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Lien on LOWLA; It's a Privilege: Recent Revisions to the Louisiana Oil Well Lien Act

Patricia H. Chicoine*

I. LEGISLATIVE BACKGROUND

Effective August 15, 1995, the Louisiana Legislature adopted the Louisiana Oil Well Lien Act,¹ a dramatic revision of the state's oil, gas and water well privilege.² Among other results, the new legislation provides a statute that conforms with modern oil and gas operations and Louisiana conservation laws, and, as well, recognizes the effect of the varying working interests participating in the development of oil and gas properties.

A. Pre-Legislative Process

The legislative process that produced the new Act did not begin on the floor of the Louisiana House or Senate. Instead, the new Act began, like much Louisiana legislation, at the instance of the Louisiana Law Institute.

The Louisiana Law Institute is an "official advisory law revision commission, law reform agency and legal research agency of the State of Louisiana" that is charged with the task of continuously revising the laws of the state.³ Essentially, every section of the Civil Code and the Revised Statutes is periodically reviewed and, if necessary, amendments or revisions are recommended to the Louisiana Legislature by the Law Institute.

For purposes of drafting and proposing new legislation, the Law Institute works through its Council, which is an approximate fifty-sixty person group that meets monthly to review proposed legislation. This group is composed of members of the legislature, judiciary, trial attorneys, office practitioners, and law school

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1. La. R.S. 9:4861-9:4873 (Supp. 1997) (1995 La. Acts No. 962).

2. Although the new legislation was affectionately referred to by its drafters as "LOWLA," the statute will be referred to herein as the "new Act" or the "revised Act."

3. La. R.S. 24:201 (1989). Section 251 of Chapter 24 specifically charges the Institute with the "continuous revision" of the Louisiana Revised Statutes.

faculty. However, the Council itself does not devise the initial revisions. Instead, smaller committees are appointed, with committee members being selected based upon their unique familiarity with a particular area of the law. It is this committee that drafts the initial proposed legislation, which, ultimately, is reviewed by the Law Institute Council. If the Council deems it appropriate (and, typically, following its own revisions as to form and substance), it will recommend the proposed legislation to the Louisiana Legislature through a House or Senate sponsor.⁴

The LOWLA Committee was composed of six attorneys, who acted as a Subcommittee of the Institute's Security Devices Committee. Not coincidentally, the subcommittee was representative of the oil and gas industry: some of the committee's representatives represented the lessee's or operator's interest, while others represented the interests of service and supply companies or financial institutions.

B. Passage by the Legislature

The revised Act was passed by the Louisiana Legislature in June 1995, which finalized three years of work by the LOWLA Subcommittee toward developing a statute that recognizes and, hopefully, will correct certain inequities brought about by prior oil and gas lien law. In addition, the new Act generally updates the prior statute to be compatible with the ever changing character of oil and gas operations and ownership. Following the Law Institute Council's review and revision at its December 1994 meeting, the final version of the new Act was passed by both the Louisiana Senate and House without further revision. As indicated above, the new legislation, as Act 962 of 1995, became effective August 15, 1995.⁵

II. THE NEW ACT

A. Format

The statutes that preceded the current legislation have commonly been referred to, by published title and common usage, as oil and gas "lien" laws, notwithstanding that the term "privilege" is the more correct Louisiana terminology for the security interest created thereunder. Regardless, the trend continues as the current legislation has been referred to in the legislative text as the Louisiana Oil Well Lien Act, despite the fact that the text of the new Act refers to a "privilege."⁶

Despite that similarity, however, those familiar with the prior Oil, Gas and Water Wells lien statute⁷ will notice that the format of the new Act is vastly

4. Patricia H. Chicoine, *LOWLA: Louisiana Oil Well Lien Act - Recent Revisions*, 43d Institute on Mineral Law 2 (1996).

5. *Id.*

6. La. R.S. 9:4861-4873 (Supp. 1997).

7. La. R.S. 9:4861-9:4867 (1991), replaced by 1995 La. Acts No. 962.

different from the earlier legislation. The new structure conforms to recent dictates of the Louisiana Law Institute and, in that regard, closely resembles the Louisiana Private Works Act.⁸ In particular, as is the trend in modern statutory draftsmanship, the new Act includes a "Definitions" section to assist in the proper understanding of the new statute.⁹ Further, where the prior statute utilized a more narrative form in describing the scope and extent of the privilege, the new Act more often makes use of subsections and lists, which more readily draw the reader's eye to the particular provisions.

B. Overview of Significant Changes from Prior Law

The new Act contains many revisions to prior statutory language; however, the significant changes were made in four general conceptual areas of the statute.

First, an attempt was made to keep the activities that give rise to the lien closer to the location of the actual oil and gas operations. For example, claims by furnishers of furnishers and suppliers of suppliers¹⁰ are now limited *unless* such claimants fall within the statute's definition of "contractor"¹¹ and their work is performed or their supplies are furnished to the "well site" as defined in the Act.¹²

Second, the property that is subject to the lien has been expanded under certain circumstances and made more restrictive in others. The liability of a non-participating working interest owner in unit operations is now limited to his operating interest (and other described property) located within the unit upon which the operations giving rise to the lien occur.¹³ The participating lessee, however, enjoys no such limitation. Also, in response to the outcry of rig owners and equipment and supply companies, the lien created by the statute only attaches to a rig located on a well site *if* it is owned by the operator or by a contractor whose actions gave rise to that lien. The new Act, in effect, overrules the results reached by the courts in *Ogden Oil Co. v. Servco*¹⁴ and *Ogden Oil Co. v. Venture Oil Corp.*¹⁵ In fairness to the *Ogden* courts, however, their decisions appear to have been correct interpretations of Louisiana law as it stood in the years the decisions were rendered.¹⁶

8. La. R.S. 9:4801-4855 (1991 and Supp. 1997).

9. La. R.S. 9:4861(1)-(12) (Supp. 1997).

10. That is, those who furnish or supply materials or equipment, often from a remote site, to those who are the ultimate furnishers and suppliers of materials and equipment to the actual well site.

11. La. R.S. 9:4861(10) (Supp. 1997).

12. La. R.S. 9:4861(12) (Supp. 1997).

13. La. R.S. 9:4863(B) (Supp. 1997).

14. 611 F. Supp. 572 (M.D. La. 1985) (privilege attached to workover rig moved to well site three months after lien claimant last supplied materials to such site).

15. 490 So. 2d 725 (La. App. 3d Cir. 1986) (privilege filed by unpaid workover rig owner attached to workover rig owned by contractor subsequently retained to provide services to same well).

16. Statutes in place during the years affected by the *Ogden* courts stated that the claimant had "a privilege . . . on all drilling rigs, standard rigs . . . attached or located on the lease." *See, e.g.*, La. R.S.9:4861(A) (1991).

The third substantive area of change deals with the requirement of notice. Notice provisions were included in an effort to reduce the number of instances where operators and contractors have to pay twice for services rendered in oil and gas operations. Under the new Act, a claimant is required to give the operator notice within 180 days of the last service rendered, or else suffer the loss of lien rights as to all property, except under certain limited and specified conditions.¹⁷

The fourth conceptual area of change focuses upon the time the privilege will be extinguished. Previously, the privilege was extinguished as to all parties if a statement of privilege was not filed before 180 days from the date of last service or provision.¹⁸ Under the new Act, however, the privilege continues—even absent filing a statement of privilege—between those in direct privity or where a direct obligation is otherwise established between the parties.¹⁹ This result is consistent with established Louisiana law stating that no privilege shall be created by contract between parties absent a statutory basis therefor.²⁰

C. Structure and Analysis of the 1995 Revision to the Louisiana Oil Well Lien Act

1. Defining the Scope and Extent of the Privilege (Section 9:4861)

The definitional section of the new Act²¹ is essential to a proper understanding of the statute's scope and application; in fact, the definitions, in most respects, define and limit the rights granted under the statute. Under prior lien statutes, terms were not defined; thus, persons or entities seeking the benefits of the law were forced to rely upon general industry usage and to hope that the courts' interpretations would be agreeable. In contrast, all of the new Act's sections following the definitions are totally dependent upon a clear understanding of the distinct definitions; thus, it is anticipated that practitioners will be constantly referring to the definitions as the further provisions of the new Act are applied. In an effort to emphasize the importance of the definitional section toward understanding the new Act's procedural requirements and enforcement, the next several pages of this article are dedicated to restating and analyzing the definitions.

17. La. R.S. 9:4867 (Supp. 1997).

18. See La. R.S. 9:4862 (1991) pursuant to 1986 La. Acts No. 191; see also *Compadres Inc. v. Johnson Oil & Gas Corp.*, 547 So. 2d 382, 387 (La. App. 3d Cir. 1989); *Hawn Tool Co. v. Crystal Oil Co.*, 514 So. 2d 636, 638 (La. App. 2d Cir. 1987); *Genina Marine Serv., Inc. v. ARCO Oil & Gas Co.*, 499 So. 2d 257, 261 (La. App. 1st Cir. 1968).

19. La. R.S. 9:4865 (Supp. 1997) limits cessation of the privilege to "third persons," defined at La. R.S. 9:4861(11) (Supp. 1997).

20. *Blasingame v. Anderson*, 236 La. 505, 519, 108 So. 2d 105, 110 (La. 1959); *Capillon v. Chambliss*, 211 La. 1, 15, 29 So. 2d 171, 175 (La. 1946).

21. La. R.S. 9:4861(1)-(12) (Supp. 1997).

a. Claimant

Under the new Act, a "claimant" is defined as "a person who is owed an obligation secured by the privilege established."²² This definition eliminates the former distinction between a laborer and those providing materials or furnishing services in connection with the drilling or operation of a well.²³ Because all privileges now rank equally (except for the contractor's privilege, which is inferior in rank to the privilege granted to the contractor's subcontractors),²⁴ the distinction between laborers and suppliers or furnishers of materials and services is no longer necessary.

b. Hydrocarbons

"Hydrocarbons" are defined in the new Act to include not only "oil and gas occurring naturally in the earth," but also "any" other valuable liquid or gaseous substance found and produced in association with them.²⁵ This definition is likely to be well accepted in the industry and should pose no significant departure from past usage or interpretation.

c. Well

Under the definition of "well,"²⁶ the privilege is now limited to operations essentially associated with oil or gas wells. It includes, however, operations related to wells drilled for injection and disposal purposes, provided such operations are associated with the exploration and production of hydrocarbons. In contrast to prior statutes, the drilling of water wells has been excluded (notwithstanding that the 1996 edition of the Louisiana Civil Code still entitles the new Act "Oil, Gas and Water Wells"²⁷), *except* those drilled for use in the operation of a well intended to explore for oil and gas. The driller of a water well, however, still has a lien remedy under the Louisiana Private Works Act.²⁸

d. Operations

The definition of "operations" has been drafted broadly and includes all typical well site activities: drilling, completing, testing, producing and reworking.²⁹ Work associated with the abandonment of wells is specifically

22. La. R.S. 9:4861(1) (Supp. 1997).

23. La. R.S. 9:4861 (1991).

24. La. R.S. 9:4870(A) (Supp. 1997).

25. La. R.S. 9:4861(2) (Supp. 1997).

26. La. R.S. 9:4861(3) (Supp. 1997).

27. Louisiana Civil Code 1073 (Yiannopoulos ed., 1996).

28. La. R.S. 9:4801-4855 (1991 and Supp. 1997).

29. La. R.S. 9:4861(4)(a) (Supp. 1997).

included in the definition of "operations," as is work associated with the treatment or disposal of substances produced from the well or associated with secondary and tertiary production methods.³⁰

In a departure from the prior statute,³¹ however, (and in contrast to the mineral lien law of at least one other oil and gas producing state³²) "operations" do *not* include activities associated with the transportation, handling, processing or treating of production (either oil or gas) after it leaves the leasehold tanks or the transmission lines for transportation away from the well site.³³ Further, although "well site"³⁴ is not necessarily limited to the physical location of the well on which the work giving rise to the privilege is conducted, the new Act attempts to limit the scope of the privilege to persons who clearly provide work associated with the drilling or production of the well. The transportation and handling of hydrocarbons beyond the well site is beyond the scope of the statute's purview. Again, remedies under the Louisiana Private Works Act³⁵ should be available to such transporters and handlers.

Likewise, under the new Act, work associated with the operation or construction of pipelines has been eliminated. The new statute returns the law to the result reached in *McGee v. Missouri Valley Dredging Co.*³⁶ in which a surveyor who surveyed a river crossing for the construction of two natural gas transmission pipelines was held not to have a privilege under the prior law.

Arguably, a significant change from prior law is the requirement that the work giving rise to the privilege be physically conducted "on a well site."³⁷ Claimants who perform work away from the well site or deliver goods and services to locations remote from the well site may not be afforded the protection of this statute. This approach, perhaps, brings full circle the intent of drafters of the first amendment to the original oil well lien statute when, in 1928, the scope of the law was expanded to include operations and drilling on the well site.³⁸ Consistent with prior law, operations need not result in a producing well.³⁹

30. *Id.*

31. La. R.S. 9:4861 (1991).

32. The applicable Texas statute includes the operation, maintenance and repair of an oil or gas pipeline in the definition of "mineral activities." Tex. Prop. Code Ann. § 56.001(1) (West 1995). Likewise, a pipeline may be the subject of the lien in Texas. Tex. Prop. Code Ann. § 56.003(a)(2) (West 1995).

33. La. R.S. 9:4861(4)(b) (Supp. 1997).

34. La. R.S. 9:4861(12) (Supp. 1997).

35. La. R.S. 9:4801-4855 (1991 and Supp. 1997).

36. 182 So. 2d 764 (La. App. 1st Cir. 1966).

37. La. R.S. 9:4861(4)(a) (Supp. 1997).

38. 1928 La. Acts No. 171.

39. See Thomas H. Harrell, *The Oil and Gas Well Lien Statute—Annotated*, 35th Institute on Mineral Law 94 (1988).

e. Operating Interest

"Operating interest" is defined as "a mineral lease or sublease of a mineral lease, or an interest in a lease or sublease that gives the lessee, either singly or in association with others, the right to conduct the operations giving rise to the claimant's privilege."⁴⁰ If, before the claimant's privilege is established, the owner of a mineral lease or sublease, or an interest in the lease or sublease, has divested himself of the right to conduct operations by assignment, sublease or other form of mineral right, then such owner no longer owns an "operating interest."⁴¹ Further, a farmout or farmin neither creates an operating interest in the farmee, nor divests the operating interest of the farmor until the sublease or transfer contemplated by the farmout or farmin is made.⁴² Thus, the privilege provided by the statute will attach to the farmor's entire operating interest, and not the more limited interest of the farmee, until the assignment contemplated under the farmout agreement is made. Until such time, the farmee is a "contractor"⁴³ of the lessee/farmor.

Thus, the definition of "operating interest"⁴⁴ codifies the results reached in *JHJ Ltd. I v. Chevron U.S.A., Inc.*⁴⁵ and *Lor, Inc. v. Martin Exploration Co.*⁴⁶ In those cases, the claimants were held to have a lien on the whole of the original lease when the privilege resulted from operations conducted on a portion of the lease by virtue of a farmout agreement. The reasoning of the courts, now codified in the new Act, is that no contractual relationship existed between the lessor and the farmee until the farmee had completed the specified operations and earned its interest; thus, no sublease was created until the occurrence of that event. Consequently, the privilege was held to attach to the whole of the original lease.⁴⁷ Conversely, the result in *J.S. Abercrombie v. Lehulu Oil Co.*⁴⁸ is also codified. In *Abercrombie*, the Louisiana Supreme Court held that a privilege affected only the interest of a sublessee where the sublease had been properly assigned before the oil and gas privilege attached.⁴⁹

f. Lessee

A "lessee" is defined as "a person who owns an operating interest."⁵⁰ Thus, this definition must be read in tandem with the definition of "operating

40. La. R.S. 9:4861(5)(a) (Supp. 1997).

41. La. R.S. 9:4861(5)(b) (Supp. 1997).

42. La. R.S. 9:4861(5)(c) (Supp. 1997).

43. La. R.S. 9:4861(10) (Supp. 1997).

44. La. R.S. 9:4861(5) (Supp. 1997).

45. 617 F. Supp. 729 (M.D. La. 1985).

46. 489 So. 2d 1326 (La. App. 1st Cir.), writ denied, 493 So. 2d 1217 (1986).

47. *JHJ Ltd.*, 617 F. Supp. at 734; *Lor*, 489 So. 2d at 1332.

48. 181 La. 644, 160 So. 126 (La. 1935).

49. *Id.* at 649, 160 So. at 128.

50. La. R.S. 9:4861(6) (Supp. 1997).

interest."⁵¹ In addition, the definitions of "operator"⁵² (who must be a lessee) and "contractor"⁵³ (who cannot be a lessee) are important to a proper understanding of whose interest can be encumbered under the new Act. As discussed hereafter, the definitions of "participating lessee"⁵⁴ and "non-participating lessee"⁵⁵ impose further restrictions upon the identification of a lessee for purposes of identifying a privilege under the new Act.

g. Operator

An "operator" is defined as "a lessee who is personally bound by contract to the claimant or to a contractor from whom the claimant's activities giving rise to the privilege emanate."⁵⁶ Since an operator must be a lessee, it follows that an operator can *never* be a contractor. That being the case, the new Act, by combination of the definitions of "operator"⁵⁷ and "contractor,"⁵⁸ effectively eliminates that lien typically referred to in the industry as an "operator's lien," which was previously accorded an operator/lessee against operating interests of non-operating co-lessees who fail to pay their share of operating costs.⁵⁹ Likewise, a non-operating lessee cannot claim a privilege under the new Act against an operator/lessee for obligations owed, since such non-operator does not meet the definitional requirement of a "contractor."⁶⁰ In contrast, neighboring Texas has long been unsettled as to whether an operator is entitled to statutory protection under its mineral lien statute.⁶¹ However, a Texas operator may enforce a contractual lien under a joint operating agreement against its indebted non-operators,⁶² and may make the lien effective against third party lien claimants or purchasers of production by having the JOA acknowledged and recorded in the proper county.⁶³

51. La. R.S. 9:4861(5) (Supp. 1997).

52. La. R.S. 9:4861(7) (Supp. 1997).

53. La. R.S. 9:4861(10) (Supp. 1997).

54. La. R.S. 9:4861(8) (Supp. 1997).

55. La. R.S. 9:4861(9) (Supp. 1997).

56. La. R.S. 9:4861(7) (Supp. 1997).

57. *Id.*

58. La. R.S. 9:4861(10) (Supp. 1997).

59. *See e.g.*, *Blasingame v. Anderson*, 236 La. 505, 519, 108 So. 2d 105, 109 (La. 1959); *Compadres, Inc. v. Johnson Oil and Gas Corp.*, 547 So. 2d 382, 386 (La. App. 3d Cir. 1989); *Kenmore Oil Co. v. Delacroix*, 316 So. 2d 468, 469 (La. App. 1st Cir. 1975).

60. La. R.S. 9:4861(10) (Supp. 1997).

61. Tex. Prop. Code Ann. §§ 56.001 (West 1995); *see Energy Fund of America, Inc. v. G.E.T. Serv. Co.*, 610 S.W.2d 833 (Tex. Ct. App. 1980), *rev'd on other grounds sub nom. Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184 (Tex. 1981).

62. *Drake v. McGalin*, 626 S.W.2d 786 (Tex. Ct. App. 1981).

63. S. Rand Stinnett, *Contractual and Statutory Liens in the Oil Patch*, *Suing, Defending & Negotiating with Oil & Gas Producers*, Professional Development Program D-29 (1985).

The operator's lien remains intact under the new Act, however, for so-called "turnkey" operators⁶⁴ or other contractors who operate properties for a fee while owning no interest in the leasehold or production derived therefrom. In that case, the person or entity conducting operations still qualifies as a "contractor"⁶⁵ under the statute and will have the same lien rights as any other supplier of labor or materials associated with the drilling or operation of an oil and gas well.

h. Participating Lessee; Non-Participating Lessee

A "participating lessee" and a "non-participating lessee" are distinctly defined under the new Act.⁶⁶ Under prior law, questions concerning the reach of the privilege as to the interest of participating and non-participating working interest owners were largely ignored and left up to the courts to answer. Through its definitions, the new Act specifically describes the liabilities of those parties for unit operations giving rise to claims for which a privilege can be asserted. Likewise, since oil and gas operations are rarely conducted by one company or individual, the new Act accounts for the liabilities of both participating and non-participating working interest owners involved in both voluntary and involuntary unit operations. A non-participating lessee's in rem liability⁶⁷ for claims of privilege arising out of unit operations is limited to the unit boundaries; thus, the privilege will not extend to the non-participating lessee's interest in other units in which the lease may participate or in other wells that may be located on the lease.⁶⁸ In contrast, the participating lessee's interest in such other units and lease wells will remain subject to the privilege granted by the new Act.

i. Contractor

As indicated above, a "contractor" cannot be a lessee; thus, the traditional operator/lessee no longer qualifies as a "contractor."⁶⁹ Any number of subcontractors, however, may qualify as a contractor, *but only if* such persons or entities have contracted to perform "operations,"⁷⁰ which, by definition, must occur "on a well site."⁷¹ As a result, certain persons or entities who qualified as contractors under prior statutes may not enjoy a privilege under the new Act if their services or equipment were provided at a location remote from the well site.

64. 8 Howard R. Williams & Charles J. Meyers, *Oil & Gas Law* 1163 (1995).

65. La. R.S. 9:4861(10) (Supp. 1997).

66. La. R.S. 9:4861(8)-(9) (Supp. 1997).

67. The new Act does not change prior law holding that no personal liability is attached by the privilege. *See, e.g.,* *Ogden Oil Co. v. Venture Oil Corp.*, 490 So. 2d 725 (La. App. 3d Cir. 1986).

68. La. R.S. 9:4863(B) (Supp. 1997).

69. La. R.S. 9:4861(10) (Supp. 1997).

70. *Id.*

71. La. R.S. 9:4861(4)(a) (Supp. 1997).

j. Third Person

A "third person" is defined as "a person, including a lessee or operator, who is not contractually bound to the claimant for the obligation secured by a privilege or who has not expressly assumed the obligation."⁷² Although this definition, on its face, appears inconsequential, the effect of this definition, when applied under the further provisions of the new Act, at least suggests that persons or entities who do not qualify as "third persons" may be subject to a virtually imprescriptible lien in favor of a "claimant."⁷³ Although this result is never specifically stated in the new Act, a review of its provisions demonstrates that the privilege may lose its "effect"⁷⁴ against third persons, but would be extant against all others (*i.e.*, presumably, those who *are* contractually bound to claimant) until the underlying obligation becomes extinct or the claimant consents to the extinguishment of the privilege.⁷⁵

k. Well Site

Although the new Act has excluded transportation and gathering activities from the range of the privilege,⁷⁶ the meaning of a well site is broader than allowed by a literal reading (without benefit of definitions) of the prior statute, which tied the provision of services or equipment to the "well or wells."⁷⁷ By definition, under the new Act, the "well site"⁷⁸ is not physically limited to the location where the activity giving rise to the privilege actually takes place. A well site will include the operating interest(s) of the lessee(s) conducting the operation that gives rise to the privilege. With respect to unit operations, the well site also includes all operating interests included in the unit. Likewise, surface locations for directional wells, injection and disposal wells, and tank batteries or other production and processing facilities are also covered within the definition of "well site."⁷⁹ Nonetheless, although the well site is not restricted to the exact physical location of a well, the qualifying definition of "operations," as discussed above,⁸⁰ along with Section 9:4862, which describes the persons entitled to the privilege,⁸¹ allows the privilege only to those persons who have provided a direct benefit to the traditional well location.

72. La. R.S. 9:4861(11) (Supp. 1997).

73. La. R.S. 9:4861(1) (Supp. 1997).

74. La. R.S. 9:4865 (Supp. 1997).

75. La. R.S. 9:4864(B) (Supp. 1997).

76. La. R.S. 9:4861(4)(b) (Supp. 1997).

77. La. R.S. 9:4861 (1991).

78. La. R.S. 9:4861(12) (Supp. 1997).

79. *Id.*

80. La. R.S. 9:4861(4) (Supp. 1997).

81. La. R.S. 9:4862 (Supp. 1997).

2. Activities Giving Rise to the Privilege (Section 9:4862)

Once becoming familiar with the definitions provided in the new Act, one must apply their meaning to the remaining provisions of the new statute. Section 4862(A) of the new Act grants a privilege to persons who perform services or provide materials in connection with "operations."⁸² As indicated above, "operations" are limited to activities "conducted by or for a lessee on a well site."⁸³ Presumably, unless otherwise stated in Section 4862(A), materials or services supplied to the well site must actually be incorporated therein. In addition, since "operations" do not include labor and services performed in connection with the operation or construction of a pipeline or other transportation away from such a well site,⁸⁴ the new Act revives the law as stated by the court in *McGee v. Missouri Valley Dredging Co.*,⁸⁵ which denied a privilege for work associated with the construction of a natural gas transmission pipeline on the basis that it was beyond the scope of the oil and gas lien statute as it then existed.⁸⁶ Prior to the new Act, *McGee* had been, in effect, overturned by Act 949 of 1984, which extended the privilege to cover those who provided labor and services in connection with certain pipeline activities.⁸⁷

Although, even under prior statutes, a claimant's work or services had to have a fairly clear connection with the drilling or operation of a well, it was not always necessary that the work had to be performed on the well or lease itself.⁸⁸ Nonetheless, claimants whose activities were performed or conducted far from the actual drilling or production operation typically were denied the benefit under former lien statutes.⁸⁹ As a result, certain furnishers and suppliers who may have prevailed in claiming a privilege under prior law may be less successful under the new Act if their activities cannot be clearly tied to the well site. However, the new Act may still contain a "loop hole" for certain claimants—even where their activities might otherwise seem remote—if such

82. La. R.S. 9:4862(A) (Supp. 1997).

83. La. R.S. 9:4861(4)(a) (Supp. 1997).

84. La. R.S. 9:4861(4)(b) (Supp. 1997).

85. 182 So. 2d 764 (La. App. 1st Cir. 1966).

86. La. R.S. 9:4861-4887 (1991).

87. 1984 La. Acts No. 949 (amending La. R.S. 9:4861).

88. *P.H.A.C. Serv., Inc. v. Seaways Int'l, Inc.*, 403 So. 2d 1199 (La. 1981). *See also* C.F. Dahlberg & Co., Inc. v. Chevron U.S.A., Inc., 836 F.2d 915 (5th Cir. 1988) (steel supplied to offshore drilling deck); *Continental Casualty Co. v. Associated Pipe & Supply Co.*, 310 F. Supp. 1207 (E.D. La. 1969), *aff'd*, 447 F.2d 1041 (5th Cir. 1971) (services to offshore pipeline construction); *Texas Pipe and Supply Co. v. Coon Ridge Pipeline Co.*, 506 So. 2d 1296 (La. App. 2d Cir. 1987) (pipe furnisher).

89. *Hebert Abstract Co. v. Touchstone Properties, Ltd.*, 914 F.2d 74 (5th Cir. 1990) (title abstractor); *Sandoz v. A.M.F. Tuboscope, Inc.*, 61 B.R. 1020 (W.D. La. 1986) (insurance premiums); *Baker Chemicals, Inc. v. TXO Prod. Co.*, 556 So. 2d 226 (La. App. 2d Cir. 1990) (drilling mud and materials not delivered to well site); *Melyn Indus., Inc. v. Sofec, Inc.*, 392 So. 2d 733 (La. App. 3d Cir. 1980) (supplier for construction of steel buoys); *McGee v. Missouri Valley Dredging Co.*, 182 So. 2d 764 (La. App. 1st Cir. 1966) (surveyor).

activities are deemed performed by a "contractor"⁹⁰ for the benefit of "persons performing labor or services on a well site located" offshore.⁹¹ Further, there may be the rare claimant who failed to enjoy a privilege under prior law, but who benefits from the more specific language of the new Act. For example, in the 1987 case of *P & A Well Service, Inc. v. Blackies Power Swivels, Inc.*,⁹² the lessor of certain drilling equipment was denied a privilege under the statute as it then existed, since the claimant had not furnished equipment directly to the well site; instead, such lessor had rented equipment to a contractor without any knowledge as to where it would be used. However, if the equipment was leased to a "contractor"⁹³ and was used in "operations,"⁹⁴ the new Act, arguably, would allow such a lessor (of the drilling equipment) to enjoy a privilege for rent that accrued while the equipment was still located on the well site.⁹⁵

The list of persons entitled to claim the privilege pursuant to Section 4862(A) of the new Act may severely restrict the right of a furnisher of a furnisher (or a supplier of a supplier) to successfully claim a privilege unless such furnishers and suppliers fall within the definition of a "contractor"⁹⁶ or, in the alternative, to qualify as a "seller . . . to an operator or contractor" of movables either incorporated at the well site or consumed in operations thereof.⁹⁷ Regardless, the new Act clearly extends the privilege to persons such as caterers, launderers, and crew boat and charter boat providers who provide their services to offshore locations,⁹⁸ but it does not include providers of the same sort of services to *onshore* operations. The underlying rationale for this distinction is the greater effort of persons who provide catering, laundry, crew boat and charter boat services to offshore locations; whereas, persons who provide food or transportation to onshore locations (*e.g.*, fast food restaurants and taxi companies) expend considerably less effort in providing such services. In addition, these providers of onshore services probably have no expectation of enjoying a privilege upon an operating interest in the event they are not paid.⁹⁹

Early reaction to the new Act from practitioners raised the concern that the phrase "waters of the state," as it appears in Section 4862(A),¹⁰⁰ was intended to exclude the new Act's application to the Outer Continental Shell ("OCS").

90. La. R.S. 9:4861(10) (Supp. 1997).

91. La. R.S. 9:4862(2) (Supp. 1997).

92. 507 So. 2d 280 (La. App. 3d Cir. 1987).

93. La. R.S. 9:4861(10) (Supp. 1997).

94. La. R.S. 9:4861(4)(a) (Supp. 1997).

95. La. R.S. 9:4862(A)(7) (Supp. 1997).

96. La. R.S. 9:4861(10) (Supp. 1997).

97. La. R.S. 9:4862(A)(6) (Supp. 1997).

98. La. R.S. 9:4862(A)(2)(5), (6)(c) (Supp. 1997).

99. Chicoine, *supra* note 4, at 12. Practically, this result seems unlikely since it would be difficult to obtain the services of a fast food restaurant or taxi company if payment is not received at the time the services are rendered.

100. La. R.S. 9:4862(A)(2)(5), (6)(c) (Supp. 1997).

This was *not* the intent of the Act's drafters.¹⁰¹ The OCS Lands Act directive to apply the law of adjacent states as the surrogate law of the OCS¹⁰² is well established, and Louisiana courts have consistently applied prior lien statutes to OCS operations.¹⁰³

The obligations secured by the privilege created under the new Act at Section 4862(B) are nearly identical to those stated under the prior statute.¹⁰⁴ Thus, courts interpreting the new Act should reach similar results as to the amount due,¹⁰⁵ legal interest,¹⁰⁶ and attorney's fees.¹⁰⁷ In the latter instance, however, the new Act limits recovery of attorney's fees to those that are "reasonable" and do not exceed ten percent (10%).¹⁰⁸ The prior law allowed the privilege to secure attorneys' fees equal to 10% of the obligation owed.¹⁰⁹

3. *Property to Which the Privilege Attaches (Section 9:4863)*

In its broadest reach, the privilege granted under the new Act attaches to the entire "operating interest under which the operations" are being conducted, as well as to such interest's rights (i) in certain described facilities located "on the well site," (ii) to non-transient movables located on the well site (for use in operations), and (iii) to related tracts, servitudes and leases.¹¹⁰ Thus, the interests of the operator *and* both participating and non-participating lessees are attached, although the encumbrance upon the non-participating lessee's operating interest is limited.¹¹¹ The breadth of the Louisiana statute in this respect is, perhaps, best realized when compared with the mineral lien law adopted in the State of Texas.¹¹² Texas claimants have long been frustrated by the fact that the mineral lien allowed under the Texas Property Code attaches only to the

101. Chicoine, *supra* note 4, at 22.

102. 43 U.S.C.A. § 1333(a)(2) (1994).

103. *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043 (5th Cir. 1990); *C.F. Dahlberg & Co. v. Chevron U.S.A., Inc.*, 836 F.2d 915 (5th Cir. 1988); *St. Mary Iron Works, Inc. v. Moran Exploration Co.*, 809 F.2d 1130 (5th Cir. 1987); *Continental Casualty Co. v. Associated Pipe & Supply Co.*, 310 F. Supp. 1207 (E.D. La. 1969), *aff'd*, 447 F.2d 1041 (5th Cir. 1971); *Genina Marine Serv., Inc. v. Mark Producing Co.*, 490 So. 2d 1158 (La. App. 3d Cir.), *writ denied*, 494 So. 2d 541 (1986); *Genina Marine Serv., Inc. v. ARCO Oil & Gas Co.*, 499 So. 2d 257 (La. App. 1st Cir. 1968).

104. *Compare* La. R.S. 9:4861 (1991) with La. R.S. 9:4862(B) (Supp. 1997).

105. *Shamsie v. Pyramid Petroleum, Inc.*, 577 So. 2d 835 (La. App. 3d Cir. 1991); *Amoco Prod. Co. v. Horwell Energy, Inc.*, 969 F.2d 146 (5th Cir. 1992).

106. *Trew v. Standard Supply & Hardware Co.*, 33 So. 2d 426, 428 (La. App. Orl. 1947).

107. *Id.*; *Continental Casualty Co. v. Associated Pipe & Supply Co.*, 31 F. Supp. 1207, 1214 (E.D. La. 1969), *aff'd*, 447 F.2d 1041 (5th Cir. 1971).

108. La. R.S. 9:4862(B)(4) (Supp. 1997).

109. La. R.S. 9:4861 (1991).

110. La. R.S. 9:4863(A)(1) (Supp. 1997).

111. La. R.S. 9:4863(B) (Supp. 1997).

112. Codified at Tex. Prop. Code Ann. §§ 56.001 (West 1995).

interest of the mineral property owner¹¹³ who contracts with claimant/mineral contractor¹¹⁴ and not to the underlying fee interest or a non-operating (non-contracting) interest.¹¹⁵ Practically speaking, therefore, the operator's interest is the only portion of the "operating interest" attached in Texas. The non-operator's interest is typically excluded from attachment¹¹⁶ unless a distinct form of partnership or joint venture (outside of the joint operating agreement) can be shown.¹¹⁷

The new Act restates prior law, in place since the Legislature's adoption of Act No. 100 in 1956,¹¹⁸ providing for the establishment of the privilege over proceeds.¹¹⁹ Thus, Louisiana continues to provide a more useful lien statute than Texas, where claimants are denied a lien upon the proceeds of production, which severely limits the effectiveness of and recovery under that state's oil and gas lien statute.¹²⁰

As earlier indicated, in the case of unit operations conducted on either a voluntary or involuntary unit in Louisiana, the property subject to the privilege may be limited if the lessee is a "non-participating lessee"¹²¹ rather than a "participating lessee."¹²² The rationale underlying this distinction is based on the equitable principle that one who elects to go non-consent under an operating agreement should only have its interest encumbered to the extent such interest is improved by the work or equipment of the lien claimant.¹²³ Therefore, a non-participating lessee's interest in a unit is attached only to the extent of the unitized zone or formation (and property related to such operations); any operating interest held by the non-participating lessee in a portion of the lease lying beyond the boundaries of an effected unit would not be covered.¹²⁴ Presumably, the affected unit (whether voluntary or involuntary) must be created or formed *before* the performance of activities giving rise to the privilege if the non-participating lessee is to enjoy the benefit of the Act's restrictive limitations

113. Tex. Prop. Code Ann. § 56.001(3) (West 1995).

114. Tex. Prop. Code Ann. § 56.001(2) (West 1995).

115. Tex. Prop. Code Ann. § 56.003 (West 1995); *Bethlehem Supply Corp. v. Wotola Royalty Corp.*, 165 S.W.2d 443, 445 (Tex. 1945).

116. *Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184, 186 (Tex. 1981); *Energy Fund of America v. G.E.T. Serv. Co.*, 610 S.W.2d 833, 837 (Tex. Ct. App. 1980), *rev'd on other grounds*, 616 S.W.2d 184 (1981).

117. See, e.g., *State v. Harrington*, 407 S.W.2d 467 (Tex. 1966), *cert. denied*, 386 U.S. 944, 87 S. Ct. 977 (1967) (joint management shown); *Pan American Petroleum Corp v. Long*, 340 F.2d 211 (5th Cir. 1964), *cert. denied*, 381 U.S. 926 (1965) (passive investor protected).

118. 1956 La. Acts No. 100.

119. La. R.S. 9:4863(A)(4) (Supp. 1997).

120. Tex. Prop. Code Ann. § 56.003 (West 1995); *Hess v. Bank of Oklahoma*, 61 B.R. 977, 978 (Bankr. N.D. Tex. 1986); *Wilkins v. Fecht*, 356 S.W.2d 855 (Tex. Ct. App. 1962); *Crowley v. Adams Bros. & Prince*, 262 S.W. 883, 885 (Tex. Ct. App. 1924).

121. La. R.S. 9:4861(9) (Supp. 1997).

122. La. R.S. 9:4861(8) (Supp. 1997).

123. *Chicoine*, *supra* note 4, at 26.

124. La. R.S. 9:4863(B) (Supp. 1997).

for unit operations. Further, note that the distinction between participating and non-participating lessees applies only with respect to unit operations.¹²⁵ Non-participating operating interests related to operations conducted on a *single* leasehold gain no additional protection under the new Act. It follows, therefore, that the non-participating lessee's interest in other wells located upon such lease, in addition to such lessee's interest in other unitized wells and production in which such non-participating lessee's lease participates, will be within the grasp of the privilege even in those instances where the non-participating lessee did not participate in a specific operation from which the privilege emanates. Except for those limitations to attaching a non-participating lessee's operating interest, the new Act is consistent with prior law in allowing all unit interests, leases and wells, to be encumbered.¹²⁶

In a departure from prior law,¹²⁷ the Louisiana privilege attaches *only* to those drilling or other rigs found at the well site, *and only if* "owned by the operator or . . . contractor" whose activities give rise to such privilege.¹²⁸ Thus, the new Act legislatively overrules the results reached in the *Ogden* cases,¹²⁹ where claims of privilege by prior workover contractors were recognized against other contractors' workover rigs, notwithstanding that such rigs had been moved to the well location *after* performance of the services giving rise to the privilege. Although the decisions in both *Ogden* cases likely were correct when rendered under then effective law,¹³⁰ such claims would not be upheld under the new Act since the rigs, in both *Ogden* cases, were owned by contractors other than those whose activities gave rise to the privilege.¹³¹

In analyzing ownership of the operating interest attached by the privilege,¹³² the effect of the law as it concerns the use of farmouts is criti-

125. La. R.S. 9:4863(B) (Supp. 1997).

126. Standard Supply & Hardware Co. v. Humphrey Brothers, 209 La. 979, 987, 26 So. 2d 8, 11 (La. 1946); J.H.J. Ltd. I v. Chevron U.S.A., Inc., 617 F. Supp. 729, 732 (M.D. La. 1985); *accord* Lor, Inc. v. Martin Exploration Co., 489 So. 2d 1326 (La. App. 1st Cir.), *writ denied*, 493 So. 2d 1217 (1986). Not surprisingly, Texas courts have extended the mineral lien encumbrance only gingerly to unit operations and, even in those instances, only the interest of the actual contracting party (*i.e.*, generally the operator) will be attached. Oil Field Salvage Co. v. Simon, 168 S.W.2d 848 (Tex. 1943); Texcalco, Inc. v. McMillan, 524 S.W.2d 405 (Tex. Ct. App. 1975). *But see* Dunigan Tool & Supply Co. v. Burris, 427 S.W.2d 341 (Tex. Ct. App. 1968), where only one of three leases that might otherwise have comprised a drilling unit was allowed to be attached.

127. *See* Ogden Oil Co. v. Servco, 611 F. Supp. 572 (M.D. La. 1985) and Ogden Oil Co., Inc. v. Venture Oil Corp., 490 So. 2d 725 (La. App. 3d Cir. 1986), where rigs placed at the well site *after* the debt was incurred were encumbered by the privilege.

128. La. R.S. 9:4863(A)(2) (Supp. 1997).

129. Ogden Oil Co. v. Servco, 611 F. Supp. 572 (M.D. La. 1985); Ogden Oil Co., Inc. v. Venture Oil Corp., 490 So. 2d 725 (La. App. 3d Cir. 1986).

130. La. R.S. 9:4861 (1983).

131. La. R.S. 9:4863(A)(1)(b), (2) (Supp. 1997). Under the new Act, the lien attaches only to the "drilling or other rig located at the well site of the operating interest if the rig is owned by the operator or by a contractor from whom the activities giving rise to the privilege emanate."

132. La. R.S. 9:4861(5) (Supp. 1997); La. R.S. 9:4863 (Supp. 1997).

cal.¹³³ Again, if unproven acreage of an otherwise productive lease is farmed out and privileges arise as a result of operations performed under the farmout agreement, but no assignments or subleases have yet been transferred, such privileges will attach to the entire leasehold, including all production attributable to the lease, whether from wells physically situated on the lease or as a result of the leases inclusion in a producing unit.¹³⁴ However, if the assignment or sublease of the operating interest under the farmout arrangement occurs *prior* to the activities giving rise to a claim of privilege, only the operating interest subject to the sublease or assignment will be "a lessee of the operating interest" under the new Act and the remainder of the operating interest in the original lease will not be encumbered.¹³⁵

It is well established under Louisiana jurisprudence that the privilege attaches to all property listed in the statute, regardless of whether a contractual relationship exists between the person claiming the privilege and the owner of the property to which it attaches.¹³⁶ This result is not altered by the revised Act. Likewise, it follows that the owner of the property subject to the claim of privilege need not be the debtor of, or for that matter have any relationship whatsoever with, the lien claimant. If the criteria for establishing a claim of privilege under the Act are met, the property described in the new Act will be encumbered.¹³⁷

It is equally well established, however, that the lien statute will be interpreted in accordance with the principle of *stricti juris*; thus, the privilege will *only* attach to those items specifically set forth in the statute and will not attach to any other property of the obligor.¹³⁸ Therefore, under the new Act, the privilege will attach only to the operating interest and the specific facilities, movables and real property described insofar as they benefit the well site (including drilling or other rigs).¹³⁹ The proceeds received by, and the obligations owed to, a lessee "from production" are also encumbered by the privilege.¹⁴⁰ Under prior law, however, other intangibles such as insurance

133. La. R.S. 9:4861(5)(c) (Supp. 1997). See *J.S. Abercrombie v. Lehulu Oil Co.*, 181 La. 644, 160 So. 126 (La. 1935); *J.H.J. Ltd. I v. Chevron U.S.A., Inc.*, 617 S. Supp. 729 (M.D. La. 1985).

134. *J.H.J. Ltd. I*, 617 F. Supp. at 732.

135. La. R.S. 9:4863(C)(1) (Supp. 1997). See *Abercrombie*, 181 La. at 644, 160 So. at 126.

136. *Eagle Star Ins. Co. v. Parker*, 261 F. Supp. 257 (W.D. La. 1965); *Sklar v. Lilly-Thompson Drilling Corp.*, 45 F. Supp. 470 (W.D. La. 1942), *aff'd sub nom. Sklar v. Oil Incomes, Inc.*, 133 F.2d 512 (5th Cir. 1943); *Guichard Drilling Co. v. Alpine Energy Sources, Inc.*, 657 So. 2d 1307 (La. 1995); *Oil Well Supply Co. v. Independent Oil Co.*, 54 So. 2d 330 (La. 1951); *Sargent v. Freeman*, 204 La. 997, 16 So. 2d 737 (La. 1943); *Fred E. Cooper, Inc. v. Farr*, 165 So. 2d 605 (La. App. 2d Cir. 1964); *Sutton-Zwoile Oil Co. Inc. v. Barr Petroleum Corp.*, 197 So. 432 (La. App. 2d Cir. 1940); *Odom v. McClanahan*, 196 So. 382 (La. App. 2d Cir. 1940); *Blankenship v. Stovall*, 159 So. 477 (La. App. 2d Cir. 1935); *Boudreaux v. Moon Oil Co.*, 158 So. 672 (La. App. 1st Cir. 1935).

137. *Id.*

138. *Eagle Star Ins.*, 211 F. Supp. at 261.

139. La. R.S. 9:4863(A) (Supp. 1997).

140. La. R.S. 9:4863(A)(4) (Supp. 1997).

proceeds were clearly excluded from the privilege under the principle of *stricti juris* since such were not specifically recited in the lien statute.¹⁴¹ Under the new Act, "obligations owed" to a lessee are also encumbered; thus, certain intangibles such as accounts receivable, insofar as they relate to the lessee's "disposition of hydrocarbons [that are] subject to the privilege" may be encumbered.¹⁴² Since Louisiana courts seem divided as to whether Louisiana privileges are to be strictly or broadly construed, the breadth of interpretation given to the extent of "obligations" that will be attached is not completely certain.¹⁴³

Consistent with the *stricti juris* approach and the intent of the new Act, like its predecessor statutes, to provide security for a claim, the new statute creates only *in rem* liability for attachment by the claim of privilege.¹⁴⁴ Any personal liability between the claimant and obligor must have been created by the contract described under the definition of "contractor" and is not created by the statute itself.¹⁴⁵

Historically, the Louisiana privilege has not been interpreted to attach to the landowner's property or the improvements thereon (since such interests were never recited in the statute).¹⁴⁶ The new Act clarifies prior law by expressly excluding "an operating interest that is owned by a lessor, sublessor, overriding royalty owner, or other person who is not a lessee of the operating interest," as well as any "obligations or proceeds" owed to such person.¹⁴⁷

4. Establishment and Extinguishment of the Lien (Section 9:4864)

Although similar to prior law, Section 9:4864 of the new Act clarifies when the privilege is first established.¹⁴⁸ Under the new text, the privilege is established as to *all* persons on the date the claimant *first* provides its services, equipment, transportation or other operations for the benefit of the affected

141. *Eagle Star Ins.*, 261 F. Supp. at 261.

142. La. R.S. 9:4863(A)(4) (Supp. 1997).

143. The Louisiana Supreme Court appears to have relied upon the rule of strict construction. *See Oil Well Supply Co. v. Independent Oil Co.*, 219 La. 936, 54 So. 2d 330 (La. 1951); *J.S. Abercrombie v. Lehulu Oil Co.*, 181 La. 644, 160 So. 126 (La. 1935). Courts of Appeal, however, have adopted a more liberal construction. *See Texas Pipe & Supply Co. v. Coon Ridge Pipeline Co.*, 506 So. 2d 1296 (La. App. 2d Cir. 1987); *Ogden Oil Co., Inc. v. Venture Oil Corp.*, 490 So. 2d 725 (La. App. 3d Cir. 1986).

144. *Guichard Drilling Co. v. Alpine Energy Services, Inc.*, 657 So. 2d 1307, 1314 (La. 1995); *Lor, Inc. v. Martin Exploration Co.*, 489 So. 2d 1326 (La. App. 1st Cir.), *writ denied*, 493 So. 2d 1217 (1986); *Ogden Oil Co. v. Venture Oil Corp.*, 490 So. 2d 725, 729 (La. App. 3d Cir. 1986).

145. La. R.S. 9:4861(10) (Supp. 1997).

146. *Tracy v. Hewitt*, 92 So. 2d 757, 759 (La. App. 2d Cir. 1957).

147. La. R.S. 9:4863(C) (Supp. 1997).

148. La. R.S. 9:4864 (Supp. 1997). The prior statute was not judicially interpreted until May 1996, when the United States Court of Appeal for the Sixth Circuit held that the lien attached as of the date services were first provided. *In re Century Management Corp. (Grasso Production v. BMO Financial Inc.)*, 83 F.3d 140 (6th Cir. 1996).

interest.¹⁴⁹ Further, even prior to recordation of a notice (statement) of privilege, the lien is effective as to third persons (*i.e.*, those not contractually bound to the claimant) as of the date of such first provision of services, equipment or other operations.¹⁵⁰ However, if a claimant does not timely file its statement of privilege as required by Section 9:4865 of the new Act,¹⁵¹ the privilege will cease to exist and will be extinguished as against third persons at the end of the filing period.¹⁵² As before, a privilege will be extinguished at the time the underlying obligation is fully satisfied or otherwise lapses by, for example, the consent of the claimant.¹⁵³

In an effort to clarify the date of "last activity" for purposes of determining the ultimate filing date for preserving an effective privilege against third persons, the new Act now makes it clear that the right to a single privilege will continue when no more than ninety (90) consecutive days elapse between the completion of previous operations or activities and the initiation of new operations or activities, and provided such operations or activities are performed for the benefit of the same operating interest.¹⁵⁴

5. Cessation of the Privilege Against Third Persons (Section 9:4865)

Recordation was essential under prior law to preserve the privilege granted by the statute.¹⁵⁵ Under the new Act, recordation of the privilege is still required to maintain its effect against third persons.¹⁵⁶ In this respect, the new Act merely codifies existing law.¹⁵⁷ However, since the Act imposes a 180-day filing requirement only for purposes of being effective as to "third persons,"¹⁵⁸ an unrecorded privilege remains viable after the 180-day period as against the claimant's contractor (*i.e.*, the person or entity with whom claimant contracted). Thus, although the privilege will not be effective against third persons beyond the 180-day period absent recordation, it will remain effective beyond that time and be enforceable against claimant's contractor (but only to the extent of the property recited in Section 9:4863) so long as the underlying obligation exists. This is a reasonable result since claimant's direct contractor will have knowledge of the particular facts that recordation is designed to impute

149. La. R.S. 9:4864(A) (Supp. 1997).

150. *Id.*

151. La. R.S. 9:4865 (Supp. 1997).

152. *Id.* See *Phillips Petroleum Co. v. Best Oilfield Serv., Inc.*, 48 F.3d 913 (5th Cir. 1995).

153. La. R.S. 9:4864(B) (Supp. 1997).

154. La. R.S. 9:4864(C) (Supp. 1997).

155. See 1986 La. Acts No. 191, which legislatively overruled *Louisiana Materials Co. v. Atlantic Richfield Co.*, 493 So. 2d 1141 (La. 1986), which held that recordation was not necessary to preserve but only affected the rank of the lien.

156. La. R.S. 9:4865 (Supp. 1997).

157. *Compadres, Inc. v. Johnson Oil & Gas Corp.*, 547 So. 2d 382 (La. App. 3d Cir. 1989); *Hawn Tool Co. v. Crystal Oil Co.*, 514 So. 2d 636 (La. App. 2d Cir. 1987).

158. La. R.S. 9:4865 (Supp. 1997).

to third parties. This result is a departure, however, from the holding in *Hawn Tool Company v. Crystal Oil Company*,¹⁵⁹ where the court analyzed Act 191 of 1986 and observed that a person's failure to record a lien statement extinguished the privilege, apparently as to all persons.¹⁶⁰ In this same regard, although the new Act still requires that a claimant bring an action to enforce its privilege within one (1) year after filing a notice of privilege, such requirement only concerns the continuing effect of the privilege against third persons.¹⁶¹ No such enforcement action is mandated under the new Act to preserve a claimant's privilege against its direct contractor. The absence of such a requirement suggests the privilege is imprescriptible between parties bound by contract or other direct obligation.¹⁶²

The new Act recognizes the additional recordation procedures and requirements brought about, effective January 1, 1990, by Louisiana's adoption of Article 9 of the Uniform Commercial Code.¹⁶³ Now, the statute provides that the statement of privilege will be recorded in the mortgage records of the parish;¹⁶⁴ however, notice of privileges encumbering rigs must be filed in accordance with financing statement requirements set forth in Chapter 9 of Title 10 of the Louisiana Revised Statutes (but the signature of the debtor shall not be required).¹⁶⁵

Due process and notice concerns arising under prior law¹⁶⁶ have been addressed in the new Act. Now, if the privilege is to continue to have effect against third persons not joined in the enforcement action described at Section 9:4865(B), a notice of *lis pendens* must be filed in the parish mortgage records where the encumbered property is located, or, in the alternative, the claimant must seize the affected property within thirty (30) days after the enforcement action is instituted.¹⁶⁷ Of course, no *lis pendens* requirement is imposed to preserve a privilege against a drilling or other rig where a financing statement is properly filed in accordance with the new Act.¹⁶⁸

For purposes of comparison, it may be interesting to note how the new Act would have impacted the outcome of three (3) particular cases decided by courts interpreting the enforcement provisions of the Louisiana lien statute. Although each of the following cases was decided around the time the new Act took effect (*i.e.*, August 15, 1995), the courts were considering the prior lien statute in each instance.¹⁶⁹

159. 514 So. 2d 636 (La. App. 2d Cir. 1987).

160. *Id.* at 637.

161. La. R.S. 9:4865(B) (Supp. 1997).

162. *See infra* notes 257-264.

163. Codified at La. R.S. 10:9-101 (1993 and Supp. 1997).

164. La. R.S. 9:4865(A) (Supp. 1997).

165. La. R.S. 9:4865(A)(2) (Supp. 1997). *See* La. R.S. 10:9-402 (Supp. 1997).

166. *See* *Guichard Drilling Co. v. Alpine Energy Serv., Inc.*, 657 So. 2d 1307, 1314 (La. 1995).

167. La. R.S. 9:4865(C) (Supp. 1997).

168. *Id.*

169. La. R.S. 9:4865 (1991).

In *Guichard Drilling Company v. Alpine Energy Services, Inc.*,¹⁷⁰ a subcontractor filed an action against a contractor to enforce a default judgment recognizing a lien granted under the prior statute. Such default judgment had been previously obtained by the subcontractor in a separately filed proceeding. The subcontractor also sought to garnish property owned by the operator and non-operators, none of whom had been made defendants in the subcontractor's original suit against its contractor for recognition of the privilege. The court held that the lien attached only to the property identified in the statute and, thus, the owners of such property (*i.e.*, the operator and non-operators) were not indispensable parties to the original suit (where the privilege was recognized).¹⁷¹ The court found that minimum due process requirements had been satisfied since both the operator and non-operators had received copies of the subcontractor's lien affidavit.¹⁷² Notice of *lis pendens* also had been filed subsequent to the timely filing of the original action (*i.e.*, within one year of the recordation of the statement of lien claim).¹⁷³

If *Guichard* were decided under the new Act, the outcome likely would be the same. Consistent with the new Act, a notice of *lis pendens* had been filed and all other requirements, such as filing an action within a year of recordation of the notice of privilege, were met.¹⁷⁴ Further, nothing in the new Act requires that the operator and non-operators be deemed indispensable parties to the enforcement action under the facts presented. Thus, despite the criticism of *Guichard* by some Louisiana legal scholars,¹⁷⁵ such ruling seems an attempt by the Louisiana Supreme Court to recognize the jurisprudential trend established by Louisiana appellate courts to liberally construe the Louisiana privilege in a manner to offer the broadest protection to those providing enhancements to the property of the operating interest owners.¹⁷⁶

Although the decision in *Supreme Contractors, Inc. v. Halliburton Logging Services, Inc.*,¹⁷⁷ would probably be the same under the new Act, the result would be reached for different, or at least clearer, reasons. In *Supreme Contractors*, the court held in favor of Halliburton, which had not been timely joined in an otherwise timely filed suit, to enforce lien claims under the prior Act.¹⁷⁸ Unlike the

170. 657 So. 2d 1307 (La. 1995).

171. *Id.* at 1315.

172. *Id.* at 1316.

173. *Id.*

174. La. R.S. 9:4865(B) and (C) (Supp. 1997).

175. *Guichard Drilling Co. v. Alpine Energy Serv., Inc.*, 657 So. 2d 1307, 1319 (La. 1995); see Louisiana Mineral Law Service—Mineral Law Institute, LSU Law Center, Vol. 14, No. 24, at 2.

176. See *Texas Pipe and Supply Co. v. Coon Ridge Pipeline Co., Inc.*, 506 So. 2d 1296 (La. App. 2d Cir. 1987); *Ogden Oil Co. v. Venture Oil Corp.*, 490 So. 2d 725 (La. App. 3d Cir. 1986). In the past, the Louisiana Supreme Court has professed a rule of strict construction, *e.g.* *P.H.A.C. Serv., Inc. v. Seaways Int'l, Inc.*, 403 So. 2d 1199 (La. 1981); *Oil Well Supply Co. v. Indep. Oil Co.*, 219 La. 936, 54 So. 2d 330 (La. 1951); *J.S. Abercrombie v. Lehulu Oil Co.*, 181 La. 644, 160 So. 126 (La. 1935).

177. 668 So. 2d 1363 (La. App. 1st Cir.), writ denied, 672 So. 2d 673 (1996).

178. La. R.S. 9:4861-4887 (1991).

circumstances supporting the decision in *Guichard*, Halliburton, apparently, had not received a copy of the lien affidavit nor had a notice of *lis pendens* been filed in the requisite mortgage records. As a result, the machinery and equipment owned by Halliburton, which had been placed at the well site *after* performance of the activities giving rise to the claimant's privilege, were found not to be subject to the privilege.¹⁷⁹

Under the new Act, *Supreme Contractors* likely would be decided in favor of Halliburton on the basis that the machinery and equipment of Halliburton, apparently being only transiently on the well site, would be exempt from the privilege.¹⁸⁰

The claimant in *Phillips Petroleum Company v. Best Oilfield Services, Inc.*,¹⁸¹ also would enjoy a privilege under the new Act. In that case, the court held that the date of fuel delivery, and not the date the fuel was depleted by use at the well site, was the date of last activity for determining the requisite filing period under the prior Act.¹⁸² As a result, the statement of privilege was not timely filed. Under the new Act, however, the contractor in *Phillips Petroleum* (being contractually bound to claimant) is not a "third person";¹⁸³ thus, recordation was not required to preserve the lien between the claimant and the contractor (although the lien would not be preserved against third persons¹⁸⁴).

6. Cessation of the Privilege as to Movable Property (Section 9:4866)

Although the prior statute exempted rigs and other equipment used in plugging and abandonment operations at the well site, as well as any tubular goods recovered during plugging and abandonment operations, all other rigs and equipment located at the well site upon attachment of the privilege were not to be removed from the property unless the written consent of the lien claimant was first obtained.¹⁸⁵

A change in such law has been effected under the new Act.¹⁸⁶ Removal of property from the well site after the attachment of the privilege is no longer expressly prohibited. The privilege upon such property is not extinguished at removal, however, *unless* the movable is removed by a third person to whom it has been transferred for good and valuable consideration in good faith.¹⁸⁷ Since, in Louisiana, good faith is presumed, recordation of the notice of privilege, without more, is not sufficient to destroy good faith.¹⁸⁸ Thus, a third person may meet the

179. *Supreme Contractors*, 688 So. 2d at 1368.

180. La. R.S. 9:4863(A)(1)(b) (Supp. 1997).

181. 48 F.3d 913 (5th Cir. 1995).

182. La. R.S. 9:4862 (1991).

183. La. R.S. 9:4861(11) (Supp. 1997).

184. La. R.S. 9:4865(A) (Supp. 1997).

185. La. R.S. 9:4861.2 (1991).

186. La. R.S. 9:4866 (Supp. 1997).

187. *Id.*

188. La. Civ. Code art. 3481.

good faith test even though a statement of privilege has been properly recorded, and all or a portion of a claimant's security may be lost without remedy therefor.

7. *Notice to Operator; When Required (Section 9:4867)*

Although Texas mineral lien law, in other areas, seems not as far reaching as does the Louisiana oil and gas privilege,¹⁸⁹ the Texas statute has long protected the mineral property owner (including the land owner and lessees) from double liability in those instances where a mineral contractor has been paid in full or in part prior to the time the mineral property owner receives notice of a subcontractor's claim.¹⁹⁰ Passage of the new Act now offers a similar remedy to Louisiana operators (and rig owners) who, under prior statutes, were not given notice of a subcontractor's claim and often were forced to make double payments to protect their property.

Timely notice to the operator or rig owner, as appropriate, is now required to preserve the privilege granted by the new statute *unless* the claimant has a direct contractual relationship with the operator or rig owner.¹⁹¹ If a contractual relationship has been established, no notice should be or is required since, presumably, the operator knows the status of his accounts with his contractors. The operator and rig owner, however, generally do not know the status of their contractors' accounts with their subcontractors and whether such contractors are timely paying their subcontractors' invoices. Imposing a requirement upon a subcontractor to provide notice to the operator/rig owner should reduce those instances where the operator/rig owner otherwise would be compelled to pay twice (*i.e.*, once to the contractor and a second time to the contractor's subcontractors who may have filed privileges against the operator's interests). The problem may not be entirely eliminated, however, since the privilege attaches immediately upon the *first* performance of services covered under the statute,¹⁹² and the claimant has 180 days after *last* services to provide the notice.¹⁹³

8. *Form and Content of the Lien Statement (Section 9:4868)*

Although the requirements for the form and content of a statement of privilege under the new Act¹⁹⁴ are set forth in greater detail than in prior statutes, the information required to be included in such notice of privilege is

189. See *supra* text accompanying notes 61-62, 112-117, 120 and 126 for discussions of other Texas law.

190. Tex. Prop. Code Ann. § 56.043 (West 1995); *Energy-Agri Prod., Inc. v. Eisenman Chem. Co.*, 717 S.W.2d 651 (Tex. Ct. App. 1986).

191. La. R.S. 9:4867 (Supp. 1997).

192. La. R.S. 9:4864(A) (Supp. 1997).

193. La. R.S. 9:4865(A) and 4867 (Supp. 1997).

194. La. R.S. 9:4868 (Supp. 1997).

fairly similar to that required under earlier law.¹⁹⁵ The notice must be in writing and "signed by or on behalf of the claimant" and must include all of the following: claimant's name and address; the amount claimed and a description of the services or materials provided; the obligor's name and address; the well operator's name as reflected in Louisiana Conservation Commission records; and a clear description of the operating interest or well affected by the privilege.¹⁹⁶

It is now clear that a well will be deemed to be adequately identified under the new Act if the notice includes the well name and serial or other identification number, as well as the field name, all as designated in the records of the Louisiana Commissioner of Conservation.¹⁹⁷ Likewise, any notice required to be given to an operator under the new Act shall be deemed properly given if delivered to that operator named in the notice of privilege.¹⁹⁸ In this same regard, the new Act now lists the particulars necessary to establish proper delivery of a notice of privilege,¹⁹⁹ including the elements that constitute *prima facie* proof of such delivery (*i.e.*, a return receipt of registered or certified mailing).²⁰⁰

If the notice of privilege contains sufficient information to "fairly" apprise the intended recipient of the nature and object of the privilege, it shall be deemed valid.²⁰¹ In the event a claimant suspects the operator of the well is other than that shown in the records of the Louisiana Conservation Commissioner (*e.g.*, if a proper change of operator form has not been filed with the commissioner), a claimant would be wise to include both the record operator and actual operator in the statement of privilege to be certain the broadest range of notice is provided.

Although the new Act provides more and clearer specifications as to the form and content of the required notice of privilege, the information required to be included therein is similar to that required under prior law.²⁰² Thus, a lien affidavit that properly describes the property furnished to a contractor and states that such property was ultimately "attached to and located at" a production platform in a specifically described block lying in the Outer Continental Shelf, but does not expressly describe the leased premises, probably will be deemed an adequate description of the operating interest upon which the privilege is claimed.²⁰³ Likewise, a description of several lease block numbers and appurtenances should be held to be a reasonable identification of the property subject to the privilege.²⁰⁴ In fact, even where a portion of the property description is misleading or incorrect,

195. La. R.S. 9:4862 (1991).

196. La. R.S. 9:4868(A) (Supp. 1997).

197. La. R.S. 9:4868(B)(1) (Supp. 1997).

198. La. R.S. 9:4868(B)(2) (Supp. 1997).

199. La. R.S. 9:4868(C) (Supp. 1997).

200. La. R.S. 9:4868(D) (Supp. 1997).

201. La. R.S. 9:4868(E) (Supp. 1997).

202. La. R.S. 9:4862 (Supp. 1997).

203. *Dooley Tackaberry, Inc. v. Freeport McMoran Oil and Gas Co.*, 802 F. Supp. 1438 (E.D. La. 1992).

204. *Cameron Offshore Boats, Inc. v. Alpine Ocean Seismic Survey*, 862 F. Supp. 1578 (W.D. La. 1994). *See also* *Guichard Drilling Co. v. Alpine Energy Serv., Inc.*, 657 So. 2d 1307 (La. 1995).

that portion of the property that is properly described by identifiable lease names and well numbers may be deemed to fairly apprise a reasonable reader of the encumbered operating interest.²⁰⁵ Further, a single *in globo* affidavit of privilege still may be filed to attach equipment and supplies furnished in connection with the drilling of several wells located on several contiguous leases provided that such single affidavit meets the form and content requirements of the new Act.²⁰⁶

Despite Louisiana's historical attachment to the form of an authentic act,²⁰⁷ neither prior Louisiana oil and gas lien statutes nor the new Act require the statement of privilege to be sworn or acknowledged. This is an interesting contrast with neighboring Texas, where a *sworn* affidavit of the claimant must be filed to secure the lien.²⁰⁸

9. Effect of Privilege upon Purchaser of Hydrocarbons (Section 9:4869)

Contrary to other oil and gas lien laws where the proceeds of production may not be attached,²⁰⁹ the proceeds of production emanating from the encumbered operating interest have long been subject to the statutory privilege established in Louisiana, provided that the purchaser of such production is given adequate notice of the lien claimed.²¹⁰ The new Act, however, is far more specific than the prior statute in stating how the privilege over proceeds may be extinguished.²¹¹ Additionally, the new Act confirms the right of the purchaser of hydrocarbon production to retain amounts owed for production, without liability, following receipt of proper notice of the privilege.²¹²

It is clear that the privilege over proceeds will be extinguished if production is transferred in a "bona fide onerous transaction" and consideration is paid before the purchaser receives notice of the privilege from the claimant.²¹³ Once the purchaser is properly notified of the privilege, however, the claimant may follow the hydrocarbons or the proceeds therefrom and enforce its privilege against either in the hands of any subsequent transferee, at the claimant's election.²¹⁴ Nonetheless, the privilege may be lost to a claimant if the hydrocarbons or their proceeds are commingled with other hydrocarbons or proceeds

205. Phillips Petroleum Co. v. Best Oilfield Serv., Inc., 48 F.3d 913, 918 (5th Cir. 1995).

206. Mercantile Nat'l Bank of Dallas v. J. Thos. Driscoll, Inc., 194 La. 935, 195 So. 497 (La. 1940).

207. E.g., La. Civ. Code art. 1833.

208. See, e.g., Barrelle v. Johnson, 741 S.W.2d 590 (Tex. Ct. App. 1987); Conn, Sherrod & Co., v. Tri-Electric Supply Co., 535 S.W.2d 31 (Tex. Ct. App. 1976).

209. See, e.g., Tex. Prop. Code Ann. § 56.003(b) (West 1995); see Wilkins v. Fecht, 356 S.W.2d 855 (Tex. Ct. App. 1962).

210. Act No. 100 of the 1956 Louisiana Legislature amended the statute of privilege to encumber proceeds of the working interest and to provide notice to the purchaser of such attachment. 1956 La. Acts No. 100, § 2.

211. La. R.S. 9:4861.1 (1991).

212. La. R.S. 9:4869 (Supp. 1997).

213. La. R.S. 9:4869(A)(1)(a) (Supp. 1997).

214. La. R.S. 9:4869(A)(1)(b) (Supp. 1997).

to such a degree as to be beyond reasonable identification.²¹⁵ Prior statutes did not expressly address the problem of commingling.

Under the new Act, a purchaser of production (properly notified of the claim of privilege) "may retain the amounts owed for [such hydrocarbons] without liability to the claimant or the transferor from whom . . . received . . . until":²¹⁶ the claimant provides written notification to the purchaser to release such proceeds or advises that the privilege has been released; purchaser receives written notification from the obligor of the obligation owed to claimant that purchaser should release such amounts to claimant; purchaser receives a joint notification from both the claimant and "the person to whom the purchaser owes the obligation"²¹⁷ to release such amounts; or purchaser is otherwise directed by appropriate court order.²¹⁸ These specific directions, undoubtedly, will provide comfort to the purchaser of production in dealing with notices of privilege (or the lack thereof). Again, however, the effects of the above-described provisions extend only to "third persons";²¹⁹ thus, the privilege will continue to encumber hydrocarbons and their proceeds to the extent parties are in actual privity.

10. Ranking of the Privilege (Section 9:4870)

The prior lien statute ranked laborers above all other lien claimants.²²⁰ Now, however, all lien claimants share equal rank and priority, *except* a contractor's privilege, which is inferior to those to whom such contractor is contractually bound.²²¹ Similarly, as under prior law, the privilege granted under the new Act shall be outranked by the following types of privileges that affect the property: *ad valorem* taxes; mortgagor's and vendor's privileges provided they have been recorded and are "effective" against third persons before the claimant's privilege is "established"; and security interests that are perfected or filed before the privilege is established.²²²

The new statute does not disturb prior law indicating that privileges of equal rank will share *pro rata* in any distribution of encumbered proceeds.²²³ Likewise, if a claimant's privilege has been reduced by proceeds received as a result of an earlier seizure, such claimant will not have to account for the

215. La. R.S. 9:4869(A)(2) and (3) (Supp. 1997).

216. La. R.S. 9:4869(B) (Supp. 1997).

217. La. R.S. 9:4869(B)(3) (Supp. 1997).

218. La. R.S. 9:4869(B) (Supp. 1997).

219. La. R.S. 9:4861(11), 4869(A) (Supp. 1997).

220. 1928 La. Acts No. 171 gave a first privilege to laborers, which survived through the immediately prior statute. La. R.S. 9:4861(B) (1991).

221. La. R.S. 9:4870(A) (Supp. 1997).

222. La. R.S. 9:4870(B) (Supp. 1997); *see also* La. R.S. 9:4864(A) (Supp. 1997).

223. Republic Supply Co. v. Carthay Land Co., 244 So. 2d 241, 243 (La. App. 4th Cir. 1971). *Accord* Lane-Wells Co. v. Continental-EMSCO Co., 397 S.W.2d 217, 219 (Tex. 1965) (applying Texas mechanics and materialmen's lien statute to oil and gas dispute).

previously seized funds and may still participate *pro rata* to the extent of claimant's remaining privilege in any subsequently seized assets, *provided* the privilege held by other claimants was not attached at the time of the prior seizure.²²⁴ If other oil and gas privileges are attached at the time a claimant receives proceeds by seizure, then, under past and current law, all lien claims participate *pro rata* in the seized assets.²²⁵ Under the new Act, properly filed mortgages²²⁶ and vendor's privileges (recorded or unrecorded) that are effective before the establishment of an oil and gas privilege will prime a later established oil and gas privilege.²²⁷ However, an otherwise properly effected and recorded mortgage will be inferior to a privilege under this Act if the privilege claimed hereunder is "established" (*i.e.*, services or materials have been provided to the affected property)²²⁸ before the mortgage is recorded.²²⁹ This result does not change prior law.²³⁰

The new Act, in effect, restates the effect of ranking vendor's privileges on immovables.²³¹ Separate filing requirements for vendor's privileges upon immovable and movable property, however, have been deleted.²³² Now, the revised statute includes language that recognizes historical recording requirements for immovables and is consistent with filing and other requirements dictated for movables under Chapter 9 of Title 10 of the Louisiana Revised Statutes.²³³

11. Enforcement of the Privilege (Section 9:4871)

The current Act is nearly identical to the prior statute in providing that a privilege may be enforced "by a writ of sequestration, without the necessity of furnishing security."²³⁴ However, the writ of sequestration should not be viewed as the exclusive manner for enforcing the privilege. It is well established that a claimant may proceed via garnishment or ordinary action as means of preserving the privilege.²³⁵ A judgment entered in an ordinary proceeding acts as a judicial mortgage, which will be ranked according to Section 4870 of the new Act and will affect third persons from the time notice of the privilege is first filed.²³⁶

224. *Republic Supply Co.*, 244 So. 2d at 241.

225. *Id.*; La. R.S. 9:4870(A) (Supp. 1997).

226. *Young v. Squeeze Tools, Inc.*, 350 So. 2d 967, 968-69 (La. App. 2d Cir. 1977).

227. *In re Martin Exploration Co.*, 731 F.2d 1210, 1211-12 (5th Cir. 1984).

228. La. R.S. 9:4864(A) (Supp. 1997).

229. La. R.S. 9:4870(B)(2) (Supp. 1997).

230. La. R.S. 9:4862(A)(2) (1991).

231. *Compare* La. R.S. 9:4862(A)(2) (1991) *with* La. R.S. 9:4870(B)(2) (Supp. 1997).

232. *See* La. R.S. 9:4863, 4864 (1991).

233. La. R.S. 9:4870(B)(2), (3) (Supp. 1997); *see* La. R.S. 10:9-101 (1993).

234. *Compare* La. R.S. 9:4866 (1991) *with* La. R.S. 9:4871 (Supp. 1997).

235. *Frank's Casing Crew & Rental Tools, Inc. v. Carthay Land Co.*, 212 So. 2d 161, 163-64 (La. App. 4th Cir.), *writ denied*, 214 So. 2d 716 (1968). *See also* *Beacon Gasoline Co. v. Sun Oil Co.*, 455 F. Supp. 506, 508-09 (W.D. La. 1978).

236. *Frank's Casing Crew*, 212 So. 2d at 164.

12. Bonding Requirements; Cancellation of Privilege; Notice of Lis Pendens (Section 9:4872)

The new Act makes no substantive change in prior law with regard to bonding, cancellation and *lis pendens* requirements, although an attempt has been made to state such requirements in more concise language.²³⁷ An interested party may still seek cancellation of a privilege or *lis pendens* by filing a bond, acceptable in form and content to the appropriate recorder of mortgages, in an amount not less than 125% of the principal obligation claimed.²³⁸

13. Burden of Proof for Delivery of Movables to Well Site (Section 9:4873)

Prior law made no definitive statement as to which party carried the burden of proof in determining whether movables were, in fact, utilized at a well site for operations and activities giving rise to a claim of privilege. Now, the statute clearly states that the party resisting the claim of privilege bears the burden of proving that movables were not used at the well site.²³⁹

III. PROBLEMS ARISING UNDER THE NEW ACT

Certainly, the underlying intent of the new Act was to clarify the oil and gas privilege and to make it more pragmatic in its application. However, it has become apparent that, since taking effect on August 15, 1995, the new statute, in some instances, may be ambiguous or may create, unintentionally, problems that will need to be resolved by future amendment or through judicial interpretation.

A. Elimination of the Operator's Lien

Prior oil and gas well lien statutes²⁴⁰ have long been interpreted by the courts to allow the privilege to an operator under a joint operating agreement over the working interest of non-operating owners to secure payment of drilling and operating expenses paid by the operator on their behalf.²⁴¹ Likewise, a non-operator could enjoy a privilege to secure payment of a co-owner's share of expenses.²⁴² Regardless, the elimination of the so-called "operator's lien" from

237. Compare La. R.S. 9:4867 (1991) with La. R.S. 9:4872 (Supp. 1997).

238. La. R.S. 9:4872 (Supp. 1997).

239. La. R.S. 9:4873 (Supp. 1997). Unfortunately, under the first publication of the new Act, a typographical error appears in Section 9:4873 by referring to "9:4862(A)(5)" rather than "9:4862(A)(6)," which is the correct subprovision referring to movables as security over which the privilege is established. *Id.*

240. La. R.S. 9:4861 (1991).

241. *Blasingame v. Anderson*, 108 So. 2d 105, 110 (La. 1959); *Kenmore Oil Co. v. Delacroix*, 316 So. 2d 468, 469 (La. App. 1st Cir. 1975).

242. *Compadres, Inc. v. Johnson Oil & Gas Corp.*, 547 So. 2d 382, 385-86 (La. App. 3d Cir. 1989).

the new Act was intentional since the operating and non-operating lessee, typically, are not characterized as contractors for other purposes.

It was not intended, however, that the operator/non-operator lessee be foreclosed from enjoying a similar privilege under some other statute.²⁴³ In the near future, a separate section of the Louisiana Revised Statutes is to be dedicated specifically to defining and establishing an enforceable operators' lien.²⁴⁴ Ideally, this will be accomplished at the Louisiana Legislature's 1997 session.

In the interim, operators who are lessees would be well-advised to take corrective measures to create a security interest in the operating interest of their non-operating co-lessees. If parties are amenable, joint operating agreements may be amended to provide for a conventional mortgage in favor of the operator that encumbers non-operating interests. In that same regard, operating lessees should utilize the provisions of Chapter 9 of Title 10 of the Louisiana Revised Statutes and file appropriate financing statements to encumber non-operators' interests in equipment, rigs and proceeds, as applicable.²⁴⁵ Operators in Louisiana may not rely upon provisions in joint operating agreements that purport to create a lien in favor of the operator since such contractual liens have no legal effect without a statutory basis.²⁴⁶

B. Outer Continental Shelf Application

It is unfortunate that use of the phrase "waters of the state" in certain provisions of the new Act²⁴⁷ has raised speculation that the new Act shall not apply to the Outer Continental Shelf ("OCS"). In hindsight, it appears that the phrase "waters of the state" was ill-conceived, especially since the phrase "offshore" would have been accurate, less confusing, and would apply equally well to state and federal waters.

The directive of the Outer Continental Shelf Lands Act ("OCSLA"), however, provides, in pertinent part, that:

the civil laws . . . of each adjacent state, now in effect and hereafter adopted . . . are declared to be the law of the United States for that portion of the subsoil and the seabed of the outer Continental Shelf . . . which would be within the area of the state if its boundaries were extended seaward to the outer margin of the outer Continental Shelf.²⁴⁸

Although jurisprudence applying the Louisiana oil and gas well lien statute has been well and often applied to the OCS,²⁴⁹ the directive was recently reaf-

243. Chicoine, *supra* note 4, at 21.

244. *Id.*

245. La. R.S. 10:9-402 (1993).

246. Capillon v. Chambliss, 29 So. 2d 171, 176 (La. 1946).

247. La. R.S. 9:4862(A)(2), (5), (6)(c) (Supp. 1997).

248. 43 U.S.C. § 1333(a)(2)(a) (1994).

249. *See supra* note 103.

firmed and recited in *Gardes Direction Drilling v. U.S. Turnkey Exploration, Inc.*²⁵⁰ *Gardes* clearly states that "the Louisiana oil, gas and water well lien act [is incorporated] as surrogate federal law under OCSLA."²⁵¹ Even without this well-established body of case law, however, the Louisiana legislature has no legal authority to legislate federal law and, thus, cannot remove the new Act's application to the OCS in those instances where Louisiana law clearly applies as the "surrogate" law under the OCSLA. Regardless, it is hoped that later amendments to the new Act will remove this apparent ambiguity.

C. Opportunity for Remote Furnishers to Benefit From the Act

Although it was the drafters' intent to keep the privilege as close to the well site as possible,²⁵² it appears the privilege granted in Section 9:4862(A)(2) may conflict with the "well site" limitation by allowing the privilege to a "contractor . . . for providing services or facilities to persons performing labor or services on a well site."²⁵³ Since the definition of "contractor" could include a *series* of subcontractors,²⁵⁴ it may be possible for a person quite distant from the well site location—who may have no knowledge of the fact that his materials or services are benefiting the well site—to enjoy the privilege. However, this result would not be inconsistent with some prior law;²⁵⁵ further, those who do not qualify as "subcontractors" would be excluded.²⁵⁶

It seems unlikely that this potential problem can ever be completely resolved since the instance where a remote subcontractor might benefit from the privilege would be very fact specific. Nonetheless, it may be possible for the courts to draw a "gray line" over which remote subcontractors will not be allowed to pass if, at the time they provide services and materials, they have no expectation that their materials or services will benefit an operating interest.

D. Imprescriptibility of Privilege Between Those in Privity

The fact that the new Act provides for extinguishment of the privilege only as to "a third person" (unless extinguished through extinction or written consent),²⁵⁷ creates a virtually imprescriptible privilege as to persons that are

250. 899 F. Supp. 287 (W.D. La. 1995), *reversed on other grounds*, 98 F.3d 860 (5th Cir. 1996). On appeal, the Fifth Circuit expressly agreed with the district court's application of Louisiana lien law in the OCS. 98 F.3d at 864.

251. 899 F. Supp. at 289.

252. Chicoine, *supra* note 4, at 3.

253. La. R.S. 9:4862(A)(2) (Supp. 1997).

254. La. R.S. 9:4861(10) (Supp. 1997).

255. P.H.A.C. Serv., Inc. v. Seaways Int'l, Inc., 403 So. 2d 1199 (La. 1981).

256. E.g., C.F. Dahlberg & Co. v. Chevron U.S.A., Inc., 836 F.2d 915 (5th Cir. 1988).

257. La. R.S. 9:4864(A), (B) (Supp. 1997).

not third persons, meaning those who are "contractually bound to the claimant . . . or who . . . expressly assumed the obligation."²⁵⁸

Clearly, Louisiana law provides that an action or right will prescribe only as mandated by the Louisiana Legislature; if no prescription is established by legislation, an action or right shall be imprescriptible.²⁵⁹ In fact, there are many rights and actions in Louisiana that, due to prescription not having been defined by the legislature, remain imprescriptible.²⁶⁰ Further, it has been recognized that the status of prescription may be modified from time to time by the legislature and is not a vested or constitutionally protected fundamental right.²⁶¹

Given the express attention to extinguishment as to a "third person" only, it is clear that the status of the privilege under the new Act as an imprescriptible right between contracting persons was intentional. The prior statute contained no such limitation and provided that the privilege would be extinguished in its entirety if not preserved by a timely filing of the statement of privilege and, subsequently, by instituting an action within one year after recording such notice.²⁶² This result could have been repeated under the new Act, but was not.

This particular aspect of the new Act (*i.e.*, its imprescriptible nature between contracting parties) really is not a "problem" except to the obligor under an applicable contract. Since the privilege would be imprescriptible to such person, the claimant would have the continuing right to enforce the privilege even beyond the one-year time period set forth in the new Act,²⁶³ as well as a continuing right to seek enforcement via a writ or writs of sequestration and seize affected property as allowed therein.²⁶⁴

Since the rights of third persons are protected by the specific extinguishment provisions of the new Act, there should be no adverse public policy consequences as a result of the imprescriptible nature of the privilege established between the contracting parties.

258. La. R.S. 9:4861(11) (Supp. 1997).

259. La. Civ. Code art. 3457.

260. Kaplan v. University Lake Corp., 381 So. 2d 385, 390 (La. 1980) (acknowledging that the hand note used in Louisiana collateral mortgages is an imprescriptible evidence of indebtedness); Harang v. Golden Ranch Land & Drainage Co., 143 La. 982, 1016, 79 So. 768, 786 (La. 1918) (acknowledging that some actions are imprescriptible); Flowers, Inc. v. Rausch, Clerk of Court, 354 So. 2d 641, 643 (La. App. 1st Cir. 1977) (recognizing that tax assessments, once final, become imprescriptible between the state and tax debtor).

261. Anadarko Prod. Co. v. Caddo Parish Sch. Bd., 455 So. 2d 699, 700 (La. App. 2d Cir. 1984).

262. La. R.S. 9:4865 (1991); Hawn Tool Co. v. Crystal Oil Co., 514 So. 2d 636, 638 (La. App. 2d Cir. 1987); Genina Marine Serv., Inc. v. ARCO Oil & Gas Co., 499 So. 2d 257, 260-61 (La. App. 1st Cir. 1986).

263. La. R.S. 9:4865(B) (Supp. 1997).

264. La. R.S. 9:4871 (Supp. 1997).

E. Effective Date of New Act

Since the new Act states no specific effective date, the new law took effect on August 15, 1995, by operation of law.²⁶⁵ As with any change in the law, there will be a transitional period during which the courts will continue to apply prior law to interpretation of privileges.²⁶⁶ Given the extensive changes in the lien statute and the application of the privilege, it is unlikely that the courts will view the new Act as merely remedial in all respects; thus, it seems doubtful the statute will be applied retroactively in every instance.²⁶⁷

In theory, privileges established before August 15, 1995, could continue for an indefinite period of time without being subject to the new Act, since a privilege is established upon the date of first provision of services or materials and survives, even under the prior statute, without need of filing so long as materials and services continue to be provided to the well or wells.²⁶⁸

Obviously, those privileges established subsequent to the effective date of the new Act will be covered thereby. Further, since preservation of the privilege as to third persons is essentially the same as under the prior statute, it should be possible for claimants and courts to give effect, generally, to the provisions of the new Act for those privileges established prior to August 15, 1995, but for which the ultimate filing date requirement, or the date by which a claimant must institute an action to enforce the privilege, falls after such effective date (and, since there are differences between past and current law as to the property attached, provided the claimant has not filed the statement of privilege or instituted an enforcement action before August 15, 1995).

A reasonable expectation as to when the courts might apply the new Act is, perhaps, as follows: for privileges both established and preserved by proper and timely recordation before August 15, 1995, the prior statute will apply. Additionally, for privileges established, preserved by proper and timely filing, and for which enforcement has been sought by institution of an appropriate action before August 15, 1995, the prior statute will apply.

For privileges established before August 15, 1995, but for which materials and/or services continue(d) to be provided subsequent to that date, and for which a statement of privilege has not yet been filed (and provided such privilege was not extinguished under the provisions of the prior statute prior to August 15,

265. La. Const. art. III, § 19 (laws passed during the regular session of the Louisiana Legislature shall take effect on August 15 of that year).

266. *E.g.*, *Gardes Directional Drilling v. U.S. Turnkey Exploration, Inc.*, 899 F. Supp. 287 (W.D. La. 1995); *Hawn Tool Co. v. Crystal Oil Co.*, 514 So. 2d 636 (La. App. 2d Cir. 1987).

267. *Hawn Tool Co.*, 514 So. 2d at 639.

268. La. R.S. 9:4862(B) (1991). In fact, with regard to the narrow area of continuous provision to the well site, claimants and courts may regard the new Act as remedial in nature to help define what constitutes the continued provision of services and materials to the well site. The new Act states that a lapse of ninety (90) days or more in the provision of materials or services to the well site will cause a new privilege to be created. La. R.S. 9:4864(C) (Supp. 1997).

1995), the prior statute shall control with respect to determining the persons entitled to such privilege; while the new Act, subject to an appropriate grace period, shall control as to determining the property subject to the privilege and for all other purposes. This result might preclude certain claimants under the prior statute from being able to attach any property due to distinctions between the prior statute and the new Act.²⁶⁹ In particular, persons who may have been able to attach drilling or other rigs pursuant to the *Ogden* cases²⁷⁰ would be precluded under the new Act from attaching rigs not "owned by the operator or by a contractor from whom the activities giving rise to the privilege emanate."²⁷¹ Nonetheless, claimants wishing to take advantage of the prior act in that respect, assuming they had adequate notice of the effective date of the new Act, would still have the opportunity to file their statement of privilege before the effective date.

Notwithstanding the foregoing, some appropriate "grace" period should be respected by the courts to insure that those affected by the new Act have been allowed a reasonable time to be properly informed of its existence. January 1, 1996, is an attractive date for that purpose, both from the standpoint of providing over four months notice to potential claimants and the clarity of dealing with a new calendar year. Of course, equity may justify variances from any rule depending upon the distinct circumstances of the parties involved.²⁷²

IV. CONCLUSION

The new Louisiana Oil Well Lien Act takes great strides in recognizing practical considerations of today's oil and gas industry, but not all problems associated with the prior statute have been solved. Undoubtedly, new problems have been inadvertently and unintentionally created; certainly, the scope and extent of those problems will be determined over time as the new Act is tested in the courts. Regardless, the revised Act represents a significant improvement over the prior statute. Despite its limitations, the new Act is modern in scope and content in its attempt to deal with difficult and complex questions that have arisen with regard to the rights of lien claimants and the liability of those against whom such liens have been asserted.

269. Compare La. R.S. 9:4861 (1991) with La. R.S. 9:4863 (Supp. 1997).

270. *Ogden Oil Co. v. Servco*, 611 F. Sup. 572 (M.D. La. 1985); *Ogden Oil Co. v. Venture Oil Corp.*, 490 So. 2d 725 (La. App. 3d Cir.), writ denied, 494 So. 2d 328 (1986).

271. La. R.S. 9:4863(A)(2) (Supp. 1997).

272. La. Civ. Code art. 4. See *Goldking Properties Co. v. Primeaux*, 477 So. 2d 76, 78 (La. 1985); *Edmonston v. A-Second Mortgage Co. of Slidell, Inc.*, 289 So. 2d 116, 120 (La. 1974).