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ARTICLES

CONSTRUCTION LIEN LAW REFORM: THE EQUILIBRIUM OF CHANGE

FRED R. DUDLEY,* WILLIAM A. BUZZETT**
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I. INTRODUCTION

ALL FIFTY STATES have enacted mechanics' liens statutes,¹ most dating back to the late nineteenth or early twentieth century. Generally, the purpose of these statutes is to protect those who contribute to the enhancement of property based upon the principle of unjust enrichment.²

In Florida, however, courts have found mixed and sometimes inconsistent reasoning for mechanics' lien laws. On the one hand courts have held that the purposes of the law were: (1) to prevent unjust enrichment of owners at the expense of lienors;³ (2) to protect the vulnerable supplier;⁴ and (3) to protect only the subcontractor; the owner being required to protect himself or herself.⁵ On the other hand, courts have also held that the purpose behind the mechanics' lien law was to assure the owner that he or she would be able to construct a

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1. 53 AM. JUR. 2d *Mechanics' Liens* § 5.

2. *Id.* § 2.

3. *Kettles v. Charter Mortgage Co.*, 337 So. 2d 1012 (Fla. 3d DCA 1976).

4. *Crane Co. v. Fine*, 221 So. 2d 145 (Fla. 1969); *Hendry Lumber Co. v. Bryant*, 189 So. 710 (Fla. 1939); *Martin v. Baird Hardware Co.*, 147 So. 2d 142 (Fla. 1st DCA 1962); *Centex-Winston Corp. v. Crown Paint, Inc.*, 294 So. 2d 694 (Fla. 3d DCA), *cert. denied*, 303 So. 2d 26 (Fla. 1974); *Art Berman Concrete, Inc. v. Sey Construction Corp.*, 247 So. 2d 791 (Fla. 3d DCA 1971).

5. *Florida Steel Corp. v. Adaptable Devs., Inc.*, 503 So. 2d 1232 (Fla. 1986).

specific improvement at a given price.⁶ Courts in Florida also have stated that the underlying premise of mechanics' lien laws was the construction industry's need for more protection for extension of credit than contract remedies provided.⁷

The Florida Mechanics' Lien Act at Florida Statutes Chapter 713 was enacted in an attempt to reconcile these sometimes conflicting purposes.⁸ Part I of Chapter 713 is structured to balance all the competing interests associated with the lien law. Most courts have recognized the duality of the mechanics' lien law; that is, in addition to protecting those who furnish labor, services, and materials, mechanics' lien laws must seek to protect the property of the owner as well.⁹

Since the last comprehensive revision of the Florida Mechanics' Lien Law in 1963,¹⁰ the mechanics' lien statute has been amended thirteen times.¹¹ Each time the statute has been amended, the Legislature was faced with the responsibility that the law could not be forced out of balance. During the 1989 legislative session, the Florida Legislature was faced with a barrage of public opinion relating to the lien law. Depending on the source, suggestions ranged from keeping the law the same, to increasing the penalties to force compliance with the law, to totally repealing the law. In response to the public outcry from consumers, subcontractors, and suppliers for reforms of the lien law, the Legislature created the Mechanics' Lien Law Study Commission (Commission).¹²

The purposes of this Article are to examine the work of the Commission, to review the concerns of the authors to appropriately balance the rights and duties of nonprivity lienors with the rights and duties of property owners, to discuss the problems associated with the lien law as identified by the Commission, and to review the recommendations of the Commission which resulted in major changes to the lien law. The Article then analyzes problem areas for future review. This Article will be of particular interest to anyone associated with the construction industry in Florida.

6. *Id.*; *Hardrives Co. v. Tri-County Concrete Products*, 489 So. 2d 1211 (Fla. 4th DCA 1986); *Climatrol Corp. v. Kent*, 370 So. 2d 394 (Fla. 3d DCA 1979); *Morgan v. Goodwin*, 355 So. 2d 217 (Fla. 1st DCA 1978); *Bryan v. Owsley Lumber Co.*, 201 So. 2d 246 (Fla. 1st DCA 1967).

7. *Florida Steel Corp. v. Adaptable Devs., Inc.*, 503 So. 2d 1232, 1234 (Fla. 1986).

8. *Id.*

9. *Id.*

10. Ch. 63-135, 1963 Fla. Laws 263.

11. *See generally* Ch. 713, FLA. STAT. ANN. (West 1989 & Supp. 1990).

12. Ch. 89-370, 1989 Fla. Laws 2451.

II. 1989 LEGISLATION

In 1989 a number of bills were filed relating to mechanics' liens.¹³ These bills were filed in response to perceived deficiencies in the existing law, and reflected the interests of owners, contractors, and subcontractors. While the Committee Substitute for House Bill 1120, establishing the Mechanics' Lien Law Study Commission, was the only mechanics' lien bill that passed in the 1989 session, each bill served as a platform for discussion by the Commission and reflected the political climate that existed during the 1989 and 1990 legislative sessions.

While some interests pushed to have revisions made to the mechanics' lien law in 1989, the number and diversity of bills filed in that session revealed the wisdom of having an independent panel review the law.

A. *House Bill 1435 and Senate Bill 1465*

Representative Thomas B. Drage, Jr., filed House Bill 1435 (1989) at the request of the Florida Lumbermen and Material Dealers Association.¹⁴ The association executives had been fielding numerous complaints from association members regarding the operation of the mechanics' lien law, and in response held a workshop where the membership could express its problems and concerns. The most common and reportedly most difficult problem for the material suppliers was the repeated failure by owners to record Notices of Commencement.¹⁵ The notice places all furnishers of labor, services, and material on notice of the identity of the owner and the description of the property. These nonprivity lienors rely on the Notice of Commencement for information needed to complete and serve a Notice to Owner, which is a prerequisite to perfecting their liens.¹⁶ Also, when the contractor obtains a payment bond which exempts the owner's property from liens of persons not in privity, it must be attached to and recorded with the Notice of Commencement.¹⁷ The failure to timely provide this information causes delay and confusion for those not aware of the bond.

House Bill 1435 addressed these concerns by proposing that if a Notice of Commencement is not recorded, prospective lienors would be

13. See, e.g., FLA. LEGIS., HISTORY OF LEGISLATION, 1989 COMBINED SESSION, SUBJECT INDEX—BILLS INTRODUCED.

14. Telephone interview with Steve Metz, representing Florida Lumbermen and Material Dealers Association (August 1, 1989) (available at Fla. Dep't of State, Bureau of Archives & Record Management, Fla. State Archives, Tallahassee, Fla.).

15. *Id.*

16. FLA. STAT. § 713.06(2)(a) (1989).

17. FLA. STAT. § 713.23(1)(a) (1989).

excused from serving a Notice to Owner and, where required, a Notice to Contractor;¹⁸ in the event a bond was obtained, prospective lienors would be excused from serving the Notice to Contractor.¹⁹ In addition, the bill clarified that failure to record a copy of the bond with a Notice of Commencement would negate the exemption of the owner's property from liens of those not in privity.²⁰ Other provisions of the bill included: (1) a reversion to previous language with regard to the time from which the period for serving a Notice of Nonpayment on the contractor and surety would run;²¹ (2) the requirement for additional information in a bond obtained for payment and performance under a contract for the construction of a public building;²² and (3) a presumption that service was effected upon mailing by registered or certified mail to the last known address of the person to be served.²³

Four technical amendments were adopted when the bill was initially heard by the Subcommittee on Real Property and Family Law, and they were incorporated into the House Judiciary Committee's Substitute for House Bill 1435.²⁴

After adopting a conforming amendment on the floor, the House of Representatives passed the bill unanimously.²⁵ Upon receipt of the message by the Senate, the Committee Substitute for House Bill 1435, as engrossed, was referred to the Senate Judiciary-Civil Committee, where it died without further hearing.²⁶

Senate Bill 1465, the Senate companion to House Bill 1435, was referred to the Senate Judiciary-Civil Committee, where it died without a hearing.²⁷

B. *House Bill 1483 and Senate Bill 661*

Representative Al Lawson filed two bills in response to problems he had personally encountered in the construction of his home. Apparently due to a failure to record a Notice of Commencement, liens of those not in privity were filed against Representative Lawson's prop-

18. Fla. HB 1435, § 1 (1989).

19. Fla. HB 1435, § 3 (1989).

20. *Id.*

21. *Id.*

22. Fla. HB 1435, § 4 (1989).

23. Fla. HB 1435, § 2 (1989).

24. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 457, HB 1435.

25. FLA. H.R. JOUR. 376 (Reg. Sess. 1989).

26. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF HOUSE BILLS at 457, HB 1435.

27. *Id.*, HISTORY OF SENATE BILLS at 226, HB 1435.

erty despite the owner's full payment to the contractor.²⁸ House Bill 1483 (1989), as introduced, would have amended Section 713.02(8), Florida Statutes, to provide an exemption from application of the mechanics' lien law for "[t]he construction of a single-family residential dwelling for which the entire contract price is \$150,000 or less. . . ."²⁹ House Bill 1483 was referred to the House Judiciary Committee,³⁰ and its Subcommittee on Real Property and Family Law held two hearings on the bill.³¹ The Subcommittee recommended, and the full Judiciary Committee adopted, a Committee Substitute for House Bill 1483, which provided for the establishment of a mechanics' lien law study commission.³² The committee substitute was fashioned after the similar Senate Bill 1040.

The Senate companion, Senate Bill 661 (1989), was withdrawn from the Senate Judiciary-Civil Committee and, at the sponsor's request, indefinitely postponed.³³ This was no doubt in response to the storm of letters and telephone calls from suppliers and others in the construction industry received by the sponsors, the leaders of each house, and almost every member of the Legislature.

C. House Bill 1120

Representative Lawson also filed House Bill 1120-SF (1989) as a short-form bill. A short-form bill outlines the need for legislation in a particular area and proposes that the committee to which it is referred develop the specifics.³⁴

House Bill 1120-SF proposed that legislation be enacted to require financial institutions to disburse funds pursuant to a construction loan for a residence directly to the homeowner instead of to the contractor and to require the homeowner to sign a waiver releasing the institution from liability in the disbursement of the funds.³⁵ House Bill 1120-SF also suggested the creation of a study commission to investigate and make recommendations regarding the role of financial institutions in construction lending.³⁶ House Bill 1120-SF was referred to the House

28. Fla. H.R., Comm. on Judiciary, Real Property and Family Law Subcommittee, tape recording of proceedings (Apr. 17, 1989, Apr. 25, 1989) (on file with committee).

29. Fla. HB 1483, § 1 (1989).

30. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF HOUSE BILLS at 464, HB 1483.

31. *Id.*

32. Fla. CS for HB 1483, § 1 (1989).

33. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF SENATE BILLS at 125, SB 661.

34. FLA. H.R. BILL DRAFTING SERV., GUIDELINES FOR BILL DRAFTING 3 (1985).

35. Fla. HB 1120-SF (1989).

36. *Id.*

Commerce Committee where it languished until its last meeting on April 26, 1989, when it was withdrawn from the Subcommittee on Banking and heard by the full Commerce Committee.³⁷ The Committee adopted a Committee Substitute for House Bill 1120,³⁸ which created the Financial Institutions Study Commission to be comprised of thirteen members representing various interests, including the financing industry, the construction industry, the state Comptroller, and the Department of Professional Regulation.³⁹ The Commission's charge was to recommend "a uniform and fair approach to construction contracting in such a manner as to provide that the financial institution would be required to disburse all funds associated with the construction of residential dwellings to the homeowner rather than the contractor. . . ."⁴⁰

Committee Substitute for House Bill 1120 was withdrawn from the Appropriations Committee and initially passed the House of Representatives without amendment.⁴¹ Upon first reading in the Senate, on May 30, 1989, three days before the session was to end, the bill was referred to the Senate Committees on Commerce, Community Affairs, Governmental Operations, and Appropriations.⁴² The bill was ultimately withdrawn from each of those committees, taken up, substantially amended by the Senate, and passed.⁴³ The version passed by the Senate bore little resemblance to any of the previous versions of House Bill 1120. The Senate amendment struck everything after the enacting clause and inserted essentially the contents of Committee Substitute for Senate Bill 1040.⁴⁴

D. Senate Bill 1040 and Enrolled Committee Substitute for House Bill 1120

Senators Fred Dudley and Karen Thurman filed Senate Bill 1040 after the two senators and Representative Dick Locke met with constituents of Senator Thurman and Representative Locke in February 1989.⁴⁵ The impetus for the meeting stemmed from their constituents'

37. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF HOUSE BILLS at 409, HB 1120.

38. *Id.*

39. Fla. CS for HB 1120 § 1 (1989).

40. *Id.*

41. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF HOUSE BILLS at 409, HB 1120.

42. *Id.*

43. *Id.*

44. FLA. S. JOUR. 788 (Reg. Sess. 1989).

45. Interview with Sen. Dudley (July 31, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

problems in dealing with the Construction Industry Licensing Board (CILB) in the aftermath of some highly publicized cases of insolvent builders in the Citrus-Hernando County area. After an informal hearing on these concerns, Senators Dudley and Thurman concluded that the CILB was not serving the citizens to the extent that legislators had expected, and that the Florida Mechanics' Lien Law failed to protect these property owners.⁴⁶ Senate Bill 826, by Senator Thurman, and its companion, House Bill 1503, by Representative Locke, were introduced to create the Construction Industry Recovery Fund.⁴⁷ Senate Bill 827 (1989) was introduced by Senator Thurman to provide for members of the public to present testimony as to the appropriateness of proposed disciplinary action against the CILB.⁴⁸ In addition, Senators Dudley and Thurman filed Senate Bill 1040 (1989) to create a Mechanics' Lien Law Study Commission for the principal purpose of determining the extent of the problems encountered in the application of the mechanics' lien law by conducting public hearings throughout the state.⁴⁹

The Senate Judiciary-Civil Committee made some adjustments to Senate Bill 1040 and passed it as a Committee Substitute.⁵⁰ When the bill was taken up on the Senate floor, Senator Dudley moved to withdraw House Bill 1120 (which at that point would have created the Financial Institutions Study Commission)⁵¹ from the four Senate committees to which it had been referred and to take the bill up in lieu of Senate Bill 1040.⁵² The Senator then amended Committee Substitute for House Bill 1120 by striking everything after the enacting clause and substituting essentially the contents of Senate Bill 1040.⁵³ The bill, as amended, passed the Senate,⁵⁴ then passed the House in the final day of the session.⁵⁵ It became law without the governor's signature on July 6, 1989.⁵⁶

III. MECHANICS' LIEN LAW STUDY COMMISSION

The Mechanics' Lien Law Study Commission was a thirteen member commission appointed by the Governor, the President of the Sen-

46. *Id.*

47. Fla. SB 826, § 1 (1989); Fla. HB 1503, § 1 (1989).

48. Fla. SB 827, § 1 (1989).

49. Fla. SB 1040 (1989).

50. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF SENATE BILLS at 173, SB 1040.

51. *See supra*, II.A. 3.

52. FLA. S. JOUR. 788 (Reg. Sess. 1989).

53. *Id.*

54. *Id.*

55. FLA. H.R. JOUR. 1137 (Reg. Sess. 1989).

56. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF HOUSE BILLS at 409, HB 1120.

ate, and the Speaker of the House.⁵⁷ The Commission was established with a mandate to review the lien law with an emphasis on the following: educating the public, encouraging the recordation of the Notice of Commencement, reviewing the effectiveness of criminal, civil, and administrative remedies, studying a lien recovery fund, reviewing the effectiveness of notice requirements, determining the scope of lender responsibility, and reviewing the scope of exemptions under the lien law.⁵⁸

The Commission met eight times, convening in Tallahassee, Tampa, and Fort Lauderdale.⁵⁹ The meetings consisted of public hearings and Commission workshops. The public hearings permitted the Commission to receive testimony from members of the construction industry, lending institutions, the title insurance industry, bonding companies, professionals, interested consumers, residential home owners, and state and local agencies.⁶⁰ The workshops presented the Commission with the opportunity to consider recommendations, to discuss proposed changes to the lien law, and to formulate the statutorily mandated report.

As part of its assigned task, the Commission reviewed the existing balance between the rights and duties of lienors and the rights and duties of owners. The Commission ultimately found inequities in the law affecting both the nonprivity lienor and the property owner and also found that these inequities caused imbalances in the lien law.

The Commission proposed a total of twenty-eight changes to the Mechanics' Lien Law, which were designed to strengthen the protection accorded owners and lienors.⁶¹ In addition, the proposed changes would stiffen criminal and administrative penalties against contractors who misappropriated funds or discouraged lienors from filing Notices to Owner. These proposals were placed in the form of a report,⁶²

57. See ch. 89-370, 1989 Fla. Laws 2451.

58. *Id.*

59. September 1, 1989, Tallahassee—Organizational meeting; September 11, 1989, Tallahassee—Workshop; October 3, 1989, Tampa—Public Hearing; October 25, 26, 1989, Fort Lauderdale—Public Hearing, Workshop; November 13, 1989, Tallahassee—Workshop; December 4, 1989, Tallahassee—Workshop; January 8, 1990, Tallahassee—Workshop.

60. The Commission heard testimony from approximately 200 witnesses and considered proposals from representatives of every group affected by the Mechanics' Lien Law, Part I, Chapter 713, Florida Statutes.

61. The amendments to Chapter 713 affected 13 sections, creating a total of 12 new subsections, amending 16 existing subsections, and repealing 1 section (section 713.24, Florida Statutes). The amendments to Chapter 489 affected 4 sections, creating 2 new sections and amending 2 sections. The amendments to Chapter 255 affected one section.

62. See FLORIDA MECHANICS' LIEN LAW STUDY COMMISSION, A REPORT TO THE GOVERNOR, THE PRESIDENT OF THE SENATE, AND THE SPEAKER OF THE HOUSE (Jan. 1990)(on file with Florida Legislative Library, The Capitol, Tallahassee, Florida). [hereinafter COMMISSION REPORT].

which was incorporated into Senate Bill 1330 (1990), and then passed by the House⁶³ and the Senate.⁶⁴ With the exception of two issues that were not considered by the Commission but were included in the bill,⁶⁵ Senate Bill 1330 represented all of the statutory changes recommended by the Commission. On June 18, 1990, Governor Martinez signed Senate Bill 1330 into law.⁶⁶

IV. OVERVIEW OF PERCEIVED PROBLEMS WITH LIEN LAW

As a benchmark to begin its review, the Commission sought and received comments from owners, contractors, subcontractors, and materialmen relating to the then existing mechanics' lien law. These served as a foundation for the Commission's hearings, workshops, and recommendations, and offered invaluable insight into the perceived deficiencies in the lien law. The following is an overview of the problems raised by the various participants.

A. *Title of the Law*

The first problem area identified by the Commission was the use of the term "mechanics' lien."⁶⁷ Many individuals, be they consumers, mechanics, contractors, subcontractors, or suppliers failed to associate this term with the protections afforded by the law. Testimony indicated that this term tended to mislead instead of provide guidance to the public,⁶⁸ and that many people were unaware of the import of the mechanics' lien law or the protections provided by the law because the title did not reflect the content or substance of the law.⁶⁹

B. *Public Education*

Public hearings supported the Commission's general belief that much of the public was unaware of the existence of the lien law or the protections the law provided.⁷⁰ The Commission recognized that pub-

63. FLA. H.R. JOUR. 972 (Reg. Sess. 1990).

64. FLA. S. JOUR. 903 (Reg. Sess. 1990).

65. The Commission did not consider the deletion of the improper payment language contained in existing section 713.06(3), which would allow an owner to make proper payments to the contractor before the Notice of Commencement is recorded, nor did it consider the creation of new section 713.245, the Conditional Payment Bond.

66. Ch. 90-109, 1990 Fla. Laws 232 (codified at FLA. STAT. § 713).

67. Florida Mechanics' Lien Law Study Commission Minutes, at 3 (Sept. 1, 1989); *id.* at 6, 7 (October 3, 1989) (contained as an appendix to COMMISSION REPORT, *supra* note 62) [hereinafter Commission Minutes].

68. *Id.* at 7 (October 3, 1989).

69. *Id.*

70. *Id.*

lic education was a priority because any reforms to the law would be moot if the public remained unaware of the law's existence.⁷¹

C. Notice of Commencement

The Commission received a multitude of complaints from nonprivity lienors that owners and contractors habitually failed to record a Notice of Commencement, presumably because the parties failed to understand the importance of taking this action.⁷² The Commission recognized that the notice characterizes several documents: a source document, a document used to establish priority, and a document used to apply the various statutes of limitation under the lien law.⁷³ The Commission also recognized that while the obligation to record the Notice of Commencement rested exclusively with the owner, the nonprivity lienor suffered along with the owner in the case of its absence.⁷⁴

D. Notice to Owner

After the first three Commission meetings, the Commission realigned its focus from the Notice of Commencement to the Notice to Owner,⁷⁵ and recognized that the Notice to Owner was the single most important notice in the lien law.⁷⁶ First, testimony revealed that the public did not realize the significance of the Notice to Owner, and frequently disregarded or discarded the notice because the present statutory form of the Notice to Owner did not adequately inform owners of their responsibilities.⁷⁷ Second, uncontroverted testimony indicated that many prospective lienors did not serve Notices to Owner, often because the lienors were intimidated, coerced, or otherwise discouraged by contractors from serving them.⁷⁸ Third, it was concluded that even where an owner failed to record a Notice of Commencement, subsequent liens might still be avoided if the owner properly responded to a Notice to Owner.

71. Commission Minutes, *supra* note 67, at 18, 19 (October 26, 1989).

72. Commission Minutes, *supra* note 67, at 2 (October 3, 1989); *id.* at 4 (October 25, 1989).

73. COMMISSION REPORT, *supra* note 62, at 15.

74. *Id.* at 15, 16.

75. Commission Minutes, *supra* note 67, at 19, 20 (October 26, 1989).

76. COMMISSION REPORT, *supra* note 62, at 25.

77. Commission Minutes, *supra* note 67, at 7 (October 3, 1989); *id.* at 5 (October 25, 1989).

78. Commission Minutes, *supra* note 67, at 6 (September 11, 1989); *id.* at 6, 7 (October 3, 1989); *id.* at 6 (October 25, 1989); *id.* at 18 (October 26, 1989).

E. Complexity of the Law

Repeated testimony suggested that the lien law was too complex and confusing for residential homeowners.⁷⁹ The Commission recognized that the lien law makes no distinction between a modest residential home and a multi-million dollar commercial project and considered the possibility that the present law could be bifurcated, repealed, or revised to exempt to residential construction.⁸⁰

F. Lender Responsibility

The Commission recognized that the lender could play an important role in helping to rectify the Notice of Commencement and Notice to Owner problems in the lien law. Because many homeowners finance construction of improvements through lending institutions, the Commission recommended that lenders assist with the recording of the Notice of Commencement and with the making of "proper" payments to the lienor.⁸¹

G. Civil, Criminal, and Administrative Enforcement

Testimony at the public hearings revealed that under the current law, criminal penalties associated with the misapplication of construction funds were too weak to act as a deterrent, and that the burden of proof imposed upon the prosecution was too difficult to be effective.⁸² The Commission also received testimony that administrative remedies were hindered by inadequate staffing and funding.⁸³

H. Investigation and Discipline of Contractors

The Commission received testimony from both owners and lienors indicating that the source of much of the abuse associated with the lien law was the contractor.⁸⁴ The Commission recognized that the investigation of complaints and the discipline of contractors were duties of the Department of Professional Regulation, and that the Department was too understaffed and underfunded to adequately perform its duties under Chapter 489, Florida Statutes.

79. Commission Minutes, *supra* note 67, at 6 (October 3, 1989).

80. Commission Minutes, *supra* note 67, at 10-15 (October 26, 1989); *id.* at 2, 3 (December 4, 1989).

81. *Id.*

82. Commission Minutes, *supra* note 67, at 4, 5 (October 3, 1989).

83. Commission Minutes, *supra* note 67, at 11, (October 3, 1989); *id.* at 18 (October 26, 1989); *id.* at 10 (November 13, 1989).

84. Commission Minutes, *supra* note 67, at 8 (October 3, 1989); *id.* at 3-5 (October 25, 1989).

I. Lien Recovery Fund

The Commission received testimony regarding recovery funds and reviewed the Michigan Lien Recovery Fund.⁸⁵ Such funds potentially provide an alternate recovery source for owners and nonprivity lienors. The Commission concluded, however, that funding sources and enforcement mechanisms could not be addressed adequately within the time limitations imposed on the Commission.

V. 1990 LEGISLATION

In the 1990 regular session, seven bills were introduced relating to mechanics' liens.⁸⁶ Most of the bills introduced, however, were overshadowed by Senate Bill 1330, which represented the work of the Commission. The Commission's recommendations were compiled into Senate Bill 1330 and House Bill 3153 and filed in the Senate and the House by the legislative members of the Commission. As expected, these two bills, along with House Bill 1855, were the principal vehicles for legislative consideration. While ultimately unsuccessful, the other bills on this subject played an important role in the process.

A. Senate Bill 2890 and House Bill 1127

Although House Bill 1127 and its companion, Senate Bill 2890, would have amended provisions of the Florida Statutes relating to building permits, the bills also would have had an impact on mechanics' liens. As introduced, these bills would have prohibited issuance of a building permit unless an authorization was filed with the application allowing the applicant to apply for the permit on behalf of the owner.⁸⁷ The House bill was referred to the House Judiciary Committee, where it died without a hearing.⁸⁸ A Staff Analysis prepared by the Judiciary Committee noted that the issue presented by House Bill 1127 was incorporated in two other bills.⁸⁹ Presumably, the Committee intended to address the issues contained in House Bill 1127 in its

85. Commission Minutes, *supra* note 67, at 3 (October 25, 1989).

86. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, SUBJECT INDEX—BILLS INTRODUCED at 668. These bills were: SB 1330, SB 2700, SB 2890, HB 677, HB 1127, HB 1855, HB 3153.

87. Fla. HB 1127, § 1 (1990); Fla. SB 2890, § 1 (1990).

88. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 325, HB 1127.

89. Staff of Fla. H.R. Comm. on Judiciary, HB 1127 (1990) (Staff Analysis).

consideration of other bills, which were heard by the Committee.⁹⁰ House 1127 was not scheduled for hearing and died in committee.⁹¹

Senate Bill 2890 was referred to and approved by the Senate Community Affairs Committee.⁹² The bill was amended on the Senate floor to specify that a lessee of a ground lease for a term of at least thirty years would be considered an owner for purposes of obtaining the permit.⁹³ Although somewhat unusual, though not entirely without precedent, the House took up the Senate message instantler, read the bill three times, and passed it without any hearing by a House committee.⁹⁴ The House amended the bill on second reading by striking everything after the enacting clause and by inserting a heretofore unseen version of the bill. This new version was tailored exclusively for shopping centers and required the owner of the property to apply for a building permit.⁹⁵ The Senate concurred in the House amendment and sent this bill on to the Governor.⁹⁶

Governor Martinez vetoed Senate Bill 2890 on July 2, 1990.⁹⁷ As grounds for his veto, the Governor stated that he felt it inappropriate to treat lien rights and permits differently for one type of construction than for other types of construction, and the Governor noted that this bill would partially conflict with the reforms approved as a result of the Mechanics' Lien Law Study Commission recommendations.⁹⁸

B. House Bill 693 and Senate Bill 1534

Presently, to perfect their liens, certain designated professionals need not comply with the rather complicated notice provisions applicable to others who perform services or labor.⁹⁹ House Bill 693 and Senate Bill 1534 would have added land planners to those entities/persons entitled to liens for professional services pursuant to Section

90. Fla. HB 1855 (1990) and Fla. HB 3153 (1990), which incorporated the recommendations in the Mechanics' Lien Law Study Commission Report, were taken up by the Subcommittee on Real Property and Family Law, Committee on Judiciary on April 25, 1990. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 375, HB 1855; *id.* at 462, HB 3153.

91. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 204, HB 1127.

92. *Id.*, HISTORY OF SENATE BILLS at 224, SB 2890.

93. FLA. S. JOUR. 674 (Reg. Sess. 1990).

94. FLA. H.R. JOUR. 1821 (Reg. Sess. 1990).

95. *Id.*

96. FLA. S. JOUR. 1409 (Reg. Sess. 1990).

97. Letter from Bob Martinez, Governor, to Jim Smith, Secretary of State (July 2, 1990) (on file at the Executive Office of the Governor).

98. *Id.*

99. FLA. STAT. §§ 713.02(1), .03 (1989).

713.03, Florida Statutes.¹⁰⁰ The House bill was heard by the House Judiciary Committee, where the subcommittee on Real Property and Family Law and the full Judiciary committee recommended the bill favorably with two amendments.¹⁰¹ The House bill, however, died on the House calendar.¹⁰² The Senate companion bill was referred to the Senate Judiciary-Civil Committee, where it died without hearing.¹⁰³

C. House Bill 677

House Bill 677 would have provided that the general contractor is the responsible party and is not considered an agent of the owner in the construction of single-family residences for which the contract price does not exceed \$150,000.¹⁰⁴ The bill did not have a Senate companion and was never heard by the House committee to which it was referred.¹⁰⁵ The concept for the bill can be traced back to House Bill 1483, sponsored by Representative Lawson in 1989.¹⁰⁶

D. Senate Bill 1330 and House Bills 3153 and 1855

Senate Bill 1330, filed by Senators Dudley, Thurman, and others, and House Bill 3153, filed by Representatives Cosgrove and Lawson, incorporated the recommendations of the Mechanics' Lien Law Study Commission,¹⁰⁷ and constituted a comprehensive rewrite of Part I of Chapter 713, Florida Statutes. The principal reforms of the bills included: (1) making the law more understandable to laypersons and those in the industry, by including disclosures in specified documents,¹⁰⁸ by increasing accessibility to information,¹⁰⁹ and by changing the terminology from "mechanics' liens" to "construction liens"¹¹⁰; (2) easing the penalties on a property owner for failure to record a Notice of Commencement by the creation of a statutory Notice of

100. Fla. HB 693, § 1 (1990); Fla. SB 1534, § 1 (1990).

101. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 294, SB 693.

102. *Id.*

103. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF SENATE BILLS at 139, SB 1534.

104. Fla. HB 677, § 1 (1990).

105. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 293, HB 677.

106. *See supra* note 29 and accompanying text.

107. *Compare* COMMISSION REPORT, *supra* note 62, with Fla. SB 1330 (1990) and Fla. HB 3153 (1990).

108. Fla. SB 1330, §§ 4, 8 (1990) (engrossed).

109. Fla. SB 1330, §§ 4, 8 (1990) (engrossed).

110. Fla. SB 1330, § 1 (1990) (engrossed).

Commencement form¹¹¹ and the development of a uniform building permit application form,¹¹² the contents of which could be relied upon in lieu of the Notice of Commencement if one has not been filed;¹¹³ (3) attributing responsibility to lenders to comply with the act on behalf of their borrowers;¹¹⁴ and (4) enhancing the penalties for fraud and other wrongdoing by contractors.¹¹⁵

House Bill 1855 was introduced by Representative Thomas B. Drage, Jr., Chair of the Subcommittee on Real Property and Family Law of the House Committee on Judiciary. Representative Drage worked independently of the Commission in crafting his proposals to reform the Mechanics' Lien Law. Many of the proposed reforms in House Bill 1855 are strikingly similar to the Commission's recommendations, pointing out a somewhat universal recognition of areas that needed to be addressed. The principal difference between House Bill 1855 and the Commission's recommendations was Representative Drage's suggestion to entirely dispose of any requirements for a Notice of Commencement.¹¹⁶ The Commission, rather than disposing of the requirements for a Notice of Commencement, dealt with the Notice of Commencement problem by adding provisions in the law to ensure that these documents were recorded.¹¹⁷

In the House Judiciary Committee, the two House bills were combined into a Committee Substitute for House Bill 1855.¹¹⁸ As Committee Substitutes for House Bill 1855 and Senate Bill 1330 worked their way through the legislative process, the two bills became more and more similar as concessions were made through successful negotiations between members of the two houses. In the end, the two houses reached a compromise that would continue the requirement for Notices of Commencement, that would ensure that Notices of Commencement would be recorded, and that would eliminate the penalties for payments made prior to recording a Notice of Commencement.¹¹⁹ Senate Bill 1330 ultimately passed both houses and became law with the Governor's signature.¹²⁰

111. Fla. SB 1330, § 6 (1990) (engrossed).

112. Fla. SB 1330, § 8 (1990) (engrossed).

113. *Id.*

114. Fla. SB 1330, § 4 (1990) (engrossed).

115. Fla. SB 1330, §§ 23, 24 (1990) (engrossed).

116. Fla. HB 1855, § 6 (Reg. Sess. 1990).

117. COMMISSION REPORT, *supra* note 62, at 17.

118. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 375, HB 1855; *id.* at 462, HB 3153.

119. Fla. CS for SB 1330 (1990) (second engrossed).

120. FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF SENATE BILLS at 124, SB 1330.

VI. 1990 CHANGES TO THE LIEN LAW

All of the 1990 changes relating to the lien law became effective on January 1, 1991, with the exception of the increased penalties for embezzlement and the creation of the conditional payment bond, both of which were effective October 1, 1990.

A. Construction Lien Law

Effective January 1, 1991, Part I of Chapter 713 (the Mechanics' Lien Law) will be referred to as the "Construction Lien Law." The Commission found that the word "mechanic" was a misnomer that misled the general public because it did not adequately reflect the contents of the law.¹²¹

B. Improper Payments

Under the concept of "proper payment," if an owner complies with the requirements of the lien law, liability is limited to the adjusted contract price less "proper payments" made to the contractor and less reasonable costs of completion in the event of abandonment.¹²² Proper payments act as an incentive to compel owners to record and post their Notices of Commencement by serving as a defense to subsequently recorded liens.

Commission testimony demonstrated that many owners were unaware of the Notice of Commencement requirement and as a result failed to record their notices.¹²³ Under subsections 713.06(3)(a) and (b), Florida Statutes (1989), any payments made by the owner prior to the recording of the Notice of Commencement were deemed "improper." Therefore, the owner would receive no credit for those payments, and would be susceptible to paying twice for improvements made by nonprivity lienors.¹²⁴

By far the boldest and most far-reaching change to the lien law is the elimination of the "proper payment" language of subsections 713.06(3)(a) and (b), Florida Statutes.¹²⁵ Those subsections represent

121. COMMISSION REPORT, *supra* note 62, at 12.

122. FLA. STAT. §§ 713.06(1), (3)(h) (1989). *See also* Alton Towers, Inc. v. Coplan Pipe & Supply Co., 262 So. 2d 671 (Fla. 1972).

123. *See supra* note 72 and accompanying text.

124. *See Meredith v. Lowe's, Inc.*, 405 So. 2d 1061 (Fla. 5th DCA 1981); *Royal v. Clemons*, 394 So. 2d 155 (Fla. 4th DCA 1981); *Tamarac Village, Inc. v. Bates & Daly Co.*, 348 So. 2d 23 (Fla. 4th DCA 1977).

125. Ch. 90-109, § 4, 1990 Fla. Laws 232, 238 (codified at FLA. STAT. § 713.06(3)).

one of the five types of "improper payments"¹²⁶ and currently provide that a payment is improper if it is made before the recording of the Notice of Commencement.¹²⁷ As a result of this change, the Legislature has eliminated one of the harshest penalties associated with the lien law. Effective January 1, 1991, an owner's payment prior to the recording of a Notice of Commencement will no longer result in the owner's loss of the prior payment defense.

As a point of interest, because the Legislature enlisted the assistance of lenders to record the Notice of Commencement and local building permitting authorities to determine at first inspection if the notice is posted, the instances in which a Notice of Commencement will not be recorded and posted will be greatly diminished. As a result, the Legislature has effectively eliminated one of the harshest and most condemned penalties of the lien law and has done so with little or no adverse consequence to subcontractors or materialpersons.

C. Notice to Owner

Initially, the primary focus of the Commission's attention was the Notice of Commencement.¹²⁸ Witnesses testified, and the Commission believed, that the cornerstone of the Mechanics' Lien Law was the Notice of Commencement.¹²⁹ After several meetings, however, the Commission retreated from its earlier position and began instead to recognize the importance of the Notice to Owner. The Commission ultimately decided that the Notice to Owner was the most significant notice for the protection of the owner, and that a proper response to the Notice to Owner could mitigate many of an owner's potential damages for failing to record a Notice of Commencement.¹³⁰

The Notice to Owner is the critical link that binds the Florida Mechanics' Lien Law. It informs the owner as to whom is working on a construction job other than the contractor, and it helps to insure that

126. The five types of improper payments are (1) payments made before recording the Notice of Commencement, (2) payments made to the contractor without obtaining releases from persons not in privity who have served a Notice to Owner, (3) final payments disbursed prior to receipt of the contractor's affidavit showing all lienors have been paid, (4) commencing construction after 90 days from recording the Notice of Commencement, and (5) payments made after the Notice of Commencement expires.

127. FLA. STAT. § 713.06(3)(a) (1989).

128. Commission Minutes, *supra* note 67, at 3, 4 (September 1, 1989); *id.* at 3, 6, 7, 9, 10, 11 (September 11, 1989); *id.* at 2, 3, 6, 7, 8 (October 3, 1989); *id.* at 14, 15 (October 26, 1989).

129. *Id.*

130. COMMISSION REPORT, *supra* note 62, at 25.

subcontractors and suppliers are paid for services rendered.¹³¹ Equally important, the Notice to Owner can help to mitigate an owner's failure to record a Notice of Commencement¹³² and can insure that "proper payments" are made to the contractor, subcontractor, and supplier, if the owner recognizes the significance of the Notice to Owner.¹³³

1. History

Prior to 1963, the Florida Mechanics' Lien Act did not require a Notice to Owner. Instead, a lienor would file a Notice of Intention to File a Claim of Lien.¹³⁴ Similar to the present Notice to Owner, the purpose of the Notice of Intention to File a Claim of Lien was to inform the owner that the nonprivity lienor was providing labor, services, or materials to the owner's property.¹³⁵ The nonprivity lienor, however, was not obligated to serve this notice as a prerequisite to record and foreclose a claim of lien.¹³⁶

In 1963, the basis for the present Mechanics' Lien Act was adopted and the Notice to Owner was initiated in Florida.¹³⁷ At the inception of the act, nonprivity lienors were required to serve a Notice to Owner as a prerequisite to perfecting a lien;¹³⁸ however, the act contained no time limitation to serve or penalty for failure to serve such notice.¹³⁹ In 1979, section 713.13, Florida Statutes, was amended to provide that the failure to serve the notice within certain time parameters was a complete defense to a subsequently recorded lien.¹⁴⁰

131. See *New Image Carpets, Inc. v. Sandery Constr., Inc.*, 541 So. 2d 1235 (Fla. 2d DCA 1989) (citing *Bishop v. James A. Knowles, Inc.*, 292 So. 2d 415, 417 (Fla. 2d DCA 1974)) (purpose of notification is to inform the owner that the subcontractor looks to the owner for payment); *W.W. Gay Mechanical Contractors, Inc. v. Case*, 275 So. 2d 570, 571 (Fla. 1st DCA 1973) (citing *Trowbridge, Inc. v. Hathaway*, 226 So. 2d 35 (Fla. 1st DCA 1969)) (purpose of the notice to owner served by one not in privity with the owner is to impound money that would otherwise be paid to the contractor); *Boux v. East Hillsborough Apts., Inc.*, 218 So. 2d 202 (Fla. 2d DCA 1969) ("purpose of the notice to owner is to protect an owner from the possibility of paying over to [a] contractor sums which ought to go to a subcontractor who remains unpaid").

132. COMMISSION REPORT, *supra* note 62, at 25.

133. *Id.*

134. FLA. STAT. § 84.04(1)(a) (1961).

135. *Id.*

136. *Id.* § 84.04(4) (1961).

137. Ch. 63-135, 1963 Fla. Laws 263.

138. FLA. STAT. § 84.061(2)(a) (1963).

139. *Viyella v. Jackson*, 347 So. 2d 830, 832 (Fla. 3d DCA 1977); *Torres v. MacIntyre*, 334 So. 2d 59 (Fla. 3d DCA 1976); *Melnick v. Reynolds Metals Co.*, 230 So. 2d 490 (Fla. 4th DCA 1970).

140. Ch. 63-135, 1963 Fla. Laws 263; see also *Arlington Lumber & Trim Co., Inc. v. Vaughn*, 548 So. 2d 727 (Fla. 1st DCA 1989); *Capital Constr. Servs. v. Rubinson*, 541 So. 2d

2. *Commission Recommendations and Legislative Action*

Public hearing testimony suggested, and the Commission concluded, that the warnings found in section 713.06, Florida Statutes, were inadequate to educate the public.¹⁴¹ The Commission discovered that the warnings failed to inform the owner of the consequences of improper payment and the importance of confirming that the non-privity lienors serving the notices had been paid before any further payments were made to the contractor.¹⁴² In addition, inadequate warnings in the statutory Notice to Owner form created a fertile ground for mechanics' lien liabilities because owners, uneducated in the lien law, frequently paid contractors without regard to the non-privity lienors' notice.

Recognizing the importance of the Notice to Owner, the Commission recommended and the Legislature adopted two major changes to section 713.06, Florida Statutes, relating to improved consumer warnings and to the liability of lenders (as newly defined).¹⁴³

First, section 713.06(2)(c) has been amended to mandate a form for the Notice to Owner and to provide that the form contain a detailed warning statement for the benefit of the owner. The purpose of the warning is to inform the owner of the significance of the Notice to Owner and to serve as a warning of the liabilities an owner can incur for failing to properly respond it.

Second, *Kalbes v. California Federal Savings & Loan Association*¹⁴⁴ was codified to impose responsibility on lenders relating to the Notice to Owner. *Kalbes* involved a dispute between an owner/borrower and a lender relating to a home construction loan and the lender's receipt of a Notice to Owner.¹⁴⁵ In *Kalbes*, the owner alleged that the lender violated section 713.06(3), Florida Statutes, by disbursing funds directly to the contractor after receiving copies of several Notices to Owner from subcontractors.¹⁴⁶ The Second District Court of Appeal, reversing the trial court, held the lender liable to the owner for the amount of these liens because the lender had sole authority on behalf of the owner to make payments for the construction of the house and

748 (Fla. 3d DCA 1989); *Roof Structures, Inc. v. Picou*, 544 So. 2d 1138 (Fla. 4th DCA 1989); *Falovitch v. Gunn & Gunn Constr. Co.*, 348 So. 2d 560 (Fla. 3d DCA 1977); *Babe's Plumbing, Inc. v. Maier*, 194 So. 2d 666 (Fla. 2d DCA 1966); *Stancil v. Gardner*, 192 So. 2d 340 (Fla. 2d DCA 1966).

141. See *supra* notes 70-71 and accompanying text.

142. COMMISSION REPORT, *supra* note 62, at 25.

143. Ch. 90-109, § 4, 1990 Fla. Laws 232, 236.

144. 497 So. 2d 1256 (Fla. 2d DCA 1986).

145. *Id.* at 1257.

146. *Id.*

thus the lender had a corresponding duty to the owner to exercise reasonable care to see that payments were made in compliance with the lien law.¹⁴⁷

In response to the *Kalbes* decision, the Commission enlisted the assistance of Florida lenders to receive and respond to Notices to Owner. Effective January 1, 1991, section 713.06(2)(d) requires that lenders who receive Notices to Owner properly respond to those notices:

(d) A notice to an owner served on a lender must be in writing and delivered to the lender by certified mail, return receipt requested, to the persons designated, if any, and to the place and address designated in the notice of commencement. Any lender who, after receiving a notice provided under this subsection, pays a contractor on behalf of the owner for an improvement shall make proper payments as provided in paragraph (3)(c) as to each such notice received by the lender. The failure of a lender to comply with this paragraph renders the lender liable to the owner for all damages sustained by the owner as a result of that failure. This paragraph does not give any person other than an owner a claim or right of action against a lender for the failure of the lender to comply with this paragraph. Further, this paragraph does not prohibit a lender from disbursing construction funds at any time directly to the owner, in which event the lender has no obligation to make proper payments under this paragraph.

The effect of the change is to transfer the responsibility of responding to a Notice to Owner, in the context of a construction loan, from the owner to the lender. In sum, the failure of a lender to make proper payments will cause the lender to be liable to the owner for all resulting damages.

As a point of interest, the Florida Bankers' Association, while ultimately voicing support for this concept, also expressed reservations that the proposal could impair contract rights between the lender and the owner and place the lender in an untenable position.¹⁴⁸ For example, the association suggested that a situation could arise where a lender receives a Notice to Owner and before the lender has the opportunity to make proper payments, the owner demands that the lender release funds to the contractor.¹⁴⁹ The lender would be forced to choose between its obligation to the owner based in contract and its

147. *Id.* at 1258.

148. Commission Minutes, *supra* note 67, at 15 (October 26, 1989).

149. *Id.*

obligation created by this new statute, the choice being between breaching the contract or making an improper payment. In either event, the lender would stand to lose.

In response to the lenders' concerns, the Commission crafted a "safe harbor" for lenders by allowing the lender to disburse funds directly to the owner and thereby avoid the consequences of section 713.06(2)(d). Many of the Commissioners expressed doubts about the practical effect of this "safe harbor," however, since most lenders would not normally entrust construction funds to an owner without some assurances that bills will be paid so as to minimize the risk that construction would cease.

D. Contractor Disciplinary Proceedings

The Commission received testimony from subcontractors that contractors frequently intimidate nonprivity lienors from filing Notices to Owners because the contractor does not want the owner to be alarmed that there might be a payment problem with the job.¹⁵⁰ Some subcontractors testified that as a condition for their continued employment, they were not permitted to serve Notices to Owner.¹⁵¹ Regardless of the contractor's motives, nonprivity lienors were being placed in the precarious position of choosing between job security and lien rights.

Because the service of a Notice to Owner is a prerequisite for a nonprivity lienor's Claim of Lien,¹⁵² the Commission proposed and the Legislature created section 489.129(1)(o), Florida Statutes, to provide that any person who impedes or obstructs another person from serving a Notice to Owner is subject to disciplinary action by the Department of Professional Regulation.¹⁵³

E. Notice of Commencement

1. Purpose and Origin

The current Notice of Commencement is a multi-purpose document that establishes the application of the statutes of limitation under the

150. Commission Minutes, *supra* note 67, at 6 (September 11, 1989); *id.* at 6, 7 (October 3, 1989); *id.* at 6 (October 25, 1989); *id.* at 18 (October 26, 1989).

151. Commission Minutes, *supra* note 67, at 11 (October 3, 1989).

152. FLA. STAT. § 713.06(2)(a) (1989).

153. Ch. 90-109, § 24, 1990 Fla. Laws 232, 252. Of course, this new section only applies to those who are licensed pursuant to Chapter 489. The section does not encompass those persons licensed only by a local government.

lien law,¹⁵⁴ protects the owner from paying twice,¹⁵⁵ establishes lien priority,¹⁵⁶ and acts as source document of information used to complete and serve the Notice to Owner.¹⁵⁷

The history of the Notice of Commencement in Florida is relatively short. Prior to 1963, there was no provision for a Notice of Commencement. Instead, liens related back to and took effect from the time of "visible commencement" of construction.¹⁵⁸ The effect of "visible commencement" was that all nonprivity lienors had liens of equal dignity which were established at the time of commencement.¹⁵⁹ Nonprivity liens were superior to conveyances, mortgages, judgments, and other demands not recorded prior to the time of "visible commencement".¹⁶⁰ As a result, many controversies arose between the nonprivity lienors and those with competing interests regarding the time of "visible commencement".

In response to this controversy, and in an effort to easily establish a commencement date certain from which to measure time limitations under the lien law, the Legislature created the Notice of Commencement.¹⁶¹ Since 1963, the Notice of Commencement has served as: (1) a source document for information needed to complete and serve the Notice to Owner; (2) a dated document that establishes both a commencement date from which to measure time limitations under the mechanics' lien law and an attachment date for recorded liens; and (3) a point document for determining "proper" payments by the owner.

Under the previous law, the property owner was required to record and post on the property to be improved a Notice of Commencement before actually beginning improvements to real property¹⁶² if the direct contract price exceeded \$2500.¹⁶³ An owner was not penalized for failing to record and post a Notice of Commencement prior to actual commencement, however, an owner could incur a severe penalty if he or she made payments prior to recording the Notice of Commence-

154. *Design Aluminum, Inc. v. DeSanti*, 521 So. 2d 285 (Fla. 2d DCA 1988).

155. *Id.* at 287.

156. *Hardrives Co. v. Tri-County Concrete Products, Inc.*, 489 So. 2d 1211, 1213 (Fla. 4th DCA 1986); *Symons Corp. v. Tartan-Lavers Delray Beach, Inc.*, 456 So. 2d 1254, 1259 (Fla. 4th DCA 1984).

157. *Id.* at 1263; *Design Aluminum*, 521 So. 2d at 287.

158. FLA. STAT. § 84.03(1) (1963).

159. For an extensive discussion of the history and adoption of the former mechanics' lien act, see Ervin, *Revised Mechanics' Lien Law; The Whys and Wherefores*, 37 FLA. B.J. 1095 (Dec. 1963).

160. *Id.* at 1101.

161. *Id.*

162. FLA. STAT. § 713.13(1)(a) (1989).

163. FLA. STAT. § 713.02(5) (1989).

ment.¹⁶⁴ All payments made prior to recording were deemed improperly paid with respect to nonprivity lienors.¹⁶⁵ An owner, however, could mitigate damages if the owner recognized the purpose of the Notice to Owner and made "proper payments" to the nonprivity lienors who served such notice.¹⁶⁶

The Commission noted that a nonprivity lienor was without any ability to mitigate and that courts had consistently held that the absence of a Notice of Commencement did not relieve subcontractors or materialpersons of the responsibility to serve a Notice to Owner.¹⁶⁷ Because the obligation to record a Notice of Commencement rested exclusively with the owner,¹⁶⁸ the Commission proposed and the Legislature enacted comprehensive amendments to Chapter 713 to help insure that Notices of Commencement are recorded, that subcontractors and materialpersons have an alternate source document in the event that a Notice of Commencement is not recorded, and that the term of the Notice of Commencement need not expire prior to the completion of the construction project.

2. *Commission Recommendations and Legislative Action*

a. *Notice of Commencement as Part of the Inspection Process*

In response to the need to assure that a Notice of Commencement is recorded and posted at the job site, the Legislature has amended section 713.135(1)(d), Florida Statutes, to require that in the course of conducting its first inspection the permit issuing authority (usually the building department) verify the presence of a posted certified copy of the notice at the building site.¹⁶⁹ In the event a Notice of Commencement is not posted, the issuing authority is required to disapprove any inspection made more than seven days after the permit is issued.

In practice this new provision should seldom result in a project being halted. Once the contractors realize that construction will halt be-

164. FLA. STAT. § 713.06(3)(a) (1989).

165. *Id.* Effective January 1, 1991, Florida Statutes subsections 713.06(3)(a) and (b) have been amended to provide that payment made prior to the recording of a Notice of Commencement is no longer deemed "improper." Ch. 90-109, § 4, 1990 Fla. Laws 232, 238 (amending FLA. STAT. § 713.06(3) (1989)).

166. COMMISSION REPORT, *supra* note 62, at 25.

167. *See* *Symons Corp. v. Tartan-Lavers Delray Beach, Inc.*, 456 So. 2d 1254 (Fla. 4th DCA 1984); *Tarlow v. Helmholtz*, 198 So. 2d 109 (Fla. 2d DCA), *cert. denied*, 204 So. 2d 332 (Fla. 1967).

168. FLA. STAT. § 713.13(1)(a) (1989).

169. Ch. 90-109, § 8, 1990 Fla. Laws 232, 241-42 (amending FLA. STAT. § 713.135(1)(d) (1989)).

cause of the absence of a Notice of Commencement, they will play an active roll in the recording or posting of the Notice of Commencement. Each contractor will want to confirm that a notice has been completed and posted because progress payments are directly tied to the continuation of the project. If the project is halted, the flow of "draws" from the owner or lender to the contractor will similarly halt.

b. Lender Assistance

In addition to the assistance of the local permit issuing authority, the Legislature has also enlisted the assistance of lenders. Under new section 713.13(6), Florida Statutes, anyone lending monies for the construction of improvements secured by a mortgage on real property will be required to record (but not to post) the Notice of Commencement on behalf of the owner prior to the disbursement of any construction funds to the contractor.¹⁷⁰

As a point of interest, this new section was the result of great deliberation by the Commission. The Commission felt that because so many projects are financed, this proposal would help insure that notices are properly recorded.¹⁷¹ This section, however, has lost some degree of import as the result of a subsequent amendment to Senate Bill 1330 which resulted in the elimination of the improper payment language which made an owner responsible to a nonprivity lienor for any payments made to the general contractor prior to the recording of the Notice of Commencement.¹⁷² While the dangers of the absence of the Notice of Commencement to the owner have been eliminated, the nonprivity lienors will still benefit from this provision by having the notice as both a source document for information and as a point for establishing lien priority.

c. Building Permit Application

Public testimony revealed and the Commission confirmed that nonprivity lienors rely on the Notice of Commencement as a source document to gather information needed to complete and serve a Notice to Owner.¹⁷³ Nonprivity lienors argued that they were placed at a disadvantage when an owner fails to record a Notice of Commencement and the nonprivity lienor is still required to serve a Notice to Owner.¹⁷⁴

170. Ch. 90-109, § 6, 1990 Fla. Laws 232, 238 (codified at FLA. STAT. § 713.13(6)).

171. Commission Minutes, *supra* note 67, at 14 (October 26, 1989).

172. See *supra* notes 122-27 and accompanying text.

173. COMMISSION REPORT, *supra* note 62, at 15.

174. Commission Minutes, *supra* note 67, at 2 (October 3, 1989).

In response to the nonprivity lienors' complaints and as an alternative source of information to complete and serve a Notice to Owner, new section 713.135(6) has been added to mandate a form for a building permit application.¹⁷⁵ Furthermore, in the event that a Notice of Commencement is not recorded, new section 713.06(2)(e) has been added to allow a lienor to rely on the information contained in the permit application for the purpose of completing and serving the Notice to Owner.¹⁷⁶

d. Notice of Commencement Form

The Legislature has also mandated a statutory Notice of Commencement form found in new section 713.13(1)(d), which incorporates the information contained in section 713.13(1)(a).¹⁷⁷ The significance of this form is that beginning January 1, 1991, only the owner may sign it. By requiring owners to sign the notice, lienors will be assured of the accuracy of the information, and the owner will be exposed to the mechanics' lien disclosure statement contained in the notice.

e. Notice of Termination

The Legislature recognized that the protection resulting from a recorded Notice of Commencement is available only so long as the Notice of Commencement remains effective.¹⁷⁸ When a Notice of Commencement expires, an owner's subsequent payments are deemed "improper," and the owner may pay twice for improvements which result in a record lien. In addition, any claim of lien filed after the expiration of the Notice of Commencement will not relate back to the date of recording of the Notice of Commencement, but instead attaches at the date of recording the claim of lien.¹⁷⁹ In both events, the owner and the nonprivity lienor may suffer.

As a result, section 713.13(1)(c) has been created to provide that if the direct contract expresses a time of completion greater than one year, the Notice of Commencement must state that it is effective for a specified period in excess of one year.¹⁸⁰ This new section works in conjunction with existing section 713.13(5), which provides that Notices of Commencement are not effective after one year unless other-

175. Ch. 90-109, § 8, Fla. Laws 232, 242 (codified at FLA. STAT. § 713.135(6)).

176. *Id.* § 4, Fla. Laws 232, 238 (codified at FLA. STAT. § 713.06(2)(e)).

177. *Id.* § 6, Fla. Laws 232, 239 (codified at FLA. STAT. § 713.13.(1)(d)).

178. COMMISSION REPORT, *supra* note 62, at 16.

179. Compare with FLA. STAT. § 713.07(2) (1989).

180. Ch. 90-109, § 6, Fla. Laws 232, 239 (codified at FLA. STAT. § 713.13(1)(c)).

wise provided in the notice. The difference between the two sections is that new section 713.13(1)(c) is not permissive, and where a contract expresses a construction period in excess of one year, the Notice of Commencement must reflect the longer period.

A companion section to section 713.13(1)(c) is new section 713.132, Florida Statutes, which permits an owner to record a Notice of Termination either when construction has been completed or when the construction has ceased prior to completion and all lienors have been paid in full or pro rata.¹⁸¹ Prior to the adoption of section 713.132, an owner had no method by which to terminate a Notice of Commencement except with a Notice of Recommencement where construction was abandoned prior to completion. New section 713.132 will permit an owner to terminate a Notice of Commencement, and therefore to transfer title without exceptions for liens that may be subsequently recorded but otherwise effective as of the date the Notice of Commencement was recorded.

F. *Liens for Professional Services*

Section 713.03(1) provides that lienors who prepare plans, specifications, or drawings as an architect, landscape architect, interior designer, engineer, or land surveyor will have lien rights for such services. The Commission concluded that a gap existed between the lienable services described in section 713.03(1) and the actual scope of practice for those professionals.¹⁸² In short, it was determined that section 713.03(1) unfairly discriminated against those professionals who do not prepare plans, specifications, or drawings, or who do more than that but nevertheless contribute to the improvement of the property.¹⁸³

As a result section 713.03(1), Florida Statutes has been amended to permit these professionals to file liens for all services performed within the scope of their respective licenses.¹⁸⁴ This amendment changes the scope of lienable professional services by removing the limiting language "in preparing plans, specifications, or drawings" and by relying exclusively on the term "services."

181. *Id.* § 7, Fla. Laws 232, 240 (codified at FLA. STAT. § 713.132).

182. Commission Minutes, *supra* note 67, at 8 (December 4, 1989).

183. The Florida Engineering Society requested that the Commission amend section 713.03(1), Florida Statutes, to expand the types of "professionals" able to assert liens for their services (for example, environmental scientists and planners). The Commission, however, declined to adopt the Society's recommendation until those professionals have received recognition from the Department of Professional Regulation. See Commission Minutes, *supra* note 67, at 8 (December 4, 1989).

184. See ch. 90-109, § 3, 1990 Fla. Laws 232, 236 (amending FLA. STAT. § 713.03(1) (1989)).

G. Abandonment

Section 713.06(2)(a), requiring a nonprivity lienor's service of a Notice to Owner as a prerequisite to perfecting a lien, provides that the notice must be given: (1) before commencing to furnish services or materials or (2) after commencing to furnish services or materials but before the owner's final payment based on the contractor's final payment affidavit, abandonment, or expiration of forty-five days from the date service or materials are furnished, whichever occurs first. Subcontractors and materialpersons expressed concern to the Commission that because there is not a clear definition of "abandonment," nonprivity lienors do not know with certainty when to serve Notices to Owner, and may ultimately lose all lien rights because of unknowingly serving a notice too late.¹⁸⁵ Unable to articulate an acceptable definition of "abandonment," the Commission recommended and the Legislature amended section 713.06(2)(a) to eliminate any reference to abandonment.¹⁸⁶ As a result, effective January 1, 1991, the date of "abandonment" no longer shortens the forty-five-day period within which the Notice to Owner can be served.

As a point of interest, while the amendment to section 713.06(2)(a) will assist nonprivity lienors by providing greater certainty, it does so at the expense of the owner and may cause construction delays. Prior to this amendment, upon abandonment an owner could pay nonprivity lienors having timely served Notices to Owner, and then record a Notice of Recommencement.¹⁸⁷ With the elimination of "abandonment" as an event which shortens the statutory forty-five-day time period for service of Notice to Owner, when a job is abandoned, an owner must now wait the full forty-five-days from the last date services and materials are furnished before recording a Notice of Recommencement.

H. Specially Fabricated Materials

The Legislature adopted the Commission's recommendation¹⁸⁸ to modify the definition of "furnish materials" and thereby resolved confusion in the industry with respect to when a nonprivity lienor's obligation to serve a Notice to Owner arises as to specially fabricated materials.

185. Commission Minutes, *supra* note 67, at 8-9 (December 4, 1989).

186. Commission Report, *supra* note 62, at 36; Ch. 90-109, § 4, 1990 Fla. Laws 232, 236-37 (amending FLA. STAT. § 713.06(2)(a) (1989)).

187. FLA. STAT. § 713.06(2) (1978).

188. COMMISSION REPORT, *supra* note 62, at 41, 42.

Pursuant to section 713.06(2)(a), Florida Statutes, a nonprivity lienor must serve a notice to the owner "before commencing, or not later than 45 days from commencing, to furnish [his] services or materials. . . ." The time to serve a Notice to Owner under section 713.06(2)(a) was further defined in *Oolite Industries v. Millman Construction Co.*,¹⁸⁹ in which the Third District Court of Appeal held that when materials are specially fabricated, the time to serve a Notice to Owner commences once fabrication has begun or forty five days from the commencement of fabrication, but not at delivery of the materials.¹⁹⁰

Notwithstanding *Oolite*, witnesses appearing before the Commission could not agree when the time period to serve the notice was triggered. Opinions varied from: the date the fabrication contract is awarded, the date the design stage is commenced, the date actual fabrication is commenced, or the date of delivery of the completely fabricated component.¹⁹¹

In an effort to resolve any further confusion relating to the service of Notices to Owner in the context of specially fabricated materials, the Commission proposed and the Legislature adopted an amendment to section 713.01(9), Florida Statutes, modifying the definition of "furnish materials" to exclude design work and submittals. As a result of the amendment, nonprivity lienors who specially fabricate materials must now serve their Notice to Owner when the actual fabrication of materials first begins or forty-five days thereafter in order to preserve future lien rights.

I. Application of Money to Materials Account

Pursuant to section 713.14(2), Florida Statutes, when a subcontractor, sub-subcontractor, or materialperson receives a payment, she or he is required to demand from the payor a designation of the account to which the payment is to be applied. The section further provides that where those persons fail to make a demand of designation, or where a payor makes a designation but the subcontractor, sub-subcontractor, or materialperson fails to properly apply the funds, such failure is a complete defense to any resulting liens. As a consequence of this section, where a materialperson or subcontractor receives an undesignated partial payment on an open account, and fails to demand a designation of account, the materialperson or subcontractor

189. 501 So. 2d 655 (Fla. 3d DCA 1987).

190. *Id.* at 656.

191. Commission Minutes, *supra* note 67, at 7 (December 4, 1989); *id.* at 2 (January 1, 1990).

may completely lose lien rights, regardless of the amount of the partial payment made.

The Commission received testimony indicating that section 713.14(2) unfairly places the burden to demand a designation on the wrong party.¹⁹² Subcontractors and materialpersons further suggested that in the absence of a designation of account from the payor, the recipient of those funds should be able to allocate the funds as the recipient finds appropriate.¹⁹³

While the Commission was unwilling to disturb the general scheme of section 713.14(2), and did not adopt the subcontractors' and materialpersons' recommendation, it did conclude that the "complete defense" penalty was too harsh and that this section should be amended to provide only a partial defense "to the extent of the payment made."¹⁹⁴ As a result, effective January 1, 1991, the misapplication of a designated payment or the failure to demand a designation of payment is no longer a complete defense to a subsequent lien.

J. Request for Sworn Statement of Account

Responding to suggestions that lienors were being unfairly deprived of their lien rights, the 1990 Legislature amended section 713.16(2), and nullified the Florida Supreme Court's holding in *Gonas v. Home Electric of Dade County, Inc.*¹⁹⁵ by requiring that a Request for Sworn Statement of Account contain a warning notifying the nonprivity lienor of the consequences of failing to timely and truthfully comply with the request.

Section 713.16(2), Florida Statutes (1989), provided:

(2) At the time any payment is to be made by the owner to the contractor or directly to a lienor, the owner may in writing demand of any lienor a written statement under oath of his account showing the nature of the labor or services performed and to be performed, the materials furnished and to be furnished, the amount paid on account to date, the amount due, and the amount to become due. *Failure or refusal to furnish the statement within 30 days after the demand, or furnishing of a false or fraudulent statement, shall deprive the person so failing or refusing to furnish such statement of his lien.* (emphasis added)

The Commission debated whether an owner or contractor should have a duty to warn a lienor of the fatal ramifications of failing to

192. Commission Minutes, *supra* note 67, at 7 (January 8, 1990).

193. *Id.*

194. COMMISSION REPORT, *supra* note 62, at 50, 51.

195. 547 So. 2d 109 (Fla. 1989).

provide a statement of account or of furnishing a fraudulent statement of account. Witnesses testified and the Commission agreed that section 713.16 was frequently used solely to invalidate an otherwise valid lien and that some owners routinely sent a lienor a Request for Sworn Statement of Account in hopes that the lienor would not timely respond.¹⁹⁶ Because there was no statutory form for such request, the Commission found that some owners would bury requests for a statement of account in letters relating to several matters; consequently, nonprivity lienors did not always recognize the letter as a statutory demand, or did not recognize its significance.¹⁹⁷ The net result was that because of ignorance of the law or untimely response, many nonprivity lienors lost all lien rights.

Several district courts¹⁹⁸ have rendered conflicting opinions regarding an owner's obligation to provide a warning in a request for sworn statement of account. Ultimately, the Florida Supreme Court in *Gonas* found that a warning need not be given.¹⁹⁹ In response to the Commission testimony, the Legislature nullified the effects of *Gonas* by adding section 713.16(3) which mandates a form for a request for sworn statement of account. The form includes a warning to the lienor that the failure to furnish the requested statement of account within thirty days or the furnishing of a false statement of account will result in a loss of the lien. As a result of this change, the Legislature has not diminished an owner's right to make the request, but at the same time has placed the lienor in a more equitable position.

K. Criminal Misapplication of Construction Funds

Most of the 1990 reforms to the lien law centered around the duties, obligations, and protections of the owner and the nonprivity lienor. The Commission, however, recognized that an owner's payment to a contractor prior to recording a Notice of Commencement or a nonprivity lienor's failure to serve a Notice to Owner is without consequence unless a contractor fails to forward the owner's payment to the subcontractor or materialperson.²⁰⁰ Simply stated, even where the owner or nonprivity lienor fails to follow the requirements of the lien law and fails to record or serve their respective notices, their failure

196. Commission Minutes, *supra* note 67, at 8 (January 8, 1990).

197. *Id.*

198. See, e.g. *Gonas v. Home Elec., Inc.*, 537 So. 2d 590 (Fla. 3d DCA 1988) (owner's demand for written account need not warn that subcontractor would lose mechanics' lien if no response to demand is made within 30 days); *Alex v. Randy, Inc.*, 305 So. 2d 13 (Fla. 1st DCA 1974) (demand letter must include notice of the statutory time for reply).

199. 547 So. 2d at 110.

200. COMMISSION REPORT, *supra* note 62, at 30, 31.

should not result in injury to any party unless the contractor subsequently fails to pay his subcontractors or material persons.

Previously, two criminal provisions in the mechanics' lien law related to a contractor's misapplication of construction funds: sections 713.34 and 713.345, Florida Statutes. Prosecutors, however, testified that neither section acted as a real deterrent to the contractor:²⁰¹ section 713.34 contained too difficult a burden for the prosecutor to carry, making it seldomly used, and section 713.345 contained such minimal penalties that it was not worth the state's effort to prosecute.

Section 713.34, Florida Statutes, defined the misapplication of construction loan proceeds as embezzlement. Testimony from several state attorneys revealed that the section was difficult to use because it required a prosecutor to prove "intent to defraud"²⁰² and that the legal presumptions contained in the statute were constitutionally infirm.²⁰³

Section 713.345, Florida Statutes, attacks the misapplication of construction funds from a different perspective. This section mandates that proceeds received for improving a specific property be first applied to payment for improvement to that property.²⁰⁴ Where the proceeds are instead used for a different project and the prosecutor can prove that the contractor "knowingly and intentionally" failed to distribute the proceeds in accordance with section 713.345(1)(a), the prosecutor has met the burden of proof.²⁰⁵ Section 713.345 eases the prosecutor's burden by eliminating the problems associated with proving theft or "intent to defraud" as found in section 713.34. Prosecutors testified, however, that section 713.345 was seldomly used because the misdemeanor penalties associated with the section were too weak to act as a deterrent.

In response to the recommendations of several state attorneys, the Commission recommended and the Legislature repealed section 713.34 in its entirety²⁰⁶ and amended section 713.345 to increase the penalties for the misapplication of construction funds from a misdemeanor to a felony.²⁰⁷ The statute specifies that the actual degree of

201. Commission Minutes, *supra* note 67, at 8 (September 11, 1989); *id.* at 4, 5 (October 3, 1989).

202. *Id.*

203. For an extensive discussion of the constitutional infirmities of section 713.34, Florida Statutes, see Lewis, *Criminal Misapplication of Construction Funds: Myth & Reality*, 63 FLA. B.J. 11 (Apr. 1989).

204. FLA. STAT. § 713.345 (1989).

205. *Id.*

206. Ch. 90-109, § 16, 1990 Fla. Laws 232, 249 (repealing FLA. STAT. § 713.34 (1989)).

207. *Id.* § 17, 1990 Fla. Laws 232, 249 (amending FLA. STAT. § 713.345 (1989)).

felony depends on the amount of funds misappropriated. Between October 1, 1990 and January 1, 1991, both sections were in effect with the increased penalties of section 713.345.

L. Conditional Payment Bond

1. Background

In January, 1990, the Commission submitted its final report to the Governor, the President of the Senate, and the Speaker of the House.²⁰⁸ Several weeks later, the Florida Supreme Court rendered an opinion in *OBS Co. v. Pace Construction Corp.*,²⁰⁹ relating to the validity of a "shift of risk" provision which conditioned contractor payments to a subcontractor on payment from the owner. The opinion created concern among the contracting industry, and the Florida Council of the Associated General Contractors (AGC) requested that legislative action be taken during the 1990 session to rectify the perceived problems created by *OBS*.²¹⁰

2. OBS Co. v. Pace Construction Corp.

In *OBS Co. v. Pace Construction Corp.*, the Florida Supreme Court found that a "risk shifting" provision contained in a subcontract was inconsistent with the general contract and ambiguous; therefore, it was unenforceable against the subcontractor.²¹¹ *OBS* involved a claim of lien by a subcontractor for money due on a project covered by a payment bond under section 713.23.²¹² *OBS*, the subcontractor, had entered into a subcontract with Pace Construction Corporation, the general contractor, whereby *OBS* was to perform framing and drywalling on a project.²¹³ The subcontract contained a provision that conditioned the contractor's obligation to pay the subcontractor upon payment to the contractor from the owner.²¹⁴ The payment bond required the surety to pay *OBS* if *OBS* failed to receive payment from Pace within 90 days.²¹⁵

208. See *supra* note 62.

209. 558 So. 2d 404 (Fla. 1990).

210. Memorandum from Neil Butler to Commission Chair Fred R. Dudley (April 9, 1990)(AGC conditional payment bond proposal) (available at Fla. Dep't of State, Bureau of Archives & Management, Fla. State Archives, Tallahassee, Fla.).

211. 558 So. 2d at 406.

212. *Id.* at 405.

213. *Id.*

214. *Id.*

215. *Id.* at 407.

OBS fully performed its work. Pace, however, refused to make final payment to OBS under the subcontract agreement because the owner had not made payment to Pace.²¹⁶ In addition, the surety refused to make final payment under its separate and independent obligation under the payment bond²¹⁷ by asserting that its obligation to do so was predicated on the obligation of the general contractor.²¹⁸ Because the surety stood in the "shoes" of the contractor, Pace and the surety argued that the surety should benefit from the shift of risk provision, and that neither of them should be required to pay the subcontractor. The Second District Court of Appeal agreed, thus leaving OBS with no lien rights against either the owner's property or the contractor's bond.

The Supreme Court of Florida, reversing the Second District Court of Appeal, held that the contractual shift of risk provision was ambiguous because it incorporated by reference an inconsistent payment provision from the general contract.²¹⁹ The court further held that this ambiguity prevented the provision from effectively shifting the risk of the owner's nonpayment from Pace to OBS.²²⁰ Therefore, the court held that Pace remained liable for final payment owed OBS.

The supreme court further held that because there was no shift of risk from the contractor to the subcontractor, the surety would also be liable under the specific terms of the payment bond.²²¹ The court implied, however, that had the terms of the subcontract and the bond been different, a valid shift of risk may have occurred.

While the *OBS* opinion could have ended there, the supreme court went further and held that "a subcontractor is a third-party donee obligee of a section 713.23 bond and, as such, its rights are vested and may not subsequently be defeated by the failure of the owner to comply with the special conditions of the bond."²²² In effect, the court said that "shift of risk" provisions which tie the benefits of a bond to an owner's payment are not enforceable, especially at the expense of the innocent nonprivy lienor.²²³

3. Reaction to *OBS*

The AGC alleged that *OBS* "reversed 200 years of suretyship law" and that under *OBS*, a subcontractor or supplier could make a claim

216. *Id.* at 405.

217. *Id.* at 407.

218. *Id.* at 405.

219. *Id.* at 406.

220. *Id.*

221. *Id.* at 407.

222. *Id.* at 408.

223. See also *DEC Elect., Inc. v. Raphael Const. Corp.*, 558 So. 2d 427 (Fla. 1990).

on and enforce payment against the general contractor's bond even if the contractor was not legally obligated to pay the subcontractor or supplier.²²⁴ The AGC further asserted that *OBS* would adversely affect subcontractors and owners by increasing the cost and decreasing the availability of bonds.²²⁵

In response to the dicta contained in *OBS*, AGC proposed the conditional payment bond. AGC asserted that the new bond would (1) protect honest owners who timely paid the general contractor, (2) give owners a way to protect themselves against double liability even if no payments have been made to the general contractor, and (3) insure that subcontractors and suppliers have lien rights or a claim against the bond if they are not paid.²²⁶ Initially, AGC's proposal met with resistance from the subcontracting industry.²²⁷

The Florida Subcontractors' Association and the Associated Builders and Contractors disagreed with AGC's characterization that *OBS* overturned surety law and asserted that *OBS* did not depart from prior law.²²⁸ Subsequently, subcontractors and contractors reached a compromise which resulted in the new Section 713.245, Florida Statutes.²²⁹

4. *Conditional Payment Bond*

The conditional payment bond was tailored to directly address the concerns of the contracting industry with *OBS*. Under new section 713.245, a contractor purchasing a conditional payment bond will no longer be a guarantor of an owner's payment. The owner's ability to benefit from the payment bond will be entirely predicated on the owner's payment to the contractor.

The concept of the conditional payment bond is not difficult. The bond is a hybrid of a section 713.23 payment bond except that once a claim of lien is recorded, it attaches to an owner's property.²³⁰ The

224. Memorandum from Neil Butler to Commission Chair Fred R. Dudley (April 9, 1990) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

225. *Id.*

226. *Id.*

227. Letter from Larry Leiby to Commission Chair Fred R. Dudley (April 11, 1990) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

228. *Id.*; see also *Peacock Constr. Co. v. Modern Air Conditioning, Inc.* 353 So. 2d 840 (Fla. 1977); *Aetna Casualty & Sur. Co. v. Warren Bros.*, 355 So. 2d 785 (Fla. 1978).

229. Letter from Larry Leiby to Commission Chair Fred R. Dudley (April 18, 1990) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

230. Ch. 90-109, § 13, 1990 Fla. Laws 232, 246 (codified at FLA. STAT. § 713.245).

owner is then given the opportunity to file a certification that the owner has paid the contractor.²³¹ If such a certification is filed, the lien transfers from the property to the payment bond, similar to a section 713.24 transfer bond.²³² In addition, under new section 713.245, where the amount of the recorded lien exceeds the amount paid as certified by the owner, the excess amount remains as a lien on the owner's property.²³³

Unfortunately, the concept behind the bond is the only thing simple about the conditional payment bond. Section 713.245 contains a complex series of affidavits and certificates requiring the owner to certify payment and permitting a contractor to contest an owner's certificate.²³⁴ Undoubtedly, under this bond disputes will arise over the reason for nonpayment, allocation of payment to other subcontractors, and the validity of the lien under the lender's loan documents.²³⁵ These disputes, however, may have little or nothing to do with the owner's degree of fault, if any, in a particular case. The owner may have a good reason for not paying, or the owner may have paid but there is a dispute concerning allocation of payment.²³⁶ In any event, the resolution of these conflicts will undoubtedly confuse the owner and potentially inhibit the sale of property.

The conditional payment bond is a complex and possibly litigious solution to a problem that has yet to manifest itself. While the Legislature should be encouraged and congratulated for anticipating problems and creating pro-active solutions, the Legislature should continue to take great care not to create an imbalance in the law.

One of the main purposes of the Commission was to review the law and to better balance the various competing interests. The introduction of the conditional payment bond acts to complicate the bonding provisions of the lien law and may work to the disadvantage of the owner. Once again, the unsophisticated owner, who at one time had a reprieve from the complexities of the lien law by requiring a payment bond, may now be confronted with difficult choices to make regarding the best type of bond to acquire. In addition, the perceived problems of *OBS* could have been resolved under the principle of

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. Memorandum from Commissioner Robert H. Miltenberger III to Commission Chair Fred R. Dudley (May 1, 1990) (discussing conditional payment bond proposal) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

236. *Id.*

indemnification. Where an owner fails to make payments to a contractor and then benefits from a payment bond, the surety could look to the owner for indemnification. By creating the conditional payment bond, the Legislature may have overreacted to the concerns of the contractors. Fortunately for all involved, the Legislature had the foresight to subject this provision to a sunset review in 1992 which will cause this new section to be automatically repealed on July 1, 1992, unless re-enactment occurs prior thereto. This will allow for a more careful review and analysis of conditional payment bonds.

VII. CONTINUING PROBLEM AREAS FOR FUTURE REVIEW

A. *Lien Recovery Fund*

The concept of a lien recovery fund was considered and tabled by the Commission.²³⁷ Several states have operating recovery funds that require the mandatory participation of contractors, owners, and non-privity lienors. The Commission, however, was unwilling to embrace this concept and instead recommended that the Legislature consider the results of an on-going review of the applicability of a lien recovery fund in Florida.²³⁸

B. *Lender Responsibility*

Under the present reforms to the construction lien law, lenders have been enlisted to record Notices of Commencement. The Commission recognized the importance of these notices and found that the assistance of the lenders would insure that the notices are recorded. Under new section 713.13(2), however, if construction is not commenced within ninety days²³⁹ from recordation, the notice is void and the owner and the nonprivity lienor lose any advantages gained.²⁴⁰

To insure that a project is timely commenced and that the Notice of Commencement remains valid, the Legislature should consider obligating the lender to require proof that the improvements described in the Notice of Commencement are actually commenced within ninety days of recording such notice. It does no good for the lender to record

237. COMMISSION REPORT, *supra* note 62, at 35.

238. Arlan Toy, Professor, University of Florida, School of Building Construction, is presently conducting a study of "The Applicability of Mechanics' Lien Recovery Fund for Florida Residential Construction Industry."

239. Ch. 90-109, § 6, Fla. Laws 232, 240 (amending FLA. STAT. § 713.132) (1989).

240. *Id.*

a Notice of Commencement for the benefit of an owner, only to find that the project was delayed and the notice is void.

C. Bifurcation

Under the construction lien law, a homeowner is required to meet the same strict requirements of the law as one engaged in a commercial business. In addition, the law makes no distinction between a small residential project and a multi-million dollar commercial project. The Legislature may consider the practicality of having two lien laws, one for residential and the other for commercial projects.

D. Exemptions

In both 1989²⁴¹ and 1990²⁴² the legislature considered bills exempting residential projects under the value of \$150,000 from these liens laws. While neither of the bills succeeded, it is safe to assume that similar bills will surface again, particularly if the concept of bifurcation is not embraced.

VIII. CONCLUSION

This country's political system, as distinguished from many others in the world, is based on the concept of private property rights. Citizens have the ability to own, alienate, convey, and devise property. The right of ownership traditionally confers the right to improve property. The concept of recognizing and enforcing liens on private property represents a dramatic encroachment on private property rights; in effect, it is an involuntary concession of property rights by private citizens and demonstrates the state's commitment that lienors be paid for services rendered. The construction lien law is a fine balance between these highly prized private property rights and a public policy of insuring that a provider of labor, services, and materials is paid so that the property owner is not unjustly enriched.

The 1990 reforms to the construction lien law represent the Legislature's efforts to maintain an equilibrium between private property rights and the rights of the lienors. Both the Commission and the Legislature recognized that the purpose of the law could be served, and enhanced, by improving statutory warnings and by enlisting the participation of both lenders and permit issuing authorities. The Legislature also responded to recommendations voiced by professionals,

241. Fla. HB 1483 (1989); Fla. SB 661 (1989).

242. Fla. HB 677 (1990).

contractors, and nonprivity lienors and enacted numerous technical changes to the law.

The Commission and the Legislature should be commended for thoroughly reviewing and revising a complex law and for enacting reforms that will have a lasting positive effect on the construction industry in Florida. The work of the Legislature, however, is far from over. The Legislature must continue to monitor the careful balance of this law to make sure that no one party bears an inordinate weight or burden. If the past serves as any indication, the Legislature will be called upon again to address changes to the construction lien law.