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Ruminations on the Louisiana Private Works Act

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Ruminations on the Louisiana Private Works Act

Michael H. Rubin*

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For over 150 years Louisiana has protected the rights of those who work on immovable property. Those who perform labor or supply materials have been accorded the right to seize and sell the immovable property and obtain a privilege on the proceeds of the sale. The rules that began in the 1808 original version of the Louisiana Civil Code¹ are now enshrined in the Louisiana Private Works Act, Louisiana Revised Statutes 9:4801 *et seq.* This article reviews the rights and liabilities of the parties under the current law and considers the theoretical underpinnings of the statute as well as the jurisprudential history.

I. HISTORICAL OVERVIEW

The Code Napoleon² and the Louisiana Civil Code of 1808³ both contain provisions creating a privilege in favor of those who worked on "constructing, building, or repairing" immovable property. The one-paragraph version of the 1808 Code was continually expanded, from a short definition of who was entitled to the privilege, to a three-paragraph definition that included many different kinds of workers in the 1825 Code, to a more expansive definition in the 1870 Louisiana Civil Code.⁴ The language of the Louisiana Civil Code on

1. The origin is found in Article 75 of the 1808 Code.

2. Article 2103 of the Code Napoleon provided a privilege under certain conditions for "architects, undertakers, bricklayers, and other workman employed in constructing and rebuilding and repairing buildings, canals, or other works . . ." The text of this version of the Code Napoleon, with an English translation, can be found in Joseph Dainow, 1972 Compiled Edition of the Civil Codes of Louisiana (West 1973).

3. Article 75 of the Louisiana Civil Code of 1808 was originally promulgated only in French. Both the French and the English translation can be found in Dainow, *supra* note 2.

4. Compare La. Civ. Code art. 75 (1808); La. Civ. Code art. 3216 (1825); and La. Civ. Code art. 3249 (1870).

worker's privileges, promulgated in 1870, has remained unchanged to the present day.⁵

Although the text of Article 3249 has not changed since 1870, a method of granting a way to compel payment in favor of those who work on immovable property has been a concern of the Louisiana Legislature.⁶ Beginning in 1879, the Louisiana Constitution mandated that the General Assembly "pass laws to protect laborers on buildings, streets, roads, railroads, canals, and other similar works, against the failure of contractors and subcontractors to pay their current wages when due, and to make the corporation, company, or individual for those whose benefit the work is done responsible for their ultimate payment."⁷ The first legislative act following this constitutional mandate occurred in 1880. Act 134 of 1880 was limited in scope and was only in favor of laborers; it did not include materialmen or subcontractors.⁸ There were a number of individual acts passed between 1880 and 1921 dealing with privileges, most tied to the type of work performed on immovable property.⁹ In 1922 the legislature made a comprehensive revision and consolidation of the laws by Acts 1922, No. 139; these provisions were modified by Acts 1926, No. 298.¹⁰ Changes were

5. Art. 3249. Special privileges on immovables

Creditors who have a privilege on immovables are:

1. The vendor on the estate by him sold, for the payment of the price or so much of it as is unpaid, whether it was sold on or without a credit.
2. Architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works.
3. Those who have supplied the owner or other person employed by the owner, his agent or subcontractor, with materials of any kind for the construction or repair of an edifice or other work, when such materials have been used in the erection or repair of such houses or other works.

The above named parties shall have a lien and privilege upon the building, improvement or other work erected, and upon the lot of ground not exceeding one acre, upon which the building, improvement or other work shall be erected; provided, that such lot of ground belongs to the person having such building, improvement or other work erected; and if such building, improvement or other work is caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease and shall not affect the owner.

4. Those who have worked by the job in the manner directed by the law, or by the regulations of the police, in making or repairing the levees, bridges, ditches and roads of a proprietor, on the land over which levees, bridges and roads have been made or repaired.

La. Civ. Code art. 3249.

6. For a detailed history of the Louisiana Private Works Act and the entire area of privileges, see Harriet Spiller Daggett, *Louisiana Privileges and Chattel Mortgage* (LSU Press, 1942).

7. La. Const. of 1879, art. 175.

8. *State v. Jackson & Co.*, 137 La. 931, 69 So. 751 (1915).

9. For a detailed discussion of these individual acts, see Daggett, *supra* note 6, § 63.

10. Daggett, *supra* note 6, § 63. See also the *Exposé de Motifs*, under Part 1, Private Works Act, Official Louisiana Law Review Comments, 1981 La. Acts No. 724, § 1, effective January 1, 1982.

continually made in these rules on an act-by-act basis. A uniform numbering scheme came into effect when the Louisiana Revised Statutes of 1950 were finally put in place.¹¹ The provisions relating to the Louisiana Private Works Act were assigned to Louisiana Revised Statutes 9:4801 *et seq.* These statutes were continually revised, almost annually, until the Louisiana Law Institute again made a comprehensive revision which was enacted as Acts 1981, No. 724, section 1. This comprehensive revision reworked and renumbered the entire area of the Private Works Act; the Louisiana Law Institute revisions contain Official Comments that give the history and background of the current statutes and a notation of whether the 1981 version continued the old law or made changes to it. The 1981 comprehensive revision has been amended a few times subsequently, but with far less frequency than the amendments prior to 1981.

This article will focus on the current text of the law, as enacted through the 1997 legislative term.

II. LOUISIANA PRIVILEGES IN GENERAL

The Private Works Act is part of the Louisiana law of "privileges." Under Louisiana law, all of a debtor's property is to be distributed ratably to all who are owed money "unless there exists among the creditors some lawful cause of preference."¹² The Louisiana Civil Code specifically lists lawful causes of preference as privileges and mortgages.¹³

Louisiana privileges are non-consensual security devices; that is, they do not arise by any contract between the parties but rather by operation of law. The redactors of the Louisiana Civil Code considered that some types of transactions were so important to the economy that they deserved special rules creating additional rights in parties to encourage commerce or societal goals. For example, the Louisiana Civil Code grants special status to those who provide funeral services¹⁴ in order to encourage the burial of bodies.¹⁵ Those who sell land on credit are granted special rights.¹⁶ Those who work on immovable property are granted the right to obtain a "privilege" on the land to encourage the

11. For a historical background on the compilation of the annual Louisiana Acts into a numbered statutory system, see "Report to Accompany the 'Projet for Louisiana Revised Statutes of 1950,'" reprinted at West's Louisiana Revised Statutes Annotated, Volume 1, page IX-XV.

12. La. Civ. Code art. 3183.

13. La. Civ. Code art. 3184.

14. The funeral privilege is found at La. Civ. Code arts. 3192-3194.

15. See *Alter v. O'Brien*, 31 La. Ann. 452, 454 (1879):

[W]ere it not for the privilege which the law allows to those who dig the grave, furnish the coffin and drive the hearse, many a lifeless frame, deprived of sepulture, would rot in unnoted or forsaken homes. Were it not for that privilege, when Death enters a city and knocks at every door—watchful and indefatigable as it is, Charity would inevitably be unequal to the increased task which—otherwise—would be imposed upon it.

16. The vendor's privilege on immovables is found at La. Civ. Code arts. 3249 and 3271.

construction of improvements, which, in turn, bolsters the economy and increases property values.

When the Louisiana Civil Code was originally enacted in 1808, the time that a privilege arose was not considered of crucial importance. Privileges were society's way of according certain individuals special rights based upon the perceived value or importance of the actions being encouraged; therefore, privileges were ranked primarily by nature and not by time. The Louisiana Civil Code contained numerous provisions indicating how privileges were to be ranked against each other and as against mortgages.¹⁷

Over the years, the Code's reliance on a ranking by "nature" has been tempered by the need for stability of land titles and by the "first-in-time-first-in-right" general rule of both Louisiana's public records doctrine and Louisiana's version of Article 9 of the Uniform Commercial Code.¹⁸ Thus, today the Louisiana Private Works Act contains a combination of ranking "by time" as well as "by nature."

Under Louisiana law privileges are always to be interpreted *stricti juris*;¹⁹ in other words, because a debtor's property is "the common pledge of his

17. The late Professor Joseph Dainow of the LSU Law School was the undisputed expert in Civil Code privileges. In his many talks and seminal articles, including *Vicious Circles in the Louisiana Law of Privileges*, 25 La. L. Rev. 1 (1964) and *Ranking Problems of Chattel Mortgages and Civil Code Privileges in Louisiana Law*, 13 La. L. Rev. 537 (1953), he lamented the fact that there is no comprehensive method of dealing with privileges and that a number of "vicious circles" exist, "such that Privilege A can prime Privilege B, Privilege B prime Privilege C, and Privilege C prime Privilege A." When one adds in the time-based ranking of mortgages, such as found in La. Civ. Code art. 3307, 1992 La. Acts No. 1132, § 2, effective January 1, 1993, it can be seen that without a specific method of dealing with Private Works Act privileges, it is possible that "vicious circles" might exist in the ranking of such privileges as against other privileges and against mortgages. The Private Works Act today contains a comprehensive way of handling the ranking problem with a single provision, La. R.S. 9:4821 (1991 & Supp. 1997).

18. The Louisiana Public Records Doctrine is enshrined in Louisiana Revised Statutes 9:2721. The Louisiana version of Article 9 is found in Louisiana Revised Statutes 10:9-101 to 9-605. It does not directly relate to immovables, except for the rules pertaining to fixtures. For an overview of the Louisiana version of what Louisiana terms "Chapter 9" (as opposed to Article 9), see William D. Hawkland, *Hawkland's Handbook on Chapter 9 of Louisiana Commercial Laws* § 3:01-3:42 (Callaghan & Co., 1990). As Hawkland notes, although the general rule of U.C.C. Article 9 is that the first to perfect is the first in rank, that there are so many "otherwise provided" rules in the U.C.C. that the general principle of "first in time" is almost completely eaten away by exceptions. Hawkland, *supra*, § 3:01, Ch. 3, at 2.

19. Civil Code article 3185 is entitled "Privileges established only by law, stricti juris." See, for example, *Bayou Pierre Farms v. Bat Farms Partners*, III, 693 So. 2d 1158, 1161 (La. 1997): "The laborers' privilege for payment of wages is subjected to a stricti juris interpretation."

Also see *Calk v. Highland Constr. & Mfg.*, 376 So. 2d 495, 497 (La. 1979): "Privileges are stricti juris and cannot be extended by inference to other objects than those mentioned in the statute granting them." Also see *Pelican State Assocs. v. Winder*, 253 La. 697, 219 So. 2d 500, 502 (La. 1969): "We are in full accord with the view expressed in the opinion of the Court of Appeal that a privilege, being an extraordinary preference granted in derogation of rights common to all, is subject to the rule of stricti juris"

creditors,"²⁰ privileges are to be interpreted extremely narrowly. The general rule is that although privileges further societal goals as expressed by legislative act, privileges should not be enforced unless the privilege holder has complied strictly with whatever rules are applicable for the creation of the right.

III. OVERVIEW OF THE ACT

In general, the Private Works Act gives those who work on immovable property two rights, regardless of whether they have contractual privity with the owner. First, they have the right to sue the owner personally for the amount that is owed. Second, they have a right to assert a lien²¹ against the property and require that the property be seized and sold—upon sale they have a privilege on the proceeds of the sale. Further, to the extent that the job has been bonded out with a surety, those who work on the property have a right to sue the surety as well.²² The owner may avoid personal liability to those with whom he has no contractual privity by timely filing a notice of contract (before work begins)²³ and by having a contractor timely file a proper bond.²⁴

All of those who work on the property are entitled to assert these rights except sellers of movables or component parts to *other* sellers of movables. In other words, the class of parties protected includes all subcontractors, laborers, sellers of movables, and lessors, as well as registered surveyors, engineers, and architects, but it does not include sellers who sell movables to other sellers.

A graphic presentation may help explain the general parameters of the Act. The class of those who are entitled to assert privileges (called, for the purposes of this article, "lien claimants") includes all of those (a) with contractual privity with the owner and (b) without contractual privity with the owner, except sellers who sell movables to other sellers. The following chart illustrates who is a protected claimant and who is not under the Act, with the solid lines indicating a contractual relationship and the dotted line indicating those who have a right to assert a Private Works Act privilege:

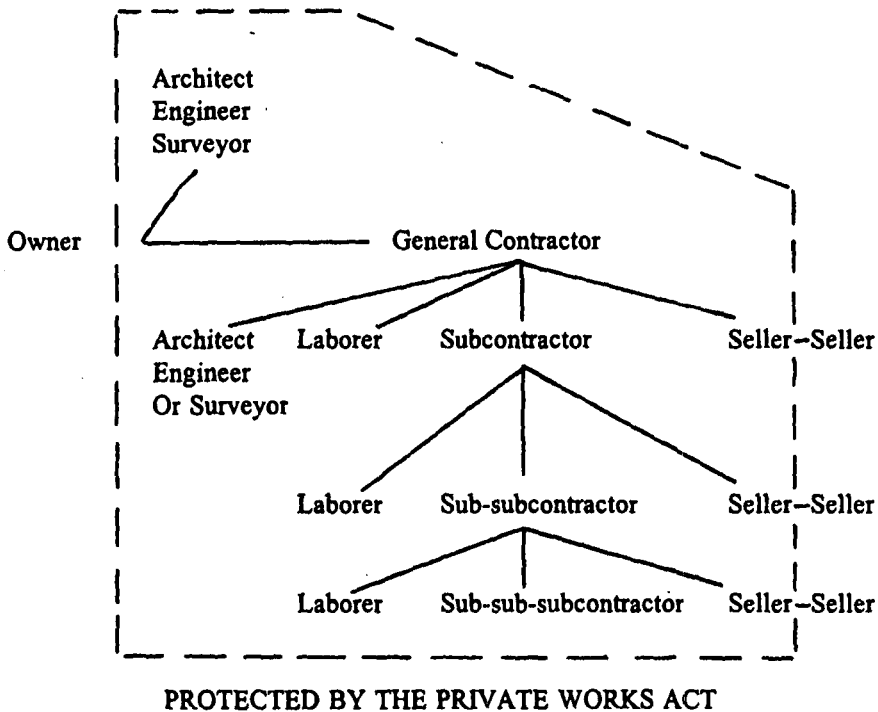
20. La. Civ. Code art. 3183.

21. This article will use the term "lien" and "privilege" interchangeably. Technically, "lien" is a common law term and "privilege" a civilian term. Louisiana statutes, back to the 1800s, often refer to "lien and privilege" and, as Harriet Spiller Daggett noted in 1942 in her book, *supra* note 6, § 2, at 4, "the bench and bar often use the words 'lien' and 'privilege' interchangeably. It would appear that the word 'lien' is being used more prominently and more currently than the word 'privilege.'" For a discussion of the distinction between common law liens and privileges in general, see Daggett, *supra* note 6, § 1, at 1-6.

22. La. R.S. 9:4813(B)(2) (1991). Louisiana Law Institute Comments to Louisiana Revised Statutes 9:4813 state, in part, that the prior law, which made a surety liable to those who had not filed a lien claim in the order in which they filed suit, was altered to "make the priority dependent upon when the claims are presented to the surety. If a valid, undisputed claim is presented to the surety, a suit should not be required to permit him to safely pay it."

23. La. R.S. 9:4811, 4820 (1991 & Supp. 1997).

24. La. R.S. 9:4812 (1991).



IV. LIABILITY OF AN OWNER

An owner, in addition to the contractual liability incurred under contract, has unlimited personal liability under the Louisiana Private Works Act to those with whom he does not have a contractual relationship and who perform work on the property *unless* the owner has timely filed a notice of contract and had the general contractor timely file a proper bond.²⁵ Therefore, it is to the owner's advantage to file a timely notice of contract and to have a proper and timely-filed bond.²⁶

The impact of a timely-filed notice of contract and bond on both an owner's liability and the rights of lien claimants can be substantial.

Example One. Assume that an owner entered into a contract with a general contractor for the construction of a house that is to cost \$100,000. Assume that the general contractor underestimated the price of construction and that lien claimants' rights totalled \$150,000.

Under this example, if there had been no timely notice of contract and bond, the lien claimants could sue the owner for \$150,000 even though the owner's

25. La. R.S. 9:4811, 4812, 4820 (1991 & Supp. 1997).

26. La. R.S. 9:4831 (1991).

contract with the general contractor was limited to \$100,000.²⁷ The owner's liability to the lien claimants is *not* reduced by the amount that he has paid the general contractor, although the general contractor must indemnify the owner for claims that arise.²⁸ This indemnification claim may be of little solace to the owner if the general contractor has no assets. For example, in this same hypothetical situation, if the owner had paid the full \$100,000 contract price to the general contractor, and if the lien claimants were still owed \$150,000, the owner would be liable personally to the lien claimants for \$150,000 and would ultimately be out-of-pocket \$250,000 (\$100,000 paid to the general contractor plus \$150,000 paid to the lien claimants).

Contrast this situation with one where the owner has required a timely-filed notice of contract and a properly-recorded bond from the contractor. The amount of a bond on a \$100,000 project is a minimum of \$50,000.²⁹ Now the owner can avoid personal liability to the lien claimants with whom the owner does not have contractual privity,³⁰ and the lien claimants' rights are restricted to \$50,000 against the surety company³¹ plus whatever contractual privity rights they may have against the general contractor.

While owners are benefitted by requiring a timely notice of contract and a proper and timely-filed bond, bonded jobs cost more than unbonded ones because general contractors pass the price of the bond on to the owner through the contract amount.

V. THERE ARE TWO DIFFERENT KINDS OF "WORK" UNDER THE PRIVATE WORKS ACT

Lien claimants under the Private Works Act are entitled to their rights only if they "performed work" as defined in the Private Works Act. The term "work," however, is defined in two locations. Louisiana Revised Statutes 9:4808 defines work in general; anyone who performs this kind of work is entitled to assert a claim under the Act and receive a privilege on proceeds of the sale of the property.³² There is a second related definition of work found in Louisiana

27. La. R.S. 9:4802 (1991 & Supp. 1997).

28. La. R.S. 9:4802(F) (1991).

29. La. R.S. 9:4812(B)(2) (1991):

If the price is more than ten thousand dollars but not more than one hundred thousand dollars the amount of the bond shall be fifty percent of the price, but not less than ten thousand dollars.

30. La. R.S. 9:4802(C) (1991) provides:

The owner is relieved of the claims against him and the privileges securing them when the claims arise from the performance of a contract by a general contractor for whom a bond is given and maintained as required by R.S. 9:4812 and when notice of the contract with the bond attached is properly and timely filed as required by R.S. 9:4811.

31. La. R.S. 9:4813 (1991).

32. La. R.S. 9:4808 (1991) provides:

4808. Work defined

Revised Statutes 9:4820; this definition relates to when liens become effective against third parties for the purpose of ranking liens against other mortgages and privileges.³³

In general, anyone who performs work on immovable property will be entitled to sue the owner and assert a lien (unless the owner obtains the protection as indicated above); however, not everyone who performs work on property ranks equally, and different types of work may well lead to different rankings of privilege claims.

The detailed rules must be examined to understand the complexity of the issue. The general rule, subject to several exceptions, is that under Louisiana law almost everyone who works on property is entitled to assert a lien claim that ranks from the first time *anyone* performs "work" under Louisiana Revised Statutes 9:4820, even if an individual lien claimant did not come on to the property or begin its activities until well after the project began.

VI. LOUISIANA REVISED STATUTES 9:4820 AND LOUISIANA REVISED STATUTES 9:4808 COMPARED AND CONTRASTED—GRADING AND TEST PILING

The first distinction between Louisiana Revised Statutes 9:4808 and Louisiana Revised Statutes 9:4820 concerns the grading of land and the driving

A. A work is a single continuous project for the improvement, construction, erection, reconstruction, modification, repair, demolition, or other physical change of an immovable or its components parts.

B. If written notice of a contract with a proper bond attached is properly filed within the time required by R.S. 9:4811, the work to be performed under the contract shall be deemed to be a work separate and distinct from other portions of the project undertaken by the owner. The contractor, whose notice of contract is so filed, shall be deemed a general contractor.

C. The clearing, leveling, trading, test piling, cutting or removal of trees and debris, placing of fill dirt, leveling of the land surface, or performance of other work on land for or by an owner, in preparation for the construction or erection of a building or other construction thereon to be substantially or entirely built or erected by a contractor, shall be deemed a separate work to the extent the preparatory work is not a part of the contractor's work. The privileges granted by this Part for the work described in this Subsection shall have no effect as to third persons acquiring rights in, to, or on the immovable before the statement of claim or privilege is filed.

D. This part does not apply to:

(1) The drilling of any well or wells in search of oil, gas, or water, or other activities in connection with such a well or wells for which a privilege is granted by R.S. 9:4861.

(2) The construction or other work on the permanent bed and structures of a railroad for which a privilege is granted by R.S. 9:4901.

(3) Public works performed by the state or any state board or agency or political subdivision of the state.

33. Louisiana Revised Statutes 9:4821 contains the ranking provisions of the Private Works Act.

of test pilings. The thrust of these articles, along with the ranking provisions (Louisiana Revised Statutes 9:4821), is that the clearing of land and the preparation of land *for* construction is deemed to be a "separate work."³⁴ Those who perform such tasks are entitled to claims under the Private Works Act, but their "work" will not start the ranking provisions which other lien claimants can use.

On the other hand, "work" that does not consist of preparatory work, such as placing building materials on the site, can be used by other lien claimants for ranking purposes.³⁵

Example Two. Assume that on January 1st of a given year, Contractor X is retained by an owner to cut and remove trees on property; on January 1st, Contractor X begins the cutting and removal. On February 1st of that same year, when the trees have been removed, Contractor Y is retained to level the surface of the land and to place fill dirt on the property. On March 1st of that same year, Contractor Z is retained to drive test pilings on the property. On April 1st, General Contractor is retained to start construction of the building by pouring a slab; on that same date the General Contractor deposits \$200.00 of wood on the site for the purposes of building the forms for the slab. On April 15th, Subcontractor A is hired to pour the slab; on May 15th, Subcontractor B is hired to erect the sides of the house; in September, Subcontractor D is hired to install the roof; and in December, Subcontractor E is hired to paint the exterior.

The impact of these events is that Contractors X (who cleared the property), Y (who leveled the property), and Z (who drove test pilings) are all entitled to sue the owner directly for the work each performed³⁶ as well as obtain a privilege on the property to secure the amounts that they are owed.³⁷ Each one's separate item of "work" benefits only that individual. The lien to which Contractor X is entitled ranks from January 1st, the date upon which it performed its "work." Likewise, Contractor Y is entitled to its lien ranking from February 1st and Contractor Z from March 1st. The "work" by Contractors X, Y, or Z does not benefit any other potential lien claimants.

On the other hand, the work performed by the General Contractor (that is, performing an action for property improvement other than clearing and grading the property, removal of trees, and the driving of test pilings) benefits not only the General Contractor but also all of those who work on the property subsequently. In this situation, Subcontractors A through E all can start the "rank" of

34. La. R.S. 9:4808(C) (1991).

35. La. R.S. 9:4820(A)(2), 4821 (1991 & Supp. 1997).

36. X, Y, and Z all have contractual privity with the owner; each may sue on the individual contract.

37. La. R.S. 9:4801 (1991).

their privileges from the April 1st date that the General Contractor began his Louisiana Revised Statutes 9:4820 "work."

It is not always easy to determine the difference between mere "dirt work" and the inception of Louisiana Revised Statutes 9:4820 "work" on property improvement when the project itself requires not mere grading of the land but rather contouring of it as an integral part of the use of the land. For example, in *C & J Contractors v. American Bank & Trust Co.*,³⁸ the court found that the construction of a golf course was Louisiana Revised Statutes 9:4820 "work" even though almost all of the construction process involved moving dirt.³⁹ Because on some of the jobs it is difficult to know whether the scope of the entire "work" is involved with the moving of dirt, or whether the dirt movement and clearing and grading is only preparatory to other Louisiana Revised Statutes 9:4820 "work," mortgage holders and others who wish to outrank the Private Works Act lien claimants are well-advised to have a "no-work" affidavit executed and recorded.⁴⁰

VII. HOW LIENS ARE ASSERTED

A. Filing the Notice of Lien

Those with⁴¹ and without⁴² privity of contract with the owner are entitled to file liens against the property. The Private Works Act provides the mechanism by which both liens are placed on the public records and by which they are enforced. The ranking as against other lien claimants and third parties involves a combination of time⁴³ (the earlier of when "work" began or the notice of contract was filed⁴⁴) and nature (the type of claim being asserted).⁴⁵

38. 559 So. 2d 810 (La. App. 1st Cir.), *writ denied*, 564 So. 2d 318, 332 (1990).

39. Under a prior version of the statute, a similar result was reached in *Tri-South Mortgage Investors v. Forest & Waterway Corp.*, 354 So. 2d 588, 591 (La. App. 4th Cir. 1977), which found that where ninety (90%) percent of a twenty-six acre site for an apartment complex had to be cleared and where there was cutting of "swale ditches for drainage, building and temporary and basic roads, moving earth to building sites, and various other projects in the amount of approximately \$19,000.00 [which] was the first step in the overall construction process[,] . . . it is impossible to distinguish the project from the rest of the construction project." The section of the Private Works Act on "no work" affidavits, Louisiana Revised Statutes 9:4820(C), was amended subsequent to the decision in the *C & J Contractors* case.

40. La. R.S. 9:4820(C) (Supp. 1997). The scope and function of a "no work" affidavit is discussed in more detail, below.

41. La. R.S. 9:4801 (1991).

42. La. R.S. 9:4802 (1991 & Supp. 1997).

43. The rank of each lien claim is controlled by Louisiana Revised Statutes 9:4821. Those claims relate back to the earliest of the "work" being performed on the property under Louisiana Revised Statutes 9:4820 and a notice of contract being filed. La. R.S. 9:4811 (1991).

44. La. R.S. 9:4820 (1991 & Supp. 1997).

45. La. R.S. 9:4821 (1991 & Supp. 1997).

Under the Private Works Act, the time of filing of liens is important for the purpose of *asserting and preserving* the lien; however, the *time of filing of the lien does not control the rank of the lien*.

Lien claimants who are entitled to privileges must assert their lien by timely filing a notice of lien statement⁴⁶ in the mortgage records⁴⁷ and then must bring a lawsuit to preserve their claim⁴⁸ at the same time. As the lawsuit is filed, a notice of *lis pendens* should be filed for recordation in the parish mortgage records.⁴⁹

The time for the filing of notice of lien claims depends upon whether there is a timely-filed notice of contract (that is, filed prior to "work" beginning) and whether the claimant is a general contractor.

Taken together, Louisiana Revised Statutes 9:4811 and 4822 provide the following general rules:

1. If a notice of contract is timely filed (that is, before Louisiana Revised Statutes 9:4820 "work" begins):
 - a. All laborers, subcontractors, sellers of movables, and lessors must file their notices of liens within thirty days after the filing of a notice of termination of the work.
 - b. A general contractor has sixty days to file its lien from the filing of the notice of termination or substantial completion of the work.
2. If there is no timely filed notice of contract (before "work" begins) or no filed notice of contract at all, then: all lien claimants have sixty days to file their notices of liens, measured from the later of notice of termination of the work or substantial completion or abandonment of the work; except that
 - a. The sellers of movables sold for use or consumption in work on residential property have seventy days rather than sixty days to file their notices of liens.
 - b. If the work is in excess of twenty-five thousand dollars, the general contractor is not entitled to any lien at all.⁵⁰

46. La. R.S. 9:4822(G) (Supp. 1997).

47. La. R.S. 9:4831 (1991).

48. La. R.S. 9:4823(A)(2) (1991). For a more detailed discussion of this requirement, *see infra* Section 17.

49. The law prior to the 1981 amendments required a lien claimant to file a notice of *lis pendens*. The requirement of filing has been deleted as an affirmative act to preserve a lien and does not appear in Louisiana Revised Statutes 9:4823; however, a reference to a notice of *lis pendens* occurs in Louisiana Revised Statutes 9:4831(A) and 9:4835. The issue of *lis pendens* is discussed elsewhere in this article.

50. La. R.S. 9:4811(D) (1991) provides:

A general contractor shall not enjoy the privilege granted by R.S. 9:4801 if the price of the work stipulated or reasonably estimated in his contract exceeds twenty five thousand dollars unless notice of the contract is timely filed.

B. Preserving the Lien Through a Lawsuit

A lien filed after the applicable time periods will not be effective to encumber the property and will expose the filing party to a damages claim.⁵¹

It is not enough merely to file a notice of lien rights; additionally, the lien claimant must institute a lawsuit to keep those rights extant and to seize and sell the property to obtain a privilege on the proceeds of the sale.⁵² The time in which this lawsuit must be filed is one year from the date the last lien claimant could have filed its lien against the property.

Two examples will illustrate these rules.

Example Three. Assume the following situation:

1. January 1, 1998—owner and general contractor enter into a notice of contract which is timely filed (i.e., Louisiana Revised Statutes 9:4820 “work” has not begun).
2. January 15, 1998—Louisiana Revised Statutes 9:4820 “work” begins on the property.
3. March 1, 1998—Subcontractor A does work on the property.
4. April 1, 1998—Subcontractor B does work on the property.
5. May 1, 1998—Subcontractor C does work on the property.
6. July 1, 1998—A notice of substantial completion is filed.

In this situation, Subcontractors A, B, and C have thirty days from the date of substantial completion to file their notice of lien rights⁵³—in other words, until July 31, 1998.

The general contractor has sixty days from the final notice of termination to file its lien—in other words, until August 30, 1998.⁵⁴

Example Four. The facts in Example Four are the same as in Example Three *except* that instead of the notice of contract being filed on January 1, 1998 and the work beginning on January 15, 1998, the dates are reversed; that is, “work” begins on January 1, 1998 and the notice of contract is filed on January 15, 1998.

Now, the time delays are altered because the notice of contract was not timely filed.⁵⁵ All lien claimants now have sixty days from the date the notice of termination is filed to file their lien notices—in other words, instead of having until July 31, 1998, as they would if there had been a timely notice of contract, each now has until August 30th to file a notice of lien rights.

51. La. R.S. 9:4833(B) (1991).

52. La. R.S. 9:4841 (1991).

53. La. R.S. 9:4822(A) (1991).

54. La. R.S. 9:4822(B) (1991).

55. La. R.S. 9:4811(A) (1991).

There are four exceptions to this sixty-day rule. First, if a seller of movables used in the improvement of residential real estate is involved, that seller has seventy days (i.e., until September 9, 1998) to file its notice.⁵⁶

The second exception is that the general contractor, if the contract is over \$25,000, cannot file any lien because it did not timely file a notice of contract.⁵⁷

The third exception occurs when there is a lessor of movables who did not have a contract with the owner; the lessor must perform an additional task before it is entitled to a lien. A lessor of movables must deliver a copy of the lease to the owner and to the contractor "not more than ten days after the movables are first placed on the site of the immovable for use in the work."⁵⁸ A failure to give a copy of the lease to the owner and to the general contractor will mean that the lessor will not be entitled to assert either a privilege on the property or a claim against the owner under Louisiana Revised Statutes 9:4802.

The fourth exception involves a seller of movables used in the improvement of residential property. Unlike a lessor, who must deliver to the owner a copy of the lease within ten days from the date of the lease, a seller of movables need not give notice to the owner of property at the time of the sale of movables. The seller of movables, however, must give notice to the owner "of nonpayment . . . at least ten days before filing a statement of his claim and privilege."⁵⁹ The notice must be sent by registered certified mail, return receipt requested, and must contain a general description of the materials, a description of the immovable property, and a written statement of the seller's lien rights and the total amount plus interest and recordation fees. This requirement applies only to sellers of movables for use or consumption on residential property and does not apply to commercial properties.⁶⁰

VIII. SPLITTING UP A SINGLE PROJECT INTO MULTIPLE PROJECTS

Often an owner would like to have the project completed in stages so that potential lien claims could be extinguished as each stage of construction is concluded. For example, the developer of an apartment complex that will consist of six different buildings might like to construct one building and have it occupied while the others are being built. If the work is all part of a "single continuous project,"⁶¹ all the lien claims that arise once Louisiana Revised Statutes 9:4820 "work" begins on the first building will continue and need not

56. La. R.S. 9:4822(D)(2) (Supp. 1997).

57. La. R.S. 9:4811(D) (1991). Cf. under a form version of the Private Works Act, State ex rel. Henry v. 8-Mile Post Plumbing Supplies, 63 So. 2d 749 (La. App. Orl. 1953).

58. La. R.S. 9:4802(G)(1) (Supp. 1997).

59. La. R.S. 9:4802(G)(2) (Supp. 1997).

60. *Id.*

61. La. R.S. 9:4808(A) (1991).

be asserted until the very last work necessary for substantial completion or termination on the last building has concluded.⁶²

Example Five. Assume the first building is started on January 1st and completed on March 1st; the second building begins February 1st and is completed on April 1st. The construction remains staggered throughout the term of the project so that the last building begins June 1st and is completed August 1st.

If a painter worked only on Building One and did no work on Buildings Two through Six, the painter would still have thirty or sixty days (depending upon whether the notice of contract was timely filed before work began) from August 1st in which to file his notice of lien, even though the painter had not worked on any of the remaining buildings. This is because the Private Works Act generally treats all work on the property as part of a single continuous project.⁶³

The Private Works Act provides four different ways for an owner to deal with this problem and shorten the lien period so that it runs congruent with the termination of work on a specific building rather than termination of work on the entire tract.

The first way is to terminate work done on a specified portion or area of the contract, or terminate work done by a particular contractor. The notice of termination is filed for this specific work or contractor.⁶⁴

The second way an owner may create "separate" work is to enter into a notice of contract that describes subparts of a tract of land rather than the whole parcel. In other words, if the owner or general contractor has a survey done of the property or legally defines the area on which immovable work is being done as a subpart of the whole tract, it is possible to argue that the work can be confined to the subpart which is specifically described.⁶⁵ An example of this approach is *Louisiana National Bank v. Triple R Contractors, Inc.*⁶⁶ Decided under a prior version of the Private Works Act, but with a rationale that is applicable under the current statute, the court found that multiple job sites can be delineated within a single tract.⁶⁷

62. La. R.S. 9:4822 (1991 & Supp. 1997).

63. La. R.S. 9:4808(A) (1991).

64. La. R.S. 9:4822(F), (H), 4808(B) (1991 & Supp. 1997).

65. La. R.S. 9:4831(C), 4808(B) (1991).

66. 345 So. 2d 7 (La. 1977).

67. The Court stated:

Great pains were taken by the owner and the mortgagee to create two job sites by expressly stating in the mortgage that it was confected solely for the purpose of construction on Phase II, identified as 4.29 acres and depicted by a plat delineating the two-phase division of the mortgaged property. The record is convincing that no contract was let or visible work done on Phase II before recordation of the mortgage.

345 So. 2d at 9.

A third method of creating separate "work" is to enter into a separate contract with separate general contractors. The Official Law Institute Comments to Louisiana Revised Statutes 9:4807 note that the current law changes the former rules in this regard and provide an example of how the desired result may be accomplished:

If a contract is entered into by an owner for work on an immovable and the notice of contract is filed correctly with the bond and proper amount attached to it, the work to be performed under the contract is conclusively deemed to be a separate work even though it may be part of a larger project being carried on by the owner. Accordingly, with respect to such work the time for filing claims, and the liability of the surety, and all other aspects of the act, will be determined independently even though in the absence of such filing the work might be considered part of a larger and single work.⁶⁸

The fourth way is to halt work for a period of time and then start again. If the statutory rules are followed, stopping work terminates one project and starting work starts another. The cautious owner will want to file a notice of termination when work ceases for each stage. Louisiana Revised Statutes 9:4820(B) is the key to this right.⁶⁹ With this provision, ceasing work for thirty days allows the owner or the general contractor to start a "new work" as long as the rights of third persons are not impacted. For example, assume that on January 1-30th "work" occurs on property and then completely ceases and the owner files a notice of termination; on March 15th a mortgage is recorded against the property; and on April 15th additional construction work occurs on the property. In this situation, the mortgage will not outrank those who performed work from January 1-March 1st (and who timely perfected their liens) but will outrank those who performed work after April 15th.

IX. CONTRACTORS AND GENERAL CONTRACTORS

Under the Private Works Act, a contractor is anyone who has privity of contract with an owner.⁷⁰ A subcontractor is one who performs work for a contractor.⁷¹ By contrast, a general contractor not only has privity of contract

68. *Also cf.* Comment (f) to La. R.S. 9:4822 (1991).

69. La. R.S. 9:4820(B) (1991) provides:

B. If the work is for the addition, modification, or repair of an existing building or other construction, that part of the work performed before a third person's rights become effective shall, for the purposes of R.S. 9:4821, be considered a distinct work from the work performed after such rights become effective if the cost of the work done, in labor and materials, is less than one hundred dollars during the thirty-day period immediately preceding the time such third person's rights become effective as to third persons.

70. La. R.S. 9:4807 (1991).

71. La. R.S. 9:4807(C) (1991).

with the owner: a general contractor is one who "perform[s] all or substantially all of [the] work."⁷² There need not be a single general contractor on a job; there can be multiple general contractors.⁷³

The Private Works Act allows an owner to have different segments of the work performed by different contractors; in that case, each is considered a general contractor if there is a written notice of contract with the proper bond.⁷⁴ For example, an owner who is handling its own construction project may have a general contractor in charge of all electrical engineering and a second general contractor who is in charge of the erection of the structure.

X. "OWNER" DEFINED

The Private Works Act creates substantial liabilities for owners. An owner faces personal liability, whether or not there is privity of contract with the lien claimants.⁷⁵ An owner also faces loss of its property when lien claimants seize and sell the property pursuant to their privilege to collect what is owed to them. The Private Works Act carefully describes who are "owners" for the purpose of having personal liability and having their ownership rights impacted by these privileges.

The first part of the definition of an owner includes all of those who may have ownership rights in immovable property, regardless of whether they own it 100% or as a "co-owner, naked owner, owner of a predial or personal servitude, possessor, lessee or other person owning or having the right to the use or enjoyment of an immovable or having an interest therein."⁷⁶ This means that a usufructuary who has work done on a home is subject to Private Works Act claims and can be liable personally to lien claimants as well as having the usufructuary rights impacted. Likewise, lessees of immovable property who have work done can be personally liable to lien claimants and have their rights of possession under the lease affected by the Private Works Act claims.

There are important limitations on the liability of owners under the Act. Louisiana Revised Statutes 9:4806(C) states that the privileges granted by the Act affect "only the interest in or on the immovable enjoyed by the owner whose obligation is secured by the privilege." If the owner did not personally contract

72. La. R.S. 9:4807(B)(1) (1991).

73. See Official Comment (b) to La. R.S. 9:4807 (1991).

74. Louisiana Revised Statutes 9:4807(B)(2) defines a general contractor as one who is "deemed a general contractor" by Louisiana Revised Statutes 9:4808(B). La. R.S. 9:4808(B) (1991) provides:

B. If written notice of a contract with a proper bond attached is properly filed within the time required by R.S. 9:4811, the work to be performed under the contract shall be deemed to be a work separate and distinct from other portions of the project undertaken by the owner. The contractor, whose notice of contract is so filed, shall be deemed a general contractor.

75. La. R.S. 9:4801, 4802 (1991 & Supp. 1997).

76. La. R.S. 9:4806(A) (1991).

with a contractor, there is no liability, either personally or for that "owner's" interest in the property.

Example Six. Assume that A and B co-own property in indivision. A, without B's knowledge or consent, contracts with General Contractor for construction work on the immovable property and Private Works Act lien claims are later filed.

Owner A has personal liability to General Contractor and to the lien claimants. Owner B, however, has no personal liability and, further, Owner B's interest in the property cannot be affected by the lien claims.⁷⁷

The same result would occur if a surviving spouse was living in the family home, owning half outright as community property and having rights as a usufructuary on the other half.⁷⁸ If the surviving spouse contracted for improvements on the home, the surviving spouse would have personal liability under the Private Works Act to all lien claimants. The surviving spouse's half interest in the home plus the rights of possession as usufructuary could be seized and sold by the lien claimants; however, the naked owners would have no liability unless they had agreed to be bound, and their interest in the immovable property would not be subject to the Private Works Act liens. The ultimate result may well be, after the liens are asserted and the rights adjudicated, that the lien claimants would own an undivided interest in the property with the naked owners and that a partition by licitation might then have to occur.⁷⁹

Another example is when a pipeline company, which owns a servitude over many different tracts of land, grants a mortgage on its servitude interests to secure the financing or refinancing of the pipeline.⁸⁰ In this case, the owners of the immovable property across which the servitude runs may have no knowledge of the mortgage. Once the mortgage is in place, construction may begin on the servitude areas. Those who perform work on the servitude areas are entitled to Private Works Act liens;⁸¹ yet, the Private Works Act lien claimants could only assert a right to the servitude and not to the property. The

77. La. R.S. 9:4806(B) (1991). *Cf.* *Louisiana Indus. v. Bogator, Inc.*, 605 So. 2d 213 (La. App. 2d Cir. 1992). The Court held that one who became the owner of a property after work began is not liable without having entered into the contract originally. The Court noted that mere evidence that the new owner "became an owner of the property aware that the construction project was ongoing . . . is insufficient to assess personal liability" against the new owner. *Louisiana Indus.*, 605 So. 2d at 219.

78. La. Civ. Code art. 890.

79. La. Civ. Code art. 811.

80. A servitude holder can mortgage its interests in the servitude. La. Civ. Code art. 3286, *as amended* by 1993 La. Acts No. 948, § 6. If buildings or other constructions are part of the servitude, these are included in the mortgage. *See* Official Revision Comments, 1991 (D) to La. Civ. Code art. 3286. *Also cf.* La. R.S. 12:702, 704 (1994), concerning mortgages on pipelines; and *cf.* La. R.S. 9:5369 (1991), which refers to mortgages of servitudes.

81. Louisiana Revised Statutes 9:4806 specifically defines an owner as "an owner of a predial or personal servitude . . ." La. R.S. 9:4806 (1991).

owners of the lands across which the servitude runs would have no liability whatsoever and their property rights would not be affected. The most the lien claimants could get would be a right to seize and sell the servitude rights and to assert the personal liability of the servitude holder.

Another limitation on owners' liability is contained in Louisiana Revised Statutes 9:4806(D), which deals with the rights of a lessee. It provides:

D. The privilege granted by this Part upon a lessee's rights in the lease or buildings and structure shall be inferior and subject to all of the rights of, or obligations owed to, the lessor, including the right to resolve the lease for nonperformance of its obligations, to execute upon the lessee's rights and to sell them in satisfaction of the obligations free of the privilege. If a sale of the lease is made in execution of the claims of the lessor, the privilege attaches to that portion of the sale proceeds remaining after satisfaction of the claims of the lessor.

This provision is applicable to tenants in an apartment complex as well as to tenants in a commercial shopping center. If a tenant in an apartment complex has work performed inside the apartment, the tenant, as lessee, is personally liable to the general contractor and all subcontractors and can have the lease affected by the Private Works Act privileges; however, if the landowner has not specifically agreed to be bound under the construction contract, then the landlord's rights are unaffected.⁸² The most that the lien claimants can get is the right of the tenant's possession.⁸³

Likewise, if a leased store in a shopping center has work performed on it by a Private Works Act claimant, the lessee is personally liable to the lien claimant and the subcontractors, and those lien claimants and subcontractors can seize and sell the tenant's right of possession; however, the landlord's rights under the lease remain superior to the lien claimants' rights, because they can get no greater rights than the tenant had.

XI. WHAT MUST BE FILED IN THE MORTGAGE RECORDS AND IN WHAT FORM

The Private Works Act contemplates the filing of several different types of documents in the mortgage records: a notice of contract;⁸⁴ a notice of substantial completion or termination;⁸⁵ a statement of a claim or privilege;⁸⁶ and a

82. Cf. under prior versions of the Private Works Act, *Fruge v. Muffoletto*, 242 La. 569, 137 So. 2d 336 (1962); *Costello v. Spalitta*, 414 So. 2d 824 (La. App. 4th Cir. 1982).

83. Cf. under the prior version of the Private Works Act, *Abbeville Lumber Co. v. Richard*, 350 So. 2d 1292 (La. App. 3d Cir. 1977).

84. La. R.S. 9:4811(A) (1991).

85. La. R.S. 9:4822(E), (F) (Supp. 1997).

86. La. R.S. 9:4822(G) (Supp. 1997).

Private Works Act bond.⁸⁷ None are required to be in authentic form and none need be witnessed.

A. Notice of Contract

The notice of contract is the written agreement between a general contractor and an owner. To be "timely" under the Act, it must be filed before Louisiana Revised Statutes 9:4820 "work" begins. There are six requirements of a notice of contract, and except for a description of the immovable property, errors or omissions in a notice of contract do not affect its validity "in the absence of a showing of actual prejudice by a claimant or other person acquiring rights in the immovable."⁸⁸ The six requirements are:

1. The notice of contract must be signed by the owner and the contractor. Note that there is no requirement the signatures be witnessed or notarized. Likewise, there is no requirement that there be but one general contractor; there can be multiple general contractors. See the discussion in Sections XVIII and IX above.
2. Legal property description. The notice of contract must contain a legal description of the property. There is a potential trap for the unwary in that Louisiana Revised Statutes 9:4811(B) indicates that errors and omissions in a notice of contract will not affect the validity if a third party is not prejudiced; however, there is a special rule contained in Louisiana Revised Statutes 9:4831 that has been read to apply to notices of contract and other filings.⁸⁹ This provision makes it clear that a legal description must be given; street addresses or mailing addresses are insufficient for a valid notice of contract.⁹⁰
3. The notice of contract must identify the parties and give their mailing addresses. The requirement of mailing addresses is important, because under certain circumstances the seller of movables used in residential construction, and the lessors of movables used in any type of Private Works Act construction, must give notices to an owner or the contractor.⁹¹ The addresses, therefore, provide a mechanism by which

87. La. R.S. 9:4812(A) (1991).

88. La. R.S. 9:4811 (1991).

89. See *Boes Iron Works, Inc. v. Spartan Bldg. Corp.*, 648 So. 2d 24 (La. App. 4th Cir. 1994), writ denied, 650 So. 2d 1184 (1995).

90. La. R.S. 9:4831(C) (1991) provides:

Each filing made with the recorder of mortgages pursuant to this Part which contains a reference to immovable property shall contain a description of the property sufficient to clearly and permanently identify the property. A description which includes the lot and/or square and/or subdivision or township and range shall meet the requirement of this Subsection. Naming the street or mailing address without more shall not be sufficient to meet the requirements of this Subsection.

91. La. R.S. 9:4802(G) (Supp. 1997).

lien claimants can learn against whom to assert their rights as well as information that third parties can use in examining the public records.

4. The notice of contract must state "the price of the work, or, if no price has been fixed, describe the method by which the price is to be calculated and give an estimate of it." The price is important, because the price of the work affects the size of the bond that is required.⁹²

5. The notice of contract must state "when payment of the price is to be made." Knowing when payment is to be made is important, because it gives third parties an indication when the work may be completed. Because lien claimants need not file anything concerning their lien rights until after substantial completion has occurred,⁹³ third parties who examine the public records may be interested in determining potentially how long the construction might last. A statement of when payment is to be made indicates the length of time during which lien claimants' rights might appear in the public records, although this is no absolute assurance; only substantial completion or a lapse of five years from the time notice of contract is filed⁹⁴ cuts off lien claimants' rights.

6. The notice of contract "shall describe in general terms the work to be done."⁹⁵ This helps third parties ascertain the scope of the project. Since it is possible for an owner to have multiple general contractors,⁹⁶ knowing the "general terms" of the work to be done by this particular contractor assists the owner and third parties in ascertaining what class of lien claimants may have rights and when those rights might arise. It also aids in defining separate works for the purposes of having the lien filing period begin to run when a particular contractor's work has been completed.⁹⁷

It is important to note that the Private Works Act specifically states that a "notice of contract is not improperly filed because a proper bond is not attached."⁹⁸ In other words, a notice of contract filed before Louisiana Revised Statutes 9:4820 "work" starts is effective to start the ranking time for lien claimants under Louisiana Revised Statutes 9:4821. The failure to attach a bond, however, has a number of important consequences that are discussed in Section XII of this article, below.

92. La. R.S. 9:4812 (1991).

93. La. R.S. 9:4822 (1991 & Supp. 1997).

94. La. R.S. 9:4834 (1991).

95. La. R.S. 9:4811(A)(6) (1991).

96. La. R.S. 9:4808(11) (1991).

97. La. R.S. 9:4808(B) (1991). *See supra* the discussion in Section 8.

98. La. R.S. 9:4811(C) (1991).

B. Notice of Substantial Completion

Notice of substantial completion is filed by an owner to fix the latest date on which liens may be filed; once the notice of substantial completion is of record, a preemptive period begins to run after which lien claims become untimely and improperly filed.⁹⁹ A notice of termination of the work can be filed when the work has been substantially completed or when the contractor is in default.¹⁰⁰

C. Notice of Termination and More on Substantial Completion

An owner has an incentive to file a notice of termination of the work because, like the notice of substantial completion, it also begins the running of the statutory periods in which lien claimants must file their liens.¹⁰¹ A lien claimant cannot properly file after the statutory time delays have run.¹⁰² A lien claimant who does so runs the risk of incurring a claim for damages for wrongful filing.¹⁰³

While the Act is explicit on the preemptive period that begins to run upon the filing of a notice of substantial completion, the Act is not as clearly written on whether a notice of lien may be filed *prior to* actual substantial completion or *before* the owner files a notice of substantial completion. Louisiana Revised Statutes 9:4822(A), the thirty-day filing period, and 9:4822(C), the sixty-day filing period, use the same terminology. Louisiana Revised Statutes 9:4822(A) states that the lien claimant "shall, *within thirty days after* the filing of a notice of termination of work. . ." file its lien notice; Louisiana Revised Statutes 9:4822(C) provides that a claimant "shall, *within sixty days after* the filing of a notice of termination of work . . ." file the lien notice (emphasis added). If the phrase "within thirty days" means that a lien is valid only if filed within a narrow window of time (for example, in the case of Revised Statutes 9:4822(A), after the filing of notice of substantial completion but before the expiration of thirty days from that date), a lien is invalid and wrongful if filed either early or late. Such a reading would benefit owners and secured lenders with mortgages on the property and would make it more difficult for lien claimants to assert their rights. On the other hand, it may well be that "within thirty days" does not preclude an early

99. La. R.S. 9:4822 (1991 & Supp. 1997). See *supra* the discussion in Section 7.

100. La. R.S. 9:4822(E) (1991).

101. La. R.S. 9:4822 (1991 & Supp. 1997).

102. A potential lien claimant who does not have privity of contract with an owner has an incentive to give direct notice to the owner even before filing a lien. If notice is given to the owner under Louisiana Revised Statutes 9:4822(K), then the owner must give that lien claimant notice of either actual substantial completion or abandonment of the work or of a filing of notice of termination. La. R.S. 9:4822(L) (1991). The owner who fails to give such a notice can be liable for attorney's fees and costs if the potential lien claimant who did not file a lien but merely gave the owner notice of the claim was not notified of substantial completion or of a notice of termination so that the potential lien claimant could then perfect the lien. La. R.S. 9:4822(L)(2) (1991).

103. La. R.S. 9:4833(A) (1991).

filing of the lien. It can be argued that the "within" language, in the example of Louisiana Revised Statutes 9:4822(A), means that the lien must be filed "not later than thirty days after the filing of a notice of termination of work" rather than "the lien is valid only if: (a) filed after the filing of notice of substantial completion and (b) before thirty days elapses from the date of the filing of the notice of substantial completion." Reading the statute in a way that would allow early lien filing would benefit lien claimants, particularly those who start work early on a project and who complete their tasks well before substantial completion of the entire construction, such as those who supply concrete for the slabs or those who install the roof.

Although there appears to be no recent litigation on this topic in Louisiana, the author is aware of several instances where lien claimants did file prior to substantial completion and prior to a notice of default being filed by an owner against the general contractor. These lien matters were settled without a lawsuit being filed, so the issue of potentially "early" lien filings was never litigated. Some cautious lien claimants, when this situation occurs, file two notices of lien—one when they are not paid and a second when the notice of default or substantial completion has been filed. The rationale these claimants use is that even if the "early" filing is held improper, the later filing should protect the privilege under the Act. There has been no litigation on this subject either, and it is unknown whether a court: (a) would reject the proposed reading of the statute suggested above, and then hold that the filing of an improper "early" lien precludes the later-filed lien from being valid, since a lien claimant is entitled to only one lien for the work performed; or (b) would find that the "early" lien is valid and so the later lien is mere surplusage that should be erased from the public records. It can be anticipated that there may be efforts in future legislative sessions to clarify the statutory language.

As a practical matter, most lien claimants are reluctant to file early because, in the building trade, most contractors, subcontractors, and suppliers know each other. A party who gets a reputation of filing "early" often will not be successfully hired on the next job. Likewise, because all parties anticipate that they may not be paid in full until all the lien periods have expired, the parties build into their pricing structure this expectation.

The notice of termination can be filed either when the work has been substantially completed, when it has been abandoned by the owner, or when the contractor is in default.¹⁰⁴ The notice must state whether it is for completion, abandonment, or default. In addition, the notice:

- A. Must identify the immovable. The immovable identification must be the complete property description and not merely a street address.¹⁰⁵
- B. Must reference the filed notice of contract.¹⁰⁶ Of course, if a notice

104. La. R.S. 9:4822(E)(3) (1991).

105. La. R.S. 9:4831 (1991).

106. La. R.S. 9:4822(E)(1) (1991) states:

of contract was never filed in the public records, then this requirement need not be met.

C. Must be signed by the owner or its representative.¹⁰⁷ Note that this document need not be notarized or witnessed. It can be signed by the owner's agent.

A notice of termination "shall be conclusive" of the matters certified "if it is made in good faith by the owner or its representative."¹⁰⁸ Occasionally an owner files a notice of termination early, perhaps in an attempt to start the time for filing liens running earlier than anticipated, or because of a dispute with the general contractor. The 1981 revisions to the Private Works Act takes this into account and look to the good faith of the owner in determining whether the notice of termination was filed appropriately. The Act does not specifically regulate what happens if a notice of termination is filed in bad faith, but the clear implication of the Revision Comments is that the lien claimant who filed, for example, ninety days after a premature "notice of termination" but within twenty-eight days of actual "substantial completion" would be deemed as having timely perfected the lien as against the owner.¹⁰⁹

As the Act existed prior to 1991, an argument could be made that, if there was a timely-filed contract, the only way the owner could start the final lien period running was by filing a notice of termination.¹¹⁰ For example, in *Bernard Lumber Co. v. Lake Forest Construction Co.*,¹¹¹ a lien claimant filed a notice of lien 206 days after its last invoice. The court found that since no notice of termination had been filed, although completion of the project might have otherwise occurred, it was the owner who bore the risk of failing to file a notice

If the work is evidenced by notice of a contract, reference to the notice of contract as filed and recorded, together with the names of the parties to the contract, shall be deemed adequate identification of the immovable and work.

107. La. R.S. 9:4822(E)(2) (1991).

108. La. R.S. 9:4822(E)(4) (1991).

109. Official Revision Comment (e) to Louisiana Revised Statutes 9:4822 states, in part: The current rule seems to be that if [a notice of termination] is prematurely filed it becomes effective when the work is completed. See *Keller Bldg. Products of Baton Rouge v. Siegen Dev., Inc.*, 312 So.2d 182 (La. App. 1st Cir. 1975). This is also equivalent to declaring the premature filing totally ineffective since, in the absence of such a filing the time for filing claims would begin upon completion of the work. Subsection E(4) makes the test of a notice's validity the good faith of the owner. It does not attempt to specifically regulate the question of what happens if the notice is filed in bad faith. Since the filing period of Subsections A and B do not expressly depend upon whether the notice is filed in good or bad faith, it is assumed they will have effect if third persons rights are involved (such as one who takes a mortgage after the apparent time for filing has expired). At the same time since one ordinarily cannot assert his own misconduct as a defense, the early filing should be ineffective as to the owner himself.

110. La. R.S. 9:4822 (1991 & Supp. 1997).

111. 572 So. 2d 178 (La. App. 1st Cir. 1990).

of termination once a notice of contract had been filed,¹¹² and the time for filing liens might not expire until five years after the contract's date. This result was legislatively overruled when Louisiana Revised Statutes 9:4822(D) was amended¹¹³ to provide that the applicable sixty-day period (or seventy days for sellers of movables used on residential property) runs from "the substantial completion or abandonment of the work, if a notice of termination is not filed."¹¹⁴

If there is no timely notice of contract, the owner has the option of filing a notice of termination; if he does not, the lien period nonetheless begins to run upon actual substantial completion or abandonment of the work.¹¹⁵

Substantial completion is defined by Louisiana Revised Statutes 9:4822(H) and can be proven in one of three ways.

First, substantial completion occurs when the last work is performed on, or materials are delivered to, the site.¹¹⁶ Thus, when no materials are to be delivered and no more work is to be done (i.e., the job is totally complete), clearly substantial completion has occurred.

Second, substantial completion can occur even though there are "minor or inconsequential matters" remaining to be remedied.¹¹⁷ This is often known, euphemistically, as "punch list" items.¹¹⁸ The origin of the term "punch list" can

112. The court stated:

The notice of contract/notice of termination procedure provides the owner with a method of cutting off the valid assertion of any potential claims or privileges. To make use of this procedure, the statute requires that an affirmative action be taken by the owner. Where the owner fails or neglects to take such affirmative action, he should be made to bear the consequences of his failure to file a notice of termination, not the claimant. [The owner or contractor] could have limited [the lien claimant's] right to file a lien at any time by simply filing a notice of termination of the work when the improvements were completed. Since a notice of termination was not filed, the [thirty]-day tolling period for a filing of a statement of claim was never activated.

Bernard, 572 So. 2d at 181. For a discussion of this case, see Thomas A. Harrell, *Developments in the Law, Security Devices, 1990-91*, 52 La. L. Rev. 737, 743 (1992).

113. 1991 La. Acts No. 1024, § 1, effective January 1, 1992.

114. La. R.S. 9:4834 (1991).

115. La. R.S. 9:4822(B), (C) (1991).

116. La. R.S. 9:4822(H)(1) (1991).

117. La. R.S. 9:4822(H)(2) (1991). The rationale for the original rule was well-stated in the early case of *Hortman-Salmen Co. v. White*, 168 La. 1067, 123 So. 715, 716-17 (1929):

The correcting of defects, which may appear from time to time in the work, after the building is considered and treated as completed, are not to be counted or deemed as part of the labor contemplated by the statute, in fixing the time, nor should material or services furnished for that purpose be so regarded. Were they so counted, the time within which to record liens might linger indefinitely, depending upon whether defects in the work came to light and were corrected, and the rank of mortgages and other claims against the property might be displaced unreasonably and unexpectedly.

118. Cf. *Sanders v. Zeagler*, 686 So. 2d 819, 820 (La. 1997). Also see *E.C. Durr Heavy Equip., Inc. v. National Tea Co.*, 538 So. 2d 1104, 1106 (La. App. 5th Cir. 1989):

LSA-R.S. 9:4822(H)(2) in defining "substantial completion" of a work, states that it occurs when the owner accepts, possesses or occupies the immovable even though punch list items may remain undone.

be traced back to the days when, on some job sites, there was a heavy paper or cardboard posted on the job with the name of each trade. As each tradesman finished his work, he would indicate completion by literally punching out a hole in the cardboard with a special hole punch that had a unique shape for the trade, or an inspector for that trade would perform the hole punching after being satisfied that all the work had been done. The work was completely done when all the holes were punched in the cardboard. When the work was substantially complete but minor matters remained before the hole could be punched, the manager or inspector of the project still might not allow a subcontractor to "punch out" and leave the job until every detail was done. The remaining items were known as "punch lists," because the trade could not (or the inspector would not) "punch a hole" in the cardboard until every detail of the final work was completed. Thus, "punch list" has come to be a euphemism for minor and inconsequential matters that need to be completed.

Third, an owner can terminate the work done on a specified portion or area of the project, or even the work of a particular contractor.¹¹⁹ Reconsider an example given earlier (Example Five) of an owner who has a single tract of land upon which six apartment buildings are being built. The owner can enter into a separate contract and bond with a general contractor on each of the six buildings and can treat each contract as a separate work. Another possible alternative on a single building is for an owner to enter into one contract with an erection contractor and a separate contract with a plumbing contractor. The owner could accept the work of the plumbing contractor and start the lien claim period running for the plumbing lien claimants while at the same time continue to have work performed by the erection contractor.

D. Notice of Lien Rights

The first step for all lien claimants¹²⁰ is to timely file a "statement of claim or privilege."¹²¹ This is often called by attorneys and by those who work on

538 So. 2d at 1106. For more on "punch list" under common law, see 2 Stephen G.M. Stein, *Construction Law* ¶ 7.09, at 7-78 (1991).

119. La. R.S. 9:4822(F), (H) (1991); La. R.S. 9:4808(B) (1991).

120. As has been noted earlier in this paper, there are special, additional rules for all lessors and for certain vendors. If a lessor who claims rent for a movable used at the site and leased to a contractor or subcontractor, the lessor must give a copy of the lease to the owner and to the contractor not more than ten days after the movables are first placed at the site. La. R.S. 9:4802(G)(1) (Supp. 1997). If the lessor does not give this notice, the lien may not be filed. Likewise, if a seller of movables to a contractor or subcontractor on residential property wishes to file a lien notice, the seller must deliver a "notice of nonpayment" to the owner (but not to the contractor) at least ten days prior to filing the lien. La. R.S. 9:4802(G)(2) (Supp. 1997). The failure to give a notice to the owner invalidates a later-filed lien and renders the seller liable for damages for an improper lien filing. La. R.S. 9:4833(A), (B) (1991).

121. La. R.S. 9:4822(G) (1991).

immovable property a "notice" of lien rights. The notice must be filed in the mortgage records of the parish where the immovable property is located.¹²²

Just as a notice of contract does not require a witness or a notary, those who would preserve their lien rights under the Act need not have their documents notarized or witnessed. There are only four requirements for a statement of claim or privilege, and these requirements are contained in Louisiana Revised Statutes 9:4822(G).

1. The statement must be in writing. No particular form of writing is required. No format is required. The only requirement is that the writing must contain the other attributes listed below.
2. The writing must be signed by the lien claimant or by "his representative." In other words, an agent may sign the notice; it need not be signed by the claimant directly.
3. Third, the immovable must be described. Louisiana Revised Statutes 9:4822(G), which requires that the immovable be "reasonably" identified, must be read in conjunction with Louisiana Revised Statutes 9:4831, which requires that the property description "clearly and permanently identify the property." Therefore, street addresses or mailing addresses are insufficient.¹²³
4. Fourth, the amount of the privilege must be set forth and must be "reasonably itemized" as to its elements, "including the person to whom or for whom the contract was performed, materials supplied, or services rendered." The amount must include the sums owing; it also should contain an itemization of or claim for interest, plus a request for recordation fees.¹²⁴

All lien claimants are well-advised to send a copy of that notice to the owner. Often, sending of the lien notice itself will result in the owner pressuring the contractor or the surety to remove the properly-filed lien by paying the lien claimant. It should be emphasized that if the lien claimant is the lessor of movables used on the premises, the lien claim cannot be filed unless the lessor had given a copy of the lease to the owner and the general contractor "not more than ten days after the immovables are first placed on the site of the immovables for use in the work."¹²⁵ Likewise, if the lien claimant is the seller of movables on residential property, before filing of the notice of lien or privilege, the seller

122. La. R.S. 9:4831 (1991).

123. *Boes Iron Works, Inc. v. Spartan Bldg. Corp.*, 648 So. 2d 24 (La. App. 4th Cir. 1994), *writ denied*, 650 So. 2d 1184 (1995). *Boes* also held that even if the general contractor's "notice of contract" contained an improper or incomplete property description, a lien claimant could not rely on that document for the description; the lien claimant must comply with Louisiana Revised Statutes 9:4831 and have an accurate and "complete" description in the "statement of claim or privilege."

124. *Cf.* La. R.S. 9:4802(G)(2) (Supp. 1997).

125. La. R.S. 9:4802(G)(1) (Supp. 1997).

must give notice of non-payment to the owner at least "ten days" prior to the filing, and the notice must be served by registered or certified mail, return receipt requested.¹²⁶

XII. WHAT HAPPENS IF THERE IS NO BOND ATTACHED TO THE NOTICE OF CONTRACT?

If a bond is not attached to a notice of contract or if the bond is not from a solvent surety, a number of important consequences result.¹²⁷

First, the failure to attach a bond means that the owner and the general contractor have unlimited liability to all the lien claimants who work on the property, even those without privity of contract with the owner.¹²⁸ Second, an owner wishing to divide a single project into multiple sections, each with an individual time frame running (whether there is a single general contractor or multiple general contractors) cannot do so, because the ability to have "separate work" performed on a tract dealt with as "separate and distinct" work is limited to written notice of contracts "with a proper bond attached" and properly filed.¹²⁹ Third, the lack of a bond means that there is no way for an owner to remove liens from the property other than the very expensive process of the 125% bond provided for in Louisiana Revised Statutes 9:4835.

Example Seven: Assume that an owner has a \$100,000 contract with a general contractor and that there are \$150,000 of liens filed. Further assume that the owner believes that the liens are inflated in amount or that certain offsets or credits should be available as deductions from the stated amounts.

If a bond has not been properly and timely filed, the only way the owner can remove these liens is by placing a bond equal to "[125%] of the principal amount of the claim as asserted in the statement of claim or privilege . . ."¹³⁰ Therefore, even before the owner can contest the validity of the claims, if the owner wishes to have the liens removed, the owner must put up a \$197,500 bond (125% of \$150,000).

There may be good reasons why an owner needs to have the liens removed. For example, if a mortgage contains an automatic acceleration clause in the event that there are liens or other privileges asserted, the owner may need to have liens

126. La. R.S. 9:4802(G)(2) (Supp. 1997).

127. Official Comment (d) to Louisiana Revised Statutes 9:4811 notes that:

[T]he filing of the notice of contract serves as notice of the potential existence of the privileges and fixes their priorities over subsequent mortgages. The absence of a bond does not affect this. The failure to attach a bond will give rise to the claim against the owner and make the privileges securing those claims valid.

128. La. R.S. 9:4801, 4802 (1991 & Supp. 1997).

129. La. R.S. 9:4808(B) (Supp. 1997).

130. La. R.S. 9:4835 (Supp. 1997).

erased to avoid having the mortgage holder declare a default in the mortgage and foreclose on the property. Likewise, there may be multiple mortgage holders on the property. The holder of the second mortgage may wish to prevent the first mortgage holder from declaring a default under the first mortgage (because of the existence of liens) even if the owner cannot bond out claims with a 125% bond; therefore, Louisiana Revised Statutes 9:4835 allows the 125% bond to be placed on the property not only by the owner but also by "any interested party." Clearly a holder of a mortgage on the property is an "interested party."

The 125% bond can be provided through a lawful surety company authorized to do business in the state¹³¹ or by placing in the court registry "a federally insured certificate of deposit."¹³²

Once the 125% bond has been submitted, the recorder of mortgages makes a notation in the public records and cancels the statement of privilege or lien.¹³³ The bond is not recorded but is retained by the recorder of mortgages "as part of his records."¹³⁴

Anyone who files the 125% bond must give notice to the owner, the holder of the lien, and the contractor by certified mail.¹³⁵

XIII. THE SURETY FOR THE GENERAL CONTRACTOR

A. *Payment Bonds Versus Performance Bonds*

A surety bond given in conjunction with a Private Works Act claim at the inception of the contract always secures the general contractor's obligation to pay the lien claimants.¹³⁶ This is what is known as a "payment bond." The creditors of the payment bond are the lien claimants (and the owner, to the extent the owner is obligated personally to those lien claimants without contractual privity with the owner); the principal obligor is the contractor; and the surety secures the contractor's liability to the lien claimants. The parties may or may not agree that, in addition to a payment bond, the general contractor shall submit a performance bond.¹³⁷ A performance bond guarantees the owner that the general contractor will complete construction of the project; if the contractor defaults, the surety agrees to pay the owner a stipulated amount. The parties are not required to enter into a performance bond.¹³⁸

131. La. R.S. 9:4835(A) (1991). The bond is a "legal suretyship" under Louisiana Civil Code article 3043. For a further discussion of the Louisiana rules of suretyship, see Michael H. Rubin, *Ruminations on Suretyship*, 57 La. L. Rev. 565 (1997).

132. La. R.S. 9:4835(A) (1991).

133. La. R.S. 9:4835(B) (1991).

134. *Id.*

135. La. R.S. 9:4835(C) (1991).

136. La. R.S. 9:4812(C)(1) (1991).

137. La. R.S. 9:4812(C)(2) (1991). *Also see* Official Comment (d) to this section of the Act.

138. Louisiana Revised Statutes 9:4812 states that a performance bond can be "expressly excluded by the terms of the bond." A surety is not obligated in a performance bond to do more

B. Amount of Bond

Clever drafting by the surety does not allow the surety to avoid its obligations under a payment bond. As a legal surety, the contract will be strictly construed against the surety¹³⁹ and the bond itself "shall be deemed to conform with the requirements" of the statute in all respects except for the amount given; if the wrong amount is stated, then the parties are bound by that provision.¹⁴⁰ If the amount stated is more than the statute requires, the surety remains bound for the full amount. If the suretyship contract is less than the statute requires, then the bond is improper and the owner is not entitled to any benefits in reduction of its personal liability and removal of liens and privileges, although lien claimants still have a right to assert claims against the surety for amounts set forth in the bond.¹⁴¹

than simply pay the owner the amount of the bond in the event that the contractor defaults in its completion of the work. A contractor can agree independently of the suretyship bond to undertake other obligations. For example, in *Klein v. Collins*, 159 La. 704, 106 So. 120 (1925), a surety gave a performance bond and then voluntarily entered into a separate and independent obligation to complete the project. The project completion cost more than the bond amount; the court found that the surety company had changed roles from being a surety to being a separate, independent principal obligor when it agreed to complete the project rather than simply paying money to the owner. The court distinguished between the surety's liability on the bond, prior to its independent agreement to complete the project, and its obligations after it entered into the independent and separate contractual understanding.

139. Louisiana case law is replete with language holding commercial suretyship companies strictly liable under the terms of their contract. An example can be found in *Bickham v. Womack*, 181 La. 837, 846, 160 So. 431, 434 (1935), which quoted the following language with approval. While the quotation is attributed by the *Bickham* court to *U.S. Fidelity & Guaranty Co. v. United States*, 191 U.S. 416, 24 S. Ct. 142 (1903), in fact the quotation is from *Atlantic Trust & Deposit Co. v. Laurinburg*, 163 F. 690, 695 (4th Cir. 1908):

The very reason for the existence of these kinds of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual sureties that give application for this rule is by them taken away; that it is their business to take risks and expect losses. *If, with their superior means and facilities they are to be permitted to take the risk, but avoid the losses by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves.*

(Italics added by the court in *Bickham v. Womack*).

140. La. R.S. 9:4812(D) (1991). Also see La. Civ. Code arts. 3066, 3067. These provide:

Art. 3066. Legal suretyship to conform to law

A legal suretyship is deemed to conform to the requirements of the law or order pursuant to which it is given, except as provided by Article 3067.

Art. 3067. Permissible variations

A surety is not liable for a sum in excess of that expressly stated in his contract. A legal suretyship may contain terms more favorable to the creditor than those required by the law or order pursuant to which it is given, but it may not provide for a time longer than is provided by law for bringing an action against the surety.

141. The amount of the required suretyship bond is set forth in Louisiana Revised Statutes 9:4812 and is tied to the amount of the contract. The Official Revision Comments to the Civil Code articles on legal suretyship contain a special rule when the bond amount is left blank. "When the

If the owner improperly pays the contractor before the time due on the contract, the surety is not relieved of liability; in this event, however, the owner must indemnify the surety for any loss or damage suffered and the surety is not thereafter liable to the owner.¹⁴²

C. Extension of Time and Impact on a Surety

The Private Works Act makes the surety liable regardless of whether there are extensions of time in the work.¹⁴³ Likewise, amendments or changes to the contract, modifications of the work, or impairments of the surety's rights of subrogation do not extinguish the surety's liability; the surety remains bound. If the modification, however, is "materially prejudicial to the surety," the surety remains liable to the lien claimants but is relieved of liability to the owner and can seek indemnification from the owner for any loss or damage suffered by the surety. This provision grants the surety some protection against changes made in the contract that materially harm the surety; yet, the lien claimants are not made to suffer. The surety can collect from the owner but may not limit its own liability to the lien claimants.

Louisiana Revised Statutes 9:4812(E) states that any bond given under the Private Works Act "shall be deemed to include" certain conditions. One of those conditions is:

Extensions of time for the performance of the work shall not extinguish the obligation of the surety but the surety who has not consented to the extensions has the right of indemnification under the original terms of the contract as provided by Article 3057 of the Civil Code.

The reference to Louisiana Civil Code article 3057 was appropriate when the Private Works Act was reworked in 1981;¹⁴⁴ however, this portion of the Private Works Act has not been amended since the Louisiana Civil Code articles on suretyship were revised in 1987.¹⁴⁵ Former Louisiana Civil Code article 3057, which had dealt with indemnification, was altered with the 1987 suretyship provisions. New Article 3053, which incorporated the concepts originally found in Article 3057, suppressed the term "indemnification"¹⁴⁶ and instead gives the surety a right to require that the contractor put up additional security to protect the surety. The provisions of Louisiana Revised Statutes 9:4812(E)(1), when

amount of the bond is left blank . . . the law will supply the amount in accordance with the statute requiring the bond. *Ricks v. Gantt*, 35 La. Ann. 920 (1883)." Official Revision Comment to Civil Code art. 3067, 1987 La. Acts No. 409, § 1, effective January 1, 1988.

142. La. R.S. 9:4812(E)(3) (1991).

143. La. R.S. 9:4812(E) (1991).

144. 1981 La. Acts No. 724, § 1, effective January 1, 1982.

145. 1987 La. Acts No. 409, § 1, effective January 1, 1988. For a discussion of the Louisiana suretyship articles, see Rubin, *supra* note 131.

146. See Official Revision Comment, 1987(b) to Louisiana Civil Code article 3053 as amended.

harmonized with the new suretyship provisions,¹⁴⁷ will probably be read to mean that an extension of time grants the surety a right to demand security from the contractor under the provisions of Article 3053(4).

D. Amendments to the Building Contract and Impact on a Surety

Another statutory provision that is "deemed" included in every Private Works Act bond is:

No other amendment to the contract, or change or modification of the work, or impairment of the surety's rights of subrogation made without the surety's consent shall extinguish the obligation of the surety, but if the change or action is materially prejudicial to the surety, the surety shall be relieved of liability to the owner, and shall be indemnified by the owner, for any loss or damage suffered by the surety.¹⁴⁸

The Official Revision Comments to this section indicate that the rule is intended to incorporate jurisprudentially-developed criteria found in three Louisiana cases decided under prior versions of the Act.¹⁴⁹ Under these provisions, a surety may not claim release because the contract rights have been assigned to a creditor¹⁵⁰ or because the parties have changed the method of payment.¹⁵¹

XIV. THE SURETY'S LIABILITY TO LIEN CLAIMANTS

A. Privity Versus Non-Privity

An owner has personal liability to all of those with whom he has privity of contract¹⁵² and, under the Private Works Act, even to those with whom he does not have privity.¹⁵³ Although the general contractor has the same personal liability,¹⁵⁴ the surety's liability is, in some instances, narrower than the owner's liability to lien claimants.

147. La. Civ. Code art. 13, as amended by 1987 La. Acts No. 124, § 1, provides that laws on the same subject matter "must be interpreted in reference to each other." Courts attempt to harmonize statutes and make them consistent where there is no express intent to overrule earlier legislation. See, e.g., *In re A.C.*, 643 So. 2d 719, 730 (La. 1994).

148. La. R.S. 9:4812(E)(2) (1991).

149. The three cases are: *Electrical Supply Co. v. Eugene Freeman, Inc.*, 152 So. 510 (La. 1993); *Central La. Elec. Coop. v. Giant Enters., Inc.*, 371 So. 2d 641 (La. App. 3d Cir. 1979), *writ denied*, 375 So. 2d 646 (1979); and *E. Rabalais & Son, Inc. v. United Bonding Ins. Co.*, 226 So. 2d 528 (La. App. 3d Cir. 1969), *writ denied*, 227 So. 2d 593, 596-97 (1969).

150. *E. Rabalais & Son, Inc.*, 226 So. 2d at 528.

151. *Cf. Central La. Elec. Coop.*, 371 So. 2d at 651.

152. La. R.S. 9:4801 (1991).

153. La. R.S. 9:4802 (1991 & Supp. 1997).

154. La. R.S. 9:4802 (1991 & Supp. 1997).

An owner is liable to those with whom he has no contractual privity, even if these claimants also have no privity with the general contractor. Thus, a sub-sub-subcontractor (i.e., one who has contractual privity with a sub-subcontractor but not with a subcontractor, the contractor, or the owner) has a right to assert a personal claim against the owner and to secure that claim with a privilege. The contractor's surety, however, has significantly reduced liability to those who have no privity of contract with the contractor. Louisiana Revised Statutes 9:4822(J), added by Acts 1987, No. 897, section 1, provides¹⁵⁵ that those without contractual relationships with the contractor must give notice of their claims to the contractor within thirty (30) days of termination of the work. The failure to give the notice to the contractor means that the surety is relieved of liability to these individuals, even though they have timely preserved their claim and even though they have a claim against the owner.

Therefore, the liability of the surety under a payment bond is:

1. First, to those with direct contractual privity with the general contractor who timely preserved their claims by filing a notice of lien right *and* to those without contractual privity to the general contractor if they give notice to the contractor within thirty (30) days of their filing a notice of lien rights.¹⁵⁶
2. Second, to those who did not preserve their liens timely but who had direct privity with the general contractor.¹⁵⁷
3. Third, to the owner (to the extent that there is a performance bond or to the extent that the payments indemnify the owner for claims that the owner properly made).

Note that because of the addition of Louisiana Revised Statutes 9:4822(J), a surety's liability is both broader and narrower than an owner's liability. The following example will illustrate this point.

Example Eight. Assume that there has been a timely and proper filing of a notice of contract and bond (Louisiana Revised Statutes 9:4811) and that a notice of substantial termination was filed on September 1st.

155. The statute provides:

J. Before any person having a direct contractual relationship with a subcontractor, but no contractual relationship with the contractor, shall have a right of action against the contractor or surety on the bond furnished by the contractor, he must record his claim as provided in this Section and give written notice to the contractor within thirty days from the recordation of notice of termination of the work, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor or service was done or performed. Such notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office in the state of Louisiana.

La. R.S. 9:4822(J) (1991).

156. La. R.S. 9:4813(B)(1) (1991); La. R.S. 9:4822(J) (1991).

157. La. R.S. 9:4813(2) (1991).

Lien claimants would have thirty (30) days from that date in which to file their liens.¹⁵⁸

Assume that Subcontractor A (one in direct privity of contract with the General Contractor) files a lien claim on September 15th.

Sub-subcontractor X (one in privity with Subcontractor A but not with the General Contractor) files a lien claim on September 15th.

On November 20th, two additional notices of lien claims are filed. One is filed by Subcontractor B (who has direct contractual privity with the General Contractor) and one by Sub-subcontractor Y (who has privity of contract with Subcontractor B but not with the General Contractor).

Under the statute, Subcontractor A has a contractual claim against the contractor and a non-contractual Private Works Act claim against the owner.¹⁵⁹ Subcontractor A also has a right to sue the surety.¹⁶⁰

Sub-subcontractor X (who has no privity with the General Contractor but who has timely filed its notice of lien rights) has a contractual claim against Subcontractor A and a Private Works Act claim against the owner.¹⁶¹ Sub-subcontractor X, however, has no claim against the General Contractor unless, in addition to filing the notice of lien rights, it gives written notice to the General Contractor "within thirty days from recordation of notice of termination of the work."¹⁶² Only by giving the additional notice to the General Contractor has Sub-subcontractor X preserved the rights against the General Contractor and therefore the additional rights against the surety.

Sub-subcontractor Y, who filed its lien notice untimely, and who gave no notice to the General Contractor, has no claims against the owner¹⁶³ and no claims against the General Contractor or the surety.¹⁶⁴

Subcontractor B, while it has no claim against the owner (because it recorded untimely),¹⁶⁵ does have a contractual privity claim against the General Contractor and, therefore, can claim against the surety from the date it gives notice to the surety, although it will collect from the surety only after all timely-filed lien claimants.¹⁶⁶

158. La. R.S. 9:4822(A) (1991).

159. La. R.S. 9:4802 (1991 & Supp. 1997).

160. La. R.S. 9:4813 (1991).

161. La. R.S. 9:4802 (1991 & Supp. 1997).

162. La. R.S. 9:4822(J) (1991).

163. La. R.S. 9:4822 (1991 & Supp. 1997).

164. La. R.S. 9:4822(A), (K) (1991).

165. La. R.S. 9:4822(A) (1991).

166. La. R.S. 9:4813(B) (1991).

B. What Happens if There is No Notice of Contract?

The contractor's failure to file a notice of contract timely (that is, before "work" begins),¹⁶⁷ does not affect the liability of the surety. The surety remains liable even though a notice of contract is not timely filed.¹⁶⁸ Likewise, the surety's liability is not extinguished if the bond is not attached to the notice of contract or if the bond is in the wrong amount.¹⁶⁹

C. When Can a Surety be Sued?

Although a surety does not have the benefit of discussion or division,¹⁷⁰ concepts that were also extinguished in the 1987 amendments to the Louisiana Civil Code suretyship articles,¹⁷¹ a surety cannot be sued by any lien claimant before the time expires for the claimants to assert their liens by filing a notice of lien rights under Louisiana Revised Statutes 9:4822.¹⁷² This means that a surety cannot be sued on a properly-bonded job until more than thirty days after the notice of termination has been filed¹⁷³ or, on a job where there has been no timely notice of contract, until more than sixty days after the notice of termination or substantial completion.¹⁷⁴ Also note that there is a seventy-day period of time for the sellers of movables on residential construction to assert their claims.¹⁷⁵

There is an exception to this rule that allows a surety to be sued before the expiration of these delays; if a lien claimant gives a notice of lien filing to the surety, then the surety can be sued thirty days after the notice has been received by the surety.¹⁷⁶

Example Nine. On January 1st, a notice of contract is filed before Louisiana Revised Statutes 9:4820 "work" begins.

On June 15th, before the project is substantially complete, Subcontractor Q has not been paid. Subcontractor Q files a notice of lien claim in the public records and hand-delivers the notice to the surety on that same day. On August 1st, a notice of substantial completion is filed. On

167. See *supra* Section V of this Article on the two different kinds of "work" defined in the Act.

168. La. R.S. 9:4813(C) (1991).

169. *Id.*

170. La. R.S. 9:4813(A) (1991).

171. La. Civ. Code art. 3045. The Louisiana Legislature, on the advice of the Louisiana Law Institute, amended the entire section of the Civil Code dealing with suretyship, Book III, Title XVI, by 1987 La. Acts No. 409, § 1, effective January 1, 1988. For an overview of the old rules of division and discussion and how they were altered, see Rubin, *supra* note 131, at 590.

172. La. R.S. 9:4813(D) (1991).

173. La. R.S. 9:4822(A) (1991).

174. La. R.S. 9:4822(C), (D) (1991 & Supp. 1997).

175. La. R.S. 9:4822(D)(2) (Supp. 1997).

176. La. R.S. 9:4813(D) (1991).

August 15th, Subcontractor R files a notice of lien claim in the public records but does not mail a notice of it to the surety.

In this situation, Subcontractor Q (who has given written notice of the lien claim to the surety) can sue the surety thirty days after the notice has been received; i.e., July 15th.¹⁷⁷ On the other hand, Subcontractor R, who has not mailed a notice of the lien claim to the surety but who has filed timely, cannot file suit against the surety until August 31st, the "expiration" of the thirty-day period within which all lien claimants could file their lien claims (thirty days from the filing of the August 1st notice of substantial completion).

XV. THE "NO WORK" AFFIDAVIT

There is no way that a third person who wishes to obtain a mortgage on property can determine from the public records whether there may be potential Private Works Act lien claims that might outrank the mortgage. Private Works Act liens can become effective when "work" begins on the property, even if there is nothing filed in the public records, and the first time third parties may get notice of a lien claim is after the project has been completed.¹⁷⁸ The Private Works Act addresses this problem by allowing mortgage creditors and others who wish to acquire rights in the property to rely on a "no work" affidavit.¹⁷⁹

If a registered or certified engineer or surveyor, a licensed architect, or a building inspector executes an affidavit stating that no "work" in accordance with the Private Works Act has commenced, that affidavit may be filed in the mortgage records and may be relied upon by third parties.¹⁸⁰ The affidavit must be filed within four days after its execution, and the implication of the Act is that the four days should run from the date of inspection of the property, although the language of the Act is not as clear as one might like. Any party who wishes to rely upon the affidavit must file the mortgage, privilege, or "other document creating a right" before the filing of the affidavit or within four business days after the filing of the affidavit. Theoretically this could lead to a maximum of up to eight days to file the mortgage after the inspection of the property, for it is possible that the inspection and affidavit-signing could occur on day one, the filing of the affidavit on day four, and the filing of the mortgage on day eight. In this event, the affidavit would have been filed "within four business days after the execution of the affidavit" and the mortgage filed "within four business days of the filing of the affidavit."¹⁸¹ There is no specific

177. La. R.S. 9:4813(D) (1991); La. R.S. 9:4822(G) (1991).

178. Louisiana Revised Statutes 9:4822 does not start the time limit for filing lien claims until after substantial completion or termination.

179. La. R.S. 9:4820(C) (Supp. 1997).

180. *Id.*

181. La. R.S. 9:4820 (1991 & Supp. 1997).

requirement that the affidavit be executed on the same day as the inspection; however, because of the narrow four-day period and the right of third parties to rely upon it, courts may strictly construe this requirement. Courts may look askance at a "no work" affidavit if the inspection occurred on day one and the affidavit was executed on day four but not filed until day eight. As a practical matter, most lenders usually file the affidavit and the mortgage at the same time; indeed, many prefer that the mortgage be filed immediately prior to or after the no-work affidavit.

Before the amendment of Louisiana Revised Statutes 9:4820 by Acts 1991, No. 370, section 1, there had been litigation concerning who may rely upon a no-work affidavit. *C & J Contractors v. American Bank & Trust Co.*¹⁸² involved the construction of a golf course. A "no work" affidavit had been executed by a person who was not a bank employee but rather who was affiliated with the developers.¹⁸³ The Court found that the "no work" affidavit under the *prior version* of the statute could not be relied upon by the Bank because the Bank officers had visited the golf course and knew that construction of the golf course was ongoing. The Court found that the "dirt work" being done on the project was not preparatory work but in fact was the "work" itself and therefore the no-work affidavit was improper; the Bank officers' visit to the site was an indication, said the court, that the Bank did not truly rely upon the affidavit.

The ruling of that case was altered by Acts 1991, No. 370, section 1, which amended Louisiana Revised Statutes 9:4820: "The correctness of the facts recited in the affidavit may not be contravened to affect the priority of the rights of the person to whom or for whom it was given, unless actual fraud by such person is proven."

Because the affidavit may be given by a building inspector employed "by a lending institution chartered under federal or state law,"¹⁸⁴ if the lender is not committing actual fraud (as opposed to "constructive" fraud), then the no-work affidavit remains effective and protects the lender. The distinction between actual fraud and other types of fraud is important.¹⁸⁵ It would appear that the statute's use of the term "actual fraud" refers to intentional fraud by the lender; reliance by a lender upon a "no work" affidavit, even if the lender has visited the construction site, does not seem to fit the definition of "actual fraud." It would appear that under the revised version of the statute, the result of the *C & J Contractors* case today would be different; if it takes an expert architect, engineer, or land surveyor to ascertain whether or not "work" is being performed, the mere fact that the lender independently views the property should not make

182. 559 So. 2d 810 (La. App. 1st Cir.), writ denied, 564 So. 2d 318, 332 (1990).

183. This fact is not apparent from the Court of Appeal opinion but the information is contained in the briefs before the appellate court which contain citations to the transcript.

184. La. R.S. 9:4820 (1991 & Supp. 1997).

185. For a discussion of actual and constructive fraud, cf. *Continental Supply Co. v. Hoell*, 170 La. 898, 129 So. 522, 524 (La. 1930).

a difference unless the lender believed that the "no work" affidavit was false and was given by the affiant in bad faith.

The importance of a no-work affidavit is that even if the no-work affidavit is factually erroneous, the mortgage lender or other security interest holder can be protected. The person who gives the affidavit, however, will be responsible for any loss or damage suffered by any person whose rights are adversely affected. Thus, the engineer, surveyor, architect, or building inspector has personal liability to the lien claimant whose rights are outranked by a mortgage holder who relies upon the no-work affidavit.

XVI. RANKING OF PRIVILEGES

The ultimate function of asserting a Private Works Act lien is to obtain a privilege on the proceeds of the sale of the property.¹⁸⁶ Therefore, the ranking of privileges and liens becomes of crucial importance not merely to lien claimants and owners but also to lenders and others who have an interest in immovable property. The ranking of privileges under the Private Works Act is contained in Louisiana Revised Statutes 9:4821 and is a mixture of ranking (a) by time of the filing of certain claims as well as (b) by the nature of the Private Works Act liens.¹⁸⁷ There are six categories of ranking under Louisiana Revised Statutes 9:4821.¹⁸⁸

186. La. Civ. Code arts. 3183, 3184.

187. As Official Comment (b) to this Section notes, these privileges "rank by nature. Thus, all claims of materialmen, subcontractors and lessors of movables rank equally (whether or not they arise out the same work) and ahead of the privilege of the contractor and surveyors, architects and engineers, which also rank equally."

188. The statute provides:

§ 4821. Ranking of privileges

The privileges granted by R.S. 9:4801 and 4802 rank among themselves and as to other mortgages and privileges in the following order of priority:

- (1) Privileges for ad valorem taxes or local assessments for public improvements against the property, liens and privileges granted in favor of parishes for reasonable charges imposed on the property under R.S. 33:1236, liens and privileges granted in favor of municipalities for reasonable charges imposed on property under R.S. 33:4752, 4753, 4754, 4766, 5062, and 5062.1, and liens and privileges granted in favor of a parish or municipality for reasonable charges imposed on the property under R.S. 13:2575 are first in rank.
- (2) Privileges are granted by R.S. 9:4801(2) and R.S. 9:4802(A)(2) rank next and equally with each other.
- (3) Bona fide mortgages or vendor's privileges that are effective as to third persons before the privileges granted by this Part are effective rank next and in accordance with their respective rank as to each other.
- (4) Privileges granted by R.S. 9:4801(3), R.S. 9:4801(4) and by R.S. 9:4802(A)(1), R.S. 9:4802(A)(3), and R.S. 9:4802(A)(4) rank next and equally with each other.
- (5) Privileges granted by R.S. 9:4801(1) and R.S. 9:4801(5) rank next and equally with each other.

1. Ad valorem taxes, certain "weed" liens, and other liens in favor of municipalities.
2. Laborer's liens.
3. Mortgages and privileges that become effective before all the Private Works Act liens (other than laborers) take effect.
4. Liens in favor of contractors (other than general contractors), lessors of equipment, subcontractors, and sellers of movable property.
5. Claims of contractors who have privity of contract with the owner and claims of architects, engineers, and surveyors who have contracts with a general contractor.
6. All other privileges and mortgages.

Initially it should be noted that within certain categories of claimants, if there is more than one claimant they rank equally within that rank and share the proceeds pro rata. Thus, categories 2, 4, and 5 require that if there is more than one claimant in that category, they rank "equally with each other."

On the other hand, categories 3 and 6 rank solely by time within their ranks; if there is more than one claimant in category 3 or category 6, it is necessary to look at the time of their mortgage or privilege to ascertain how they rank in relation to each other.

Second, it should be noted that categories 1, 2, 4, and 5 rank by the nature of their claims, not by the time at which they filed their lien, privilege, ad valorem tax notice, or municipal lien. For example, even if a laborer is the last person to timely file his or her lien, the rank of the privilege is in category 2, ahead of a subcontractor who may have timely filed and who would rank only in category 4.

Third, it should be noted that holders of mortgages and vendor's privileges can have their rank impacted if there is a valid "no work" affidavit.¹⁸⁹

A. Ad Valorem Taxes and Local Assessments

Ad valorem taxes are always a "super-priority" rank on property. Over the years, however, statutes have been passed in which "local assessments" have attempted to obtain the same "super-priority" by referring to this ranking provision. The charges listed in Louisiana Revised Statutes 9:4821(3) refer to those in Title 33 of the Revised Statutes and include such matters as specialized parish liens for cutting and removing grass and weeds,¹⁹⁰ charges for removal of dangerous structures,¹⁹¹ demolition of structures, and even garbage and trash

(6) Other mortgages or privileges rank next and in accordance with their respective rank as to each other.

La. R.S. 9:4821 (1991).

189. La. R.S. 9:4820 (1991 & Supp. 1997).

190. La. R.S. 33:1236 (1988 & Supp. 1997).

191. La. R.S. 33:4752, 4754 (1988 & Supp. 1997).

removal.¹⁹² Other statutes in other titles of Louisiana law, however, also have attempted to utilize this "super-ranking" provision.¹⁹³

B. Examples of Ranking Problems

Most ranking issues under the Private Works Act can be resolved by looking at one primary date—the earliest date of a valid notice of contract or when Louisiana Revised Statutes 9:4820 "work" begins. This date is crucial because it is the earliest of these two dates that determines when all lien claimants, other than laborers, rank. This is apparent from the language of Louisiana Revised Statutes 9:4821(3), the third category, which reads: "Bona fide mortgages or vendor's privileges that are effective as to third persons before the privileges granted by this Part are effective rank next in accordance with their respective rank as to each other."

This means that if a mortgage or privilege on immovable property is effective before a notice of contract is timely filed and before Louisiana Revised Statutes 9:4820 "work" begins, it will outrank all lien claimants except the "category one" claimants (ad valorem taxes and local assessments) and laborers. On the other hand, if the mortgage or privilege arose after the notice of contract is filed or after "work" began, it would rank at the very end of the listing (category six).

Example Ten. Assume that February 1st is the earliest date upon which the notice of contract or work began. Further assume that Laborer L, Contractor C, and Subcontractor S all timely preserved their lien rights in December of the same year.

If there were no mortgages or other privileges affecting the property, the rank of these claims would be:

1. Ad valorem taxes¹⁹⁴
2. Laborers¹⁹⁵
3. Subcontractors¹⁹⁶
4. Contractors (i.e., those with privity of contract with the owner).¹⁹⁷

192. La. R.S. 33:4766 (1988 & Supp. 1997).

193. See, for example, La. R.S. 13:2575(B)(2)(f) (Supp. 1997); and La. R.S. 37:701(I) (1988), which attempts to give engineers, architects, and surveyors a lien that is "superior to any lien, privilege, or mortgage subsequently recorded." This provision attempts to change the ranking provisions of Louisiana Revised Statutes 9:4821, although the statute also refers to Louisiana Revised Statutes 9:4821.

194. La. R.S. 9:4821(1) (Supp. 1997).

195. La. R.S. 9:4821(2) (1991). Note that it matters not whether the laborer had a direct contract with the owner or no privity contract with the owner; all laborers rank in category 2.

196. La. R.S. 9:4821(4) (1991).

197. La. R.S. 9:4821(5) (1991).

This example does not mention in which order Laborer L, Contractor C, and Subcontractor S timely preserve their lien rights, because the time of filing is irrelevant to their ranking, as long as all of the lien claims are timely. Therefore, it would not matter whether Laborer L filed on December 15th, Contractor C on December 16th, and Subcontractor S on December 17th or in any other order. The Private Works Act states that as long as a laborer timely preserves his or her lien, it outranks contractors and subcontractors.¹⁹⁸

Example Eleven. Assume the same facts as in Example Ten, except now an ordinary, residential real estate mortgage to secure lending contemporaneous with the advancement of funds took place on January 1st of the same year. On the date the funds were advanced, the note for the funds was signed, the mortgage was executed to secure the note, the note was paraphrased for identification with the act of mortgage, and the mortgage was filed properly in the mortgage records with the proper property identification.

Now the rank becomes:

1. Ad valorem taxes¹⁹⁹
2. Laborers²⁰⁰
3. The residential mortgage.²⁰¹ The residential mortgage ranks third because it is effective prior to February 1st, the earliest date upon which the notice of contract was filed or work began and therefore was effective "as to third persons before the privileges granted by this Part are effective."
4. Subcontractor²⁰²
5. Contractor²⁰³

Example Twelve. The same facts as in Example Eleven except that, in addition to the residential mortgage, the owner executes a collateral mortgage package on January 15th of the same year. The collateral mortgage package consists of a collateral mortgage note paraphrased for identification with an act of collateral mortgage, a collateral mortgage, and a U.C.C. 9 security agreement.²⁰⁴ While the lender obtains

198. La. R.S. 9:4821(1) (Supp. 1997).

199. *Id.*

200. La. R.S. 9:4821(2) (1991).

201. La. R.S. 9:4821(3) (1991).

202. La. R.S. 9:4821(4) (1991).

203. La. R.S. 9:4821(5) (1991).

204. La. R.S. 9:5550, 5551 (1991 & Supp. 1997). For discussion of perfection of a collateral mortgage after January 1, 1990, the advent of Louisiana's adoption of Chapter 9 of the Commercial Laws, Louisiana Revised Statutes 9:10-101 *et seq.*, see Michael H. Rubin and Stephen P. Strohschein, *Recent Developments in the Law 1993-1994: A Faculty Symposium*, 55 La. L. Rev. 611 (1995); Michael H. Rubin et al., *Is the Collateral Mortgage Obsolete?*, 41 La. B.J. 529 (1994); Michael H. Rubin & R. Marshall Grodner, *Recent Developments in the Law: Security Devices*, 53 La. L. Rev.

possession of the collateral mortgage note and the collateral mortgage on January 15th and in fact advances funds on that date, the lender does not get around to filing the collateral mortgage until February 15th:

Now, the rank is as follows:

1. Ad valorem taxes²⁰⁵
2. Laborers²⁰⁶
3. The residential mortgage²⁰⁷
4. Subcontractor²⁰⁸
5. Contractor²⁰⁹
6. Collateral mortgage.²¹⁰ The reason the collateral mortgage ranks last is that a collateral mortgage, to be effective against third persons, requires a perfection of a security interest in a collateral mortgage note and filing of the collateral mortgage.²¹¹ Because a collateral mortgage does not become effective as to the world until the earliest concurrence of these two factors, in this case February 15th, the collateral mortgage is not effective before the privilege granted by the act is effective,²¹² and thus falls to the last rank.²¹³

Example Thirteen. Same facts as in Example Twelve above, except here, the holder of the collateral mortgage files on the same day the collateral mortgage is filed (February 15th) a "no work" affidavit dated and signed February 15th indicating that a certified engineer has looked at the property and has determined that there is no work being performed.²¹⁴ Assume further that there has been no notice of contract filed but rather only physical "work" that began on February 1st, and that the holder of the collateral mortgage does not know that the "no work" affidavit is false and is not committing "actual fraud"²¹⁵ in relying on the affidavit.

Now, the rank would be:

969 (1993); David S. Willenzik, *Future Advance Priority Rights of Louisiana Collateral Mortgages: Legislative Revisions, New Rules, and a Modern Alternative*, 55 La. L. Rev. 1 (1994).

205. La. R.S. 9:4821(1) (Supp. 1997).

206. La. R.S. 9:4821(2) (1991).

207. La. R.S. 9:4821(3) (1991).

208. La. R.S. 9:4821(4) (1991).

209. La. R.S. 9:4821(5) (1991).

210. La. R.S. 9:4821(6) (1991).

211. La. R.S. 9:5551 (1991 & Supp. 1997). See the law review articles cited at *supra* note 204.

212. La. R.S. 9:4821(3) (1991).

213. Cf. under the prior version of the Act, *American Bank & Trust Co. v. F & W Constr.*, 357 So. 2d 1226 (La. App. 2d Cir.), writ denied, 359 So. 2d 1306 (1978).

214. La. R.S. 9:4820(C) (Supp. 1997).

215. La. R.S. 9:4820(C) (Supp. 1997).

1. Ad valorem taxes²¹⁶
2. Laborers²¹⁷
3. The residential mortgage²¹⁸
4. Collateral mortgage.²¹⁹ The reason the collateral mortgage ranks next is that it clearly is inferior in time to the residential mortgage and cannot outrank the residential mortgage. The residential mortgage was effective on January 1st as to third persons and the collateral mortgage was effective on February 15th. The collateral mortgage holder, however, can rely upon the no-work affidavit to outrank all lienholders other than laborers and thus the no-work affidavit protects the collateral mortgage holder. The certified engineer who gave the incorrect affidavit is liable to all of the lien claimants whose rights are affected and who may not collect because of the now-increased rank of the collateral mortgage holder.
5. Subcontractor²²⁰
6. Contractor²²¹

XVII. EXTINGUISHMENT OF CLAIMS OR PRIVILEGES

The holder of a Private Works Act lien can lose that right in a number of ways. Note that this discussion refers to the extinguishment of the privilege and is separate from the lien claimants' rights to sue the surety or those with whom the lien claimant has contractual privity (see the discussion above). A lien claimant can lose the privilege if it does not timely file its statement of lien within the thirty, sixty, or seventy-day period, whichever is applicable to it under Louisiana Revised Statutes 9:4822.

Even if the lien claimant has timely filed a notice of lien under Louisiana Revised Statutes 9:4822, the lien claimant nonetheless will lose the lien if it does not file a suit against the owner to enforce it "within one year after the expiration of the time given by La. R.S. 9:4822 for the filing of the statement of lien or privilege." Note that the one-year period expires not one year from the date the lien was filed, but rather one year from the date any person of that lien claimant's rank could have filed under Louisiana Revised Statutes 9:4822.

Example Fourteen. A notice of contract is timely filed before work begins and a notice of termination is filed on January 1st. Assume that Laborer L files its notice of lien rights on January 15th, Subcontractor

216. La. R.S. 9:4821(1) (Supp. 1997).
217. La. R.S. 9:4821(2) (1991).
218. La. R.S. 9:4821(3) (1991).
219. La. R.S. 9:4820(C) (Supp. 1997).
220. La. R.S. 9:4821(4) (1991).
221. La. R.S. 9:4821(5) (1991).

S files its notice of lien rights on January 20th, and the General Contractor filed its notice of lien rights on February 3rd. All notices of lien rights are timely.²²²

Both Laborer L and Subcontractor S must bring a lawsuit to enforce each of their claims prior to January 31st of the following year. Note that the time in which to file the lawsuit is one year from the date any lien claimant in the category of the laborers' lien or the subcontractors' lien can bring the suit (i.e., thirty days from the filing of the notice of termination).²²³

Of course, if the lien claimant files a lien but is later paid, the lien is extinguished because "the obligation which it secures is extinguished."²²⁴ The obligation which the lien secures is the amount owed to the lien claimant, and payment of the principal obligation extinguishes the accessory obligation.²²⁵

Although a lien claimant may lose the privilege, the lien claimant may have rights against the surety (see the discussion at Section XIV above) and even against the contractor.²²⁶ Thus, lien claimants who wish to preserve not only the lien rights but also their rights to sue the contractor and the surety should deliver copies of their claim to the contractor and surety as soon as possible.

While the liens against the property are lost in the context set forth above, the liens also may be removed from the property in other ways; however, these other mechanisms do not deprive the lien claimants of their rights to collect monies but rather may limit the source of the funds from which they can seek collection. Liens can be extinguished if the owner files a 125% bond under Louisiana Revised Statutes 9:4835 or if the owner invokes a concursus proceeding under Louisiana Revised Statutes 9:4841.

The concursus under the Act can be invoked only if the job was properly bonded at the beginning of the project, when a timely-filed notice of contract was filed.

222. Laborer L and Subcontractor S's notices of lien rights are timely because they were filed within thirty days of the notice of termination being recorded. La. R.S. 9:4822(A) (1991). The General Contractor was timely filed because a general contractor has sixty days from the date of filing of the notice of termination to file a statement of lien claim when a timely notice of contract is of record. La. R.S. 9:4822(B) (1991).

223. Louisiana Revised Statutes 9:4822(A) provides for the thirty day filing of the statement of lien claims; Louisiana Revised Statutes 9:4823(A)(2) states that a lawsuit is necessary to preserve the claim and the timely filing is "within one year after the expiration of the time given by R.S. 9:4822 for the filing of statement of claim or privilege to preserve it." The cautious lienholder, however, will institute the suit within one year from the date of the lien filing, even though the statute allows for a longer period of time. Also note, in this example, that the General Contractor will have one year plus sixty days from January 1st to file its lien. Note, however, the trap for the unwary involving the notice of *lis pendens*. See *infra* Section XX.

224. La. R.S. 9:4823 (1991).

225. La. Civ. Code arts. 1888-1892.

226. La. R.S. 9:4822(J) (1991).

Thus, a lien claimant on a properly and timely-bonded job may find that its claims have been removed from the property and that it is relegated to a claim against the bonding company and those with whom the claimant has contractual privity. The amount of the bond will always be less than the amount of the contract with the general contractor.²²⁷ On the other hand, if a timely bond was not put up at the inception of the job, then the lien claimant has a chance of collecting 100% of the amount of the 125% bond under Louisiana Revised Statutes 9:4835, because now the bond must cover all lien amounts that are timely asserted (see the discussion above).

XVIII. CONCURSUS PROCEEDINGS

If a notice of contract and a bond have been timely recorded, the owner may remove liens from the property and avoid personal liability by invoking a concursus proceeding.²²⁸ A concursus proceeding under Louisiana law is equivalent to federal interpleader—it is a way to force competing claimants into court to determine their rights.²²⁹

Typically the owner is the party who invokes the concursus proceeding, because the owner is interested in both eliminating personal liability²³⁰ and removing the liens from the property. When the owner invokes a concursus proceeding, the owner names as defendant all of the lien claimants and further requires that the surety deposit into the registry of court the full amount of the bond.²³¹

The owner may, but is not required to, deposit any monies that have not yet been paid to the contractor (for example, amounts withheld under a "retainage" clause in a contract).²³² When the owner invokes a concursus proceeding, the owner may bring a rule to "order the other parties to the action to show cause why a judgment should not be entered discharging and cancelling their claims and privileges or discharging the owner from further responsibility to them."²³³ The owner's rule is to be tried separately and is limited solely to four matters: whether the proper amount has been deposited into the registry of court; whether the liens and privileges have been preserved properly; whether the notice of

227. La. R.S. 9:4812 (1991).

228. La. R.S. 9:4841 (1991).

229. The Louisiana procedural rules on concursus proceedings are found in the Louisiana Code of Civil Procedure articles 4651-4662. The Louisiana Law Institute's "Introduction" to this Section, in the Official Law Institute Comments, discusses in detail the history of concursus proceedings from Romano-Canonical law until 1960, when the Official Comments were written. Interpleader actions under federal law are controlled by Federal Rule of Procedure 22 and 28 U.S.C. § 2361 (1994).

230. La. R.S. 9:4841(D) (1991).

231. La. R.S. 9:4841(C), (E) (1991).

232. La. R.S. 9:4841(B) (1991).

233. La. R.S. 9:4841(C) (1991).

contract and bond were properly and timely filed; and whether the bond complies with the Act.²³⁴

Although typically an owner invokes a concursus proceeding, the owner is not the only person who can bring such an action. A surety may invoke a concursus proceeding and, if so, is required to put into the registry of court the lesser of the bond amount or 125% of the timely-filed lien claims.²³⁵

If neither the owner nor the surety invokes the concursus proceeding, it may be started by "any other interested party."²³⁶ A mortgage holder would clearly fit within this definition.

The concursus proceeding allows the court to order the notice of liens cancelled, thereby freeing the property from these encumbrances. The court also may order the owner relieved of personal liability to those with whom he has no privity of contract.²³⁷ It is through the concursus proceeding that the owner eliminates personal liability to those with whom there is no privity of contract; it is the only mechanism for the owner to achieve this relief.

A lien claimant may invoke a concursus proceeding; the lien claimant's right, however, is limited by time—the lien claimant may not start a concursus proceeding less than ninety (90) days from the expiration of the time given under the statute for all lien holders to file statements of their claim.²³⁸

Attorney's fees are allowed in the concursus proceeding under certain limitations. Attorney's fees are permitted to an owner who invokes a concursus proceeding and may be paid out of the funds deposited into the registry of court "but only after satisfaction of all valid claims and privileges."²³⁹ The lien claimant who invokes a concursus proceeding likewise is entitled to reasonable attorney's fees.²⁴⁰ In addition to the court's ability to extract the attorney's fees from the funds on deposit, the contractor and surety may be personally liable for the reasonable attorney's fees of the owner or lien claimant who invokes a concursus proceeding.²⁴¹ No attorney's fees are provided for a surety who invokes a concursus proceeding or for a concursus action started by "any other interested party."

XIX. THE 125% BOND

In a number of instances an owner is not entitled to invoke a concursus proceeding and will not be relieved of personal liability. This can occur when: work begins before a notice of contract is timely filed; or when a timely notice

234. La. R.S. 9:4841(C) (1991).

235. La. R.S. 9:4841(E) (1991).

236. La. R.S. 9:4841(A) (1991).

237. La. R.S. 9:4841(D) (1991).

238. La. R.S. 9:4841(F) (1991).

239. La. R.S. 9:4841(F) (1991).

240. *Id.*

241. *Id.*

of contract is filed but the bond is improper; or when a notice of contract and bond are filed but are filed untimely (that is, after "work" begins). In all of these instances the liens remain against the property and the owner has personal liability to those with whom he has no privity of contract. The statute, however, does provide a mechanism for the liens to be removed from the property even in these situations. Louisiana Revised Statutes 9:4835 allows the owner or "any interested party" to deposit "with the recorder of mortgages" a bond equal to "125% of the principal amount" of the claims asserted. For example, if the contract amount was \$100,000 and the contractor had been paid \$90,000, and if liens were asserted against the property in the amount of \$80,000, the only way under this provision for the owner to remove the liens is to put up a bond for 125% of the lien amounts (i.e., 125% of \$80,000 equals \$100,000; note that the amount required bears no relationship to the contract price or the amounts already paid to the general contractor—the amount is tied to the principal amount of the lien claims).

When the bond has been placed of record, the recorder of mortgages cancels the notice of lien and any notice of *lis pendens* that has been filed.²⁴² The bond is not recorded but is retained by the recorder of mortgages "as a part of his records."²⁴³ If the 125% bond has been filed under this provision, the following parties must be given notice by certified mail: the owner of the immovable; the holder(s) of the lien; and the contractor.²⁴⁴

XX. LIS PENDENS

A trap for the unwary exists in the requirement of the filing of a notice of *lis pendens* by lien claimants. Louisiana Revised Statutes 9:4822 concerns "preservations of claims and privileges"; it is silent on a notice of *lis pendens*. Louisiana Revised Statutes 9:4823 which discusses "extinguishment of claims and privileges" also is silent on any requirement of a notice of *lis pendens*. The *lis pendens* requirement is found in Louisiana Revised Statutes 9:4833(F); it mandates that a notice of *lis pendens* be filed "within one year after the date of filing of the claim or privilege," although lien claimants might have longer to bring their lawsuits.²⁴⁵ An example will illustrate a trap for the unwary and will use the same general situation as in Example Three:

242. La. R.S. 9:4835(B) (1991).

243. *Id.*

244. La. R.S. 9:4835(C) (1991).

245. La. R.S. 9:4833(F) (1991) provides:

The effect of filing for recordation of a statement of claim or privilege and the privilege preserved by it shall cease as to third persons unless a notice of *lis pendens* identifying the suit required to be filed by R.S. 9:4823 is filed within one year after the date of filing the claim or privilege. In addition to the requirements of Article 3752 of the Code of Civil Procedure, the notice of *lis pendens* shall contain a reference to the notice of contract, if one is filed, or a reference to the recorded statement of claim or privilege if a notice of contract is not filed.

Example Fifteen. Assume the following situation:

1. January 1, 1998—Owner and General Contractor enter into a notice of contract which is timely filed (i.e., R.S. 9:4820 "work" has not begun).
2. January 15, 1998—R.S. 9:4820 "work" begins on the property.
3. March 1, 1998—Subcontractor A does work on the property.
4. April 1, 1998—Subcontractor B does work on the property.
5. May 1, 1998—Subcontractor C does work on the property.
6. July 1, 1998—A notice of substantial completion is filed.
7. July 2, 1998—Subcontractor A files notice of lien rights.
8. July 5, 1998—Subcontractor B files notice of lien rights.
9. July 30, 1998—Subcontractor C files notice of lien rights.

All of the subcontractors have timely filed their liens; they have filed within thirty (30) days of the notice of substantial completion.²⁴⁶ Subcontractors A, B, and C all have until July 31, 1999 to file a lawsuit on their respective lien, because a lawsuit must be brought "within one year after the expiration of the time given by R.S. 9:4822" for filing a statement of lien.²⁴⁷ Since the last date that a lien claimant could have filed was thirty (30) days after the notice of lien—July 31, 1998, each lien claimant would have until July 31, 1999 to file its lawsuit. Yet, the trap occurs because Louisiana Revised Statutes 9:4833 requires that the notice of *lis pendens* be filed not "within one year of the expiration of the time given by R.S. 9:4822" but rather "*within one year after the date of filing of the claim or privilege.*"²⁴⁸ This change was brought about by an amendment to Louisiana Revised Statutes 9:4833, Acts 1985, No. 711, section 1. Previously, the language of both 4833(F) and 4823(A)(2) were the same—the operative language was the "expiration of the time given" for filing. The alteration of the language of 4833(F) means that, under Example Fifteen, Subcontractor A must file a notice of *lis pendens* by July 2, 1999, Subcontractor B by July 5, 1999 and Subcontractor C by July 30, 1999. Since one cannot file a notice of *lis pendens* until a lawsuit has been filed, the result is that a lien claimant who wishes to preserve the lien must file the lawsuit and must file the notice of *lis pendens* within one year after filing the notice of lien, even though the lien claimant might have had longer to file the lawsuit under Louisiana Revised Statutes 9:4823(A)(2). Because privileges are *stricti juris* and are narrowly construed, this result creates a risk that a lien claimant who had otherwise timely filed suit nonetheless would be unable to assert the lien against the property when third persons are involved because of the lack of a timely filing of a notice of *lis pendens*.²⁴⁹

246. La. R.S. 9:4822(A) (1991).

247. La. R.S. 9:4823(A)(2) (1991).

248. La. R.S. 9:4833(F) (1991) (*emphasis added*).

249. See, for example, *Triangle Pacific Corp. v. National Bldg. & Contracting Co.*, 652 So. 2d 552 (La. App. 1st Cir. 1995). The court held that failure to record any notice of *lis pendens* meant

XXI. SUBROGATION

Because the ranking of claims under the Private Works Act consists of a combination of ranking by nature (for example, the laborer's lien ranks first, even if recorded last,²⁵⁰ and an architect's lien ranks after pre-existing mortgages, even if "work" begins before the mortgage is recorded),²⁵¹ and by time (for example, a mortgage recorded before "work" begins or before notice of contract is filed outranks the claims of a contractor or a supplier),²⁵² there is an understandable desire by lien claimants to find a way to change one's rank under the Private Works Act. If a claimant in a lower category of rank could elevate its claim by paying off one higher in rank, the result would alter the policy provisions of Louisiana Revised Statutes 9:4820, which controls rank.

In the seminal case of *Pringle-Associated Mortgage Corp. v. Eanes*,²⁵³ decided under the old version of the Private Works Act, a subcontractor filed a claim for amounts paid to the subcontractor's laborers; the subcontractor claimed that it could get the elevated status of a laborer's lien when ranked against the mortgage. After deciding the case initially in favor of the subcontractor, on rehearing the court reversed itself and held that the only person who could get the laborer's superior rank is a laborer. The subcontractor could not change its rank by obtaining conventional subrogation from its laborer or even by claiming legal subrogation: "To permit the subcontractors to invoke legal subrogation for the payment of their employees' wages would in effect award them a first ranking privilege for their own credit against the owner."²⁵⁴

The court's analysis was detailed and rested, in part, on the fact that the laborers had never filed their own liens. The decision was affected by the language of the old Private Works Act itself, which, like the new Private Works Act, makes a policy decision in favor of pre-existing mortgages that are of record before "work" begins or notice of contract is filed, subject only to the "by nature" ranking of ad valorem taxes and laborer's liens.²⁵⁵

that the lien was invalid against third parties, even if third parties might have had actual notice of the litigation and of the lien. *Id.* at 556.

250. La. R.S. 9:4821 (1991 & Supp. 1997).

251. See La. R.S. 9:4821(5) (1991); *G.R.W. Eng'rs, Inc. v. Elam*, 557 So. 2d 725 (La. App. 2d Cir. 1990).

252. La. R.S. 9:4820 (1991 & Supp. 1997).

253. 254 La. 705, 226 So. 2d 502 (La. 1969).

254. *Id.* at 741, 226 So. 2d at 515.

255. The *Pringle* court stated:

The clash of economic interests in this litigation has not escaped our attention. When asserted under the present circumstances, a laborers' privilege protects no laborers. They receive their wages in full as they accrue. On the other hand, the construction lender may be deprived of reasonable security for money already advanced.

Our present holding converges with a salutary policy: the optimum protection of recorded mortgages from the intrusion of later claims, unrecorded when the funds are disbursed. Our holding safeguards the security of the recorded mortgage—a catalytic force in the state's economy.

A similar issue has arisen under the Louisiana Public Works Act, the statute that governs liens on construction projects by the state and political subdivisions.²⁵⁶ In a result that appears to be at odds with the *Pringle* decision, the Louisiana Supreme Court, in *Wilkin v. Dev Con Builders, Inc.*,²⁵⁷ held that a third party who had no privity with the owner could get a secured claim through conventional subrogation. The facts were that Wilkin agreed to lend money to Dev Con Builders, which was having financial difficulties. As Dev Con's suppliers were owed money, Wilkin would pay them and have each supplier execute a "subrogation of rights" document. When Dev Con was unable to repay Wilkin, Wilkin filed an affidavit of lien against the public project and sought to get repayment from the surety as well.

The Supreme Court held that the subrogation agreements allowed Wilkin to stand "in the shoes of Dev Con's suppliers" and "enforce the suppliers' subrogated rights."²⁵⁸ The majority opinion does not refer to the *Pringle* case, although the same issues—subrogation to the rights of a lien claimant (albeit under the Private Works Act rather than the Public Works Act)—were at issue. The result may well be that a different result applies under the Private Works Act (no subrogation to rank) than under the Public Works Act. It appears that amendments to the Public Works Act may have legislatively altered the holding in *Wilkin*.²⁵⁹

It is suggested that the better view under the Private Works Act is to hold the following:

1. A subcontractor who pays its laborers is entitled to file a lien for the amounts it is owed as a subcontractor (including the amounts paid for laborers' wages), but it must rank its lien as a subcontractor, not as a laborer. This is in line with the *Pringle* decision.
2. Once a lien has been filed, an inferior-ranking lien claimant could pay off a superior-ranking lien claimant and be subrogated to the superior rank but only for the amounts paid. For example, if a laborer has a \$100.00 lien claim and a subcontractor has a \$1,000.00 lien claim, once both have filed their liens the subcontractor can pay off the laborer

Id. at 743, 226 So. 2d at 516.

256. The Public Works Act is found at Louisiana Revised Statutes 38:2181-2319.10.

257. 561 So. 2d 66 (La. 1990).

258. *Wilkin*, 561 So. 2d at 72.

259. In *Wilkin* the subrogation agreements were signed in 1983, the liens were filed in 1984, and a lawsuit was filed on January 4, 1985. *Id.* at 68. Although the case was not decided by the Louisiana Supreme Court until 1990, the rules that controlled were obviously those in effect at the time the liens were filed. In 1985 substantial revisions were made to the Public Works Act by Acts 1985, No. 244, section 1. Among these changes was an alteration of Louisiana Revised Statutes 38:2242 to define "claimant" narrowly and to limit who can file liens to "claimants." La. R.S. 38:2242 (1989 & Supp. 1997). Thus, it is possible, under the post-1985 version of the Act, that a third party who does not fit the definition of a "claimant" could not be "subrogated" to the claimant's rights.

and could get subrogated to the laborer's \$100.00 claim but could not try to use the laborer's "rank" for the entire \$1100.00. This rationale is in accordance with Louisiana rules on subrogation by operation of law.²⁶⁰

XXII. RESIDENTIAL TRUTH IN CONSTRUCTION ACT

During the 1970s the legislature enacted the grandly-entitled "Residential Truth in Construction Act."²⁶¹ The intent behind the Act may well have been salutary—to inform a homeowner that those who work on immovable property could seize and sell the home unless there was a timely-recorded notice of contract and bond. Most homeowners may well be unaware that the roof repairman or plumber who does not get paid can file a lien against the house. The problem with the act is that the language of the notice which the homeowner receives is written in "legalese" and is close to being incomprehensible to laymen, or anyone who values clear, succinct language.²⁶² Further, if the

260. Louisiana Civil Code article 1829 states subrogation takes place by operation of law in favor of one "who pays another . . . whose right is preferred to his because of a privilege . . ." Louisiana law also provides that when subrogation takes place by operation of law, the "new obligee may recover from the obligor only to the extent of the performance rendered to the original obligee. The new obligee may not recover by invoking conventional subrogation." La. Civ. Code art. 1830.

261. La. R.S. 9:4851-4855 (1991), added by 1976 La. Acts No. 237, § 1.

262. The statutorily-required notice reads:

Notice of Lien Rights

Delivered this ____ day of ____, 19____, by _____, Contractor.

I, the undersigned owner of residential property located at _____ (street address) _____ in the city of _____, parish of _____, Louisiana, acknowledge that the above named contractor has delivered this notice to me, the receipt of which is accepted, signifying my understanding that said contractor is about to begin improving my residential property according to the terms and conditions of a contract, and that in accordance with the provisions of law in Part I of Chapter 2 of Code Title XXI of Title 9 of the Louisiana Revised Statutes of 1950, R.S. 9:4801, et seq.:

(1) A right to file a lien against my property and improvements is granted to every contractor, subcontractor, architect, engineer, surveyor, mechanic, cartman, truckman, workman, laborer, or furnisher of material, machinery or fixtures, who performs work or furnishes material for the improvement or repair of my property, for the payment in principal and interest of such work or labor performed, or the materials, machinery or fixtures furnished, and for the cost of recording such privilege.

(2) That when a contract is unwritten and/or unrecorded, or a bond is not required or is insufficient or unrecorded, or the surety therefor is not proper or solvent, I, as owner, shall be liable to such subcontractors, materialmen, suppliers or laborers for any unpaid amounts due them pursuant to their timely filed claims to the same extent as is the hereinabove designated contractor.

(3) That the lien rights granted herein can be enforced against my property even though the contractor has been paid in full if said contractor has not paid the persons who furnished the labor or materials for the improvement.

homeowner is not given the "notice of lien rights" required by the statute, lien claimants are unaffected; they may still file their liens with impunity.²⁶³ The only penalty for violation is against the contractor, who is liable for "damages and attorney's fees."²⁶⁴ Of course, the contractor is always liable to the owner if liens are filed; the only additional claim is for attorney's fees.²⁶⁵ A better approach, it is suggested, would be to both simplify the notice that must be given and to strengthen the damage provisions.²⁶⁶ If the legislature required that the following proposed "notice" be given to homeowners under the Residential Truth in Construction Act, it is submitted that homeowners would be better informed of their potential liabilities:

Notice: Work is being performed on your home. You may have a contract with one person or business, but that contractor may have contracts with others who will be working on your property. If the contractor does not pay in full everybody who works on your property, a lien can be filed against your home. The lien can be filed by anyone who is owed money by the contractor, by anyone who works on your house, or anyone who supplied materials to those who worked on your house. Your home can eventually be seized and sold to pay for the claim. Therefore, even if you have paid the contractor in full, there is a risk that a lien can be filed against your home, that a lawsuit can be brought against you personally, and that a suit to sell your house can be started by those who did not get paid.

The only way to avoid personal liability and liens is to have the contractor timely record a "notice of contract" in the parish mortgage records and put up a proper bond, which also should be attached to the contract and filed in the mortgage records.

(4) That I may require a written contract, to be recorded, and a bond with sufficient surety to be furnished and recorded by the contractor in an amount sufficient to cover the cost of such improvements, thereby relieving me, as owner, and my property, of liability for any unpaid sums remaining due and owing after completion to subcontractors, journeymen, cartmen, workmen, laborers, mechanics, furnishers of material or any other persons furnishing labor, skill, or material on the said work who record and serve their claims in accordance with the requirements of law.

I have read the above statement and fully understand its contents.

Date

Owner or Agent

La. R.S. 9:4853 (1991).

263. La. R.S. 9:4854 (1991).

264. La. R.S. 9:4855 (1991).

265. *Gaines v. Phills Constr. Co.*, 389 So. 2d 445 (La. App. 2d Cir. 1980), *writ denied*, 385 So. 2d 1363 (1981).

266. For example, in *E.D. Haber Heating and Air Conditioning, Inc. v. Koppenol*, 407 So. 2d 488 (La. App. 1st Cir. 1981), the court held that Residential Truth in Construction Act was not triggered unless the home was owner-occupied at the time the construction began.

XXIII. CONCLUSION

The Louisiana Private Works Act attempts to balance the interests of those who work on immovable property with the rights of owners and those who provide the financing for the acquisition of land or for construction on property. The overview contained in this article has not been intended to be a comprehensive recitation of every case decided under the Act, nor of an explanation of each and every subpart of each and every section of the Act. Rather, it is hoped that the explanations given, along with the examples, will provide guidance on the Act's intent and interpretation to laymen, lien claimants, contractors, lenders, law students, and practitioners.

