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# Notice of Commencement and Completion: A Recommendation for the Minnesota Mechanics' Lien Statute

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## NOTES

### NOTICE OF COMMENCEMENT AND COMPLETION: A RECOMMENDATION FOR THE MINNESOTA MECHANICS' LIEN STATUTE

*The growing sophistication of the construction industry has made the use of Minnesota's Mechanics' Lien Statute more frequently litigated than ever before. This increase in litigation has highlighted weaknesses in the present mechanics' lien statute. This Note examines two areas of concern in the present statute and recommends changes designed to decrease litigation in the areas of commencement and completion.*

INTRODUCTION .....	193
I. HISTORY OF MECHANICS' LIENS .....	196
II. THE MINNESOTA MECHANICS' LIEN STATUTE .....	197
III. A NEED FOR CHANGE .....	199
A. <i>Minnesota Statutes Section 514.05</i> .....	199
1. <i>Judicial Interpretation of Section 514.05</i> .....	201
2. <i>Continuing Confusion</i> .....	207
3. <i>Recommendation</i> .....	208
B. <i>Minnesota Statutes Section 514.08</i> .....	211
1. <i>Judicial Development</i> .....	213
2. <i>Recommendations</i> .....	218
CONCLUSION .....	220

#### INTRODUCTION

Mechanics' liens, unlike equitable liens<sup>1</sup>, are based entirely upon statute.<sup>2</sup> "Mechanics' lien" is a generic term which has been defined as:

a claim created by law for the purpose of securing a priority of payment of the price and value of the work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon.<sup>3</sup>

Mechanics' liens are applicable only to construction and related

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1. "Although it is difficult to give an accurate and comprehensive definition of the term 'equitable lien' . . . it frequently has been stated that such a lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or loss of debts." 51 AM. JUR. 2d *Liens*, § 22 (1970).

2. H. TIFFANY, *THE LAW OF REAL PROPERTY* § 1574-75 (3d ed. 1939).

3. *Van Stone & Stillwell v. Bierce Mfg. Co.*, 142 U.S. 128, 136 (1891).

fields involved in the improvement of real estate and have no application to personal property.<sup>4</sup> At common law, certain merchants were favored with the right to replevy specific goods before judgment.<sup>5</sup> This right was not available to subcontractors and suppliers of building material to recover their contributions to the improvement of real property.<sup>6</sup> This lack of protection for subcontractors and material suppliers made them vulnerable to unscrupulous general contractors and property owners.<sup>7</sup>

The purpose of mechanics' liens is to protect those who have contributed supplies or labor to the improvement of real property.<sup>8</sup> "He whose property is enhanced in value by the labor and toil of others should be made to respond in some way by payment and full satisfaction for what he has secured. To accomplish this result is the intent of the lien law."<sup>9</sup> Mechanics' liens are therefore a method to prevent the unjust enrichment of the owner whose property has been improved at the expense of contractors and materialmen.<sup>10</sup>

Mechanics' lien claimants acquire security in the improvement independent of any contractual remedies that may be available against the owner of the property.<sup>11</sup> The security provided by mechanics' lien statutes is a remedial interest rather than an ownership interest.<sup>12</sup> This interest gives the claimant the right to collect monies owed through foreclosure, and not any right to possess or use the real property.<sup>13</sup> The right to foreclose and the lack of the right to

4. Nygren, *Mechanics' Liens in Minnesota*, 26 BENCH & B. OF MINN., Feb. 1970, at 21.

5. *Fuentes v. Shevin*, 407 U.S. 67, 78-79 (1972).

6. H. TIFFANY, *supra* note 2, at § 1576.

7. Mechanics' lien laws are also designed to prevent financial ruin for the over-extended contractor or materialman.

These laws grew, and their validity became established as the courts held that the building business did not have the protection inherent in the widespread distribution of credit risk common to other businesses, and therefore needed this broader and special protection. Contractors, sub-contractors, materialmen, and other building groups were frequently obliged to extend credit in larger amounts paid for longer times than other businesses. Such parties might have their entire capital, or a substantial part of it, tied up on one or two, or ten or twenty, projects under construction.

G. OSBORNE, G. NELSON, D. WHITMAN, *REAL ESTATE FINANCE LAW* § 12.4 at 736 (1985) [hereinafter OSBORNE & WHITMAN] (quoting Stalling, *Mechanics' Lien Laws as They Exist Today*, 4 F.H.L.B. REV. § 232, 232 (1938)).

8. S. PHILLIPS, *THE LAW OF MECHANIC'S LIENS* 15-16 (3d ed. 1893).

9. *Emery v. Hertig*, 60 Minn. 54, 57, 61 N.W. 830, 831 (1895).

10. See 2 POWELL, *THE LAW OF REAL PROPERTY Mechanics' Liens* ¶ 483 (1986) ("mechanics' liens provide . . . a security device available to prevent unjust enrichment of landowners at the expense of workers and materialmen who are creditors of persons other than the landowner.").

11. *Stone, Mechanics' Lien in Iowa*, 30 DRAKE L. REV. 39, 42 (1980-81).

12. *Id.*

13. *Id.*

possess the property distinguishes mechanics' liens from other types of property interests.<sup>14</sup>

A simple illustration of the mechanics of the operation of mechanics' liens may be helpful.

O contracts with C for the construction of a garage.

C subsequently contracts with S to perform the roofing on the garage.<sup>15</sup>

Ordinarily, upon the garage's completion, O will pay C, who will in turn pay S. However, O may be unable to pay the construction costs of the garage or actually does pay C who fails to pay S. Under either scenario, the mechanics' lien scheme is designed to protect unpaid contractors and subcontractors.

Both C and S,<sup>16</sup> provided they followed the statutory guidelines, will have a security interest in the garage. Their interests in the garage will reflect the agreed price for their contribution or the reasonable value of their contribution.<sup>17</sup> In the event that O fails to pay for the garage, the mechanics' lien claimants may force the foreclosure sale of the garage and satisfy their claims from the sale price. From this elementary illustration, it is easy to see the importance of mechanics' liens in the construction industry.<sup>18</sup>

Consistent with the general mechanics' lien concept, the Minnesota mechanics' lien statute "is structured to guarantee payment for work performed on property by assigning the property as security."<sup>19</sup> The Minnesota mechanics' lien statute generally balances the competing interests that are involved quite well. However, it is not free of defects. The Minnesota mechanics' lien statute is flawed by the operation of two sections.

The first problematic section involves the method by which the Minnesota mechanics' lien statute determines priorities among various lien claimants.<sup>20</sup> The second problematic section involves the

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14. *Id.* These characteristics, a remedial interest giving rise to a right to foreclose but not the right to possess, are also distinctive of equitable liens. *See supra* note 1.

15. Because S has not contracted directly with O, S is known as a "subcontractor." *See* MINN. STAT. § 514.011(2) (1984).

16. A somewhat remarkable aspect of mechanics' liens is that they provide subcontractors with a remedy absent contractual privity with the owner of the property. *See* MINN. STAT. § 514.01 which provides for a lien "whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner . . ." (emphasis added).

17. *See* MINN. STAT. § 514.03.

18. This example will be modified to facilitate later discussion in the article.

19. *Guillaume & Assocs., Inc. v. Don-John Co.*, 371 N.W.2d 15, 19 (Minn. Ct. App. 1985).

20. MINN. STAT. § 514.05.

inherent duration of a mechanic's lien.<sup>21</sup> More precisely, at what point must a lien claimant affirmatively act in order to secure the lien for possible foreclosure proceedings?

These are crucial concerns for those involved in mechanics' lien law. This article will focus on these problems through analysis of both the statutory language and the resulting case law. These troublesome areas of the Minnesota mechanics' lien statute will then be explored. Finally, possible improvements to these areas will be proposed.

## I. HISTORY OF MECHANICS' LIENS

As previously mentioned, mechanics' liens exist solely by virtue of statute.<sup>22</sup> A form of mechanics' lien can be traced back to Roman Law.<sup>23</sup> In France, the Code Napoleon allowed masons, architects, contractors, and others employed in the construction industry a form of mechanics' lien.<sup>24</sup> Although historically, mechanics' liens were well developed in the civil law,<sup>25</sup> they were unknown in England, either at common law or in equity.<sup>26</sup>

This nation's first mechanics' lien statute was enacted by the Maryland General Assembly in 1791.<sup>27</sup> By promulgating the statute, the Maryland General Assembly hoped to encourage the construction of the new capitol city of Washington.<sup>28</sup> The statute extended protection only to those "master builders" in direct privity with the property owner.<sup>29</sup> Furthermore, its authority was geographically limited to the situs of the new capital city.<sup>30</sup>

21. *See id.* at § 514.08.

22. *See supra* note 2 and accompanying text.

23. OSBORNE & WHITMAN, *supra* note 7, at § 12.4 at 737 (citing MACKELDY, *HANDBOOK OF ROMAN LAW* 274 (Dropsie trans. 1927)).

24. *Id.* (citing CODE NAPOLEON, *PRIVILEGES AND MORTGAGES*, § 2 (2103) (1804)).

25. *Id.*

26. *See Canal Co. v. Gordon*, 73 U.S. 561, 571 (6 Wall.) (1867) ("Liens of this kind were unknown in the common law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law.").

27. OSBORNE & WHITMAN, *supra* note 7, § 12.4 at 736 (citing Acts of General Assembly of Maryland, ch. 45, § 10 (1791)).

28. *See Moore-Mansfield Const. Co. v. Indianapolis N.C. & T. Ry. Co.*, 179 Ind. 356, 101 N.E. 296 (1913). The court stated:

The origin of such laws in America arose from the desire to establish and improve, as readily as possible, the city of Washington. In 1791, at a meeting of the commissioners appointed for such purpose, both Thomas Jefferson and James Madison were present, and a memorial was adopted urging the General Assembly of Maryland to pass an act securing to *master builders* a lien on houses erected and land occupied. The requested law was enacted December 19, 1791.

*Id.* at 369, 101 N.E. at 301. (emphasis in the original).

29. *See supra* note 27.

30. *See*, POWELL, *supra* note 10, at § 483 (citing Md. Laws 1791, ch. 45).

It was not until 1803 that Pennsylvania enacted the next mechanics' lien statute in this country.<sup>31</sup> The general growth of urban construction throughout the nineteenth century fostered the passage of mechanics' liens in many states.<sup>32</sup> Today every state in the Union has such legislation.<sup>33</sup> The national development of mechanics' lien statutes has also seen the protection extended beyond those in privity of contract with the property owner.

## II. THE MINNESOTA MECHANICS' LIEN STATUTE

Mechanics' liens have existed in Minnesota since March of 1858, nearly two months before Minnesota attained statehood.<sup>34</sup> By 1888, there had been three different versions of mechanics' liens in Minnesota. The last of the three mechanics' liens statutes<sup>35</sup> was declared an unconstitutional violation of the state constitution.<sup>36</sup> As a result,

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31. *Id.* (citing Pa. Laws 1803). This was a temporary statute restricted to the City of Philadelphia. A permanent statute was enacted three years later which included a lien for those not in privity with the owner. *Id.*

32. *Id.* The constant construction and city building of the nineteenth century set the stage for statutes dealing with mechanics' liens.

33. ALA. CODE § 35-11-110 (1975); ALASKA STAT. § 34.35.050 (1962); ARIZ. REV. STAT. ANN. § 33-981 (1974); ARK. STAT. ANN. § 51-601 (1971); CAL. CIV. CODE § 3109 (West 1974); COLO. REV. STAT. § 38-22-101 (1982); CONN. GEN. STAT. ANN. § 49-33 (West 1978); DEL. CODE ANN. tit. 25, § 2701 (1974); D.C. CODE ANN. § 38-101 (1986); FLA. STAT. ANN. § 713.01 (West 1969); GA. CODE ANN. § 44-14-360 (1982); HAW. REV. STAT. § 507-41 (1976); IDAHO CODE § 45-501 (1947); ILL. ANN. STAT. ch. 82, para. 1 (Smith-Hurd 1966); IND. CODE ANN. § 32-8-3-1 (West 1979); IOWA CODE ANN. § 572.1 (West 1950); KAN. STAT. ANN. § 60-1101 (1983); KY. REV. STAT. ANN. § 376.010 (Michie/Bobbs-Merrill 1972); LA. REV. STAT. ANN. § 9:4801 (West 1983); ME. REV. STAT. ANN. tit. 10, § 3251 (1980); MD. REAL PROP. CODE ANN. § 9-101 (1981); MASS. GEN. LAWS ANN. ch. 254, § 1 (West 1959); MICH. COMP. LAWS ANN. § 570.1104 (West 1986); MINN. STAT. § 514.01 (1984); MISS. CODE ANN. § 85-7-131 (1972); MO. ANN. STAT. § 429.010 (Vernon 1986); MONT. CODE ANN. § 71-3-501 (1985); NEB. REV. STAT. § 52-101 (1984); NEV. REV. STAT. § 108.221 (1985); N.H. REV. STAT. ANN. § 447:1 (1983); N.J. STAT. ANN. § 2A:44-64 (West 1974); N.M. STAT. ANN. § 48-2-1 (1978); N.Y. LIEN LAW § 3-39C (McKinney 1986); N.C. GEN. STAT. § 44A-7-23 (1984); N.D. CENT. CODE § 35-27-01 (1980); OHIO REV. CODE ANN. § 1311.01 (Anderson 1979); OKLA. STAT. ANN. tit. 42, § 141 (West 1979); OR. REV. STAT. § 87.005 (1983); PA. STAT. ANN. tit. 49, § 1101 (Purdon 1965); R.I. GEN. LAWS § 34-28-1 (1984); S.C. CODE ANN. § 29-5-10 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 44-9-1 (1983); TENN. CODE ANN. § 66-11-101 (1982); TEX. PROP. CODE ANN. § 53.021 (Vernon 1984); UTAH CODE ANN. § 38-1-1 (1974); VT. STAT. ANN. tit. 9, § 1921 (Supp. 1986); VA. CODE ANN. § 43-1 (1986); WASH. REV. CODE ANN. § 60.04.010 (Supp. 1986); W. VA. CODE § 38-2-1 (1985); WIS. STAT. ANN. § 779.01 (West 1981); WYO. STAT. § 29-2-101 (1981).

34. *See*, Act of August 12, 1858, ch. 54, § 1, 1858 Minn. Laws 121, 121.

35. Act of March 12, 1878, ch. 3, 1878 Minn. Laws 71.

36. *Meyer v. Berlandi*, 39 Minn. 438, 40 N.W. 513 (1888) (the court held the entire mechanics' lien statute invalid since several sections were unconstitutional in their attempt to either impose a lien without the owner's consent, authority or agreement, or to subordinate all prior encumbrances).

the state constitution was amended in 1888<sup>37</sup> to allow mechanics' liens to include homestead property.<sup>38</sup> The predecessor of Minnesota's current mechanics' lien was then enacted.<sup>39</sup>

The state constitution also provides for a lien similar to a mechanics' lien.<sup>40</sup> Such "constitutional liens" are far more restrictive in scope than mechanics' liens.<sup>41</sup> While the scope of mechanics' liens<sup>42</sup> protect those not in privity of contract with the owner of the property, "constitutional liens" only protect those in privity of contract with the owner.<sup>43</sup>

The Minnesota mechanics' lien statute<sup>44</sup> protects engineers, land surveyors, contractors, subcontractors, material suppliers, and others who contribute to the improvement of real estate by performing labor.<sup>45</sup> To successfully assert a lien, a claimant must show three things. First, the claimant must show that either the owner or an au-

37. Article I, Section 12 of the state constitution, as originally adopted, provided that "a reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law." MINN. CONST. art. I, § 12 (1857, amended 1888). Obviously then, the legislature intended to carve out the exempted property.

The legislature did pass a law determining the amount of exempted property. The law generally placed a blanket exemption on all defined homestead property. See, Act of March 9, 1875, ch. 66, § 1, 1875 Minn. Laws 92, 92-93.

As a result of *Meyer*, the state constitution was amended in 1888. The above-quoted passage of the constitution was amended by adding the language:

Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same; and provided further that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed.

MINN. CONST. art. I, § 12. The effect of this amendment was to make previously exempt homestead property subject to a mechanics' lien.

38. Act of February 21, 1887, ch. 2, § 1, 1887 Minn. Laws 4.

39. Act of April 24, 1889, ch. 200, §§ 1-2, 1889 Minn. Laws 313, 313-14.

40. MINN. CONST. art. I, § 12.

41. See *infra* note 45 and accompanying text.

42. Nygren, *supra* note 4, at 22.

43. *Id.* Because subcontractors and material suppliers are not in privity of contract with the owner, such claimants may have a difficult time securing a personal judgment against the owner. Without a personal judgment, a claimant will have nothing upon which to base a "constitutional lien." In Lundstrom Constr. Co. v. Dygert, 254 Minn. 224, 94 N.W.2d 527, (1959) the court noted the difficulty of acquiring a personal judgment against a homeowner absent privity:

[I]t is generally recognized that, other than the statutory right to a mechanics' lien or other special statutory remedies, subcontractors and materialmen have no right to a personal judgment against the owner *where there is no contractual relation between them.*

*Id.* at 232, 94 N.W.2d at 533 (emphasis in original).

44. MINN. STAT. §§ 514.01-.959. The correct name of the applicable statute is "Liens, Labor, Material."

45. *Id.* § 514.01.

thorized agent<sup>46</sup> contracted for the supply of material or labor. Second, the claimant must show that it actually furnished material or labor for the improvement. And finally, the claimant must show that it furnished material or labor for one of the stated purposes of section 514.01.<sup>47</sup>

### III. A NEED FOR CHANGE

It has been persuasively argued that the construction industry breeds more civil litigation than any other aspect of our society.<sup>48</sup> Minnesota has not avoided this unfortunate phenomenon.<sup>49</sup> This quantity of litigation is an increased burden on our overloaded court system, is time consuming, and is ultimately responsible for increased construction costs. Since mechanics' liens are a vital part of the construction industry and the construction industry is a vital part of our economy, it is important that measures are taken to improve Minnesota's mechanics' lien statute.

#### A. *Minnesota Statutes Section 514.05*

Perusal of the Minnesota's mechanics' lien statute for problem areas leads inexorably to section 514.05. This section has been, and will continue to be, the source of more litigation than any other section of the Minnesota mechanics' lien statute. Section 514.05 states in pertinent part:

As against a bona fide purchaser, mortgagee, or encumbrancer without notice, no lien shall attach *prior to the actual and visible beginning of the improvement on the ground* . . . .<sup>50</sup>

The importance of section 514.05 is that it determines the priority in which liens will be satisfied upon foreclosure.<sup>51</sup> Referring back to

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46. *Id.*

47. *Anderson v. Breezy Point Estates*, 283 Minn. 490, 494, 168 N.W.2d 693, 696 (1969). In *Anderson*, the court held the surveyors' staking of the property was insufficient to meet the purposes of the statute. *Id.* at 495, 168 N.W.2d at 697. MINN. STAT. § 514.01 was amended in 1974 to include "land surveying services" as one of the enumerated purposes of the statute. Act of April 9, 1974, ch. 381, 1974 Minn. Laws 683.

48. Comment, *The Release Bond Statutes: Achieving Balance in the Mechanics' Lien Laws*, 28 UCLA L. REV. 95 (1980).

49. See, e.g., *R. B. Thompson, Jr. Lumber Co. v. Windsor Dev. Corp.*, 383 N.W.2d 357 (Minn. Ct. App. 1986)(three consolidated actions from two counties involving foreclosure actions on mechanics' liens on three pieces of property owned by defendant); *Jesco, Inc. v. Home Life Ins. Co.*, 357 N.W.2d 123 (Minn. Ct. App. 1984)(three consolidated actions to determine priority and amount of mortgage and mechanic's lien).

50. MINN. STAT. § 514.05.

51. "All such liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for



the introductory illustration, imagine that C not only contracted with S for the construction of the garage, but that he also contracted with S1, S2 and S3 for laying the concrete foundation, for the electrical work and for the painting of the garage. Also imagine that O has financed the entire project through M who takes a mortgage on the project. The once elementary scenario has become very complex and the lien priority issue becomes crucial.

Since there are a number of claimants, the assets generated from a foreclosure sale may be insufficient to satisfy all claims. The proceeds from a foreclosure sale are particularly likely to be insufficient where the court has determined that the interest of a party holding less than a fee interest<sup>52</sup> is subject to the lien claims. In such a case, the only interest subject to the judicial sale may be the improvement severed from the land. Generally, an improvement, if capable of severance from the underlying property, has a substantially decreased value.<sup>53</sup> There are a variety of scenarios that illustrate the importance of the priority issue.<sup>54</sup>

In our example, the troublesome language of section 514.05, quoted above, pertains directly to M's priority. According to the statutory language, M's mortgage will generally have priority over C, S, S1, S2 or S3 until the "actual and visible beginning of the improvement on the ground."<sup>55</sup> In other words, until C, S, S1, S2 and S3 have either delivered materials that can be seen<sup>56</sup> to the garage site or have begun construction that can be seen on the garage, M's mortgage will have priority over their mechanics' liens. The logical import of the "actual and visible beginning of the improvement on

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the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record . . ." *Id.*

52. See *Benjamin v. Wilson*, 34 Minn. 517, 26 N.W. 725 (1886) ("owner" as used in Minnesota's mechanics' lien statute does not require proof of absolute ownership but may include any interest which court may order sold).

53. *Stone*, *supra* note 11, at 97.

54. *Id.*

55. MINN. STAT. § 514.05. Any contractor or subcontractor may record a contract for an improvement before commencement of any visible improvement thus providing constructive notice to all interested parties.

56. A reading of this section does not clearly establish that mere delivery of material to a site should establish priority for a mechanics' lien claimant over a mortgage. The language of the statute expressly states that liens shall attach against owners "from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement." MINN. STAT. § 514.05.

No such express language exists when addressing lien priority as against mortgages. The statute uses entirely different language stating, "[N]o lien shall attach prior to the actual and visible beginning of the improvement on the ground." Nonetheless, the Minnesota Supreme Court has failed to recognize the distinction in the statutory language. See *Jadwin v. Kasal*, 318 N.W.2d 844 (Minn. 1982); *Landers-Morrison-Christenson Co. v. Ambassador Holding Co.*, 171 Minn. 445, 214 N.W. 503 (1927).

the ground" language is that, before executing any loan agreements, mortgagees and other encumbrancers of property concerned about their lien priority should view the property securing the loans.

1. *Judicial Interpretation of Section 514.05*

The philosophy of the visible commencement standard was announced by Justice Mitchell in *Wentworth v. Tubbs*:<sup>57</sup>

[I]t would be very unjust if the land could be afterwards swallowed up by mechanics' liens for work which had not been commenced on the ground, and of which consequently one who might buy the property or take a mortgage upon it had no notice or means of knowledge when he took his deed or his mortgage.<sup>58</sup>

There should be no objection to fixing the date of a lien's attachment by something that can be discovered by viewing the land itself. As a practical matter, however, just what constitutes visible commencement on the ground is often a difficult question. In spite of the long-standing difficulties that courts have had with this standard,<sup>59</sup> nearly half of the states have basically the same standard.<sup>60</sup>

The date of the visible beginning of the improvement has even greater significance when it is realized that *all* mechanics' lien claimants date their priority from the date of the visible beginning of the improvement.<sup>61</sup> Although section 514.05 does not expressly provide for this construction, courts have long recognized this interpretation.<sup>62</sup> In *Glass v. Freeburg*,<sup>63</sup> the Minnesota Supreme Court explained the reasonableness of this interpretation. Visible evidence of an improvement can, supposedly, be easily ascertained. The court noted that once visible evidence of an improvement has occurred, any reasonably prudent person should know that a variety of materi-

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57. 53 Minn. 388, 55 N.W. 543 (1893).

58. *Id.* at 395, 55 N.W. at 544.

59. Other jurisdictions have wrestled with this difficult issue as well. *See, e.g.*, *Planters Lumber Co. v. Jack Collier East Co.*, 234 Ark. 1091, 356 S.W.2d 631 (1962) (construed commencement of visible improvements to be the date of first delivery of materials for the improvement); *Sheridan, Inc. v. Palchanis*, 172 So. 2d 872 (Fla. Dist. Ct. App. 1965) (materials furnished for layout work on vacant lot did not constitute visible commencement of operations); *Maule Indus., Inc. v. Gaines Constr. Co.*, 157 So. 2d 835 (Fla. Dist. Ct. App. 1963) (removing dirt and scarifying land did not constitute the visible commencement of the improvement); *Rupp v. Earl H. Cline & Sons, Inc.*, 230 Md. 573, 188 A.2d 146 (1963) (removal of soil from one lot and placing it in another was at most only preparatory work and was not commencement of the improvement that would give the mechanics' lien claimants priority).

60. *See* KRATOVIL, *MODERN MORTGAGE LAW AND PRACTICE* 214 (1972).

61. *Glass v. Freeburg*, 50 Minn. 386, 390, 52 N.W. 900, 901 (1892) (subcontractor's lien attaches when lien of the original contractor attaches by virtue of the contract relationship between the parties).

62. *Id.*

63. *Id.*

als and labor may be necessary to complete the improvement.<sup>64</sup> Convinced that general contractors generally subcontract out some portion of an improvement project, the *Glass* court reasoned that if mortgagees “see fit to take a mortgage under such circumstances they assume the risk of its being subordinated to all liens which may attach to the premises for labor or materials for the completion of the building in accordance with the contract.”<sup>65</sup>

An examination of case law decided under section 514.05 illustrates the confusion and uncertainty created by the nebulous “visible commencement” standard. The courts, which must struggle with this standard, have oftentimes yielded inconsistent results.<sup>66</sup> Perhaps more importantly, the parties themselves have demonstrated a total lack of understanding of the concepts involved and their importance in establishing a standard to decide whether a beginning of an improvement was visible. The beginning of an improvement is visible if it would be found during a reasonably diligent inspection of the property.<sup>67</sup> The logical question arising from this standard is what constitutes a “reasonably diligent search”?

The facts of *Reuben E. Johnson Co. v. Phelps*,<sup>68</sup> a thoroughly confusing case, touched upon the issue of “a reasonably diligent search.” *Reuben E. Johnson Co.* involved the issue of whether surveying stakes allegedly in place prior to the recordation of the mortgage constituted the visible beginning of the improvement.<sup>69</sup> During the trial, agents for the mortgagee testified that they “walked about the property” but saw no stakes in the tall weeds.<sup>70</sup>

Although the court in *Reuben E. Johnson Co.* did not embrace a “rea-

64. *Id.* at 390, 52 N.W. at 901.

65. *Id.*

66. *Compare* *Lampert Yards, Inc. v. Thompson-Wetterling Constr. & Realty, Inc.*, 302 Minn. 83, 223 N.W.2d 418 (1974) (stakes with attached 2 x 4 boards and string around perimeter of proposed building did not constitute visible commencement) with *R.B. Thompson, Jr. Lumber Co.*, 383 N.W.2d at 360 (Minn. Ct. App. 1986) (stakes rising three and one-half feet above ground and topped with red fabric did constitute visible commencement).

67. *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 64, 226 N.W.2d 603, 607 (1973) (“[T]he test is whether the person performing the duty of examining the premises to ascertain whether an improvement has begun is able in the exercise of reasonable diligence to see it.”); *Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 113, 156 N.W.2d 247, 251 (1968) (“[A] person using reasonable diligence in examining the premises must be able to see the actual and visible beginning of the improvement.”); *Wentworth*, 53 Minn. at 395, 55 N.W. at 544 (“[T]he liens of mechanics or materialmen all attach as of the date of the performance of the first work or the delivery of the first material on the ground.”).

68. 279 Minn. 107, 156 N.W.2d 247 (1968).

69. *Id.* It is unclear when the staking was done but a witness testified that he saw the stakes on the property about a week before the mortgage was recorded. *Id.* at 111, 156 N.W.2d at 250.

70. *Id.*

sonably diligent search" standard, perhaps it can be inferred that it involves, at the very least, physically walking over the property.<sup>71</sup> However, it is difficult to glean a standard from *Reuben E. Johnson Co.* because it was decided upon the court's belief that the "survey was not an improvement."<sup>72</sup>

The burden of making a reasonably diligent search was considerably lessened by the holding in *Lampert Yards, Inc. v. Thompson-Wetterling Constr. & Realty Inc.*<sup>73</sup> *Lampert Yards* again involved those troublesome survey stakes.<sup>74</sup> The lien claimant apparently had done the surveying work and installed the stakes one day before the mortgage was recorded.<sup>75</sup>

The court rejected the lien claimant's argument that *Reuben E. Johnson Co.* required the mortgagee, in the exercise of reasonable diligence, to actually walk over the property.<sup>76</sup> Instead, the court stated: "The legislative intent . . . would not be served by a rule of law which established statutory notice whenever such slight structures as then existed could be discovered only by tramping the fields of an intended construction site."<sup>77</sup> In its holding, the court stated that

71. *See id.*

72. *Id.* at 114, 156 N.W.2d at 252. A confusing aspect of *Reuben E. Johnson Co.* is the court's apparent determination that, even if the mortgagee has notice that the staking of the property had occurred, it would prevail over the mechanics' lien claimant. *Id.* at 115-16, 156 N.W.2d at 252-53.

Earlier, the court stated that "if the mortgagee has notice of the furnishing of material or labor upon the premises for the beginning of the improvement, he stands in the same position as the owner." *Id.* at 113, 156 N.W.2d at 251. This implies that if the mortgagee knew the staking has occurred, it, like the owner of the property, would be subject to the lien.

Yet the court, later in the opinion, rejects this very notion. The mechanics' lien claimant argued that the mortgagee had actual notice of the staking. *Id.* at 115, 156 N.W.2d at 252. The court rejects this argument based generally on the mechanical philosophy that a lien does not attach against a mortgagee without actual, visible beginning of the improvement. *Id.* at 115-16, 156 N.W.2d at 252-53. In support of its position, the court cites several cases where mechanics' lien claimants argued that mortgagees had actual notice of contemplated improvements. *Id.*

The cases cited by the court are easily distinguished from the facts of *Reuben E. Johnson Co.* In *Reuben E. Johnson Co.*, the improvements were actual and not merely contemplated. *Id.* at 111, 156 N.W.2d at 250.

*See also* *Knutson, Inc. v. Westchester, Inc.*, 374 N.W.2d 485, 489 (Minn. Ct. App. 1985) (in dicta, the court acknowledged the appeal of holding mortgagees in the same position as owners if they have notice of surveying or architectural services rendered but not yet visible). *But see* *Jadwin v. Kasal*, 318 N.W.2d 844 (Minn. 1982) (actual notice by mortgagee of architectural services rendered prior to a visible beginning does not deprive a mortgagee of priority).

73. 302 Minn. 83, 223 N.W.2d 418 (1974).

74. *Id.*

75. *Id.* at 85-86, 223 N.W.2d at 420.

76. *Id.* at 88, 223 N.W.2d at 421.

77. *Id.*

“such notice is not given where nothing can be seen . . . from the edge of the field.”<sup>78</sup>

Shortly after *Lampert Yards*, the court, in *Kloster-Madsen, Inc. v. Taft's, Inc.*<sup>79</sup> revived the apparently slumbering “reasonably diligent search” standard.<sup>80</sup> In *Kloster-Madsen*, the lien claimant, without the knowledge of the mortgagee or the vendor of the property, began work on the vendee’s remodeling plans. The work done on a large three-story building consisted of removing four light fixtures and installing them elsewhere, removing two electric outlets, and cutting a “crawl hole” in the ceiling.<sup>81</sup>

The court determined that the lien claimant had priority over the mortgagee by virtue of the visible beginning of the improvement.<sup>82</sup> The court rejected the mortgagee’s argument that “the improvement although ‘visible to the naked eye,’ must also be discernible to ‘the mind’s eyes insofar as they tell one’s mind that an improvement has been commenced.’ ”<sup>83</sup> The court also affirmed the lower court’s decision based in part upon testimony regarding “the mortgagee’s knowledge of contemplated improvements.”<sup>84</sup>

The mortgagee in *Kloster-Madsen* was faced with a formidable “reasonably diligent search” burden. In a large three story structure, it was held to have constructive notice of “improvements” that in reality were quite insignificant. Apparently, the mortgagee in *Kloster-Madsen* should have thoroughly searched each room of the building. In considering the “reasonably diligent search” standard at this point, two conclusions may be reached. First, it places a more significant burden than before on all mortgagees. And second, it places a greater burden of discovering visible improvements on mortgagees of buildings than on mortgagees of land. Unfortunately, the case law does little to illuminate these questions.

The mortgagee’s argument, rejected by the court in *Kloster-Madsen*, that there should be some subjectivity in the visible beginning determination,<sup>85</sup> does have support in the policies of requiring a visible

78. *Id.* at 88, 223 N.W.2d at 422.

79. 303 Minn. 59, 226 N.W.2d 603 (1975).

80. *Id.* at 64, 226 N.W.2d at 607.

81. *Id.* at 61-62, 226 N.W.2d at 606.

82. *Id.* at 64, 226 N.W.2d at 607.

83. *Id.*

84. *Id.* Using the mortgagee’s knowledge of contemplated improvements to deprive it of priority violates the principles established in a long line of Minnesota cases. See *supra* note 67 and accompanying text.

85. The mortgagee’s test for visibility included not only visible to the eye, but “also be discernible to the mind’s eyes insofar as they tell one’s mind that an improvement has been commenced.” *Id.*

beginning.<sup>86</sup> Since the standard was established to protect mortgagees from hidden liens, it makes little sense to hold a mortgagee responsible for "visible improvements" that are not recognized as such. This problem is compounded by the fact that mortgagees often do not know what to look for when inspecting property.<sup>87</sup>

In a very recent case, *Jesco, Inc. v. Home Life Insurance Co.*,<sup>88</sup> the court again addressed a surveying stake case. In *Jesco*, the lien claimants had completed surveying work several months prior to the recording of the mortgage.<sup>89</sup> The thirteen stakes marking the perimeter of the proposed building stuck out of the ground approximately twenty-four inches to thirty inches and had orange strips of material tied to the ends.<sup>90</sup> The testimony at trial indicated that some of the stakes may have been visible but others were obscured by the tall weeds at the time of the mortgagee's inspection.<sup>91</sup>

The mortgagee's agent spent approximately an hour inspecting the site. He walked around the perimeter and also took pictures of the property.<sup>92</sup> The agent saw no stakes during the inspection. The court held that this inspection did not meet the "reasonably diligent" search test.<sup>93</sup>

The *Jesco* court based its decision on the 1974 amendment to section 514.05.<sup>94</sup> The court determined that only through this amend-

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86. See *Wentworth*, 53 Minn. at 395, 55 N.W. at 544. Justice Mitchell discussed the policy underlying the visibility test:

[I]t would be very unjust if the land could be afterward swallowed up by mechanics' liens for work which had not been commenced on the ground, and of which consequently one who might buy the property or take a mortgage upon it had no notice or means of knowledge when he took his deed or his mortgage.

*Id.*

87. *Knutson*, 374 N.W.2d at 487 (agent failed to look for any stakes); *Jesco*, 357 N.W.2d at 127 (the agent for the mortgagee who was sent to inspect the property stated that he was not looking for surveying work "because he was not aware that it had any significance.").

88. *Jesco*, 357 N.W.2d at 123.

89. *Id.* at 124.

90. *Id.*

91. *Id.*

92. *Id.* Recall that this inspection was similar, if not identical, to the inspection found satisfactory in *Lampert Yards*. See *supra* note 73-78 and accompanying text.

93. 357 N.W.2d at 127.

94. *Id.* In 1974, the Minnesota legislature amended section 514.05 by adding two sentences to its end:

Engineering or land surveying services with respect to real estate shall not constitute the actual and visible beginning of the improvement on the ground referred to in this section, except when such engineering or land surveying services include a visible staking of the premises. No lien shall attach for engineering or land surveying services rendered with respect to a purchaser for value if the value of those services does not exceed \$250.

Act of April 9, 1974, ch. 381, § 2, 1974 Minn. Laws 683, 683-84. This amendment makes it clear that mortgagees are charged with notice of visible surveying work.

ment could surveying work constitute the visible beginning of the improvement.<sup>95</sup> Before the 1974 amendment, the *Jesco* court reasoned, the holding in *Anderson v. Breezy Point Estates*<sup>96</sup> prevented surveying work from ever constituting the visible beginning of an improvement.<sup>97</sup> Because surveying stakes could now constitute the visible commencement of the improvement, the court believed that a more thorough search was necessary than was required in *Lampert Yards*.<sup>98</sup>

The *Jesco* court also stated that a number of circumstances affect the determination of when a beginning of an improvement constitutes the visible beginning.<sup>99</sup> Among the circumstances considered are the condition of the property and the mortgagee's knowledge of plans or improvements.<sup>100</sup> The court in *Kloster-Madsen* mentioned these factors as well.<sup>101</sup> Unfortunately, it is unclear what weight these circumstances have. Moreover, it has been held that such extrinsic factors should not enter into the visible improvement-reasonably diligent search analysis.<sup>102</sup>

95. *Jesco*, 357 N.W.2d at 127.

96. 283 Minn. 490, 168 N.W.2d 693 (1969).

97. *Jesco*, 357 N.W.2d at 127. A close reading of *Anderson* does not support this proposition. In *Anderson*, a surveyor was attempting to establish a mechanics' lien for his own services. There was no issue of priority involved. The court stated:

[W]e have in the past considered and rejected the claim that the work of a surveyor constitutes the "actual and visible beginning of the improvement on the ground" within the provisions of Minn. St. 514.05 so as to establish a priority among secured claimants. . . .

*Anderson*, 283 Minn. at 494, 168 N.W.2d at 696 (citations omitted). The cited cases do not hold that surveying work cannot constitute the visible beginning of the improvement. While in both cases the surveying work was held not to be a visible beginning of the improvement, the cases so held because the work could not be seen in the exercise of reasonable diligence. In both cases the courts applied the traditional visible beginning analysis. A more reasonable reading of *Anderson* indicates that the court rejected the idea that surveying services were lienable. There is little, if any, support in *Anderson* for the proposition that surveying services are incapable of constituting the visible commencement of an improvement.

98. See *supra* notes 57-62 and accompanying text.

99. 357 N.W.2d at 126-27.

100. *Id.* at 127.

101. 303 Minn. at 63-65, 226 N.W.2d at 607-08.

102. It seems that the court's allowing knowledge of contemplated improvements to lower the burden of showing commencement of a visible improvement is contradictory to previous holdings. The court's holding in *Reuben E. Johnson Co.*, 279 Minn. at 116, 156 N.W.2d at 253 rejects the idea that notice of contemplated improvements somehow eases the lien claimant's burden of showing a visible improvement. Allowing knowledge of contemplated improvements to work against the mortgagee, according to the court, "would not accord with the purpose of the statute to fix the relative rights and priorities of purchasers, incumbancers, and lienholders with definiteness and certainty." *Id.* (quoting *Landers-Morrison-Christenson Co. v. Ambassador Holding Co.*, 171 Minn. 445, 448, 214 N.W. 503, 505 (1927)).

This same theme, that a visible improvement should be objectively obvious with-

Most recently, in *R.B. Thompson, Jr. Lumber v. Windsor Development Corp.*,<sup>103</sup> the court wrestled with the “visible beginning of the improvement” standard. The court reluctantly held that surveying stakes could represent the “visible commencement of the improvement.”<sup>104</sup> The court’s reluctance to so hold was based on concern that allowing such preparatory work to constitute the visible commencement of the improvement “inject[ed] great uncertainty” into the area of construction financing.<sup>105</sup> The court noted that lien claimants may tack their liens back to any visible work done on the site, even if done years before the actual erection of the building.<sup>106</sup>

## 2. Continuing Confusion

With over one hundred years of case law to interpret and clarify it,

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out resort to the mortgagee’s subjective knowledge of the improvement, was also espoused in *Jadwin*, 318 N.W.2d at 847.

103. 383 N.W.2d 362 (Minn. Ct. App. 1986). In this case, another difficult issue, beyond the scope of this article is highlighted. The issue involves large projects with a number of separate developers and stages of development. The question becomes whether all materialmen for the entire project may look back to the first visible improvement or the first stage of improvement in establishing lien priority.

104. *Id.* at 367. “From before the turn of the century, the practicing bar as well as developers and construction financiers have acted in reliance upon the understanding that priority will not attach to preparatory work such as the platting of lots, staking for grading, site grading, construction of building pads, etc.” *Id.*

105. *Id.*

106. *Id.* The court’s concern in this area is misplaced. The time of making the first visible improvement is not important. Rather, it is the *existence* of the visible improvement that is crucial. Therefore, if a construction lender or mortgagee inspects the property before advancing funds, it will be on notice of any existing visible improvements regardless of when made. Once alerted to any visible improvement, they can determine the providence of the loan.

The court in *R.B. Thompson, Jr. Lumber Co.* also erroneously finds that a line of prior cases precluded surveying stakes from constituting the first visible improvement. See *supra* note 97 for a discussion of why survey stakes could potentially constitute a first visible improvement. The court states:

If a preliminary survey . . . were to be held an actual and visible beginning of the improvement on the ground so that all liens filed thereafter would have priority over a mortgage given to secure advances for completion of the improvement, it is safe to say that it would be difficult, if not impossible, to procure financing for any such improvement. We do not believe that the legislature could have intended such a result.

*Id.* at 366 (citing *Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 114-15, 156 N.W.2d 247, 252 (1968)).

In quoting this passage from *Reuben E. Johnson Co.*, the court in *R.B. Thompson Jr., Lumber Co.* omitted the words “of this kind” at the beginning of the quote. The type of preliminary survey involved in *Reuben E. Johnson Co.* was merely a division of property among two different mortgages. The surveying was not necessary to any of the improvements except to its financing. Furthermore, the court found that these stakes were obscured by the underbrush. 279 Minn. at 114-15, 156 N.W.2d at 252. Nothing in *Reuben E. Johnson Co.* indicates that surveying stakes visible and necessary to the improvement cannot constitute the visible commencement of the improvement.



section 514.05 is still shrouded in uncertainty. Just what constitutes a "visible beginning of the improvement on the ground" remains unclear. Is it a strictly objective test<sup>107</sup> or does the mortgagee's knowledge of contemplated improvements, among other facts, make an otherwise invisible beginning a visible beginning?<sup>108</sup>

Equally unclear is what constitutes a "reasonably diligent search" of the property. Has the holding in *Jesco* left the mortgagee with no alternative but to "tramp the fields of the construction site"<sup>109</sup> in search of the obscure yet visible beginning of the improvement? If indeed it has, is it a fair burden to place on the mortgagees who generally are financing the entire project anyway?<sup>110</sup>

Simply stated, section 514.05 does not provide interested parties with the necessary guidance to address or even avoid costly priority disputes. Similarly, the nebulous standards that have evolved to address priority questions have left the courts to decide such cases on a haphazard case-by-case basis. The vital construction industry demands more certainty in this important mechanics' lien area.

### 3. Recommendation

In the area of priority determination, certainty should be the principal consideration. Article Five of the Uniform Simplification of Land Transfers Act<sup>111</sup> provides a workable solution to the priority dilemma. Article Five employs a notice of commencement<sup>112</sup> system

107. See *supra* note 67 and accompanying text.

108. See *Jesco*, 357 N.W.2d at 127; *Kloster-Madsen*, 303 Minn. at 64, 226 N.W.2d at 607.

109. See *supra* note 62 and accompanying text.

110. See, e.g., *Dolder v. Griffin*, 323 N.W.2d 773, 779-80 (Minn. 1982); *Jadwin*, 318 N.W.2d 844; *Kloster-Madsen*, 303 Minn. 59, 226 N.W.2d 603; *Lampert Yards*, 302 Minn. 83, 223 N.W.2d 418.

111. The predecessor to the Uniform Simplification of Land Transfers Act (USLTA) was the Uniform Mechanics Lien Act. In 1925, Herbert Hoover, then Secretary of Commerce, appointed a committee for the purpose of considering a "Standard State Mechanics' Lien Act." The National Conference of Commissioners on Uniform State Laws designated a committee to cooperate. After several drafts had been presented, the final draft was approved in 1932 and was designated as the "Uniform Mechanics' Lien Act." In 1935, Florida substantially adopted the "Uniform Mechanics' Lien Act." Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 413 (1977).

In August 1943, the "Uniform Mechanics' Lien Act" was withdrawn from the active list of Model Acts recommended for adoption by the states at the National Conference of Commissioners on Uniform State Laws. At that time, only Florida had adopted the act and further acceptance was unlikely. *Id.* at 413-14.

Article Five of the Uniform Simplification of Land Transfers Act is partially based on the Florida statute that was adopted in 1963 which preserved aspects of the Uniform Mechanics' Lien Act. See OSBORNE & WHITMAN, *supra* note 7, at 736.

112. See Betz, *USLTA Article 5: Parts 3 & 4*, 10 STETSON L. REV. 109, 110 n.5 (1978):

to establish priorities among lien claimants.<sup>113</sup> This concept was developed to alleviate the difficulties inherent in the "visible commencement approach" to determining lien priorities.<sup>114</sup> A recorded notice of commencement provides notice to third parties searching the record for potential liens against the real estate and therefore, alleviates the problem of hidden liens.<sup>115</sup>

Using the notice of commencement system, the date of recording notice of commencement on the public record establishes lien priorities.<sup>116</sup> There is no need to determine when construction began or whether a beginning was "visible" or not. In addition to providing certainty in the area of lien priority, the notice of commencement scheme also allows an owner to designate what portion of his real estate is subject to mechanics' liens.<sup>117</sup>

Under the Article Five scheme, the owner records a notice of commencement before construction begins which places all parties on notice that mechanics' liens may be filed against the property for the time period specified in the notice.<sup>118</sup> If a lien claimant records his lien during this period, the lien relates back to the date the notice of commencement was recorded.<sup>119</sup> It is the recordation date of the notice of commencement that becomes the priority date as against all third parties.<sup>120</sup> If, however, the owner fails to record a notice of commencement,<sup>121</sup> a claimant is entitled to record a notice<sup>122</sup> and

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"Notice of commencement" is a notice recording device first developed in Florida to eliminate problems associated with the visible commencement approach of dating lien claimants' priorities. Under the visible commencement approach, most mechanics' liens took effect from the time of visible commencement. The major problem associated with that approach was determining with certainty when commencement of construction began and thus, when the lien attached.

*Id.* (citing Ervin, *Revised Mechanics' Lien Laws; the Whys and Wherefores*, 37 FLA. B. J. 1095, 1096-97 (1963).

113. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 5-301 (1978).

114. *See id.* Art. 5, Introductory Comment (1978) "The notice of commencement system permits third parties to rely on the record and, at the same time, gives all claimants on a particular improvement equal priority no matter how many prime contractors there are and no matter when the particular claimant comes on the job." *Id.* at 248.

115. *Id.* (the commencement priority rule gives a "secret lien").

116. *Id.* § 5-207(b).

117. *Id.* § 5-203(a). *See id.* § 5-301(a)(1) comment 2 (by recording the notice, the owner can control the real estate subject to liens).

118. Comment, *A Comparison Between Article Five of the Uniform Simplification of Land Transfers Act and Present Illinois Mechanics' Lien Law*, 1981 S. ILL. U.L.J. 563, 577.

119. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 5-301(a)(3).

120. *Id.*

121. There are no provisions in the USLTA that make recordation of a notice of commencement mandatory. This lack of mandatory filing has been a source of criticism of the USLTA. *See* Comment, *supra* note 108, at 578-79:

his priority date is the date he recorded.<sup>123</sup> Finally, if no notice of commencement is filed at all, the date of the visible commencement of the improvement is referred to in establishing lien priorities.<sup>124</sup>

Although Article Five provides far more certainty in the area of mechanics' lien priorities than present Minnesota law, it too, could be improved. The most notable improvement to Article Five would be a statute that provides for mandatory rather than optional owner recordation of notice of commencement.<sup>125</sup> Recording a notice of commencement would not be unduly burdensome to owners, espe-

Adoption of Article Five may leave priority to be arbitrarily determined by when the owner decides to file a notice of commencement . . . .

The drafters should consider amending Article Five to require that owners file a notice of commencement before any work begins on the improvement. Any owner who violates the proposed amendment should be subject to personal liability for any damage suffered by a claimant as the result of the claimant's low priority.

*Id.*

122. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 5-301(c) provides:

The notice of commencement may state that it is limited to a particular improvement project, or portion thereof, on the real estate. But the limitation is not effective unless the particular improvement, or portion thereof, to which it applies is stated with sufficient specificity that a claimant, by reasonable inquiry, can determine whether his contract is covered by the notice of commencement.

The notice of commencement concept has a dual purpose. Not only does it establish a priority date, it also protects owners by limiting the amount of real estate subject to the lien. One commentator notes:

It will generally be to the owner's advantage to file a notice of commencement prior to construction because, by doing so, the owner may limit the real estate. The only limitation on the owner's right to limit the real estate on which later liens will attach is that the property "described must include all the real estate on which improvements are actually being made." If the owner does not include all of the real estate subject to improvements, the Act provides for damages to those wrongly deprived of benefits.

If no notice of commencement is filed, a lien attaches to all of the owner's real estate which is improved or directly benefited. This is a situation which should be avoided by the owner. The determination of what property is benefited will be decided by the finder of fact, and it has been suggested that "it may be appropriate to resolve doubts on the issue in favor of lien claimants." Finally, if the owner fails to record a notice of commencement, any claimant who is entitled to record a lien may, in addition, record a notice of commencement.

If a claimant records a notice of commencement, he may include as the real estate subject to liens "all or any part of the contracting owner's real estate being improved or directly benefited." This would clearly be to the owner's disadvantage because such a recording may subject a greater portion of real estate to lien liability than would the owner's notice if one had been filed.

Comment, *The Nebraska Construction Lien Act: Which Way to Lien?*, 62 NEB. L. REV. 86, 108-09 (1983) (footnotes omitted). Nebraska's Construction Lien Act is modeled after Article 5 of the USLTA. See NEB. REV. STAT. § 52-125-159 (1984).

123. UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 5-301(e).

124. *Id.* § 5-301 comment 1.

125. See Comment, *supra* note 118, at 579 (optional owner recordation allows priority to be arbitrarily determined by date of owner's recordation).

cially in light of the benefits they derive by recording, and many problems are avoided thereby. Florida<sup>126</sup> generally requires that an owner or his authorized agent file a notice of commencement.<sup>127</sup> Authority could be granted to lien claimants to compel owners to record a notice of commencement.<sup>128</sup>

In addition to mandatory recordation of notice of commencement, Florida requires posting of the notice at the construction site.<sup>129</sup> This additional safeguard would prevent problems with mortgagees who fail to check the public records. Such a provision would provide notice to those at the construction site and would eliminate the continuing need to search the public records.<sup>130</sup>

With the aforementioned modifications, Article Five goes a long ways towards providing certainty in the litigation-prone area of mechanics' lien priorities. Minnesota, sorely in need of such certainty, should adopt an Article Five-type priority scheme. Adoption of such a plan in Minnesota would not represent too dramatic a change. Section 514.05 presently allows lien claimants with contracts for improvements to record the contract, thus putting all third parties on constructive notice of the lien for priority purposes.<sup>131</sup> Any burden created by the notice of commencement filing requirement is an equitable trade-off for the certainty the system would bring to this area.

#### B. *Minnesota Statutes Section 514.08*

Further inspection of Minnesota's mechanics' lien statute for problem areas leads to section 514.08. While not as problematic, in terms of litigation, as section 514.05, section 514.08 is responsible for much litigation. Although section 514.08 addresses several areas,<sup>132</sup> the concern of this discussion is the lien filing period. Section 514.08 states in pertinent part:

The lien shall cease at the end of 120 days after doing the last of the work, or furnishing the last item of skill, material, or machinery

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126. Florida has been credited with developing the "notice of commencement" approach. Furthermore, Article 5 is based heavily on Florida Mechanics' Lien Law. Pedowitz, *USLTA-ULTA Perspective*, 57 TITLE NEWS 23, 26 (Jan. 1978). See also *supra* note 101.

127. FLA. STAT. ANN. § 713.13 (West 1984).

128. The National Association for Credit Managers has suggested the owner be required to file the notice or face liability for damages or \$200, whichever is greater. Pedowitz, *Uniform Simplification of Land Transfers Act- A Commentary*, 13 REAL PROP. PROB. & TR. J. 696, 726 (1978).

129. FLA. STAT. § 713.13(1) (1984).

130. See Pedowitz, *supra* note 126, at 726.

131. MINN. STAT. § 514.05.

132. *Id.* Section 514.08, in addition to stating when a lien claim must be filed, states where and in what form it must be filed.

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Because this area is controlled by statute, the 120 day period is strictly interpreted.<sup>134</sup> Although the parties may contract to shorten this period or eliminate lien rights altogether, they may not extend the statutory period.<sup>135</sup> Since this period is strictly interpreted, in many cases it is crucial to determine exactly when the lien filing period begins to run.

It is when attempting to determine the date at which the lien filing period begins to run that the weaknesses of section 514.08 become apparent. Like the "visible beginning of the improvement" rule of section 514.05, the rule of section 514.08 is easier stated than applied.<sup>136</sup> Unfortunately, the date of "doing the last of the work, or furnishing the last item of skill, material, or machinery" is not always easy to determine.<sup>137</sup>

The strict application of the lien filing period has, of course, resulted in attempts to avoid its effect. The most common, as well as troublesome, scheme to avoid the lien filing period involves the furnishing of additional labor or materials after the lien filing period has expired.<sup>138</sup> The lien claimant then files a lien statement claiming the additional labor or material constituted doing the last of the work.<sup>139</sup>

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133. *Id.*

134. *Armco Steel Corp., Metal Prod. Div. v. Chicago & N.W. Ry. Co.*, 276 Minn. 133, 138, 149 N.W.2d 23, 26 (1967).

135. *But see Bellline Brick Co. v. Standard Home Bldg. Co.*, 170 Minn. 509, 213 N.W. 41 (1924) (implies that parties may agree to extend the lien filing period thus estopping the owner from raising the defense of late filing).

136. *See Kahle v. McClary*, 255 Minn. 239, 240, 96 N.W.2d 243, 245 (1959) ("The law in this area is quite clear; its application is difficult.").

137. *See OSBORNE & WHITMAN*, *supra* note 7, at 737.

138. *See, e.g., Hayle Floor Covering v. First Minnesota Constr. Co.*, 253 N.W.2d 809, 812-13 (Minn. 1977) (incidental work not relating to construction project itself, moving equipment and materials, not sufficient to satisfy mechanics' lien statute); *A.Y. McDonald Mfg. Co. v. Nesstone*, 187 Minn. 237, 239, 244 N.W. 806, 807 (1932) (subsequent installation of a tumbler holder and towel bar did not extend the time for filing a lien for prior work on a sink, since the purchase and installation of these items were considered separate and distinct contracts from the sink); *Guy T. Bisbee Co. v. Granite City Investing Co.*, 159 Minn. 442, 446, 199 N.W. 17, 18 (1924) (when contract substantially completed, delaying to finish a small item for an unreasonable time will not extend time for filing lien); *Dayton v. Minneapolis Radiator & Iron Co.*, 63 Minn. 48, 48, 65 N.W. 133, 133 (1895) (two hours of additional labor was considered immaterial and trifling to extend time for filing lien); *Enviro-Fab, Inc. v. Blandin Paper Co.*, 349 N.W.2d 842, 847 (Minn. Ct. App. 1984) (time for filing lien cannot be extended by intentional and unilateral providing of minor incidental items).

139. *See, e.g., Newstone*, 187 Minn. at 239, 244 N.W. at 807; *Enviro-Fab*, 349 N.W.2d at 846.

### 1. *Judicial Development*

This issue has been addressed in a number of Minnesota cases.<sup>140</sup> Unfortunately, the cases have often created more questions than they have answered.

Many of the rules currently used to address this problem were established in *Guy T. Bisbee Co. v. Granite City Investing Co.*<sup>141</sup> This 1924 case involved a flagrant attempt to avoid the running of the lien filing period. The lien claimant was persuaded by the owner not to file a lien statement because the owner was concerned that it would prevent the closing of a loan agreement.<sup>142</sup> When the lien claimant's bill had not been paid and after the ninety-day lien filing period had run, the lien claimant compelled the owner to make a subsequent order of insignificant materials.<sup>143</sup> There was an abundance of evidence introduced at trial which showed the order of materials to be a sham made solely for the purpose of reviving the lien.<sup>144</sup>

The court had little difficulty in denying the lien claimant's lien for untimely filing. The court went on to hold that materialmen, who have substantially completed an improvement project, may not extend the lien filing period by merely furnishing additional material.<sup>145</sup> The court will look to the intent and significance of the additionally furnished material as well as the time gap between substantial completion of the improvement.<sup>146</sup> This examination into the nature of the transaction is necessary because "[a] lien cannot be kept alive by purposely and unnecessarily delaying the completion of the contract in minor and unimportant particulars for that purpose."<sup>147</sup>

An examination of the general rules emanating from *Bisbee*, indicates that their application requires the court to address a number of difficult factual questions. First, the court must determine whether the contract has been substantially completed. Second, the court must determine if the additional contribution of material or labor is significant. Third, the court must determine whether the delay in furnishing the additional material or labor was of an unreasonable

140. See *supra* note 138.

141. 159 Minn. 442, 199 N.W. 17 (1923).

142. *Id.* at 444, 199 N.W. at 18.

143. *Id.* at 445, 199 N.W. at 18. The owner's business went into receivership shortly after the insignificant order was made. The owner probably made the additional order to remain on good terms with the lien claimant and with the realization that his creditors ultimately would suffer from the lien claim.

144. *Id.* There were letters between the parties indicating that the intent of the later shipment of tiles was for mechanics' lien claim purposes. *Id.* Furthermore, the shipment of tiles was minimal and the tiles were never used. *Id.*

145. *Id.* at 446, 199 N.W. at 18.

146. *Id.*

147. *Id.*

length. Finally, and most importantly, the court must determine whether the additional supply of material or labor was solely for the purpose of extending the lien.

Each of these questions allow for a highly subjective response. The combination of all the questions is a recipe for uncertainty and confusion. Indeed, the case law in this area demonstrates some inconsistency.<sup>148</sup>

Courts have found that the aforementioned analysis does not work well with continuing or multi-project contracts.<sup>149</sup> The general rule for this situation was enunciated in *Paine & Nixon Co. v. Dahl Vick*.<sup>150</sup> The court in *Paine* looked at the overall nature of the project. If it appears that the overall project is a single project or "one continuous work," then, regardless of the number of agreements for the furnishing of goods or services, a lien claim filed within the statutory period of the last item preserves a lien for all.<sup>151</sup> If, however, the overall nature of the project indicates that the series of contracts are separate and unrelated, then a lien claim filed will not extend back beyond the statutory period.<sup>152</sup> In other words, each contract for the furnishing of materials or labor will have a separate statutory lien filing period. The difficulties inherent in this analysis were recognized by the court when it noted that "[t]he application of these two doctrines to the varying facts of particular cases is often attended with difficulty."<sup>153</sup>

The rule stated in *Paine* calls for an additional rule to determine

148. See, e.g., *Kahle*, 255 Minn. at 243, 96 N.W.2d at 247 (lien filing period extended by the installation of a hot-air register over a year after the initial furnace installation was completed); *W.B. Martin Lumber Co. v. Noss*, 256 Minn. 471, 474, 99 N.W.2d 65, 68 (1959) (when a company had delivered two pairs of shutters two months after all the other lumber deliveries were completed, the time for filing was extended); *Enviro-Fab*, 349 N.W.2d at 846-47 (lien filing date extended when lien claimant sent a gasket for a tank that it had supplied and upon which the statutory lien filing period had run). But see *Hayle Floor Covering*, 253 N.W.2d at 812-13 (lien denied when lien claimant returned to the site and moved some equipment and materials, originally intended for the improvement, to another location); *Villaume Box & Lumber Co. v. Condon*, 146 Minn. 156, 158-59, 178 N.W. 492, 493 (1923) (lien period not extended for claimant who supplied additional storm sashes some time after the lien filing period expired); *Dayton*, 63 Minn. at 48, 65 N.W. at 133 (liens were denied where more than three and one-half months after the job was done, the lien claimants returned to the job and spent two hours adjusting the doors).

149. See, e.g., *Rochester's Suburban Lumber Co. v. Slocumb*, 282 Minn. 124, 129-30, 163 N.W.2d 303, 307 (1968); *Barrett v. Hampe*, 237 Minn. 80, 82-84, 53 N.W.2d 803, 805-06 (1952); *Paine & Nixon Co. v. Dahl Vick*, 136 Minn. 57, 59, 161 N.W. 257, 257 (1917); *Enviro-Fab*, 349 N.W.2d at 846.

150. 136 Minn. 57, 161 N.W. 257 (1917).

151. *Id.* at 58, 161 N.W.2d at 257.

152. *Id.* at 59, 161 N.W.2d at 257.

153. *Id.*

whether a job consists of “one continuous work” or consists of separate contracts. This distinction was addressed in *Kahle v. McClary*<sup>154</sup> where the court noted:

Where work, distinct in its nature, is performed at different times, the law supposes it performed under distinct engagements, as where the work at one time is for building, and at another for repairing. So, where two distinct contracts are in fact made, as . . . distinct contracts for different parts of the work, the work done under each contract must be considered as entire of itself. But when work etc. is done or furnished, all going to the same general purpose, as the building of a house, or any of its parts, though such work, etc., be ordered and done, at different times, yet, if the several parts form an entire whole, or are so connected together as to show that the parties had it in contemplation that the whole should form but one, and not distinct matters of settlement, the whole account must be treated as a unit, or as being but a single contract.<sup>155</sup>

An examination of the facts of *Kahle* demonstrates just how liberally such general rules can be applied. In *Kahle*, the lien claimant entered into a verbal agreement to install a new heating system for the defendant.<sup>156</sup> On August 9, 1955, work began on the project. The entire furnace installation was completed in late September, 1955.<sup>157</sup> During the following winter, it was discovered that the heating system was inadequate. The lien claimant agreed to install another hot air register.<sup>158</sup> The additional register was not installed until one year following the completion of the furnace project. The cost of the hot-air register was only twenty eight dollars.<sup>159</sup> By taking a substantial rather than technical view,<sup>160</sup> the court determined that this entire transaction involved one contract thus entitling the mechanics' lien claimant to the lien on the entire installation.<sup>161</sup>

It seems unlikely that the legislature, in establishing the 120 day lien filing period, envisioned a fourteen month extension.<sup>162</sup> Equally unlikely is that the owner would have authorized the minor addition had he realized that the lien filing period would thereby be extended.

Adding further uncertainty to the validity of the *Kahle* holding is Minnesota's subsequent adoption of the Uniform Commercial Code.

154. 255 Minn. 239, 96 N.W.2d 243 (1959).

155. *Id.* at 241, 96 N.W.2d at 245-46 (quoting *Hazard Powder Co. v. Loomis & Campbell*, 13 Ohio Dec. Reprint 333, 337 (1859)).

156. *Id.* at 240, 96 N.W.2d at 244.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 242, 96 N.W.2d at 246.

161. *Id.*

162. *See supra* note 134 and accompanying text.



Under the Uniform Commercial Code, the warranty sections<sup>163</sup> would most likely apply to the inadequate heating system, thus allowing the property owner a variety of remedies. It seems inconceivable that a lien claimant could reap the windfall that the lien claimant in *Kahle* did simply because the property owner exercised his rights under the Uniform Commercial Code.

A particularly troublesome aspect of *Kahle* is that, in spite of the unfair result to the property owner, the analysis of the general rules supported the decision. Since the court's analysis was correct, the problem then must lie with the general rules.

The Minnesota Court of Appeals addressed this issue recently in *Enviro-Fab, Inc. v. Blandin Paper Co.*<sup>164</sup> In *Enviro-Fab*, the lien claimant agreed to fabricate seven tanks for \$29,000, install a fly ash silo for \$42,000, and erect a clarifier for \$34,000.<sup>165</sup> The tanks were installed and paid for in early 1980. On June 24, 1980, the lien claimant completed erection of the clarifier but was not paid.<sup>166</sup> Due to circumstances beyond either party's control, problems arose concerning completion of the fly ash silo.<sup>167</sup> Following numerous unsuccessful negotiations, the contract was repudiated and terminated on September 15, 1980.<sup>168</sup>

On September 16, 1980, the lien claimant, at defendant's request, sent a gasket for one of the tanks it had installed. On November 7, 1980, approximately four and one-half months after completing the work on the clarifier, the lien claimant filed its lien.<sup>169</sup>

The court, in allowing the lien, determined that the entire relationship between the lien claimant and defendant was based on a single unitary contract.<sup>170</sup> This conclusion was based on the court's belief that "[a]ll agreements were contemplated at the same time and were not an afterthought."<sup>171</sup> The court denied the defendant's argument that the contracts were separate because the clarifier and silo agreements were documented on "subcontract agreements" and the tank agreement was documented on a "purchase order."<sup>172</sup>

There are several troubling aspects about the holding in *Enviro-Fab*. As in *Kahle*, the lien claimant's date for filing a lien statement is

163. U.C.C. § 2-313 to -315 (1978).

164. 349 N.W.2d 842 (Minn. Ct. App. 1984).

165. *Id.* at 845.

166. *Id.*

167. *Id.* Apparently there was a union jurisdictional dispute which was creating costly delays in the project. *Id.*

168. *Id.* It was the general contractor who repudiated the contract.

169. *Id.*

170. *Id.* at 847.

171. *Id.*

172. *Id.* The items were written up in different manners because the elements of the project involved part material and part on-site labor. *Id.*

substantially extended for a trifling item. It is inconceivable that property owners understand the consequences of allowing lien claimants to supply such minimal items of material or labor. The *Enviro-Fab* court seems to justify this result noting: "Respondent had no need to send a gasket on September 16, 1980, to extend the time, since there was still sufficient time in which to file."<sup>173</sup> This fact is not only irrelevant to the determination of whether a lien statement is timely filed, it also violates the policy of strictly construing the mechanics' lien statutes that determine whether a mechanics' lien attaches or not.<sup>174</sup>

The court's conclusion that the parties intended that the insignificant gasket transaction was merely part of one unitary contract is unconvincing.<sup>175</sup> Even if the parties were operating under one contract, that contract was repudiated and terminated.<sup>176</sup> This suggests that further performance according to the contract is no longer required of either party.<sup>177</sup> If this is the case, the gasket must have been sent pursuant to a separate contractual arrangement. Any lien statement filed more than 120 days after the June 24, 1980, completion of the clarifier necessarily includes only the gasket.

The foregoing case study indicates that the date of the last work or furnishing of skill, material, or machinery is a difficult question. Many additional questions arise under the present statutory analysis.

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173. *Id.*

174. See *Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn. 1982).

175. The court apparently used a contractual analysis in determining the parties' intent when reaching the agreement. Recall that courts look at the language of a contract as well as the surrounding circumstances to determine the intent of the parties. See A. CORBIN, CORBIN ON CONTRACTS §§ 537-38 (1982). This analysis is used to determine what rights and obligations the parties anticipated when entering the contract.

While this analysis is useful in settling contract disputes, it is not entirely clear that such an analysis is appropriate in the context of mechanics' liens. Even if the parties in *Enviro-Fab* had informally agreed the lien claimant was to furnish materials and services under a unitary agreement, can it be said that the property owner was aware or intended that his property be subject to such broad mechanics' lien liability? It is more reasonable to assume that the parties group the various material and service aspects of the project into a single agreement merely as an expedient bookkeeping measure.

Perhaps a more fact specific approach is more appropriate in determining the various aspects of an improvement project. In the present case, the mechanics' lien claimant was responsible for the delivery of seven assembled tanks. In addition, it was responsible for performing on-site work for a different aspect of the project. It would have been elementary for the court to have separated the two aspects of the lien claim into a material agreement and a labor agreement. This would have been a fairer result to the property owner especially in light of the late filing by the lien claimant.

176. 349 N.W.2d at 845.

177. See CORBIN, *supra* note 175, § 1229 .

Persons involved in the construction industry as well as the courts require more certainty than the present statute provides. Any modifications of the law in this area should make certainty a primary concern.

## 2. Recommendations

Just as the notice of commencement concept injects certainty into the area of lien priority, a notice of completion concept would have the same effect in the area of filing lien statements. Although no states presently have a mandatory notice of completion recording statute, many states provide for optional recordation.<sup>178</sup> An examination of one such statute is beneficial at this point.

Arizona has an optional "notice of completion" recordation statute.<sup>179</sup> This device is used for lien filing purposes to indicate just exactly when the improvement is complete. A notice of completion is defined as "a written notice which the owner or his agent may elect to record at any time after the completion of construction . . . for the purpose of shortening the lien period."<sup>180</sup>

The rationale for shortening the time period is that all parties will know exactly when completion occurs. Also, because of the notice of completion requirements, all parties will know who to file liens against, thus eliminating the post-construction search for the owner.<sup>181</sup>

One commentator on the Arizona notice of completion statute noted that an optional recording statute is satisfactory since "in almost all cases involving lenders the notice of completion will be filed; the lender will insist on the right to do so. The shorter lien recording period . . . allows a lender to finalize a project much earlier (50% earlier)."<sup>182</sup>

According to the Arizona statute, a properly filed notice of completion must include:

- 1) the name and address of the owner or owners;
- 2) the nature of the interest or estate of the owner;
- 3) the address and legal description of the job site;

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178. ALASKA STAT. § 34.35.072 (1985); ARIZ. REV. STAT. ANN. § 33-993 (1984); CAL. CIV. CODE § 3093 (West 1986); HAW. REV. STAT. § 507-43 (1976); MONT. CODE ANN. § 71-3-511 (1985); OR. REV. STAT. § 87.045 (1986); TENN. CODE ANN. § 66-11-143 (1982).

179. ARIZ. REV. STAT. ANN. § 33-993 (Supp. 1985).

180. *Id.* § 33-993C.

181. Paragraph F requires the owner to mail by certified or registered mail a copy of the recorded notice of completion to all interested parties. *Id.* § 33-993F.

182. Irvine, *Mechanics' & Materialmens' Liens: Major Modifications in Arizona Law*, 15 ARIZ. B.J. 27, 35 (Feb. 1980).

4) the name of the original contractor, if any.<sup>183</sup>

Minnesota should adopt a mandatory notice of completion scheme. Some modification of the Arizona statute is necessary to provide maximum certainty. Logistically, such an addition to Minnesota mechanics' lien law would be relatively problem free.<sup>184</sup>

One concern of this system is determining when an owner may file.<sup>185</sup> The determination of the date that an owner must file a notice of completion must avoid the pitfalls present in Minnesota's current law.<sup>186</sup> A better recommendation would be to allow the owner to make a good-faith determination of when to file a notice of completion. Once recorded, any subsequent improvements would be considered pursuant to a separate contract.

To prevent potential abuse by owners, certain safeguards could be employed. First, filing a notice of completion could have the effect of owner-acceptance of the improvement at that point. Contractors and their subcontractors would then be entitled to payment. This would preclude the owner from prematurely filing a notice of completion thereby requiring lien claimants to file separate lien statements for the work done before and after the filing of the notice of completion.

Hardship to owners caused by equating acceptance with filing a notice of completion could be avoided by adopting some Uniform Commercial Code principles. An acceptance based on recording a notice of completion could be revoked if:

- 1) the defect is substantial;
- 2) the defect was not reasonably discoverable or the contractor made assurances that no defects exist; and
- 3) the rejection occurs within a reasonable time.<sup>187</sup>

It must also be remembered that, generally, an owner would still be entitled to withhold payment from a contractor for 120 days.<sup>188</sup> This period is a substantial period of time to discover any defects. Additionally, contractual remedies are always available to owners.

183. ARIZ. REV. STAT. ANN. § 33-993C (Supp. 1985).

184. The lien filing period would not have to be shortened. Owner notification of interested parties would not be burdensome since current Minnesota law requires all potential lien claimants to notify owners of their identity. See MINN. STAT. § 514.011 (1984).

185. A concern in the notice of completion statutes is that owners may file the notice too early, which may result in lien claimants finding the lien filing period running much earlier than expected. However, this concern is less real than imagined as long as lien claimants are given notice of the recording of the notice of completion.

186. The problem of determining when the last labor or materials, etc. were furnished would be eliminated if an exact date was established when an owner must file a notice of completion.

187. See U.C.C. § 2-608 (1978).

188. MINN. STAT. § 514.07.

The benefits derived by a notice of completion recording system outweigh any incidental burdens on ignorant parties. The system is simple and would not require a major overhaul of the Minnesota mechanics' lien statute. Most importantly, a "notice of recording" system is sensitive to the need for certainty in the vital construction industry.

#### CONCLUSION

The mechanics' lien statute was enacted in Minnesota to prevent owners from receiving the goods and services of subcontractors and material without paying for them. Without this protection, such persons were without remedy since they were not in privity of contract with the owners. Certainly, such protection stimulates the extension of credit for construction.

For the most part, Minnesota's mechanics' lien statute is well drafted. It represents a fairly balanced approach to the competing interests served by mechanics' liens. However, as has been seen, the Minnesota's mechanics' lien statute contains some noteworthy problem areas. The volume of litigation resulting from these "gray areas" demands legislative attention.

The legislature could remedy this situation by adopting some form of notification outlined in this discussion. By requiring the recordation of both the commencement and the completion of the improvement, additional certainty could be injected into an otherwise well drafted mechanics' lien statute.

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