARD MECHANICS' LIEN PROCEDURES

In the absence of a payment bond, a lienor is required to record  
 his claim of lien during the progress of work but not later than  
 ninety days after the final furnishing of services or materials by the  
 lienor.<sup>201</sup> The lienor must bring an action to enforce the lien within  
 one year of recordation.<sup>202</sup> When a payment bond has been fur-

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193. 342 So. 2d 132 (Fla. 1st DCA 1977).

194. A claim must be asserted against a bond within "1 year from the performance of  
 the labor or completion of delivery of the materials and supplies." FLA. STAT. § 713.23(1) n.1  
 (1977).

195. 342 So. 2d at 134. Furthermore, the original dismissal of the supplier's foreclosure  
 action was a final judgment. It was improper to reinstate litigation several months thereafter.  
*Id.*

196. FLA. STAT. § 713.23(1) n.1 (1977).

197. *Id.*

198. 358 So. 2d 892 (Fla. 2d DCA 1978) (per curiam).

199. *Id.* at 894.

200. See text accompanying note 197 *supra*.

201. FLA. STAT. § 713.08(5) (1977).

202. *Id.* § 713.22(1) n.1.

nished, the lienor must institute suit on the bond within one year from the performance of labor or completion of delivery of materials or supplies.<sup>203</sup> In a case where a contractor and its surety argued that a subcontractor had failed to perfect his lien by filing suit within one year of a claim of lien, the court stated that the existence of a payment bond precluded the necessity for perfecting the lien.<sup>204</sup> Thus, the requirements of sections 713.23 and 713.08 have been tacitly held to be mutually exclusive.<sup>205</sup>

## 2. 1977 AMENDMENTS

The 1977 amendment to section 713.23 of the Florida Statutes strikingly changed the payment bond provisions, particularly in the way the parties must establish a network of communication among themselves. Under amended section 713.06(2)(a) of the Florida Statutes, a lienor<sup>206</sup> not in privity with the owner must send a notice to owner before commencing work or not later than forty-five days from commencing to furnish services.<sup>207</sup> Prior to the 1977 amendments the owner did not need to respond. Now, however, the owner must inform the lienor in writing of the existence of the payment bond within ten days after receipt of this notice.<sup>208</sup> This return notice must include the name and address of the surety and principal.<sup>209</sup>

Within forty-five days after commencing to furnish labor or materials, a lienor not in privity with the contractor must inform the contractor in writing that he will "look to the contractor's bond for protection."<sup>210</sup> In effect, the lienor tells the contractor that he is aware of the existence of the payment bond and at some future time will not seek to foreclose against the owner. If for some reason the lienor is not notified of the payment bond through usual channels,<sup>211</sup> under amended section 713.23(1) he has forty-five days from the

203. *Id.* § 713.23 n.1.

204. *E.E. Dean Snavelly, Inc. v. Sullivan*, 360 So. 2d 451 (Fla. 1st DCA 1978).

205. *Id.* at 452.

206. A laborer need not provide a notice to owner. *FLA. STAT.* § 713.06(2)(a) n.1 (1977); see note 13 *supra*. A laborer personally performs on the site and does not provide materials or labor service of others. *Id.* § 713.01(9). Certain on-site personnel such as architects, engineers and surveyors are not considered laborers. *Id.*

207. 1977 Fla. Laws ch. 77-353, § 5 (amending *FLA. STAT.* § 713.06(2)(a) (1977)). The purpose is to inform the owners of the identity of potential lien claimants. The owner is spared from unanticipated claims later. 2 R. BOYER, *supra* note 14, at 1096.

208. 1977 Fla. Laws ch. 77-353, § 10 (amending *FLA. STAT.* § 713.23 (1977)).

209. *Id.*

210. *Id.*

211. A lienor may also learn of a payment bond when reference to the bond is incorporated in the owner's notice of commencement. See *FLA. STAT.* § 713.13(1)(e) (1977). This notice is posted conspicuously at the site. *Id.* See also *id.* § 713.01(24).



time he learns of the payment bond to serve the preliminary notice on the contractor.<sup>212</sup> As a prerequisite to suit, a lienor not in privity with the contractor must send the contractor a second notice stating that he has performed labor or delivered materials for which he has not been paid.<sup>213</sup> Where, for example, a materialman has supplied a subcontractor and has not been paid, that materialman must deliver both notices to the contractor as a prerequisite to bringing suit.

There are three indications that the materialman must comply exactly with the two-notice requirement. First, amended section 713.23(1) of the Florida Statutes specifically establishes both notices as a condition precedent to suit.<sup>214</sup> Second, section 713.37 of the Florida Statutes requires courts to construe strictly the Mechanics' Lien Law.<sup>215</sup> Finally, the notice to contractor by a lienor not in privity under section 713.23(1) of the Florida Statutes, parallels the notice to owner by a lienor not in privity under amended section 713.06(2)(a) of the Florida Statutes.<sup>216</sup> Formerly, failure to send a notice to owner merely resulted in a loss of priority, rather than the forfeiture of the right to bring an action.<sup>217</sup> The 1977 amendment to section 713.06(3)(c)4 of the Florida Statutes changed this result so that a failure to file a notice to owner will preclude the lienor from obtaining a mechanic's lien.<sup>218</sup> Similarly, a materialman who fails to follow the requirements of section 713.23(1) may not argue that he has merely lost priority. He has irretrievably lost his right of action under the statute.

### B. *Transferring Liens to Security*

An owner may transfer a claim of lien to a security in the form of either money or a bond.<sup>219</sup> The owner may seek the transfer in order to avoid a cloud upon his title. The money or bond, intended to pay any judgment rendered in favor of the lienor, must be in an amount equal to that demanded by the claim of lien.<sup>220</sup> The clerk prepares a certificate showing the transfer and mails a copy to the

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212. 1977 Fla. Laws ch. 77-353, § 10 (amending FLA. STAT. § 713.23 (1977)).

213. *Id.* The requirements of this notice to the contractor are retained from the former version of section 713.23.

214. *Id.*

215. FLA. STAT. § 713.37 (1977). This provision was added to the Mechanics' Lien Law by the 1977 Florida Legislature. 1977 Fla. Laws ch. 77-353, § 15.

216. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(2)(a) (1977)).

217. *See Crane Co. v. Fine*, 221 So. 2d 145 (Fla. 1969).

218. 1977 Fla. Laws ch. 77-353, § 5 (amending FLA. STAT. § 713.06(3)(c)(4) (1977)).

219. FLA. STAT. § 713.24(1)(b) (1977).

220. *Id.*

lienor.<sup>221</sup> Filing the certificate of transfer releases the property from the lien<sup>222</sup> and restores the marketability of the property. The owner's right to transfer is then unrestricted.<sup>223</sup>

The existence of a transfer bond does not relieve a lienor of its procedural obligations under the Mechanics' Lien Law. In each of three recent cases in which the lienor neglected to follow the statute, it was argued unsuccessfully that section 713.24 of the Florida Statutes (1975) permitted noncompliance with the other provisions of the lien law.

In *Fidelity & Deposit Co. v. Accel, Inc.*<sup>224</sup> the subcontractor foreclosed on a claim of lien. The contractor transferred the lien to a security.<sup>225</sup> After an adverse judgment below, the surety on the transfer bond appealed and argued that the subcontractor had failed to allege and prove that it had given notice to the owner pursuant to section 713.06(2)(a) of the Florida Statutes (1975). In reversing the trial court and finding for the surety, the District Court of Appeal, Fourth District, maintained that "the claimant must prove all of the conditions precedent to the perfection and enforcement of that lien."<sup>226</sup>

The District Court of Appeal, First District, invoked the same "conditions precedent" language in finding against the lienor in *Corry Construction Co. v. Hector Construction Cos.*<sup>227</sup> In *Corry*, the lienor had previously won a judgment against Will-O-Wick, Inc., the original owner. The lienor was granted leave to file a further complaint against the surety on the transfer bond. The surety defended by showing that the record title holder of the property was a limited partnership named Will-O-Wick Apartments. The lienor had sent its notice to owner to the corporation, but thereafter, in April, 1973, the corporation deeded the property to the limited part-

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221. *Id.*

222. *Id.*

223. *Riviera Beach Partnership, Ltd. v. S.I. Goldman Mechanical Contractor*, 345 So. 2d 783 (Fla. 4th DCA 1977). In *Riviera*, the owner transferred the lien to a bond after the foreclosure suit was filed, but before service was perfected. Summary judgment in favor of the lienor was granted. The court held that there was no time limit on the transfer. In reversing the lienor's summary judgment, the court implicitly held that once the transfer was made the owner was an improper target for recovery. The lienor should have amended its pleadings in acknowledgment of the transfer. See 2 S. RAKUSIN, *supra* note 75, ch. 18, at 11.

224. 354 So. 2d 424 (Fla. 4th DCA 1978).

225. Any person having an interest in the real property may transfer the lien. FLA. STAT. § 713.24(1) n.1 (1977). In this case the subcontractor argued that it need not prove it had furnished notice to owner because the contractor, not the owner, had acquired the transfer bond.

226. 354 So. 2d at 425.

227. 363 So. 2d 1125, 1128 (Fla. 1st DCA 1978).

nership. The lienor filed its claim of lien in May, 1973. The lienor argued that its notice to owner, which preceded the conveyance, effectively initiated its foreclosure. The court rejected this argument and found that the conveyance took priority over the claim of lien under section 713.07(3) of the Florida Statutes.<sup>228</sup>

Concomitantly, the lienor had argued that the existence of the transfer bond relieved it of the requirement to establish a valid claim of lien against the record title holder.<sup>229</sup> The transfer bond was, by its terms, intended to pay any judgments in satisfaction of a claim of lien. Since the lienor had already won a judgment against the wrong party, the corporation, the lienor maintained that the bond covered *any* judgment on the claim of lien beyond that of a judgment on a claim of lien against the rightful owner. The First District refused to accept the lienor's interpretation of the bond's function. Having failed to establish the conditions precedent to a valid lien, the lienor could not receive the benefits of the bond.<sup>230</sup>

A subcontractor's confusion as to the meaning of the Mechanics' Lien Law caused it to forfeit its right of action in *Vic Tanny, Inc. v. Fred McGilvray, Inc.*<sup>231</sup> In this case, Vic Tanny of Florida, Inc. was a lessee of real property owned by Monumental Properties, Inc. Vic Tanny International was listed in the lease as the trade name of the tenant. McGilvray, the subcontractor, filed its claim of lien. In response, Vic Tanny of Florida, Inc., as principal, and Reliance Insurance, as surety, filed a transfer bond. The principal and surety also filed a notice of contest of lien which required the subcontractor to foreclose within sixty days.<sup>232</sup> Within sixty days the subcontractor filed a foreclosure action listing three defendants including Vic Tanny International, but omitting both Vic Tanny of Florida, Inc. and Reliance Insurance. As no suit was filed against the principal and surety, the clerk returned the transfer bond after sixty days had elapsed.

On appeal, the subcontractor contended that section 713.24(4) of the Florida Statutes leaves the door open for suit against defen-

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228. The conveyance was recorded prior to the time the lien attached. FLA. STAT. § 713.07(3) (1977). A lien attaches as of the time of the recordation of the owner's notice of commencement and, if there is no notice of commencement, as of the time the claim of lien is recorded. *Id.* § 713.07(2).

229. 363 So. 2d at 1128.

230. *Id.*

231. 348 So. 2d 648 (Fla. 3d DCA 1977).

232. An owner or agent may shorten to 60 days the time in which a subcontractor must commence an action on either a § 713.23 payment bond or § 713.24 transfer bond. FLA. STAT. § 713.22(2) (1977).

dants other than the principal and surety.<sup>233</sup> Apparently, the subcontractor argued that once the sixty days had lapsed and the security was returned, suit could be brought against other parties. The District Court of Appeal, Third District, ruled that section 713.22(2), read *in pari materia* with section 713.24, operates as a statute of limitation.<sup>234</sup>

In *Fidelity, Corry* and *McGilvray*, the lienors forfeited their claims because they had failed to grasp the complexities of the statute. Where once courts would have construed the statute liberally to protect the small businessman, they no longer are permitted to do so.<sup>235</sup> The result has been harsh. In *Corry*, for instance, the subcontractor did not know of a paper transfer of ownership and therefore failed to join the proper defendant.<sup>236</sup> The subcontractor and materialman must now be aware of their multifarious obligations under the statute and how those obligations are intertwined with those of the other participants in a construction project. The courts, particularly where bonds are furnished, are no longer inclined to forgive a procedural misstep.<sup>237</sup>

### C. Concurrent Payment and Transfer Bonds

Despite the existence of a payment bond exempting an owner from liability, subcontractors invariably seek to foreclose claims of lien against the owner. Even though the lien may be legally invalid, it can still place a cloud upon the owner's title. In *Resnick Developers South, Inc. v. Clerici, Inc.*,<sup>238</sup> the owner transferred the lien to security pursuant to section 713.24 of the Florida Statutes (1975). The District Court of Appeal, Fourth District, recognized that the

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233. 348 So. 2d at 650.

234. The court cited the following provision:

If no proceeding to enforce a transferred lien shall be commenced within the time specified in § 713.22 or if it appears that the transferred lien has been satisfied of record, the clerk shall return said security upon request of the person depositing or filing the same, or the insurer.

*Id.* (quoting FLA. STAT. § 713.24(4) (1971)).

235. This is due to the new statutory provision which requires strict construction. FLA. STAT. § 713.37 (1977).

236. It was especially harsh considering that the lienor had demonstrated the merit of its case by winning a judgment against the former owner.

237. In one recent case, however, a procedural misstep was not fatal. In *American Fire & Cas. Co. v. Davis Water & Waste Indus., Inc.*, 358 So.2d 225 (Fla. 4th DCA 1978), the lienor failed to join the surety on a transfer bond as a defendant. The lienor finally sought to join the surety two and one-half years after the claim of lien was recorded and two years and two months after the transfer to bond. Because a suit was already in existence within one year of the claim of lien pursuant to FLA. STAT. § 713.22(1) (1977), joinder of the surety thereafter did not violate the intent of the statute. 358 So. 2d at 226.

238. 340 So. 2d 1194 (Fla. 4th DCA 1976).

subcontractor did not have a right to file a claim of lien against the owner since the owner was without exception exempted by the payment bond as against a subcontractor.<sup>239</sup> Furthermore, the owner had a right to utilize the transfer bond as a prompt device for removing the encumbrance.<sup>240</sup>

When the lienor improperly attempts to foreclose against an owner of property protected by a payment bond, the owner may choose among several courses of action. Posting a transfer bond will immediately clear the encumbrance. Alternatively, the owner may seek to discharge the lien.<sup>241</sup> In *Goldberger v. United Plumbing & Heating Co.*,<sup>242</sup> the owner filed a complaint to discharge a lien and the subcontractor made no response.<sup>243</sup> By not responding, the lien of the subcontractor was subject to automatic cancellation.<sup>244</sup>

The court in *Goldberger* noted that when the lienor files his lien foreclosure action first, the owner may raise the payment bond either as an affirmative defense or in a motion to dismiss.<sup>245</sup> In dictum in the *Resnick* case, the District Court of Appeal, Fourth District, condoned the affirmative defense approach.<sup>246</sup> One year later in *Hunt Truck Sales & Service, Inc. v. Bonanza Construction, Inc.*,<sup>247</sup> the Fourth District elaborated by stating that if the payment bond defense appears on the face of the foreclosure complaint, the owner may raise the defense by motion to dismiss. In *Hunt*, an order granting a motion to dismiss was reversed, however, because the owner failed to allege that the bond attached to the complaint stated the amount of the original contract price.<sup>248</sup> In other words,

239. *Id.* at 1197. See also *Edward L. Nezelek, Inc. v. Concreform Co.*, 351 So. 2d 1046 (Fla. 4th DCA 1977). In *Resnick*, the Fourth District receded from the language in *Schleifer v. All-Shores Constr. & Supply Co.*, 260 So. 2d 270 (Fla. 4th DCA 1972), which suggested that a subcontractor may sue on the transfer bond.

240. The court in *Resnick* permitted the use of an otherwise unnecessary bond to remove an encumbrance without channeling liability to the bond. A similar approach was taken in *Corry Constr. Co. v. Hector Constr. Cos.*, 363 So. 2d 1125 (Fla. 1st DCA 1978); see text accompanying note 226 *supra*. A payment bond was not at issue here. Instead, the lienor had erroneously filed a claim of lien against the former owner. The present owner, not party to the suit, executed the transfer bond (supposedly to remove the cloud on its title, but perhaps in anticipation of liability). The court, however, would not permit a claim of lien on the transfer bond because the lien was improper under the Mechanics' Lien Law.

241. FLA. STAT. § 713.21(4) (1977).

242. 358 So. 2d 860 (Fla. 4th DCA 1978).

243. Under FLA. STAT. § 713.21(4) (1977), the lienor has 20 days to show cause why he has failed to bring an action to enforce his lien.

244. No notice or hearing is required before cancellation; the summons attached to the owner's complaint will serve as notice to the lienor. 358 So. 2d at 863.

245. *Id.*

246. 340 So. 2d at 1196-97.

247. 353 So. 2d 612 (Fla. 4th DCA 1977).

248. This is an essential element of FLA. STAT. § 713.23(1) n.1 (1977).

the court required assurance that the payment bond had met the conditions of section 713.23 of the Florida Statutes before it would dismiss the action.<sup>249</sup>

The court in *Goldberger* apparently did not consider the court's suggestion in *Hunt* that the pleadings should reflect a proper payment bond as a condition to a motion to dismiss. In *Goldberger*, the *Hunt* rule was given without reference to this suggestion.<sup>250</sup> Thus, it is difficult to discern exactly where the Fourth District stands. At least this court will consider a motion to dismiss. The District Court of Appeal, Second District, appears to have foreclosed that possibility in *Alpha Electric Supply, Inc. v. F. Feaster, Inc.*<sup>251</sup> There, the court held that a motion to dismiss was premature since there had been no allegations that the payment bond conformed with the statute. The court said payment bonds may be interposed as an affirmative defense when it is shown that the payment bond meets the statutory requirements.<sup>252</sup>

#### D. Notice of Bond

In the 1977 amendments to the payment bond provision, the legislature gave the owner a method by which to publicize his exemption from liability under a payment bond and to avoid unnecessary suit. Amended section 713.23(2) of the Florida Statutes provides that every lien accruing subsequent to the exemption of the bond shall be transferred to the bond.<sup>253</sup> The transfer is recorded by a notice of bond and a copy is sent to the lienor.<sup>254</sup> The transfer produces the same effect as that of a section 713.24 transfer to security, *i.e.*, the owner's title is immediately unencumbered.

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249. Perhaps in this instance a presumption could have been made that the statutory requirements had been met. If the bond which the plaintiff-lienor attaches to his complaint represents an amount lower than the original contract price, then the bond is not statutorily valid. The plaintiff would want to expose the invalidity of the bond in its complaint as a means of circumventing the owner's alleged exemption.

250. The *Hunt* rule as given was: "If the payment bond defense appears on the face of the foreclosure complaint, the owner may raise the defense by a motion to dismiss." 358 So. 2d at 863 (citing *Hunt Truck Sales & Serv. v. Bonanza Constr., Inc.*, 353 So. 2d 612 (Fla. 4th DCA 1977)).

251. 358 So. 2d 892 (Fla. 2d DCA 1978) (*per curiam*).

252. *Id.* at 894.

253. 1977 Fla. Laws ch. 77-353, § 10 (amending FLA. STAT. § 713.23 (1977)), and adding *id.* § 713.23(2)). This provision does not encompass a contractor's lien to which the owner's exemption is always inapplicable.

254. *Id.*

## V. THE EQUITABLE LIEN

An equitable lien is a nonstatutory lien which can be imposed upon real property, undisbursed construction loan proceeds, or special funds by one who has furnished materials or services in connection with the improvement of real property.<sup>255</sup> It affords an additional remedy to one whose efforts to perfect his statutory rights have proved to be unavailing. The mere fact that one has not been paid for services or materials which have been incorporated into an improvement, however, is not sufficient to establish an equitable lien.<sup>256</sup> The party seeking to establish an equitable lien must meet specific requirements if he is to succeed in his effort to recover for the value of services or materials furnished to the improvement.<sup>257</sup>

### A. *Crane Co. v. Fine*

Prior to 1969, Florida courts were divided on the issue of whether a mechanic's lien claimant who had failed to perfect his statutory remedies was barred from establishing an equitable lien.<sup>258</sup> In *Crane Co. v. Fine*,<sup>259</sup> the Supreme Court of Florida resolved the conflict by reaffirming the rule that "one who has performed services or furnished materials in the improvement of real property is not limited to proceeding under the mechanics' lien law, but may proceed to establish an equitable lien on the property in question."<sup>260</sup>

In *Crane*, a materialman furnished supplies to a plumbing subcontractor who, after incorporating the supplies into the project, became insolvent and abandoned the plumbing job. At the time the plumbing subcontractor abandoned the project, the general contractor held \$15,000 in a special fund for the plumbing subcontractor under a percentage hold-back clause in the construction loan agreement. The materialman filed suit to enforce his claim against this fund. Neither the notice to owner<sup>261</sup> nor the claim of lien,<sup>262</sup>

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255. See generally 2 S. RAKUSIN, note 75 *supra*, ch. 27, at 1-38; Boyer & Kutun, *The Equitable Lien in Florida*, 20 U. MIAMI L. REV. 731 (1966); Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 425-33 (1977).

256. *Charter Dev. Corp. v. Eversole*, 342 So. 2d 143 (Fla. 1st DCA 1977).

257. See text accompanying notes 264-69 *infra*.

258. See, e.g., *Green v. Putnam*, 93 So. 2d 378, 380 (Fla. 1957) (failure to exercise statutory lien remedies does not bar establishment of equitable lien); *Kimbrell v. Fink*, 78 So. 2d 96, 98-99 (Fla. 1955) (failure to exercise statutory lien remedies bars establishment of equitable lien).

259. 221 So. 2d 145 (Fla. 1969).

260. *Id.* at 147 (quoting *Green v. Putnam*, 93 So. 2d 378, 380 (Fla. 1957)).

261. See FLA. STAT. § 84.061(2)(a) (1965) (current version at *id.* § 713.06(2)(a) n.1 (1977)).

however, was timely filed.

After first determining that the materialman was not precluded from attempting to establish an equitable lien by virtue of having filed to perfect his statutory lien remedies, the court examined the record to see if there were "special and peculiar equities" sufficient to support the materialman's equitable lien claim.

The supreme court noted that the \$15,000 fund held by the contractor was due and owing to the plumbing subcontractor for work it had completed at the time of abandonment. Furthermore, the fund was held solely as security for the payment of the amounts due to the plumbing contractor's materialmen and any damages sustained as a result of a breach of the plumbing subcontract. Since no other lienor claimed any portion of the fund and since the cost of completion of the plumbing project did not exceed the remaining amount payable under the contract, the contractor had no rights to the fund. Retention of the \$15,000 fund would unjustly enrich the contractor. Thus, the court determined that permitting the materialman to foreclose his lien against the fund would not force the owner to pay twice for the same improvement. The court held that "because of the special and peculiar equities shown by the record in this particular case, the plaintiff should not be foreclosed from seeking an equitable lien merely because he was entitled to but failed to perfect his statutory materialman's lien."<sup>263</sup>

### B. Requirements for an Equitable Lien

A lien claimant who has failed to perfect his statutory remedies and seeks to establish an equitable lien must specifically request relief in the form of an equitable lien,<sup>264</sup> allege the inadequacy of his remedy at law,<sup>265</sup> allege that the fund or property upon which the equitable lien is to be imposed is in the possession of or owned by the defendant,<sup>266</sup> and allege ultimate facts which support the imposition of an equitable lien in his favor.<sup>267</sup> Under the *Crane* doctrine the facts must reveal "special and peculiar equities" which justify imposing an equitable lien.<sup>268</sup> More recent cases indicate that the

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262. See *id.* § 84.081 (1965) (current version at *id.* § 713.08 & n.1 (1977)).

263. 221 So. 2d at 149.

264. *Charter Dev. Corp. v. Eversole*, 342 So. 2d 143, 144 (Fla. 1st DCA 1977).

265. *Cohen v. Lunsford*, 362 So. 2d 383, 384 (Fla. 1st DCA 1978); *Architectonics, Inc. v. Salem-Am. Ventures, Inc.*, 350 So. 2d 581, 584 (Fla. 2d DCA 1977).

266. 2 S. RAKUSIN, note 75 *supra*, ch. 27, at 37.

267. *Id.* ch. 27, at 37-38.

268. 221 So. 2d at 149. A mere allegation that the lienor's materials have been incorporated into the improvement will not meet the special and peculiar equities test. *Charter Dev. Corp. v. Eversole*, 342 So. 2d 143, 144 (Fla. 2d DCA 1977).



lien claimant must show that he has been prevented from exercising his statutory remedies because of fraud, misrepresentation or affirmative deception by the party against whom the lien is sought to be imposed.<sup>269</sup>

### C. *Equitable Liens on Real Property*

An equitable lien may be imposed against real property as a means of enforcing an owner's obligation to one who has improved that property.<sup>270</sup> Although the lien claimant must ordinarily plead each of the elements of the cause of action, where the lien claimant is unable to show fraud or misrepresentation by the owner, he may have an equitable lien if there is an agreement relating to the property which contemplates use of the property as security.<sup>271</sup> Furthermore, Florida courts have permitted a lien claimant to establish an equitable lien where the lien claimant was mistaken as to the ownership of the property,<sup>272</sup> although a lien claimant's mere confusion as to the proper party defendant is insufficient for the imposition of an equitable lien.<sup>273</sup>

Several recent Florida decisions demonstrate the variety of factual situations which can give rise to an equitable lien. In *Architectonics, Inc. v. Salem-American Ventures, Inc.*,<sup>274</sup> the owner induced the lienor not to file a claim of lien, promised to guarantee payment on the contract, and agreed to subject the property to any claim of lien later filed by the lienor.<sup>275</sup> Nevertheless, the owner refused to pay the lienor the balance due on the contract. The lienor then brought an action against the owner which included a count claiming an equitable lien. The trial court dismissed the equitable lien count for failure to state a cause of action. The District Court

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269. See, e.g., *Giffen Indus., Inc. v. Southeastern Assoc., Inc.*, 357 So. 2d 217 (Fla. 1st DCA 1978) (lenders must be guilty of fraud or misrepresentation, or gain inequitable advantage for imposition of trust on undisbursed construction funds); *Chase Manhattan Bank v. S/D Enterprises, Inc.*, 353 So. 2d 131 (Fla. 3d DCA 1977) (per curiam); *Rosen v. Fierro*, 340 So. 2d 955 (Fla. 3d DCA 1976) (award of equitable lien must be predicated on factors such as mistake or material misrepresentation); *J.G. Plumbing Serv., Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393 (Fla. 2d DCA), cert. dismissed, 339 So. 2d 1169 (Fla. 1976) (equitable lien imposed when construction lenders, by fraud or misrepresentation, falsely advise materialmen or subcontractors that mortgage is not in default).

270. *Architectonics, Inc. v. Salem-Am. Ventures, Inc.*, 350 So. 2d 581, 584 (Fla. 2d DCA 1977).

271. *Id.*

272. 2 S. RAKUSIN, note 75 *supra*, ch. 27, at 13 (citing *Gottesman v. Owen*, 172 So. 2d 257 (Fla. 3d DCA 1965); *Frank v. Groo*, 176 So. 2d 119 (Fla. 2d DCA 1965)).

273. *Vic Tanny, Inc. v. Fred McGilvray, Inc.*, 348 So. 2d 648 (Fla. 3d DCA 1977).

274. 350 So. 2d 581 (Fla. 2d DCA 1977).

275. *Id.* at 583.

of Appeal, Second District, reversed, finding that the lienor had failed to establish and perfect its statutory mechanic's lien because he had relied upon the owner's false promises of payment.<sup>276</sup> "Imposition of an equitable lien upon specific property is particularly appropriate where the creditor has lost security in that property in reliance upon the false representations of one who later claims a superior interest in the property."<sup>277</sup>

It is clear, however, that a mere misstatement of fact by one claiming a superior interest in the property is not sufficient to justify the imposition of an equitable lien. In *Indiana Mortgage & Realty Investors v. Peacock Construction Co.*,<sup>278</sup> the contractor attempted to establish an equitable lien superior to the rights of the mortgage lender who had filed suit to foreclose a mortgage on which the owner had defaulted. The mortgage lender's loan disbursements representative had stated to the contractor that there was enough money in the construction loan fund to cover the amount then owed the contractor by the owner. When the project was completed, however, there were no remaining funds with which to pay the contractor. Accordingly, the contractor argued that it should be granted an equitable lien superior to the interest of the mortgage lender. The District Court of Appeal, Second District, disagreed. It found no promise to retain monies for the contractor. No funds had been disbursed in violation of the loan agreement. The lender had not induced the contractor to continue work on the project. The Second District stated:

[T]he only duty flowing from the mortgagee in this posture was not to "affirmatively deceive" the contractor to his detriment. The mistaken observation that there seemed to be enough money left in undisbursed loan funds to complete the project falls short of what we contemplated as "affirmative deception" equivalent to fraud and misrepresentation which would justify the imposition of an equitable lien.<sup>280</sup>

A recent decision by the District Court of Appeal, First District, suggests that the requirement of fraud, misrepresentation or affirmative deception need not be present to impose an equitable lien in favor of a privity lienor. In *Divine Homes, Inc. v. Gulf Power Co.*,<sup>281</sup> a contractor installed an underground electrical distribution system

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276. *Id.* at 584.

277. *Id.*

278. 348 So. 2d 59 (Fla. 2d DCA 1977).

279. *Id.* at 60.

280. *Id.* at 60-61.

281. 352 So. 2d 115 (Fla. 1st DCA 1977).

on a subdivision owned by the defendant developer. The developer did not pay the contractor but transferred all but one of the lots to individual purchasers. The remaining lot was then conveyed to the president of the defendant corporation. The contractor brought an action to impose an equitable lien on the lot owned by the developer's president for the full value of the improvements to all the lots in the subdivision. The First District permitted the contractor to establish an equitable lien on this lot, stating that "[t]he right to impress and foreclose an equitable lien is not limited to one particular set of circumstances. It may arise from any combination of facts and circumstances, the totality of which establish a right of a special nature to charge realty with improvement costs."<sup>282</sup> The defendant's "subterfuge of corporate conveyance"<sup>283</sup> did not defeat the contractor's equitable lien claim even though the court did not hold the conveyance by the developer to be fraudulent.

#### D. *Equitable Liens on Undisbursed Loan Funds*

Where the owner of a construction project has defaulted upon mortgage payments and the lender has initiated a foreclosure action, lien claimants have attempted to impose equitable liens upon undisbursed construction loan funds.<sup>284</sup> Lien claimants have proceeded on the theory that they had an interest in the undisbursed funds prior to the time foreclosure proceedings were instituted. Generally, the requirements for imposing an equitable lien on undisbursed construction loan funds are the same as those for imposing an equitable lien on real property.<sup>285</sup>

In *Chase Manhattan Bank v. S/D Enterprises, Inc.*,<sup>286</sup> creditors of the owner of a construction project sought to impose an equitable lien upon the mortgage lender's undisbursed construction loan funds. The court refused to grant the creditors an equitable lien, concluding that factors such as fraud, affirmative deception or material misrepresentation must be present in order to impose an equitable lien.<sup>287</sup> Since there was no finding by the chancellor that the mortgage lender had defrauded or affirmatively deceived the credi-

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282. *Id.* at 116.

283. *Id.*

284. *See, e.g.,* *J.G. Plumbing Serv., Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393 (Fla. 2d DCA 1976); *Morgen-Oswood & Assoc., Inc. v. Continental Mortgage Invs.*, 323 So. 2d 684 (Fla. 4th DCA 1975).

285. *See* text accompanying notes 264-69 *supra*.

286. 353 So. 2d 131 (Fla. 3d DCA 1977) (per curiam).

287. *Id.* at 133.

tors of the owner, the trial court erred in imposing an equitable lien.<sup>288</sup>

Recent cases indicate that in some circumstances a lienor will be permitted to establish an equitable lien on undisbursed loan funds even though there has been no act of fraud, misrepresentation or deception by the lender.<sup>289</sup> In *Giffen Industries, Inc. v. Southeastern Associates, Inc.*,<sup>290</sup> a contractor-supplier filed a complaint to foreclose a mechanic's lien, impose an equitable lien on the owner's real property, and impose an equitable lien on undisbursed loan funds held by the mortgage lender. Although the mechanic's lien claim of the contractor was barred by a notice of lis pendens<sup>291</sup> filed by the mortgage lender in its foreclosure suit, the court found merit in the contractor's equitable lien count.

The court observed that ordinarily,

[u]nless there is fraud on the part of the mortgagee or unless a mortgagee has in some way induced a materialman or laborer to forego taking action which would have protected his interests, such materialman or laborer would have no claim for an equitable lien superior to the mortgage lien of the mortgagee . . . .<sup>292</sup>

The fact that a mortgage lender continues to release loan funds to the owner for continuation of construction at a time when the owner is in default is not a sufficient basis for establishing an equitable lien on undisbursed loan funds where the mortgagee forecloses on an uncompleted project.<sup>293</sup>

If at the time of foreclosure, however, the construction project is completed and the mortgage lender still retains undisbursed funds, the equities demand a different result. In such a situation the lender can foreclose upon a completed building, even though it has not disbursed all of the funds earmarked for completion of the project. The District Court of Appeal, Fourth District, has held that under such circumstances a contractor who has completed the construction in accordance with his construction contract is entitled to an equitable lien against the undisbursed balance of construction

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288. *Id.*

289. *See, e.g.,* *Morgen-Oswood & Assoc., Inc. v. Continental Mortgage Invs.*, 323 So. 2d 684 (Fla. 4th DCA 1975).

290. 357 So. 2d 217 (Fla. 1st DCA 1978).

291. The filing of a notice of lis pendens is a bar to foreclosure of a mechanic's lien. *FLA. STAT. § 48.23(1)(b)* (1977); *see Cleveland Trust Co. v. Ousley Sod Co.*, 351 So. 2d 58 (Fla. 4th DCA 1977).

292. 357 So. 2d at 219.

293. *See J.G. Plumbing Serv., Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393 (Fla. 2d DCA 1976).

loan funds.<sup>294</sup>

In *Giffen Industries*, the court considered the completion of the project crucial to whether the claimant was entitled to undisbursed loan funds.<sup>295</sup> If the project were completed at the time of foreclosure, the lien claimant would be able to impose an equitable lien on any undisbursed loan funds under the holding of *Morgen-Oswood & Associates, Inc. v. Continental Mortgage Investors*.<sup>296</sup> If the project were not completed, however, the lien claimant would be required to show that it had failed to perfect its statutory remedies as a result of the fraud, misrepresentation or affirmative deception of the mortgage lender in order to establish an equitable lien. Since it was unclear from the record whether the project had been completed at the time of foreclosure or whether there were any undisbursed loan funds upon completion, the court in *Giffen Industries* remanded the case for further proceedings.<sup>297</sup>

Similarly, in *Blosam Contractors, Inc. v. Republic Mortgage Investors*,<sup>298</sup> the District Court of Appeal, Second District, permitted a contractor to impose an equitable lien on a retainage fund held by the mortgage lender where the construction had been completed at the time the lender initiated his foreclosure suit. In *Blosam*, the mortgage lender had agreed to pay the contractor one-half the retainage fund upon completion of the condominium project and the remaining one-half of the fund upon the sale of the first fifty-six units. The owner defaulted on mortgage payments after the construction was completed but before any of the units were sold, so the lender refused to pay the contractor the remainder of the retainage fund. The court found the equitable lien to be a particularly appropriate remedy in view of the injustice which would otherwise have been imposed on the contractor.<sup>299</sup>

A lien claimant's success in obtaining an equitable lien often depends upon the nature of the property upon which he seeks to impose the lien and his relationship with the owner. A lien claimant seeking to impose an equitable lien on undisbursed loan funds need not prove fraud, misrepresentation or affirmative deception by the lender if he can show that at the time the lender instituted foreclosure, the construction project was complete and construction loan

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294. *Morgen-Oswood & Assoc., Inc. v. Continental Mortgage Invs.*, 323 So. 2d 684 (Fla. 4th DCA 1975).

295. 357 So. 2d at 221.

296. 323 So. 2d 684 (Fla. 4th DCA 1975).

297. 357 So. 2d at 221.

298. 353 So. 2d 1225 (Fla. 2d DCA 1977).

299. *Id.* at 1228.

funds remained undisbursed.<sup>300</sup> For the lien claimant seeking to impose an equitable lien on real property, the existence of a privity relationship<sup>301</sup> with the owner of the property is crucial. Recent cases suggest that unless a lien claimant who is not in privity with the owner can show fraud, misrepresentation or other affirmative deception, an equitable lien will not be imposed on the owner's property.<sup>302</sup> The lien claimant in contractual privity with the owner or whose relationship and course of dealing with the owner give rise to a "right of a special nature,"<sup>303</sup> need not show fraud, misrepresentation or affirmative deception, but only that special and peculiar equities<sup>304</sup> exist which entitle him to impress and foreclose an equitable lien on the owner's property.<sup>305</sup>

## VI. ATTORNEY'S FEES

Section 713.29 of the Florida Statutes provides:

In any action brought to enforce a lien under part I, the prevailing party shall be entitled to recover a reasonable fee for the services of his attorney for trial and appeal to be determined by the court, which shall be taxed as part of his costs, as allowed in equitable actions.<sup>306</sup>

Although the command of the statute is straightforward,<sup>307</sup> ques-

300. *Giffen Indus., Inc. v. Southeastern Assoc., Inc.*, 357 So. 2d 217 (Fla. 1st DCA 1978); *Blosam Constr., Inc. v. Republic Mortgage Invs.*, 353 So. 2d 1225 (Fla. 2d DCA 1977). See also *Morgan v. Goodwin*, 355 So. 2d 217 (Fla. 1st DCA 1978).

301. Contractual privity is not required. See *Crane Co. v. Fine*, 221 So. 2d 145, 148 (Fla. 1969); *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925); *Devine Homes, Inc. v. Gulf Power Co.*, 352 So. 2d 115, 116 (Fla. 1st DCA 1977); *Imler Earthmovers, Inc. v. Schatten*, 240 So. 2d 76, 78 (Fla. 1st DCA 1970); *Carter v. Suggs*, 190 So. 2d 784, 788 (Fla. 1st DCA 1966).

302. *Architectonics, Inc. v. Salem-Am. Ventures, Inc.*, 350 So. 2d 581 (Fla. 2d DCA 1977); *Indiana Mortgage & Realty Invs. v. Peacock Constr. Co.*, 348 So. 2d 59 (Fla. 2d DCA 1977); see cases cited in note 269 *supra*. See also *Rinker Materials Corp. v. Palmer First Nat'l Bank & Trust Co.*, 361 So. 2d 156 (Fla. 1978).

303. *Crane Co. v. Fine*, 221 So. 2d 145, 149 (Fla. 1969).

304. *Id.* at 147.

305. *Id.* at 149; *Devine Homes, Inc. v. Gulf Power Co.*, 352 So. 2d 115 (Fla. 1st DCA 1977). See also *Imler Earthmovers, Inc. v. Schatten*, 240 So. 2d 76 (Fla. 1st DCA 1970); *Blanchard v. Continental Mortgage Invs.*, 217 So. 2d 586 (Fla. 1st DCA 1969); *O.H. Thomason Builders' Supplies, Inc. v. Goodwin*, 152 So. 2d 797 (Fla. 1st DCA 1963).

306. FLA. STAT. § 713.29 n.1 (1977). The 1977 Florida Legislature amended this section to provide that attorney's fees incurred on appeal are also recoverable by the prevailing party. 1977 Fla. Laws ch. 77-353, § 11. This amendment conforms with FLA. STAT. § 59.46 (1977), which provides that whenever any statute or contract provides for the payment of attorney's fees to the prevailing party, this shall include the payment of attorney's fees to the prevailing party on appeal. See *Florida Glass & Mirror Co. v. Economy King Equip. Co.*, 353 So. 2d 596 (Fla. 4th DCA 1977).

307. The statutory mandate is clear: attorney's fees shall be awarded to the prevailing party. When the legislature amended the section in 1977, however, it created unnecessary

tions arise concerning the propriety of awarding attorney's fees in a number of situations.<sup>308</sup>

### A. *Prevailing Party*

Any lien claimant who successfully maintains a cause of action to enforce his statutory rights is a "prevailing party" within the meaning of section 713.29 of the Florida Statutes.<sup>309</sup> Similarly, one who successfully resists a claim for a mechanic's lien is a prevailing party and entitled to recover attorney's fees.<sup>310</sup> A lien claimant who prevails in his foreclosure action and successfully defends against a counterclaim to discharge the lien is entitled to attorney's fees for both his claim and the defense of the counterclaim.<sup>311</sup>

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uncertainty by adding to the end of the statute the phrase "as allowed in equitable actions." 1977 Fla. Laws ch. 77-353, § 11. It is not clear what the legislature intended by this apparent afterthought, but presumably this language does not contradict the statutory directive that attorney's fees be awarded to the prevailing party.

308. Suits brought against a surety to enforce a claim of lien against a payment bond are governed by FLA. STAT. §§ 627.428(1), .756(2) (1977).

Section 627.428(1) provides:

Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of an insured or the named beneficiary under a policy or contract executed by the insurer, the trial court, or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court, shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

This section is made applicable to suits brought against surety insurers by lien claimants and others by § 627.756(2), which provides:

Section 627.428 (attorney fee) shall also apply as to suits brought by owners, subcontractors, laborers and material men against a surety insurer under payment or performance bonds written by the insurer under the Laws of Florida to indemnify such owners, subcontractors, laborers and material men against pecuniary loss by breach of a building or construction contract; except, that the amount to be so recovered for fees or compensation of such a plaintiff's attorney shall not be more than 12.5 percent of the amount which the judgment or decree awards such plaintiff under the bond (exclusive of the costs of suit and attorney fees or compensation), nor shall it be less than \$100 where the judgment or decree is for more than \$500 nor less than \$50 where the judgment or decree is \$500 or less. Such owners, subcontractors, laborers and material men shall be deemed to be "insureds" or "beneficiaries" for the purposes of this section.

Both of these sections have been repealed by the legislature effective July 1, 1982. 1976 Fla. Laws ch. 76-168, § 3 (amending FLA. STAT. §§ 627.428(1), .756(2) (1975)). For a case applying the 12.5% limitation to a successful suit, see *CFW Constr. Co. v. Richardson Elec. Co.*, 364 So. 2d 854 (Fla. 2d DCA 1978).

309. See, e.g., *Hawaiian Inn, Inc. v. Robert Myers Painting, Inc.*, 363 So. 2d 125 (Fla. 1st DCA 1978) (per curiam); *Florida City Dev. Corp. v. Benrus Constr., Inc.*, 362 So. 2d 298 (Fla. 3d DCA 1978) (per curiam).

310. *Charter Dev. Corp. v. Eversole*, 342 So. 2d 143 (Fla. 1st DCA 1977); *Falovitch v. Gunn & Gunn Constr. Co.*, 348 So. 2d 560 (Fla. 3d DCA 1977).

311. *Peacock Constr. Co. v. Gould*, 351 So. 2d 394, 396 (Fla. 2d DCA 1977).

In *Winnie v. Buckhalter*,<sup>312</sup> a lien claimant brought an action to foreclose a mechanic's lien. The owner counterclaimed for breach of contract. The trial court determined that neither party had established his claim by a preponderance of the evidence and held that each party should be responsible for his own attorney's fees. On appeal, the District Court of Appeal, First District, held that the owner was entitled to recover attorney's fees as the prevailing party "since he successfully resisted the mechanics' lien foreclosure action and was not found otherwise liable for damages in the same case."<sup>313</sup> Presumably, if the owner had been found liable for breach of contract, he would not have been able to recover attorney's fees even though the lien claimant did not succeed in his mechanic's lien claim.

In *First Atlantic Building Corp. v. Neubauer Construction Co.*,<sup>314</sup> a contractor brought an action against the owner both to enforce a mechanic's lien and for breach of contract. The contractor was unsuccessful in his mechanic's lien claim but obtained a money judgment against the owner for breach of contract. On appeal the owner argued that it was entitled to attorney's fees because the contractor was unsuccessful in its mechanic's lien claim and because of a contractual provision.<sup>315</sup> The District Court of Appeal, Fourth District, rejected the owner's arguments finding that since the contractor proved that the owner breached the contract, the contractor, not the owner, became the prevailing party.<sup>316</sup> The court

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312. 362 So. 2d 1014 (Fla. 1st DCA 1978).

313. *Id.* at 1015. The owner was entitled to attorney's fees in connection with the mechanic's lien aspect of the case. The owner could not recover the attorney's fees expended in connection with his unsuccessful counterclaim for breach of contract.

314. 352 So. 2d 103 (Fla. 4th DCA 1977).

315. The clause in the contract provided:

"17. In the event that any action is instituted against the Owner either by the Contractor or by any persons claiming privity with him such as material men or laborers, then and in that event, the Contractor shall be responsible for the payment of reasonable attorney's fees expended by the Owner in defending such. In the event the Owner institutes or maintains an action to enforce this Agreement or any part hereof or any obligations covered under this Agreement, either in an original action or in an action brought by anyone else, then the Contractor agrees to pay an attorney's fee to the Owner."

Quoted in *id.* at 105-06.

316. *Id.* at 105. To the extent that *First Atlantic* suggests that an unsuccessful lien claimant is a prevailing party entitled to attorney's fees by virtue of having obtained a judgment against the owner for breach of contract, the decision is incorrect. In *Emery v. International Glass & Mfg., Inc.*, 249 So. 2d 496 (Fla. 2d DCA 1971), the case cited by the court in *First Atlantic* in its discussion of attorney's fees, the District Court of Appeal, Second District, specifically stated: "[A] claimant is not entitled to attorney's fees under the section before us, notwithstanding that he ultimately prevails in the case, unless the mode and substance of his recovery is expressly provided for within the lien law itself." *Id.* at 500 (emphasis in original).



also refused to enforce the clause in the contract awarding the owner attorney's fees, stating "[i]t would be an anomaly to permit a party who breaches a contract to rely on the same contract to reimburse it for expenses, such as attorney's fees, which arose out of the breach."<sup>317</sup>

When *Winnie* and *First Atlantic* are read together, it becomes apparent that the owner is not entitled to attorney's fees even if he successfully resists a mechanic's lien claim if it also appears that he is otherwise liable for damages to the lienor in the same case.<sup>318</sup> In such a situation neither party is entitled to attorney's fees under section 713.29 of the Florida Statutes.<sup>319</sup>

The question of whether a lien claimant who has been offered a settlement can be a prevailing party for purposes of section 713.29 has been recently addressed by the District Courts of Appeal, Second and Fourth Districts. In *Monde Investments No. 2, Inc. v. R.D. Taylor-Made Enterprises, Inc.*,<sup>320</sup> a nonprivity lien claimant brought an action to foreclose a lien against the owner of a building around which it had installed paving. Although the owner had retained ten percent of the original contract price as required by statute,<sup>321</sup> this amount was insufficient to cover the amount of the lien. The District Court of Appeal, Fourth District, affirmed the trial court's ruling that the lien claimant was only entitled to a pro rata portion of the retained funds, finding that the owner had made no improper payments within the meaning of section 713.06(3)(h).<sup>322</sup> Neverthe-

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317. 350 So. 2d at 106.

318. Conversely, if a lien claimant proves his entitlement to a mechanic's lien but loses on a counterclaim for breach of contract resulting in an affirmative judgment being entered in favor of the owner he is "otherwise liable for damages" and should not be allowed to recover attorney's fees under the holding of the *Winnie* case. The *Winnie* and *First Atlantic* cases raise numerous questions about the propriety of awarding attorney's fees in multicount actions between lienor and owner when each party prevails on one or more of the counts.

319. *Emery v. International Glass & Mfg., Inc.*, 249 So. 2d 496 (Fla. 2d DCA 1971).

320. 344 So. 2d 871 (Fla. 4th DCA 1977).

321. FLA. STAT. § 713.06(3)(d)(5) (1975). This section was amended by the legislature in 1977. The new section, which became effective on July 1, 1978, provides: "The owner shall retain the final payment due under the direct contract that shall not be disbursed until the contractor's affidavit under paragraph (d)1 of this section has been furnished to the owner." 1977 Fla. Laws ch. 77-353, § 5.

322. FLA. STAT. § 713.06(3)(h) (1975), which provides:

When the owner has properly retained all sums required in this section to be retained but has otherwise made improper payments, the owner's real property shall be liable to all laborers, subcontractors, subsubcontractors and materialmen complying with this chapter only to the extent of the retentions and the improper payments, notwithstanding the other provisions of this subsection. Any money paid by the owner on a direct contract, the payment of which is proved to have caused no detriment to any certain lienor, shall be held properly paid as to the lienor, and if any of the money shall be held not properly paid as to any other

less, the award of attorney's fees was reversed.

Before the lien claimant filed its complaint, the owner offered to pay the maximum amount to which the claimant was entitled—the ten percent of the original contract price retained by the owner. The court reasoned that since the lien claimant did not accept and should have accepted this offer of settlement, it was not the prevailing party within the meaning of section 713.29 and was therefore not entitled to attorney's fees.<sup>323</sup>

The offer of settlement precluded the lien claimant from becoming the prevailing party in the *Monde* case because the court found the litigation unnecessary: success in the foreclosure action could not have yielded the lien claimant any more than the amount offered to it by the owner. But in most cases an offer of settlement does not and should not affect one's status as a prevailing party.

In *Peter Marich & Associates, Inc. v. Powell*,<sup>324</sup> the District Court of Appeal, Second District, held that a prevailing party is one in whose favor an affirmative judgment is rendered even though the judgment is for less than the amount originally sought in the complaint.<sup>325</sup> The court rejected the owner's argument that the lien claimant was not the prevailing party since it had declined an offer of judgment before trial.<sup>326</sup> Although the court recognized that an offer of judgment should be taken into consideration when determining attorney's fees, it rejected the argument that the offer of judgment should have been considered by the trial court in determining who was the prevailing party under section 713.29.<sup>327</sup> It is apparent, therefore, that an offer of settlement or judgment will not affect the court's determination of the prevailing party except when the court is confronted with a factual situation similar to the *Monde* case.

When a prevailing party is successful on more than one count, the court must determine the amount of attorney's fees attributable to the mechanic's lien claim. In *Planas & Franyie Engineers, Inc. v. Padilla*,<sup>328</sup> an owner of property successfully resisted a contractor's mechanic's lien foreclosure action and breach of contract claim. The contractor appealed the attorney's fees awarded to the owner as

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lienors, the entire benefit of its being held not properly paid as to them shall go to the lienors.

323. 344 So. 2d at 872.

324. 365 So. 2d 754 (Fla. 2d DCA 1978).

325. *Id.* at 756; *accord*, *Dynamic Builders, Inc. v. Tull*, 365 So. 2d 1032 (Fla. 3d DCA 1978).

326. FLA. R. CIV. P. 1.442.

327. 365 So. 2d at 756 n.1.

328. 341 So. 2d 259 (Fla. 3d DCA 1977) (*per curiam*).

excessive. The District Court of Appeal, Third District, agreed and remanded for apportionment of attorney's fees to the lien foreclosure aspect of the case.<sup>329</sup> The trial court's apportionment of attorney's fees was sustained on appeal.<sup>330</sup>

The requirement that attorney's fees be apportioned to a mechanic's lien claim was recognized in *Paley v. Cocoa Masonry, Inc.*<sup>331</sup> In that case the court stated that "[t]he inclusion of any aspect other than the mechanics' lien foreclosure in arriving at fees taxed as costs would be an impermissible expansion of the legislative intent contained in the statute."<sup>332</sup>

Although the statute requires that attorney's fees be awarded to the prevailing party, the prevailing party must prove that he is entitled to the amount he seeks. In *Leader Mortgage Co. v. Richards Electric Service, Inc.*,<sup>333</sup> an award of attorney's fees to the prevailing party was reversed on appeal. The District Court of Appeal, Fourth District, noted that the attorney's fees had been awarded without a hearing, without testimony and without any affidavits. The court concluded that under such circumstances the awarding of attorney's fees was improper.<sup>334</sup>

Similarly, in *Crystal Properties, Inc. v. Florida Industrial Construction Co.*,<sup>335</sup> the District Court of Appeal, Second District, reversed that portion of a judgment awarding attorney's fees to the prevailing party, since no hearing was held on the amount of attorney's fees to which the prevailing party was entitled. The trial court's award of attorney's fees was presumably based upon an attorney's affidavit which had been submitted following the hearing on the motion for summary judgment. The Second District concluded that, unless the parties agreed to waive the adversary proceedings otherwise required to determine the amount of a reasonable attorney's fee, awarding attorney's fees on the basis of an attorney's affidavit was reversible error.<sup>336</sup>

The *Leader Mortgage* and *Crystal Properties* cases are instructive. Affidavits attached to the prevailing party's motion for attorney's fees are insufficient to obtain the fees which section 713.29 requires to be awarded. A hearing must be held, and the prevailing party must prove through expert witnesses that the fees sought are

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329. *Planas & Franyie Eng'rs, Inc. v. Padilla*, 310 So. 2d 354 (Fla. 3d DCA 1975).

330. 341 So. 2d at 260.

331. 352 So. 2d 945 (Fla. 2d DCA 1978).

332. *Id.* at 947.

333. 348 So. 2d 1202 (Fla. 4th DCA 1977).

334. *Id.* at 1205.

335. 350 So. 2d 362 (Fla. 2d DCA 1977) (per curiam).

336. *Id.* at 363.

reasonable.<sup>337</sup> Opposing counsel may of course present evidence to show that the fees sought are unreasonable.<sup>338</sup>

### B. Arbitration

The existence of a mandatory arbitration clause in a contract between a lien claimant and the owner will prevent the claimant from recovering attorney's fees in a suit brought against the owner to foreclose a lien. In *Oakdale Park Ltd. v. Byrd*,<sup>339</sup> a subcontractor brought an action against an owner to foreclose a mechanic's lien for labor and materials furnished to a construction project. The owner had a direct contract with the subcontractor which contained a mandatory arbitration clause. Upon the owner's motion, the trial court ordered the parties to arbitrate. The lien claimant prevailed and, in addition, was awarded attorney's fees. The trial court entered an order and the owner appealed the award of attorney's fees.

The District Court of Appeal, First District, reversed the award of attorney's fees to the lien claimant and reaffirmed the holding of *Beach Resorts International, Inc. v. Clarmac Marine Construction Co.*<sup>340</sup> The court concluded that awarding attorney's fees to the claimant would be improper since it was unnecessary for the lien claimant to initiate the foreclosure action against the owner. "A party, who has entered into a contract requiring arbitration, may not flagrantly disregard his contractual prerequisite, march down to the courthouse, file a complaint of foreclosure, and demand an attorney's fee by reason of ignoring at the outset his contractual duty to arbitrate."<sup>341</sup>

## VII. CONCLUSION

The Florida Mechanics' Lien Law as originally enacted was designed to protect the rights of materialmen, laborers and others who provided services or furnished materials in connection with the

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337. If opposing counsel waives a hearing, however, affidavits of other attorneys that the fees requested are reasonable should be sufficient.

338. 2 S. RAKUSIN, note 75 *supra*, ch. 19, at 23-24.

339. 346 So. 2d 648 (Fla. 1st DCA 1977).

340. 339 So. 2d 689 (Fla. 2d DCA 1976). In that case the court stated that "the mechanic's lien statute, in cases initiated as lien foreclosures but submitted to mandatory arbitration, is not operative unless the judgment entered confirming, vacating or modifying the arbitration award must be enforced in favor of the plaintiff." *Id.* at 692.

341. 346 So. 2d at 650. The court did note, however, that if the claimants had sought redress through the agreed upon arbitration forum but failed to resolve their claim prior to the expiration of the jurisdictional time for a mechanic's lien foreclosure, then in such event they would have possessed a right to file the action of foreclosure in order to preserve their statutory rights.

improvement of real property. The statute was subject to a rule of liberal construction "so as to afford the laborers and materialmen the greatest protection compatible with justice and equity."<sup>342</sup> The scope of protection offered by the statute was interpreted broadly to include virtually all persons who furnished labor or materials in connection with the improvement of real property.<sup>343</sup>

In 1977, the legislature revised the Mechanics' Lien Law. The statute is no longer subject to a canon of liberal construction in favor of the lien claimant<sup>344</sup> and the class of persons afforded protection by the statute has been limited.<sup>345</sup> Nevertheless, the present version of the statute does provide a workable mechanism through which materialmen, laborers and others can vindicate their rights. Those individuals who seek the protection of the statute, however, must strictly comply with its terms.

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342. *Hendry Lumber Co. v. Bryant*, 138 Fla. 485, 189 So. 710 (1939).

343. *See, e.g., Hey Kiley Man, Inc. v. Azalea Gardens Apts.*, 333 So. 2d 48 (Fla. 2d DCA 1976); *Ceco Corp. v. Goldberg*, 219 So. 2d 475 (Fla. 3d DCA 1969).

344. 1977 Fla. Laws ch. 77-353, § 15 (amending FLA. STAT. § 713.37 (1977)) which provides: "This part shall not be subject to a rule of liberal construction in favor of any person to whom it applies." *Id.*

345. A lienor was formerly defined as "any person having a lien or prospective lien upon real property by virtue of this chapter and includes his successor in interest." FLA. STAT. § 713.01(10) (1977). Thus, the Mechanics' Lien Law offered protection to *all* persons who furnished labor or materials to an improvement site regardless of the remoteness of their relationship to the owner.

As amended, the Mechanics' Lien Law only applies to a specific class of persons. Section 713.01(10) now provides:

(10) "Lienor" means:

(a) A contractor,

(b) A subcontractor,

(c) A subsubcontractor,

(d) A laborer,

(e) A materialman who contracts with the owner, a contractor, a subcontractor, or a subsubcontractor, or

(f) A professional lienor under s. 713.03, as each is defined herein, and who has a lien or prospective lien upon real property under part I, and includes his successor in interest. *No person shall have a lien under part I, except those specified in this subsection as they are defined in this section.*

1977 Fla. Laws ch. 77-353, § 1 (emphasis added) (amending FLA. STAT. § 713.01(10) (1977)).