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# Reworking Louisiana's Private Works Act

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*The privilege in favor of the contractor is one which exemplifies the intelligent sense of justice which distinguishes the civil law. It is founded on the equitable theory that he who has by his labor or expenditure increased the value of a thing pledged for the payment of a debt, should not be omitted in the distribution of the proceeds of that thing.*[1]

## INTRODUCTION

Arriving to lay the foundation stone of a great house, Goethe's fictional mason, with trowel and hammer in hand, and in verse flowing merrily from his lips, proclaimed to the party assembled: "Three things are to be looked to in a building—that it stand on the right spot; that it be securely founded; that it be successfully executed."[2] In a sense, Louisiana's Digest of 1808, promulgated the year before the publication of Goethe's novel although almost certainly not his source of inspiration, was in accord on all three points,[3] yet insisted upon a fourth: *that*

1. City of Baltimore v. Parlange, 23 La. Ann. 365, 366 (1871).

2. JOHANN WOLFGANG VON GOETHE, ELECTIVE AFFINITIES 96.

3. *See* A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT, Book II, Title II, Ch. III, Sec. I, art. 12 (1808), *available at* https://digestof1808.law.lsu.edu/ [https://perma.cc/KB6X-Y837] [hereinafter "DIGEST OF 1808"] ("When plantations, constructions, and works

*architects, contractors, bricklayers, and other workers who contributed to its construction be paid*.[4] Indeed, for over two centuries, Louisiana law has protected those who perform work for the improvement of immovable property by granting them claims against the owner and privileges on the immovable to secure the amounts owed to them. These protections—originally borrowed from the law of France but retained and enhanced over the course of the adoption of all three of Louisiana's Civil Codes and numerous supplementary statutes—can now be found in the Private Works Act, Louisiana Revised Statutes §§ 9:4801 *et seq*. As the Louisiana Supreme Court expressed long ago in the quotation appearing above, these protections are founded upon the equitable principle that those who contribute to the improvement of an immovable are entitled to be paid and accordingly must not be overlooked in distributing the proceeds of the immovable. From their perspective, this is as important a consideration as the three things pointed out by Goethe's mason.

Since its enactment in the early part of the 20th century, the basic policy goals and mechanisms of the Private Works Act have remained largely intact, though legislators created its present structure and organization when they comprehensively revised the Act in 1981. That revision was prompted by the disorganization that had resulted from decades of piecemeal amendments.[5] The process of legislative change did not, however, cease with the adoption of the 1981 Act, which over the ensuing years was the subject of dozens of amendments, all of which were narrow in scope and many of which inevitably introduced ambiguities or inconsistencies into the Act. The cumulative effect of those ambiguities and inconsistencies led to the most recent revision of the Act in 2019, the

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have been made by a third person and out of said person's own materials, the owner of the soil has a right to keep them, or to compel this third person to take away or demolish the same."); DIGEST OF 1808, Book III, Title VIII, Ch. III, Sec. I, art. 71 ("If a building which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the said architect or undertaker shall bear the loss."); DIGEST OF 1808, Book III, Title VIII, Ch. III, Sec. I, art. 77 ("If an undertaker fails to do the work he has contracted for, or if he does not execute it in the manner and at the time he has agreed to do it, he shall be liable to pay all the losses that may ensue."). Analogous provisions can be found in Louisiana's current Civil Code. *See* LA. CIV. CODE arts. 493, 2762, and 2769 (2020).

4. DIGEST OF 1808, Book III, Title VIII, Ch. III, Sec. I, art. 78 and Book III, Title XIX, Ch. IV, Sec. I, art. 75 (granting special privileges on the immovable in favor of these workers and, in the case of masons, carpenters, and other workers, a direct action against the owner).

5. Michael H. Rubin, *Private Law: Security Devices*, 42 LA. L. REV. 413, 428 (1982).

goal of which, as before, was to restore the Act's integrity and cohesiveness by harmonizing its provisions, eliminating inconsistencies and unintended consequences, and removing potential traps for the unwary.[6]

This Article presents a comprehensive treatment of the Private Works Act, including its historical development; the basic protections it confers upon those who contribute to the improvement of an immovable; the filing and notice requirements it imposes; the effectiveness and ranking of the privileges it grants; and the manner of enforcement of the rights it creates. Although particular emphasis will be placed on the changes made by the 2019 revision and the policy reasons behind those changes, this Article will not presuppose a familiarity with the Act as it existed before the 2019 revision. It is the hope of the authors that this Article will be as helpful to those reading and applying the Act for the first time as to those members of the bench and bar already versed in the workings of the Act.

## I. HISTORICAL DEVELOPMENT

The Private Works Act, enacted in its present form in 1981, is the culmination of a long history of legislative efforts to protect contractors, laborers, suppliers, and others who contribute to the improvement of an immovable. As will be seen below, the 1981 Act was a comprehensive revision of a series of statutes enacted in response to an 1879 constitutional directive to the legislature to improve upon the regime of construction privileges found in the 1870 Civil Code. That regime was itself the product of several decades of attempts to expand the rather modest protections that had been codified in the Code Napoleon.

### *A. The Code Napoleon*

The Code Napoleon granted a privilege[7] to architects, contractors, bricklayers, and other workers employed in constructing, rebuilding, or

6. *See* Report of the Louisiana State Law Institute to the Louisiana Legislature in Response to S.R. No. 158 of 2012, Louisiana Lien Laws (Private Works Act) (Feb. 15, 2013), *available at* www.lsli.org/files/reports/2013/7.%202012%20SR%20158%20Louisiana%20Lien%20Laws%20Private%20Works%20Act%20Report.pdf [https://perma.cc /SHR5-UFWS].

7. According to the Code Napoleon, and also article 3186 of the current Louisiana Civil Code, a "[*p*]*rivilege* is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages." *See* CODE CIVIL [C. CIV.] art. 2095 (Fr.) (1804); LA. CIV. CODE art. 3186. A privilege is thus a preference established by legislation and is

repairing buildings, canals, or other works.[8] The privilege had existed under both Roman law and ancient French law[9] and had been confirmed by legislation adopted during the French Revolution, the law of 11 brumaire An VII.[10] Justified by augmentation of the debtor's patrimony, the privilege was accordingly limited to the increase in value of the immovable resulting from the work.[11]

Despite the rather expansive wording of the text of the Code Napoleon, the privilege was understood to be established in favor of only those who contracted directly with the owner; thus, subcontractors and workers employed by either the contractor or a subcontractor had no privilege of their own on the immovable.[12] Moreover, suppliers of materials, even when sold directly to the owner, had no privilege.[13] Workers employed by a contractor were, however, given a right of action against the owner for payment up to the amount for which the owner was still indebted to the contractor at the time that their actions against the owner were instituted.[14] Although noted French scholar Marcel Planiol felt

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an exception to the general rule that the proceeds of the sale of an obligor's property are distributed ratably among his creditors. LA. CIV. CODE art. 3134. Privileges cannot be granted contractually; they can arise only by operation of law based upon the nature of the debt. *See* LA. CIV. CODE art. 3185; *see, e.g.*, Southport Petroleum Co. of Del. v. Fithian, 13 So. 2d 382, 383 (La. 1943); *In re* Liquidation of Hibernia Bank & Trust Co., 162 So. 644, 645 (La. 1935); State v. Miller, 126 So. 422, 428 (La. 1930); Succession of Rousseau, 23 La. Ann. 1, 3 (1871). A privilege in Louisiana is similar in many respects to the form of security known in other states as a lien.

8. CODE CIVIL [C. CIV.] art. 2103 (Fr.) (1804). After recent revisions to the French Civil Code, the privilege is now provided in article 2374. CODE CIVIL [C. CIV.] art. 2374 (Fr.) (1804).

9. *See* 2 Marcel Planiol & Georges Ripert, *Treatise on the Civil Law* pt. 2, No. 2913.

10. *Loi du 11 brumaire An* VII (*1er novembre* 1798), art. 12.

11. CODE CIVIL [C. CIV.] art. 2103 (Fr.) (1804). *See also* PLANIOL & RIPERT, *supra* note 9, Nos. 2914 and 2921.

12. *See* PLANIOL & RIPERT, *supra* note 9, Nos. 2916–17.

13. *See* Harriet Spiller Daggett, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE § 63, at 218 (1942).

14. CODE CIVIL [C. CIV.] art. 1798 (Fr.) (1804). This right was limited to masons, carpenters, and other workers providing manual labor. 3 M. TROPLONG, L'ÉCHANGE ET DU LOUAGE, LE DROIT CIVIL EXPLIQUÉ § 1052 (1840); 22 G. BAUDRY-LACANTINERIE & A. WAHL, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, *Du contrat de louage, Tome Deuxième*, No. 4045 (3d ed. 1907). The workers' right to bring suit against the owner could not be defeated by a stipulation to that effect in the contract between the owner and contractor. *Id*. at No. 4043.

that this right of action was properly viewed only as a species of the oblique action, he recognized that the jurisprudence had effectively transformed the right of action into a privilege upon the sum remaining due by the owner.[15] The direct action against the owner was not available to either suppliers or subcontractors.[16]

The Code Napoleon made the existence of the privileges of architects, contractors, and workers dependent upon a double appraisal of the immovable. Specifically, an appraisal was required to be made by a court-appointed expert before the commencement of the work, and a second appraisal was required after its completion.[17] The purpose of the double appraisal was, of course, to fix the extent of the privilege. In practice, this condition was almost never fulfilled, thus making the privilege, in the eyes of Planiol, a "dead letter."[18]

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15. *See* PLANIOL & RIPERT, *supra* note 9, Nos. 1921–22. Troplong cast doubt upon the view that article 1798 was simply a redundant application of the oblique action, asserting instead that the article created a direct right of action in favor of workers in their own right, founded on notions of *negotiorum gestio*. *See* TROPLONG, *supra* note 14 at § 1048–49. Troplong also disagreed with the proposition that the article created a privilege, explaining that there can be no privilege except where there are creditors of a common debtor and that in this instance the contractor is no longer a creditor and is not in competition with the workers. *Id*. at § 1050. Though recognizing the prevailing view that article 1798 creates a direct action against the owner and a privilege upon the unpaid balance owed by the owner to the contractor, Baudry-LaCantinerie insisted that the proper view was that the article is nothing more than an illustration of the application of the oblique action and that the theory of the existence of a direct action leads to an insoluble dilemma if the owner is presented with claims not only from workers asserting this direct action but also from other creditors who undeniably are exercising the oblique action. Baudry-LaCantinerie also disputed the assertion that article 1798 is based on *negotiorum gestio* because workers are not managing the affairs of the owner, and, in any event, this theory would grant them a distinct right against the owner independent of the right they have against the contractor. BAUDRY-LACANTINERIE *supra* note 14 at No. 4028.

16. *See* PLANIOL & RIPERT, *supra* note 9, No. 1923; TROPLONG, *supra* note 14 at § 1052; BAUDRY-LACANTINERIE, *supra* note 14 at Nos. 4045 and 4047. Being in derogation of common right, article 1798 could also not be expanded to give workers employed by a subcontractor a right of direct action against the contractor. *Id*. at No. 4090.

17. CODE CIVIL [C. CIV.] art. 2103 (Fr.) (1804).

18. *See* PLANIOL & RIPERT, *supra* note 9, Nos. 2923–24. Some present-day commentators agree that these requirements have made the privilege anachronistic and have urged its abrogation. *See* Philippe Simler & Philippe Delebecque, DROIT CIVIL: LES SURETÉS LA PUBLICITÉ FONCIERE, § 425 (6th ed. 2012). Modern French law has found other means of protecting contractors and

### *B. The Digest of 1808 and the Civil Code of 1825*

An almost identical framework appeared in Louisiana's Digest of 1808, except that the drafters eliminated the double-appraisal requirement.[19] Thus, the Digest afforded architects, contractors, and workers a privilege upon the immovable, provided that they were in privity of contract with the owner. Other workers had an action against the owner to the extent of any contract funds remaining in the owner's hands at the time of initiation of the action. Suppliers of materials were accorded neither a privilege nor a right of action against the owner.[20]

This would change with the adoption of the Civil Code of 1825, which supplemented the existing privileges of contractors and workers[21] with a new privilege for those who supplied materials to the owner.[22] No privilege upon the immovable, however, was afforded directly in favor of either workers or suppliers who contracted with a contractor or subcontractor rather than directly with the owner.[23] Instead, those workers and suppliers were given the right to seize any unpaid funds owed by the owner to the contractor, and they were subrogated of right to the contractor's privilege upon the immovable.[24] If the owner had made payments to the contractor that were not yet due, these payments were disregarded and considered as having not been made.[25] The 1825 Civil Code also preserved the direct action that the Code Napoleon and Digest

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subcontractors, such as the addition to the French Civil Code of article 1799-1, which requires the owner to furnish a guaranty of payment to the contractor or, where the owner is obtaining financing for the work, to arrange for his lender to make direct payment to the contractor, as well as special legislation affording subcontractors a non-waivable right of direct action against the owner. *See* CODE CIVIL [C. CIV.] art. 1799-1 (Fr.) (1804); *Loi No.* 75-1334 *de* 31 *décembre* 1975.

19. DIGEST OF 1808, Book III, Title XIX, Ch. IV, Sec. I, art. 75 and Book III, Title VIII, Ch. III, Sect. III, art. 78.

20. *See* DAGGETT, *supra* note 13, § 63; Schwartz v. Cronan, 30 La. Ann. 993, 996 (1878).

21. LA. CIV. CODE arts. 2743, 3216(2) (1825).

22. *Id.* art. 3216(3). According to the Projet of the 1825 Code, the rationale given for the creation of the supplier's privilege, as well as another new privilege in favor of those who make or repair levees, bridges, and roads through exercise of the state's police power, was that "the last two species of privilege are not contained in the code: but the justice and expediency of adopting them will be readily admitted." Projet of the Civil Code of Louisiana of 1825, p. 375.

23. *Schwartz*, 30 La. Ann. at 996.

24. LA. CIV. CODE art. 2744.

25. *Id.* art. 2745.

of 1808 had given to masons, carpenters, and other workers against the owner for sums remaining owed to the contractor.[26]

The 1825 Civil Code imposed a recordation requirement when the contract for the work exceeded $500.[27] If the parties did not record such a contract, the contractor enjoyed no privilege, and those who might otherwise claim subrogation to his privilege obviously could not be subrogated to a privilege that did not exist.[28] The text of the law was not clear as to whether the recordation requirement applied to the privileges arising directly in favor of workers or suppliers, but the weight of judicial authority was that the recordation requirement also applied to them.[29]

The 1825 Code also addressed the issue of *when* recordation was required, providing that privileges flowing from contracts having an amount in excess of $500 were effective against third persons from the date of the contract, but only if the contract was recorded within six days of its execution.[30] If not recorded within that time, the privilege degenerated into an ordinary mortgage, taking its rank from the time of recordation.[31]

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26. *Id.* art. 2741.

27. *Id.* art. 2746.

28. *Id.* Allen v. Willis, 4 La. Ann. 97 (1849). Where the contractor did record his contract, others claiming subrogation to his privilege on the immovable were not required to separately record their own claims. Nolte v. Their Creditors, 6 Mart. (n.s.) 168 (La. 1827). Even if the contractor failed to record the contract, workers and suppliers still enjoyed their own privilege upon the unpaid balance of the price due to the contractor, with priority over other creditors of the contractor. *See* First Municipality v. Bell, 4 La. Ann. 121 (1849).

29. *See* Taylor et al. v. Crain's Administrator, 16 La. 290 (1840) and Spence v. Brooks, 6 La. Ann. 63 (1851). *But see* Succession of Erard, 6 Rob. 333 (La. 1844) (suggesting that the recordation requirement applies only to those who are employed by virtue of a contract, or those who do work by the job or for a fixed price, rather than to those who are employed by the owner to work by the day or by the week and are to be paid as the work progresses).

30. LA. CIV. CODE art. 3239 (1825). If the act was not passed in the same place in which registry was required, the period was lengthened by one day for every two leagues of distance. *Id.* art. 3240 (1825). These articles are the predecessors of present Civil Code article 3274, which provides for a period of seven days if the property is located in the same parish where the act was passed; otherwise, the period is 15 days. *Id.* art. 3274 (2020).

31. The "degeneration" concept, which applied to privileges generally and not just those arising from construction, was borrowed from the French Civil Code. *See* CODE CIVIL [C. CIV.] art. 2379 (formerly art. 2113) (Fr.) (1804); PLANIOL & RIPERT, *supra* note 9, Nos. 3149–50. The concept was expressly incorporated into the Civil Code of 1825. LA. CIV. CODE arts. 3240–3241 (1825). The 1870 Code, however, suppressed the degeneration concept altogether,

Another innovation of the Civil Code of 1825 was its introduction of a series of articles that ranked privileges among themselves. These articles did not find their genesis in the Code Napoleon[32] but were instead created, apparently out of whole cloth, by the redactors of the Projet of the Civil Code of 1825. Most of these rather complicated, and even enigmatic, articles ranked privileges on movables, but there were a few articles ranking special privileges on immovables. According to these articles, privileges on immovables, including the construction privileges, enjoyed a preference over all mortgages if they were filed in a timely manner.[33] Construction privileges and the only other special privilege on immovables created by the Civil Code, the vendor's privilege, were ranked ahead of most general privileges.[34] Construction privileges were not directly ranked against vendor's privileges, but instead the Civil Code provided for a separate appraisement procedure with the vendor being paid the amount of the "appraisement on the land" and those entitled to a construction privilege receiving "the appraisement of the building."[35] The existence of this separate appraisement procedure, protecting a contractor who subsequently performs work upon an immovable against the pre-

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providing instead that an untimely inscribed privilege affords no preference over creditors who have previously acquired mortgages. LA. CIV. CODE art. 3274 (2020). In other words, the creditor in question still holds a privilege, but the tardily inscribed privilege is robbed of its priority over mortgages that were recorded before the date the privilege was recorded. For an explanation of the differing treatment of this issue by the 1825 and 1870 Codes, see Wheelright v. St. Louis, N.O. & Ocean Canal Transp. Co., 17 So. 133 (La. 1895). *See also* L. David Cromwell, *Vendor's Privilege:* Adheret Visceribus Rei, 75 LA. L. REV. 1165, 1235–37.

32. Planiol observed that the failure of the legislator to rank privileges had the fortunate result of allowing time for the doctrinal writers to study the matter and to arrive at "scientific solutions." PLANIOL & RIPERT, *supra* note 9, No. 2622, at 460. Not all French commentators shared his enthusiasm for this omission. *See* 3 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 797 *et seq*., § 289 (5th ed. 1900); 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 919, no. 1126 (8th ed. 1935).

33. LA. CIV. CODE arts. 3153, 3240 (1825).

34. *Id.* art. 3234. This article, and its analogue in the current Civil Code, article 3267, erroneously use the word "movables" in the first clause of the article where "immovables" certainly was intended, as more fully discussed *infra* in Part VIII. *See* Joseph Dainow, *Art. 3267 and the Ranking of Privileges*, 9 LA. L. REV. 370 (1949). After nearly two centuries, this error was at last corrected in the 2019 revision of the Private Works Act, as discussed *infra* in Part VIII. *See* Act No. 325, §2, 2019 La. Acts.

35. LA. CIV. CODE art. 3235 (1825).

existing privilege of the vendor, prompted the Louisiana Supreme Court to make the observation appearing at the beginning of this Article, praising "the intelligent sense of justice" exemplified by the civil law.[36]

### *C. Subsequent Amendments and the Civil Code of 1870*

Legislation enacted in 1844 enhanced the remedies available to workers and suppliers.[37] This legislation added a mechanism by which workers and suppliers not in privity of contract with the owner could provide a statement of account to the owner, who was then obligated to initiate a procedure with the contractor to adjust and fix the amount owing to the claimant. If the contractor did not pay the claimant this amount within 10 days after it was determined, the owner was required to pay the amount owed out of any remaining funds due to the contractor. The effectiveness of this additional remedy was somewhat diminished, however, when the Supreme Court held that a claimant had no right to force an owner to initiate the procedure to adjust the amount due and, where the owner refused to do so, the claimant's only recourse was to exercise one of the other remedies available under the Civil Code.[38]

When Louisiana adopted the Civil Code of 1870, the 1844 statute was copied nearly verbatim into the article that provided privileges to contractors and workers employed by the owner.[39] Most of the other relevant articles of the 1825 Code were carried forward without change.[40] New article 3249 continued to provide, as had article 3216 of the 1825 Code, for privileges in favor of those contractors, workers, and suppliers who were in privity of contract with the owner, but the new article also

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36. City of Baltimore v. Parlange, 23 La. Ann. 365, 366 (1871).

37. Act No. 66, 1844 La. Acts 34. The Act was originally introduced as an amendment to article 2744, but, as passed, enacted a new section of the Revised Statutes, leaving article 2744 untouched. *See* Schwartz v. Cronan, 30 La. Ann. 993, 996–97 (La. 1878) (expressing the view that the "whole matter would have been greatly simplified if . . . this act had been accepted and treated as an amendment to article 2744; and if articles 2741, now 2770, and 2745, now 2774, had been stricken out").

38. *Schwartz*, 30 La. Ann. 993. The Supreme Court ultimately retreated from this holding in *Vordenbaumen v. Bartlett*, 30 So. 219 (La. 1901).

39. LA. CIV. CODE art. 2772 (2019), the first two paragraphs of which were taken from article 2743 of the 1825 Code. As discussed *infra* in Part VIII, Civil Code article 2772 was repealed in the 2019 revision.

40. *See* LA. CIV. CODE arts. 2770 (identical to article 2741 of the 1825 Code), 2773–75 (identical to articles 2744–46 of the 1825 Code), 3267 (closely parallels article 3234 of the 1825 Code, except for the deletion of a reference to slaves), and 3268 (identical to article 3235 of the 1825 Code) (2020).

recognized the effect of a recent amendment to the 1825 Code, which had granted a privilege to persons supplying materials to a contractor or subcontractor.[41]

The Civil Code of 1870 substantially altered recordation requirements for all privileges. Although the $500 threshold applicable to construction privileges was preserved, and contracts less than that amount were still not required to be recorded or even to be in writing, the 1870 Code provided that privileges arising under such contracts were preserved only if a statement of the claim was recorded.[42] This change was consistent with the broader goal of the 1870 Code, which was to protect third persons from unrecorded interests. Where the 1825 Code had provided that privileges were effective against third persons from the date of the act creating them if the act was ultimately recorded within the delay prescribed by law, the 1870 Civil Code provided that privileges were effective against third persons only from the time of recordation of the act or evidence of indebtedness.[43] Where the 1825 Code had allowed a period of at least six days to record the act creating a privilege, the 1870 Code, as originally enacted, required recordation on the very day that the contract was entered into, thus eliminating the need for retroactive effectiveness that the 1825 Code had allowed.[44]

*D. Genesis of the Private Works Act*

As outlined above, the regime of construction privileges found in the 1870 Civil Code was the result of several decades of legislative evolution, beginning with the Code Napoleon and Digest of 1808, both of which

41. Act No. 126, 1868 La. Acts 167. This Act also limited the extent of the privileges arising under the article to a maximum of one acre and provided that privileges arising from a work undertaken by a lessee extended only to the lease and did not affect the owner.

42. LA. CIV. CODE art. 2776 (2020).

43. *Compare* LA. CIV. CODE art. 3273 (2020), *with* LA. CIV. CODE art. 3240 (1825). This change had been introduced two years earlier in Act No. 126, 1868 La. Acts 167.

44. *Compare* LA. CIV. CODE art. 3274 (1870), *with* LA. CIV. CODE art. 3241 (1825). Thus, where a contractor had no written contract and therefore failed to record one on the date that he was engaged, any construction privilege in his favor did not enjoy the priority that a seasonably filed privilege ordinarily has over a previously recorded mortgage. *See* Marmillon v. Archinard, 24 La. Ann. 610 (1872). By an amendment in 1877, the present delays of seven and fifteen days were inserted. *See* Act No. 45, 1877 La. Acts 59. For a discussion of the effect of the changes that the 1870 Civil Code made to the rules applicable to recordation of privileges, see *supra* note 31.

granted privileges only to architects, contractors, and laborers. The evolution continued with innovations made in the Civil Code of 1825, which extended privileges to suppliers for the first time, and with numerous statutory enactments that preceded the adoption of the 1870 Code. However intelligent and just this system may have appeared to Supreme Court,[45] others apparently found it lacking. The Louisiana Constitution of 1879, in article 175, mandated that the General Assembly "pass laws to protect laborers on buildings, streets, roads, railroads, canals and other similar works, against the failure of contractors and sub-contractors to pay their current wages when due, and to make the corporation, company or individual for whose benefit the work is done responsible for their ultimate payment."[46]

The first attempt at fulfillment of this constitutional directive appeared in Act 134 of 1880, which, as the Constitution dictated, sought to protect laborers. Among other protections, it gave laborers a first priority privilege upon the immovable that was improved by their labor, subject to the requirement of recordation of evidence of their claims. No protection was provided for suppliers or subcontractors.

Act 180 of 1894 marked the first real step toward enactment of the protections that exist in the current Private Works Act. It required each owner under a contract for $1,000 or more in cities containing a population of at least 50,000 inhabitants to require the contractor to post a bond in the full amount of the contract for the protection of laborers and suppliers. The owner was required to record the contract and bond within one week after the contract was signed and before work commenced. If the owner failed to do so, he was made personally liable for their claims. The 1894 Act also afforded these claimants a privilege upon the immovable to secure their claims, provided that they recorded their sworn bills, regardless of whether the contract was recorded. The protections of the statute were not limited to those who dealt with the contractor or his immediate subcontractor but included even those who dealt with remote subcontractors.[47]

In 1896, the legislature expanded the protections of Act 180 of 1894 to apply to all cities having a population of at least 10,000 inhabitants.[48] Ten years later, the state adopted Act 134 of 1906 for cities of 50,000 or more inhabitants. Where the 1906 Act applied, the bond was required to be for only one-half of the contract sum, and, if the surety was ultimately found to be insolvent, the owner was personally liable for the claims of

45. City of Baltimore v. Parlange, 23 La. Ann. 365, 366 (1871).

46. LA. CONST. art. 175 (1879). Similar mandates were found in later constitutions. *See* LA. CONST. art. 185 (1898); LA. CONST. art. 185 (1913).

47. Willey v. St. Charles Hotel, 28 So. 182 (La. 1899).

48. Act No. 123, 1896 La. Acts 179.

persons who were supposed to be protected by the bond. This Act was also the first to provide for the institution of concursus proceedings to resolve claims in a single proceeding.[49] To fill the gap left by the population thresholds of the 1894 and 1906 acts, the legislature enacted Act 65 of 1908, which applied to cities having a population under 10,000 inhabitants and to rural areas of the state. Unlike the acts that applied to larger municipalities, the 1908 Act required the bond to exceed the amount of the contract by one-half.

Over the ensuing years, the legislature enacted a number of other statutes on this subject matter, often with overlapping and inconsistent provisions.[50] These statutes culminated in Act 139 of 1922, which was comprehensive in its scope but lacked a repealing clause. Thus, it was held that the 1922 Act did not repeal the statutes that had preceded it, except to the extent of a conflict.[51] The lack of a repealing clause was cured four years later, with the enactment of Act 298 of 1926, which was not only exhaustive of the subject matter but also provided that "[t]he manner and method of creating and preserving liens and privileges created and specified in this act shall be exclusive" and repealed all conflicting laws, including inconsistent provisions of the Civil Code.[52]

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49. *See* DAGGETT, *supra* note 13, § 63. A later Act would allow claimants to institute a concursus. Act No. 262, §3, 1916 La. Acts 563.

50. A listing of all of these statutes, commencing with Act 180 of 1894, can be found in *Thibodaux Boiler Works v. People's Sugar Co.*, 122 So. 290 (La. Ct. App. 1st Cir. 1929). For a detailed discussion of these statutes and their provisions, see DAGGETT, *supra* note 13, § 63.

51. *Thibodaux Boiler Works*, 122 So. 290. The cases also held that these new statutes were supplementary to the provisions of the Civil Code, and, to the extent that the articles of the Civil Code were not in conflict with the new statutes, they remained in force. Vordenbaumen v. Bartlett, 30 So. 219 (La. 1901) (construing Act No. 180, 1894 La. Acts 223); Daniel v. Vasquez, 9 Teiss. 300 (Orl. App. 1912) (construing Act No. 134, 1906 La. Acts 223); Conroy v. Pine Belt Oil Co., 79 So. 523 (La. 1918) (construing Act No. 229, 1916 La. Acts 494).

52. Act No. 298, §16, 1926 La. Acts 552. The 1926 Act did not, however, expressly repeal any articles of the Civil Code. Nevertheless, on the basis of the repealing clause contained in the Act, it has been held that the Act was intended to exhaust the subject matter and thus repealed article 2772 and other provisions of the 1870 Code by implication, even those provisions of the Civil Code that were not inherently inconsistent with the Act. *See* Robertshaw Controls Co. v. Pre-Engineered Products, Co., Inc., 669 F.2d 298 (5th Cir. 1982). As discussed more fully *infra* in Part VIII, the 2019 revision of the Private Works Act expressly repealed article 2772 and a number of other related articles. *See* Act No. 325, §3, 2019 La. Acts.

Writing in 1942, Professor Harriet S. Daggett praised the 1926 Act for eliminating the "general state of confusion" that had plagued the statutory law and jurisprudence on the subject prior to its enactment. Yet, lamenting both its "undue technicality and repetition" as well as its "varying and arbitrary classifications," she called for a further revision of the 1926 Act with the goal of clarification and simplification.[53]

*E. The 1981 Revision*

With a number of subsequent amendments, the 1926 Act, after incorporation into the Revised Statutes of 1950,[54] was the law in force at the time the legislature adopted House Concurrent Resolution No. 150 of 1977, directing the Louisiana State Law Institute to "study and propose a revision of the lien laws under Title 9 of the Louisiana Revised Statutes of 1950 so as to clarify and simplify the lien laws and the enforcement thereof." The process of revision consumed nearly four years and resulted in the enactment of Act 724 of 1981, which totally rewrote the Private Works Act, creating its present structure and organization.[55] One of the goals of the revision was to improve a statute that was "disorganized, contradictory, and confusing" on account of amendments that had been made to the Private Works Act following its incorporation into the Revised Statutes.[56] Apart from these general criticisms, the Law Institute identified three deficiencies of particular concern: (1) the Act's failure to define what comprised a "work"; (2) the existence of parallel, but not entirely consistent, provisions imposing personal liability on an owner for his failure to file a bond and his failure to file the contract; and (3) the Act's failure to distinguish between cases in which the owner's liability arose from contracts entered into by his contractor—rather than from the owner's own actions—and the Act's related failure in the former instance to indicate whether the privilege arising under the Act directly secured the principal debt owed to the claimant or rather secured the statutory liability that the Act imposed upon the owner.[57]

Although Act 724 of 1981 completely reworked Louisiana Revised Statutes §§ 9:4801 *et seq.*, it left the statute's basic policy goals and

53. *See* DAGGETT, *supra* note 13, § 73, at 323.

54. LA. REV. STAT. ANN. § 9:4801 *et seq*. (1950).

55. Rubin, *supra* note 5, at 428.

56. *Exposé des Motifs*, LA. REV. STAT. ANN., CIV. CODE ANCILLARIES, Vol. 3D, page 96.

57. *Id.*

mechanisms intact.[58] The identity of persons entitled to privileges under the Private Works Act was largely unchanged, and the ranking of those privileges also remained the same, although the provisions governing priority were harmonized.[59] The revision defined terms such as "work,"[60] "contractor,"[61] and "general contractor."[62] Structurally, the 1981 Act separated privileges securing an owner's contractual obligation to a person with whom he is in privity of contract[63] from those privileges securing claims that the Act established in favor of other claimants.[64] The revision contemplated the possibility of multiple contracts and multiple contractors on the same work.[65] Recordation of the full contract was no longer to be required; rather, a notice of contract containing only basic statutorily prescribed information would be filed. The previous requirement that the filing occur within 30 days from the date of the contract was suppressed. For contracts under $25,000, a general contractor was no longer required to file his contract in order to be entitled to a privilege.[66] Statements of claim or privilege filed by claimants were no longer required to be in affidavit form.[67] The revision changed the period within which a claimant was required to file suit on his claim to one year from the expiration of the period allowed for filing statements of claim or privilege, rather than one year from the actual date of filing of the claimant's statement of claim or privilege.[68] The revision also clarified that the privileges arising under the Private Works Act always secure the liability of the owner, rather than the underlying obligation owed by others to claimants not in privity of contract with him. For that reason, if the owner had no personal liability, there was no privilege created upon his immovable.[69]

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58. For a scholarly and comprehensive treatment of the 1981 Act, *see* Michael H. Rubin, *Ruminations on the Louisiana Private Works Act*, 58 LA. L. REV. 569 (1998). Much of the discussion in that article of the workings of the Private Works Act remains relevant even after the 2019 revision.

59. *Exposé des Motifs*, *supra* note 56.

60. LA. REV. STAT. ANN. § 9:4808 (1982).

61. *Id.* § 9:4807(A).

62. *Id.* § 9:4807(B).

63. *Id.* § 9:4801.

64. *Exposé des Motifs*, *supra* note 56.

65. LA. REV. STAT. ANN. §§ 9:4801(1), 9:4807(A), 9:4808(B).

66. *Id.* § 9:4811(D).

67. *Id.* § 9:4822.

68. *Id.* § 9:4823(A). A subsequent amendment to the Private Works Act restored the requirement that the claimant file suit within one year after filing his statement of claim or privilege. *See* Act No. 394, 2012 La. Acts 2111, *amending* LA. REV. STAT. ANN. § 9:4823(A)(2).

69. *Exposé des Motifs*, *supra* note 56.

Although the Law Institute's 1981 proposal for revision of the Private Works Act was adopted with only a few changes,[70] little time would pass before the legislature would decide that further changes to the Act were warranted. After the 1981 revision, the Private Works Act underwent over two dozen amendments, almost all of which were very narrow in their scope and operation.[71] Even though those amendments did not alter the Act's basic structure and policies, they modified its details and procedures to deal with specific problems caused by the jurisprudence, changing business and financing practices, or the desires of certain classes of persons affected by the Act to correct what they perceived to be its deficiencies as applied to them in particular cases. However well-intentioned, these disjointed changes to certain specific provisions of the Private Works Act were sometimes made in a fashion that did not comport with the overall thrust of the Act. A number of changes introduced statutory language that was imprecise, ambiguous, or different from the words used to describe the identical concepts elsewhere in the Act. Some amendments used the words "claim" and "privilege" almost interchangeably, even though these two concepts have entirely different meanings and consequences under the Act. Over the course of time, the legislature added notice requirements to the Act in a variety of places, rather than in a central location, with the unintended effect of creating traps for unwary claimants. A number of changes to the Act did not appear to state what was likely intended, leaving courts to struggle with the proper interpretation of the amendments.[72]

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70. Rubin, *supra* note 5. That article also contains a detailed comparison of the 1981 revision against former law.

71. *See* Act No. 589, 1983 La. Acts 1179; Act No. 388, 1984 La. Acts 994; Act No. 556, 1985 La. Acts 1024; Act No. 711, 1985 La. Acts 1287; Act No. 903, 1985 La. Acts 1945; Act No. 424, 1986 La. Acts 790; Act No. 685, 1987 La. Acts 1657; Act No. 685, 1988 La. Acts 1774; Act No. 713, 1988 La. Acts 1826; Act No. 904, 1988 La. Acts 2363; Act No. 999, 1988 La. Acts 2698; Act No. 41, 1989 La. Acts 287; Act No. 952, 1990 La. Acts 2334; Act No. 353, 1991 La. Acts 1270; Act No. 370, 1991 La. Acts 1314; Act No. 1024, 1991 La. Acts 3298; Act No. 31, 1995 La. Acts 238; Act No. 666, 1995 La. Acts 1759; Act No. 1155, 1995 La. Acts 3323; Act No. 861, 1997 La. Acts 1443; Act No. 1134, 1999 La. Acts 3017; Act No. 1105, 2001 La. Acts 2348; Act No. 729, 2003 La. Acts 2470; Act No. 209, 2004 La. Acts 1227; Act No. 169, 2005 La. Acts 1383; Act No. 13, 1st Ex. Sess., 2005 La. Acts 2506; Act No. 601, 2010 La. Acts 2195; Act No. 638, 2010 La. Acts 2296; Act No. 394, 2012 La. Acts 2111; Act No. 425, 2012 La. Acts 2182; Act No. 277, 2013 La. Acts 1822; Act No. 357, 2013 La. Acts 2130; Act No. 182, 2014 La. Acts 1550; and Act No. 791, 2014 La. Acts 3326.

72. *See, e.g.*, Hawk Field Servs., L.L.C. v. Mid Am. Underground, L.L.C., 94 So. 3d 136 (La. Ct. App. 2d Cir. 2012), *writ denied*, 99 So. 3d 652 (La. 2012);

Of course, no argument could be reasonably made that the 1981 Act as originally adopted was insusceptible of improvement, or that the legislative changes made over the years following the 1981 revision were necessarily inappropriate either in their substantive effect or in their drafting. In the 15 years preceding the enactment of the 2019 revision, the legislature twice adopted resolutions directing the Law Institute to consider revisions to the Private Works Act.[73] In its report in response to the latter resolution,[74] the Law Institute expressed its belief that, in order to restore the integrity and cohesiveness of the Private Works Act, a comprehensive review of the whole Act was warranted. The report indicated that the Law Institute would undertake this task and make recommendations to the legislature for specific changes to the wording in the Act. It was not envisioned that this process would result in a wholesale revision of the Act as occurred in 1981, nor that the recommended changes would have far-reaching substantive effects. Rather, the report noted that the recommended changes would be designed to remove ambiguities or inconsistencies in the wording of the Act that either had already caused, or had the potential to cause, the Act to be interpreted in a manner that likely was not intended.

*F. The 2019 Revision*

The work leading to the 1981 revision of the Act consumed four years; the process leading to the 2019 revision required even longer. The task was assigned to the Law Institute's Security Devices Committee,[75] which supplemented its ranks with special advisors representing segments of industries with interests in the proper working of the Act, such as representatives of general contractors, subcontractors, suppliers, lessors,

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Byron Montz, Inc. v. Conco Constr., Inc., 824 So. 2d 498 (La. Ct. App. 4th Cir. 2002).

73. H.C.R. 259, 2004 Leg., Reg. Sess. (La. 2004) and S.R. 158, 2012 Leg., Reg. Sess. (La. 2012).

74. Report of the Louisiana State Law Institute to the Louisiana Legislature in Response to S.R. No. 158 of 2012, *supra* note 6.

75. Members of the Security Devices Committee during the revision process included L. David Cromwell (Reporter), James R. Austin, David J. Boneno, Elizabeth R. Carter, Christopher K. Odinet, Scott P. Gallinghouse, David W. Gruning, Peter L. Koerber, Marilyn C. Maloney, Max Nathan, Jr., Kelly Juneau Rookard, Michael H. Rubin, Ronald J. Scalise, Jr., Emmett C. Sole, James A. Stuckey, Adam J. Swensek, Susan G. Talley, George J. Tate, Robert P. Thibeaux, Dian Tooley-Knoblett, and Keith Vetter. Claire Popovich and Mallory C. Waller served as the Committee's staff attorneys during the revision process.

sureties, title insurers, construction lenders, developers, and construction law practitioners.[76] To the task of revision, the committee devoted a total of 20 committee meetings beginning in 2014, and the committee's work was presented in stages to the Council of the Law Institute at seven different meetings. Once complete, the Law Institute introduced its proposal for revision in the legislative session as House Bill No. 203 of 2019,[77] and, with only scant legislative changes, the revision was enacted into law as Act 325 of 2019, with a general effective date of January 1, 2020.[78]

The essential mechanisms of the Act were untouched by the 2019 revision. As was the case under prior law, contractors, laborers, materials suppliers, equipment lessors, engineers, architects, and surveyors who are in privity of contract with the owner are granted a privilege on the immovable upon which work is performed as security for their contractual claims against the owner.[79] Those who are not in privity of contract with the owner but instead have a contractual relationship with either a contractor or a subcontractor of any tier are given personal claims against both the owner and the contractor,[80] as well as a privilege upon the immovable to secure their statutory claims against the owner.[81] Claims and privileges arising under the Act must be preserved by the filing of a statement of claim or privilege before the expiration of a rather short filing period following substantial completion or abandonment of the work.[82] Provided that they are properly preserved by a timely filing, privileges under the Act have effect against third persons from the earlier to occur of

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76. These special advisors included John T. Andrishok, Billy J. Domingue, George Trippe Hawthorne, John O. Hayter, III, Craig Kaster, H. Bruce Shreves, Tim Stine, David C. Voss, and Russ Wray.

77. The bill was authored by Representative Gregory A. Miller.

78. The effective date of the Act and its limited retroactivity are discussed in a later Part of this Article. *See infra* Part IX.

79. LA. REV. STAT. ANN. § 9:4801 (2020).

80. As the official revision comments to Louisiana Revised Statutes § 9:4802 reflect, these personal claims against the owner and contractor are a form of personal security. *See id.* § 9:4802 cmt. c. *See generally* LA. CIV. CODE arts. 3136–37 (2020). Although official revision comments to Louisiana legislation are generally anonymous, the authors of this Article are, in fact, the drafters of the comments to the 2019 revision of the Private Works Act. Therefore, it is their hope that any similarity between the words used in this Article and those found in the comments is attributed not to the vice of plagiarism but rather to the virtue of consistency in thought.

81. LA. REV. STAT. ANN. § 9:4802.

82. *Id.* § 9:4822(A)–(D). The 2019 revision did clarify, and to some extent alter, the filing periods.

the commencement of the work or the filing of a notice of contract.[83] A claimant who has properly preserved his privilege by filing a statement of claim or privilege must bring suit within one year after the date of filing and, to preserve the effectiveness of the privilege against third persons, must file a notice of pendency of the action in the mortgage records before expiration of that one-year period.[84]

Although the 2019 revision completely rewrote the ranking provision, the substance of ranking rules was for the most part unchanged. As under prior law, laborer's privileges have priority over all mortgages and other non-governmental privileges. As they were under prior law, most other Private Works Act privileges are superior to all mortgages and other non-governmental privileges, except for mortgages and vendor's privileges that became effective as to third persons before work began or notice of contract was filed.

Apart from its myriad stylistic changes,[85] the 2019 revision did, however, make a number of substantive changes, all of which will be discussed later in this Article. The threshold contract amount triggering the requirement that a general contractor record notice of his contract in order to be entitled to a privilege was raised from $25,000 to $100,000, and the revision expressly provides that a general contractor who fails to file notice of his contract when it exceeds that threshold is deprived of any privilege under the Act.[86] A payment bond must now be in the full amount of the contract, rather than in the tiered amounts that had existed under prior law.[87] The rules governing the periods within which statements of claim or privilege must be filed were revised and clarified, and, most importantly, an outer time limit was imposed even when notice of termination is never filed.[88] The requirement that a materials supplier on a

83. *Id.* § 9:4820(A).

84. *Id.* §§ 9:4823(A), 9:4833(E).

85. Included among the non-substantive changes found in the 2019 revision was the relocation of three provisions whose original placement interrupted the flow and progression of the Act. Those provisions pertained to the misapplication of proceeds by contractors or subcontractors, the escrow of funds earned by contractors and held as retainage, and the furnishing of retainage bonds by contractors. *See* LA. REV. STAT. ANN. §§ 9:4814, 9:4815, 9:4822(M) (2019). Moved to a newly created Subpart H of the Act, these provisions were redesignated as Louisiana Revised Statutes §§ 9:4856, 9:4857, and 9:4858. As indicated in the legislation that enacted the 2019 revision, this redesignation should not be interpreted as either an amendment to or a reenactment of these provisions. *See* Act No. 325, §4, 2019 La. Acts.

86. LA. REV. STAT. ANN. § 9:4811(D) (2020).

87. *Id.* § 9:4812(B).

88. *Id.* § 9:4822(A)–(D).

residential project give notice of nonpayment to the homeowner before filing a statement of claim or privilege was suppressed. The 2019 revision provided a meaningful consequence for an owner's failure to comply with a claimant's request to be notified of the filing of notice of termination.[89] The time within which affidavits of no work must be filed, and the effect of a timely filed affidavit, were altered.[90] Notice requirements of the Act were revised,[91] and the mechanisms of giving notice modernized.[92] The revision expanded the reach of the Act to cover work on "other constructions" belonging to owners who are not landowners and to provide that privileges arising from such work extend to those other constructions, even though property law classifies them as movables.[93] Finally, the Civil Code articles providing for or contemplating the existence of construction privileges were at long last either repealed outright or substantially modified.[94]

A few changes to the bill drafted by the Law Institute were made during the legislative process. The period within which a lessor is required to notify a contractor of the fact that the lessor is leasing movables in connection with a work was expanded from 20 to 30 days after the date movables first leased by the lessor are placed at the site.[95] The legislature also added a stipulation that a lessor is not required to respond to a request made by an owner or contractor for information unless the lessor has previously given such a notice to the person making the request.[96] A proposed provision that a seller of movables to a subcontractor need give notice of nonpayment on only one occasion to an owner or contractor was deleted,[97] as was an entirely new § 4805, which, if adopted, would have

89. *Id.* § 9:4822(J).
90. *Id.* § 9:4820(C).
91. *Id.* § 9:4804.
92. *Id.* §§ 9:4842–45.
93. *Id.* § 9:4810(4).
94. *See* Act No. 325, §§ 2–3, 2019 La. Acts.
95. *See* LA. REV. STAT. ANN. § 9:4804(B)(1).
96. *See id.* § 9:4804(B)(2).
97. *See id.* § 9:4804(C). The proposed provision that was deleted by legislative amendment had read as follows: "A seller who sells movables to a subcontractor shall not be required to deliver a notice under Paragraph (1) of this Subsection on more than one occasion with respect to amounts owed or to be owed by that subcontractor in connection with a work. After one such notice has been given to an owner and contractor, no further notices under this Subsection shall be required with respect to any movables sold at any time by the seller to that subcontractor in connection with the work, regardless of whether or when the amounts claimed in the notice are paid." H.B. 203 at 10, 2019 Leg., Reg. Sess.

provided a formal mechanism by which an owner or contractor could request a statement of amounts owed to claimants who have no direct contractual relationship with the person making the request.[98] Another legislative amendment added a stipulation that a sub-subcontractor having no direct contractual relationship with the contractor has no right of action to enforce a claim against the contractor or surety, unless at least 30 days before filing suit the sub-subcontractor has given the contractor a notice stating the amount owed and identifying the other subcontractor for whom the work was performed.[99] The form of notice that residential contractors must give to homeowners, already substantially simplified in the Law Institute's projet, was further revised to address concerns of residential contractor groups.[100]

The amendment that spawned the most discussion during the legislative session was the addition of a new Louisiana Revised Statutes § 9:4822(D), which, on a residential work for which a timely notice of

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(La. 2019), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=1118818 [https://perma.cc/669D-QBXA].

98. The premise behind proposed § 4805 was that, once enabled to obtain information from those supplying materials or services to subcontractors, the contractor and owner would be able to see that the unpaid claimants were paid before making payment to the subcontractor who was responsible for the unpaid balances owed to these claimants. The thrust of proposed § 4805 was as follows:

> Within fifteen days after receipt of a written request from an owner or contractor, a person who is granted a claim and privilege under R.S. 9:4802(A)(3) or (4) but who has no direct contractual relationship with that owner or contractor shall provide to that owner or contractor a statement of all amounts owed to the person as of a date no earlier than forty-five days before the date of the response. The request shall contain a reasonable identification of the work and shall state that a failure to provide a timely or accurate response may result in a loss of all or part of the person's claim and privilege. The person's failure to provide a timely and accurate response to a request made under this Subsection shall extinguish the person's claim and privilege under R.S. 9:4802(A)(3) or (4) to the extent of any damages suffered by the owner or contractor as a result of the failure or inaccuracy.

H.B. 203 at 12, 2019 Leg., Reg. Sess. (La. 2019).

99. *See* LA. REV. STAT. ANN. § 9:4804(D). This is similar to the former requirement of Revised Statutes § 9:4822(J) (2019), which had not only required notice before suit but also required an actual filing of the claimant's statement of claim or privilege in the mortgage records. That provision was removed in the 2019 revision on account of its incompatibility with other provisions of the Private Works Act. *See id.* (2020), which provides a claimant rights against a contractor and his surety even where a statement of claim or privilege is never filed.

100. *Id.* § 9:4852(A) (2020).

contract has not been filed, allows sellers, lessors, and all claimants under Louisiana Revised Statutes § 9:4802 to extend their filing period to a total of 70 days by giving notice of nonpayment to the owner at least 10 days before filing a statement of claim or privilege.[101] This notice of nonpayment is, however, wholly optional, and its effect, if properly and timely given, is simply to extend the filing period applicable to those claimants.[102]

## II. BASIC PROTECTIONS AFFORDED BY THE ACT

The Private Works Act serves as the framework for implementing two fundamental policy objectives: (1) to protect those who contribute to the improvement of an immovable to ensure that they are compensated by owners for the value of their work; and (2) to encourage owners who benefit from the work to take reasonable steps to ensure not only that their direct contractors are paid, but also that subcontractors, laborers, and suppliers are paid for the value of their work.[103] The primary mechanism by which these policy objectives are accomplished is by granting to contractors, subcontractors, sellers, and lessors of movables—and others who contribute to the improvement of an immovable—claims and privileges to secure the price of their work or the price of the movables they provide.[104]

### *A. General Observations*

The claims and privileges afforded by the Private Works Act are set forth in the Act's first two provisions: Louisiana Revised Statutes §§ 9:4801 and 9:4802. The dichotomy between these two provisions was first created in 1981, when the Act separated privileges arising in favor of persons who had a direct contractual relationship with the owner from privileges securing claims established in favor of persons who were in privity of contract with a contractor or subcontractor, rather than with the

101. *Id.* § 9:4822(D). This change, which illustrates one of the few instances in which the Act treats residential projects differently from others, required the addition of a definition for the term "residential work." *Id.* § 9:4810(8). *See* discussion *infra* in Part III.

102. As discussed *infra* in Section IV.D.4, this provision replaced a mandate that had existed under prior law requiring a seller on a residential project to give notice of nonpayment to the owner at least 10 days before filing his statement of claim or privilege. *See* LA. REV. STAT. ANN. § 9:4802(G)(2) (2019).

103. *Exposé des Motifs*, *supra* note 56.

104. *Id.*

owner.[105] Privileges arising in favor of those who have a direct contractual relationship with the owner are included in Louisiana Revised Statutes § 9:4801,[106] and claims and privileges established in favor of those who do not have a direct contractual relationship with the owner are included in Louisiana Revised Statutes § 9:4802.[107]

As is the case with other lien statutes, the courts have held that the Private Works Act is *stricti juris*. Accordingly, its provisions must be interpreted rigidly, and the privileges it confers cannot be extended or enlarged either by implication or the application of equitable considerations. Nevertheless, strict construction cannot be applied as to permit purely technical objections to defeat the real intent of the Act.[108]

*B. Privileges Granted by Louisiana Revised Statutes Section 9:4801*

Louisiana Revised Statutes § 9:4801 grants a privilege on immovable property to secure the obligations of the owner arising out of work performed on the immovable.[109] This privilege is afforded to contractors for the price of their work, as well as to laborers or other employees of the owner for the price of their labor or services performed at the site of the immovable.[110]

A privilege under Louisiana Revised Statutes § 9:4801 is also granted to sellers and lessors of movables when they sell or lease directly to the owner. Sellers of movables sold to the owner are granted a privilege for the price of the movables, provided that these movables: (1) become component parts of the immovable; (2) are consumed at the site of the immovable; or (3) are consumed in equipment used at the site of the immovable.[111] Another provision of the Act creates a rebuttable presumption that movables delivered by the seller to the site of the immovable have become component parts of the immovable or were used

105. *See id.*

106. *See* LA. REV. STAT. ANN. § 9:4801 cmt. a (2007).

107. *See id.* § 9:4802 cmt. a. As discussed *infra* in Section III.I, there is an exception to this general rule in the case of professional subconsultants who are employed by other surveyors, engineers, or architects employed by the owner.

108. Guichard Drilling Co. v. Alpine Energy Services, Inc., 657 So. 2d 1307 (La. 1995); Subdivision Planning Engineers, Inc. v. Manor Dev. Corp., 349 So. 2d 247 (La. 1977); Morgan v. Audubon Constr. Corp., 485 So. 2d 529 (La. Ct. App. 5th Cir. 1986); Authement's Ornamental Iron Works, Inc. v. Reisfeld, 376 So. 2d 1061 (La. Ct. App. 4th Cir. 1979), *writ denied*, 378 So. 2d 1390 (La. 1980).

109. LA. REV. STAT. ANN. § 9:4801 (2020).

110. *Id.* § 9:4801(1), (2).

111. *Id.* § 9:4801(3).

on or at the site of the immovable in performing the work.[112] Lessors of movables leased to the owner by written contract are granted a privilege for the rent of the movables, provided that these movables are used at the site of the immovable.[113]

Finally, a privilege under Louisiana Revised Statutes § 9:4801 is afforded to professional consultants engaged by the owner and to the professional subconsultants of those professional consultants for the price of professional services rendered in connection with work undertaken by the owner.[114] As will be discussed more fully in Section III.I, those professional subconsultants are the only persons who have no direct contractual relationship with the owner but who are nevertheless granted a privilege under § 4801.[115]

### *C. Claims Against the Owner and Privileges Granted by Louisiana Revised Statutes Section 9:4802*

The second section of the Act, Louisiana Revised Statutes § 9:4802, grants a personal claim against the owner to secure payment of obligations arising out of the performance of work under a contract between the owner and contractor.[116] This claim is afforded to subcontractors for the price of their work, as well as to laborers or other employees of the contractor or a subcontractor for the price of their labor or services performed at the site

112. *See Id.* § 9:4846. This presumption can be rebutted by a showing that the movables "were not used in the construction or incorporated into the job." Parish Concrete, Inc. v. Fritz Culver, Inc., 399 So. 2d 694 (La. Ct. App. 1st Cir. 1981).

113. *Id.* § 9:4801(4).

114. *Id.* § 9:4801(5). As discussed *infra* in Section III.I, "professional consultants" are professional surveyors, professional engineers, or licensed architects who are engaged by the owner, a contractor, or a subcontractor. "Professional subconsultants" are professional surveyors, professional engineers, or licensed architects who are engaged by professional consultants.

115. Since 1987, Louisiana Revised Statutes § 9:4801 has granted a privilege in favor of professional subconsultants who are employed by other surveyors, engineers, or architects who are employed by the owner. *See* Act No. 685, 1987 La. Acts 1657. Although the surveyors, engineers, or architects who employ these professional subconsultants have a direct contractual relationship with the owner, the professional subconsultants themselves do not. As discussed *infra* in Section III.I, the 2019 revision continues to include these professional subconsultants within the scope of Louisiana Revised Statutes § 9:4801, even though they lack privity of contract with the owner, because their work does not emanate from the contractor, as is required under Louisiana Revised Statutes § 9:4802.

116. LA. REV. STAT. ANN. § 9:4802(A) (2020).

of the immovable.[117] This claim is also granted to sellers and lessors of movables when they sell or lease to a contractor or a subcontractor of any tier.[118] Sellers of movables sold to the contractor or a subcontractor are granted a claim for the price of movables that become component parts of the immovable, are consumed at the site of the immovable, or are consumed in equipment used at the site of the immovable.[119] Lessors of movables leased to the contractor or a subcontractor by written contract are granted a claim for the rent of movables that are used at the site of the immovable.[120]

Finally, Louisiana Revised Statutes § 9:4802 grants a claim against the owner to professional consultants engaged by the contractor or a subcontractor, and to the professional subconsultants of those professional consultants, for the price of professional services rendered in connection with work undertaken by the contractor or a subcontractor.

Given that these personal claims against the owner exist in the absence of privity of contract and regardless of whether the owner has paid the contractor the full amount owed, it might be legitimately questioned why the law imposes such liability upon the owner. The following explanation appears in the Law Institute's 2012 report to the legislature on the Private Works Act:

> Several arguments have been made to support the Act's imposition of personal liability on the owner to persons with whom there is no privity of contract, even after the owner has paid his contractor. First, and most importantly, the Act gives the owner a means to avoid personal liability by recording notice of

117. *Id.* § 9:4802(A)(1) and (2).

118. A claim under Louisiana Revised Statutes § 9:4802 is not, however, granted to a seller of movables who sells to another seller of movables. *See* Cable & Connector Warehouse, Inc. v. Omnimark, Inc., 700 So. 2d 1273, 1275 (La. Ct. App. 4th Cir. 1997) ("[W]hile a supplier to a subcontractor or a contractor has certain rights under the Private Works Act, a supplier to a supplier does *not* have such rights under that statute. Put another way, in order to have rights under the Private Works Act, a supplier must sell directly to a subcontractor or a contractor."). *See also* Jesse F. Heard & Sons v. Southwest Steel Products, 124 So. 2d 211, 220 (La. Ct. App. 2d Cir. 1960), interpreting the corresponding provision of the Public Works Act ("Under the settled law of this State, a materialman who furnishes material to a materialman, has no right to a lien.").

119. LA. REV. STAT. ANN. § 9:4802(A)(3). *See also id.* § 9:4846, creating a rebuttable presumption that movables delivered by the seller to the site of the immovable became component parts of the immovable or were used on or at the site of the immovable in performing the work.

120. *Id.* § 9:4802(A)(4).

> contract and requiring a surety bond. Secondly, the presence of the bond permits, indirectly, the owner to agree to make his payments as the work progresses, or even after it is finished, and still permits the contractor to obtain credit for the cost of the work as it progresses. In the absence of some assurance of payment, subcontractors and suppliers are less likely to extend credit to the contractor, who would then need to have sufficient capital to complete the job. In a sense, the credit extended to the contractor is in effect credit extended to the owner, for in the absence of the contractor's ability to obtain services and supplies on credit, the contractor would demand that the owner fund costs in advance, rather than in periodic, after-the-fact progress payments. Moreover, it is obviously advantageous to the owner to defer paying until after the work or some definable part of it is finished, particularly since financial institutions are unlikely to lend even part of the funds without some assurances of completion and freedom from claims. The Act's balancing of interests among the contractors, those from whom they obtain services and supplies, the owner, and lenders, has proved to be essentially effective for more than a hundred years. This balancing of interests is ultimately founded in the policy judgment, which pervades many areas of Louisiana law, that one who receives an unmerited enhancement of his property should compensate those persons who cause that enhancement.[121]

The personal claims granted by Louisiana Revised Statutes § 9:4802 against the owner are a form of security because they secure the underlying obligation of the person who is contractually indebted to the claimant for the amount owed.[122] The personal claims against the owner are themselves in turn secured by a privilege on the immovable on which the work was performed.[123] Because the privilege acts as security for the corresponding claim against the owner, the privilege is necessarily extinguished when the claim is extinguished.[124] The converse, however, is not necessarily true, and courts have held that even if a privilege under Louisiana Revised Statutes § 9:4802 has been lost, the corresponding claim against the owner

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121. Report of the Louisiana State Law Institute to the Louisiana Legislature in Response to S.R. No. 158 of 2012, *supra* note 6.

122. *See* LA. REV. STAT. ANN. § 9:4802 cmt. c. *See generally* LA. CIV. CODE arts. 3136–37 (2020).

123. LA. REV. STAT. ANN. § 9:4802(B).

124. *See id.* § 9:4802 cmt. d. *See also* LA. CIV. CODE art. 3277(3), providing that privileges become extinct "[b]y the extinction of debt which gave birth to it."

can still persist.[125] These holdings were based on provisions of former law that provided for the loss of the privilege under Louisiana Revised Statutes § 9:4802 without also providing for the loss of the underlying claim,[126] an issue that the 2019 revision sought to correct by providing, in most cases, that the claim and privilege afforded by this section are coterminous.[127]

Louisiana Revised Statutes § 9:4802 thus provides considerable protection to laborers, subcontractors, materials suppliers, equipment lessors, and others who lack privity of contract with the owner in the form of a personal claim against the owner and a privilege upon the immovable, both of which arise by operation of law. A central feature of the Act, however, is that the owner is given the ability to avoid both the personal claims and the privileges of § 4802 claimants by filing a notice of contract before work begins along with a surety bond guaranteeing the contractor's payment of the amounts owed to those claimants.[128] Where the owner has done so, he will be entitled at the conclusion of the work to a judgment directing the cancellation of all claims or privileges of § 4802 claimants and declaring him discharged from further liability.[129] Regardless of whether the owner has complied with these requirements, he is entitled to indemnity from the contractor against all claims and privileges asserted under Louisiana Revised Statutes § 9:4802.[130]

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125. *See, e.g.*, Hawk Field Servs., L.L.C. v. Mid Am. Underground, L.L.C., 94 So. 3d 136 (La. Ct. App. 2d Cir. 2012), *writ denied*, 99 So. 3d 652 (La. 2012) (holding that even though a lessor of movables lost its privilege under Louisiana Revised Statutes § 9:4802 for failing to timely provide the owner with a copy of its lease, the lessor nevertheless still had a claim against the owner because the notice requirements "refer[] only to the privilege securing the owner's personal liability . . . granted by La. R.S. 9:4802(B) and not the claim granted by La. R.S. 9:4802(A)"). *See also* Standard Materials, L.L.C. v. C & C Builders, Inc., 2010 WL 5479903 (La. Ct. App. 1st Cir. 2010) (holding that a seller's failure to comply with the 10-day notice requirement imposed under former Louisiana Revised Statutes § 9:4802(G)(2) caused only a loss of the seller's privilege and not a loss of his personal claim against the owner).

126. *See, e.g.*, former LA. REV. STAT. ANN. § 9:4802(G) (1982), which originally provided that a lessor must give notice to the owner and contractor in order to preserve his *claim* under Louisiana Revised Statutes § 9:4802. Inexplicably, an amendment made in 1991 substituted "privilege" for "claim," thus creating the possibility that a claim could persist where the privilege had been lost by the lessor's failure to give notice. Act No. 1024, § 1, 1991 La. Acts 3298.

127. There are, however, certain exceptions to this rule, which can be found in LA. REV. STAT. ANN. §§ 9:4822 and 9:4823 (2020). *See also id.* § 9:4802 cmt. d.

128. *Id.* § 9:4802(C).

129. *Id.* § 9:4841(D).

130. *Id.* § 9:4802(F).

The claims arising against the owner in favor of § 4802 claimants are in addition to any other contractual or legal rights that those claimants may have for the payment of amounts owed to them.[131] Thus, the claims against the owner supplement, and in fact secure, the contractual obligations owed to those claimants by the contractor or subcontractor who contracted with them. The claims against the owner also supplement the personal claims that the Act establishes in favor of § 4802 claimants against the contractor, as discussed in Section II.D below.

### *D. Claims Against the Contractor Granted by Louisiana Revised Statutes Section 9:4802*

In addition to the claim against the owner, Louisiana Revised Statutes § 9:4802 grants a claim against the contractor to secure payment of obligations arising out of the performance of work under a contract between the owner and contractor.[132] The claim against the contractor is afforded to the same persons to whom a claim against the owner is granted: (1) subcontractors; (2) laborers or other employees of the contractor or a subcontractor; (3) sellers and lessors of movables sold or leased to the contractor or a subcontractor; and (4) professional consultants engaged by the contractor or a subcontractor, as well as the professional subconsultants of those professional consultants.[133] Like claims against the owner, claims against the contractor are in addition to any other contractual or legal rights that § 4802 claimants may have for the payment of amounts owed to them.[134] Unlike claims against the owner, however, claims against the contractor are not secured by a privilege on the immovable.

The Act allows a claimant to assert his claim against the owner, the contractor, or the contractor's surety without the joinder of the others.[135] As mentioned in Section II.C above, Louisiana Revised Statutes § 9:4802 requires the contractor to indemnify the owner for claims against the owner arising from work to be performed under the contract.[136] A similar indemnification requirement applies to a subcontractor for amounts paid by the owner, the contractor, or another subcontractor for claims arising from work performed by the former subcontractor.[137]

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131. *Id.* § 9:4802(D).
132. *Id.* § 9:4802(A).
133. *Id.* § 9:4802(A)(1)–(5).
134. *Id.* § 9:4802(D).
135. *Id.* § 9:4802(E).
136. *Id.* § 9:4802(F).
137. *Id*.

## III. DEFINITIONS

The Private Works Act contains a number of definitions. Many of the terms that are defined, such as "owner," "contractor," and "work," appeared for the first time in the 1981 Act. The 2019 revision retained these existing definitions and added a new provision—Louisiana Revised Statutes § 9:4810—that contains miscellaneous definitions previously scattered throughout the Act. This newly enacted provision also introduces several additional defined terms, including "complete property description," "immovable," and "residential work."

### *A. Owner*

Before the 1981 revision, the Private Works Act contained no definition of "owner." Based on judicial interpretation of former law,[138] the 1981 revision defined this term for the first time: owners, co-owners, naked owners, owners of predial or personal servitudes, possessors, lessees, and other persons having an interest in an immovable were all deemed to be owners for purposes of the Act.[139] The 1981 revision also provided that claims against an owner under Louisiana Revised Statutes § 9:4802 were limited to the owner who contracted with the contractor and that, if more than one owner had contracted, each was solidarily liable for the claims.[140] Similarly, the privileges arising under the Private Works Act were limited to the interest in the immovable enjoyed by those owners.[141] The Act was subsequently amended in 1985 to provide that claims under Louisiana Revised Statutes § 9:4802 could also arise against an owner who agreed in writing to the price and work of the contract of a lessee and specifically agreed to be liable for any claims granted by the Act.[142]

The 2019 revision retained the broad definition of "owner" for purposes of the Act to include anyone having the right to use or enjoy an immovable, regardless of whether the owner's interest is actual ownership or whether the owner even holds a real right in the immovable.[143] The

138. *See id.* § 9:4806 cmt. a (2007).
139. *Id.* § 9:4806(A) (1982).
140. *Id.* § 9:4806(B).
141. *Id.* § 9:4806(C).
142. Act No. 903, 1985 La. Acts 1945, *amending* LA. REV. STAT. ANN. § 9:4806(B).
143. Prevailing doctrine in Louisiana, as well as the jurisprudence, has long insisted that a contract of lease, even of an immovable, is a mere personal contract. *See* Hoffman v. Jaurans, 18 La. 70, 73 (1841) (holding, in a suit involving a claim to a construction privilege, that "[a lease] is a right strictly personal giving to the

definition now includes a specific reference to usufructuaries.[144] The 2019 revision also retained the provisions limiting the application of Louisiana Revised Statutes § 9:4802 to those owners who contracted with the contractor or agreed in writing to the price and work of the contract made by another owner, provided that the owner expressly agreed in writing to be liable for claims arising under that provision.[145] In other words, the 2019 revision retains the longstanding rule that the mere consent of one owner to the performance of work contracted by another, or knowledge that such work is ongoing, will not be sufficient to impose liability upon the owner who consented to or knew of the work.[146]

Also unchanged by the 2019 revision is the statement that privileges arising under the Act encumber only the interest in the immovable enjoyed by the owner whose obligation is secured by the privilege.[147] The 2019 revision did, however, make more general a proposition that—at least according to the express text of the Act—formerly applied only to lessees: if the owner whose obligation is secured by the privilege is a lessee or holder of a servitude, or otherwise derives his interest in the immovable from another person, the privilege is inferior and subject to the rights and

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lessee only the use of the property and conferring neither the legal possession nor any proprietary interest in it."). *See also* 2400 Canal, L.L.C. v. Board of Supervisors of Louisiana State University Agricultural and Mechanical College, 105 So. 3d 819 (La. 2012) (reaffirming that a lease is distinguishable from a real right, such as a right of use, because a lease involves only personal rights rather than real rights); A. N. YIANNOPOULOS, PROPERTY § 9:26, *in* 2 LOUISIANA CIVIL LAW TREATISE (5th ed. 2015); Stadnik, *The Doctrinal Origins of the Juridical Nature of Lease in the Civil Law*, 54 TUL. L. REV. 1094, 1135 (1980). Nevertheless, a lessee can clearly be an "owner" under the Act. *See* Cajun Contractors, Inc. v. EcoProduct Solutions, LP, 182 So. 3d 149 (La. Ct. App. 1st Cir. 2015).

144. LA. REV. STAT. ANN. § 9:4806(A) (2020).

145. *Id.* § 9:4806(B). Before the 2019 revision, this rule, as stated in the Act, applied when an owner agreed to be liable for a work undertaken by a lessee. The 2019 revision expanded the rule to apply whenever an owner agrees to be responsible for a work undertaken by any other owner.

146. *See id.* § 9:4806 cmt. a. The principle was established very early in Louisiana that an owner is not responsible for claims arising from a work undertaken by a lessee, even where the owner consents to the work and provides funds for its execution. Hoffman v. Jaurans, 18 La. 70 (1841). *See also* Fruge v. Muffoletto, 137 So. 2d 336, 341 (La. 1962); Louisiana Industries v. Bogator, Inc., 605 So. 2d 213 (La. Ct. App. 2d Cir. 1992); Clegg Concrete, Inc. v. Bonfanti-Fackrell, Ltd., 532 So. 2d 465, 469 (La. Ct. App. 1st Cir. 1988).

147. LA. REV. STAT. ANN. § 9:4806(C).

obligations of that other person.[148] The Act continues to set forth a specific application of that proposition in the context of leases, providing that privileges arising under the Act upon a lessee's rights in the lease or in buildings and other constructions are inferior and subject to rights and claims of the lessor, such as the right to dissolve the lease upon the lessee's default.[149]

The 2019 revision contains an express statement that inclusion in a statement of claim and privilege of the name of an owner who has no responsibility for the claim does not, of itself, create liability on the part of that owner or create a privilege upon his interest in the immovable.[150]

*B. Contractors and Subcontractors*

The 1981 Act expressly defined the terms "contractor," "general contractor," and "subcontractor" for the first time. The 2019 revision made no changes to the definitions of those terms.

A contractor is defined under the Act as a person who contracts directly with an owner to perform all or a part of a work.[151] A general contractor is a contractor who either contracts to perform all or substantially all of the work or is deemed to be general contractor because notice of his contract has been properly filed, even if the scope of his work is less than the entire project.[152] Whether a contractor is considered to be a general contractor has important consequences under the Act. For example, a general contractor who fails to properly file notice of contract when the price of the work exceeds $100,000 is denied any privilege under the Act and is not entitled to file a statement of claim or privilege for any amounts owed to him.[153]

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148. *Id*.

149. *Id.* § 9:4806(D).

150. *Id.* § 9:4806(E). As the official revision comments mention, an owner without responsibility for the claim might be named as a result of the claimant's error or abundance of caution, or, under a rule introduced in the 2019 revision, on account of the responsible owner's lack of an interest of record in the immovable. *Id.* § 9:4806 cmt. e. In that circumstance, the 2019 revision permits the claimant to name the owner of record in a statement of claim or privilege rather than naming the responsible owner who has no interest of record. *See id.* § 9:4822(H)(5).

151. *Id.* § 9:4807(A).

152. *Id.* §§ 9:4807(B), 9:4808(B).

153. *Id.* § 9:4811(D). The threshold amount that triggers the requirement of filing a notice of contract was increased from $25,000 to $100,000 by the 2019 revision, as mentioned *supra* in Section I.F.

By so providing, the 2019 revision overruled a line of cases that allowed a general contractor to assert a privilege for that portion of the work that he had personally performed, as opposed to what he had subcontracted out, even when he had failed to comply with the requirement of filing notice of his contract.[154] The theory behind those cases was that, to that extent, the contractor was acting only as an ordinary contractor, not as a general contractor. The 2019 revision rejected this rationale, expressly providing that a general contractor who does not comply with the requirement of filing notice of a contract exceeding $100,000 is not entitled to file a statement of claim or privilege for *any amounts* due to him.[155] The definition of a "general contractor" in Louisiana Revised Statutes § 9:4807(B) makes no differentiation based on whether the contractor has subcontracted out none, some, or all of the work.

An additional reason that the distinction between general contractors and other contractors is important is that a general contractor potentially benefits from a longer period of time within which to file a statement of his privilege: a general contractor is given seven months after substantial completion or abandonment of the work within which to file—rather than only 60 days—in cases where no notice of termination is filed.[156] Yet another reason that the distinction has significance is that both the default of the general contractor and the termination of his contract serve as bases for filing a notice of termination of the work, but this is not true in the case of a contractor who is not a general contractor.[157]

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154. *See* Burdette v. Drushell, 837 So. 2d 54, 68–69 (La. Ct. App. 1st Cir. 2002) (finding that a general contractor who failed to record a notice of contract nevertheless "occupied the status of an ordinary 'contractor'" and was therefore entitled to a privilege under the Act "to the extent he performed or provided labor or services other than the supervisory work generally performed by a 'general contractor'"); Tharpe & Brooks, Inc. v. Arnott Corp., 406 So. 2d 1, 5–6 (La. Ct. App. 1st Cir. 1981) (recognizing a laborer's privilege in favor of a contractor who entered into a contract with the owner "solely for labor that was understood to be performed by the contractor himself" and concluding that such contract did not need to be recorded because the contractor "was not a general contractor"). *See also* Tee It Up Golf, Inc. v. Bayou State Constr., L.L.C., 30 So. 3d 1159 (La. Ct. App. 3d Cir. 2010).

155. LA. REV. STAT. ANN. § 9:4811(D).

156. *Compare id.* § 9:4822(A), *with id.* § 9:4822(C). If a notice of termination is filed, both the general contractor and any other contractor would have 60 days from its filing to file their statements of claim or privilege. *Id*.

157. *Id.* § 9:4822(E)(3)(c), (d). The 2019 revision made this clear by substituting "general contractor" for "contractor" in LA. REV. STAT. ANN. § 9:4822(E)(3)(c).

The Act defines subcontractors as those who contract either directly with a contractor, or through a series of contracts emanating from a contractor, to perform all or a part of the work contracted for by the contractor.[158] Thus, the term embraces subcontractors of any tier. Accordingly, not only are remote subcontractors entitled to a claim and privilege under the Act, but so are the laborers or employees who work for them and those who sell or lease movables to them.[159]

*C. Work*

The determination of what constitutes a "work" affects a host of issues that arise under the Act. As discussed in Part VII below, the commencement of work often determines when Private Works Act privileges become effective as to third persons.[160] Similarly, the commencement of work determines the ranking of Private Works Act privileges arising from the work against mortgages and vendor's privileges.[161] If no notice of termination is filed, the substantial completion or abandonment of work marks the beginning of the periods within which claimants must file statements of their claims or privileges.[162] Additionally, the determination of whether a contractor has contracted to perform all or substantially all of a work and is therefore a general contractor necessarily requires a determination of the work itself.[163]

The 1981 Act expressly defined the concept of "work" for the first time based on the jurisprudential development of the meaning of the term.[164] A work is a *single continuous project* for the improvement, construction, erection, reconstruction, modification, repair, demolition, or other physical change of an immovable or its component parts.[165] As

158. *Id.* § 9:4807(C).

159. *See id.* §§ 9:4807(C), 9:4802(A)(1)–(4). This rule illustrates the importance of the distinction between a subcontractor and a supplier: a supplier to a subcontractor is given a claim and privilege under the Act; a supplier to another supplier is not. *See* discussion *supra* note 118.

160. LA. REV. STAT. ANN. § 9:4820(A).

161. *Id.* § 9:4821(A)(2).

162. *Id.* §§ 9:4822(A)(2), (B)(2), (C)(2), (D)(2).

163. *Id.* § 9:4807(A).

164. *See id.* § 9:4808 cmt. a (2007).

165. *Id.* § 9:4808(A) (2020). The 2019 revision added one additional clarification to this definition, inserting the words "located in this state" after "immovable." The intent of this addition was to expressly include a choice of law rule providing that Private Works Act privileges arise only in connection with work performed on immovables in Louisiana, not real property located in other

explained by the jurisprudence, "a work constitutes the entire continuous project, and not just one portion of the project."[166]

The provision that defines "work" for purposes of the Private Works Act, Louisiana Revised Statutes § 9:4808, also sets forth instances in which a work will be considered separate and distinct from other parts of the project. For example, if notice of contract is properly filed, the work to be performed under the contract is deemed a separate work, even if such work does not comprise the entirety of the project.[167] Moreover, as discussed in Section III.B above, the contractor under such a contract is deemed to be a general contractor, even if he contracts to perform less than all or substantially all of the project.[168]

The Private Works Act provides that preliminary site work, such as clearing, leveling, grading, test piling, cutting or removing trees and debris, placing fill dirt, and demolishing existing structures, is deemed a separate work as long as it is not performed by the contractor responsible for later constructing a building or other structure on the immovable.[169]

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states, as discussed more fully *infra* in Section III.G. *See* LA. REV. STAT. ANN. § 9:4808 cmt. b.

166. Nu-Lite Elec. Wholesalers, LLC v. Alfred Palma Inc., 878 So. 2d 660, 662 (La. Ct. App. 1st Cir. 2004). Thus, the court held that an abandonment by an electrical subcontractor of its portion of the work did not constitute an abandonment of the entire work because the part of the work undertaken by the subcontractor was less than the "entire single, continuous project."

167. LA. REV. STAT. ANN. § 9:4808(B). Applying these rules, the court in *Keybank National Association v. Perkins Rowe Associates, LLC*, 823 F. Supp. 2d 399 (M.D. La. 2011), held that work performed for the construction of a medical office building within a larger development pursuant to a separate contract that was properly filed was considered to be a work separate from that concerning the overall development. As discussed later in this Article, the 2019 revision removed the additional requirement that a proper bond be attached in order for this effect to be achieved. *See infra* Section IV.A.

168. LA. REV. STAT. ANN. §§ 9:4807(B)(2), 9:4808(B). These rules apply to a *contractor* who files a notice of contract with respect to the portion of the overall work that he has contracted with the owner to perform; these rules do not apply to a *subcontractor* who has contracted with a contractor to perform part or even all of the work within the scope of that contractor's contract. The portion of a work to be performed by a subcontractor is never itself deemed to be a separate work. For the distinction between a contractor and a subcontractor, see *id.* § 9:4807(A) and (C) and discussion *supra*.

169. *Id.* § 9:4808(C). This means that those who perform the preliminary site work are required to file statements of their claims or privileges upon the substantial completion of the site work. Also, unlike the privileges of most other claimants, their privileges are effective as to third persons only from the time of filing their statements of claim or privilege. *See id.* § 9:4808(C).

Thus, in *Keybank National Association v. Perkins Rowe Associates*,[170] the court held that work creating roads, drainage, and utilities for a large development was mere preliminary site work that was separate from the overall project because it "differ[ed] in kind" from the work that was ultimately performed to "raise the buildings" of the development.[171] Nevertheless, it is important not to confuse "preliminary site work" with "dirt work," for not all dirt work is considered to be preliminary site work, as evidenced by the court's decision in *C & J Contractors v. American Bank & Trust Co*.[172] In this case—a ranking dispute between a mortgagee and several Private Works Act claimants involving work performed on a golf course—the mortgagee argued that the work performed at the golf course was mere dirt work that should not be considered for purposes of determining the ranking of privileges as to third persons under the Act.[173] The court disagreed, explaining that the dirt work at issue "was not in preparation for the construction, but was the actual work of constructing a golf course" and therefore constituted the beginning of work for purposes of the Act.[174]

The provision concerning preliminary site work has remained largely unchanged since its enactment almost 40 years ago, with the exception of a 2003 legislative amendment that, in addition to adding the demolition of existing structures as an example of preliminary site work, expanded this provision to cover preliminary site work performed by the contractor when the preliminary site work was not part of the contractor's work *for the erection of the building or other construction*.[175] The 2019 revision retained the reference to demolition work but eliminated as unnecessary the expansion of the provision to cover preliminary site work performed by the building contractor.[176]

In certain limited instances, the Act provides that a suspension of a work for 30 days or more will cause it to be divided, *for the limited purposes of ranking only*, into two separate works. This division results

170. *Keybank Nat'l Ass'n*, 823 F. Supp. 2d 399.

171. *Id.* at 414.

172. C & J Contractors v. American Bank & Trust Co., 559 So. 2d 810 (La. Ct. App. 1st Cir. 1990), *writ denied*, 562 So. 2d 318, 332 (La. 1990).

173. *Id.* at 814.

174. *Id.* at 815.

175. Act No. 729, 2003 La. Acts 2470, *amending* LA. REV. STAT. ANN. § 9:4808(C).

176. *See* LA. REV. STAT. ANN. § 9:4808 cmt. d (2020). The 2019 revision retained a separate provision of the Act stating that preliminary site work does not mark the commencement of work, even if performed by the contractor who will erect the building. *See id.* § 9:4820(A)(2).

only when the work is for the renovation or modification of an existing building or other construction, and then only when notice of contract was not filed.[177] This provision, which was substantially rewritten by the 2019 revision in an effort to more clearly convey its intended meaning, is discussed in Section VII.B below in the treatment of ranking issues.

By its terms, the Private Works Act does not apply to certain types of work covered by other statutes, such the drilling of oil, gas, and water wells, construction on railroads, and public works performed by the state or its political subdivisions.[178]

*D. Commencement of Work*

Since 1966, the Private Works Act has specified the kinds of activities that constitute the commencement of work.[179] Generally, work was considered to have commenced when excavation started and could be observed upon inspection or when materials having a value of more than $100 were delivered to the job site and were visible upon inspection. This definition was amended several times prior to the 1981 revision to exclude from consideration activities such as test piling,[180] the cutting or removal of trees and debris, the placing of fill dirt, and the leveling of the land surface.[181] The 1966 amendment also provided that work performed by an architect, engineer, or other professional was not considered for purposes of determining the commencement of work.[182]

The 1981 revision codified the basic elements of this definition, and subsequent amendments introduced the additional exclusion of demolition of existing structures[183] and a provision that, for purposes of determining when work has begun, the site of the immovable is the area within the boundaries of the property.[184] The 2019 revision retained this definition of commencement of work, making technical changes to improve readability and adding only the clearing and grading, in addition to leveling, of land

177. *Id.* § 9:4820(B). A work is suspended if the cost of the work performed is less than $100 during a period of 30 days or more.

178. *Id.* § 9:4808(D). Public works are governed by the Public Works Act, LA. REV. STAT. ANN. §§ 38:2241 *et seq.* (2005).

179. Act No. 507, 1966 La. Acts 1062.

180. Act No. 152, 1972 La. Acts 509.

181. Act No. 163, 1979 La. Acts 407.

182. Act No. 507, 1966 La. Acts 1062. Registered land surveyors were expressly added to this list of professionals in 1968. *See* Act No. 252, 1968 La. Acts 593.

183. Act No. 729, 2003 La. Acts 2470.

184. Act No. 666, 1995 La. Acts 1759.

surfaces to the list of exclusions provided by former law. This addition was made for the sake of consistency with the provision of the Act treating preliminary site work as a separate work.[185]

For purposes of the Act, work is commenced by placing materials to be used in the work at the site of the immovable or conducting other work at the site of the immovable, the effect of which is visible from a simple inspection and reasonably indicates that work has begun.[186] Preliminary site work, services rendered by surveyors, architects, and engineers, and the placing of materials having an aggregate price of less than $100 are not considered for purposes of determining when work has begun, even if performed by the contractor who will erect a building.[187]

The determination of whether and when work has commenced is of critical importance for a number of reasons. For example, as will be discussed more fully in Section VII.A below, Private Works Act privileges are effective against third persons from the earlier of the commencement of the work or the filing of a notice of contract. The date that these privileges become effective against third persons largely determines their ranking.[188] Owners are relieved of the claims and privileges of claimants not in privity of contract with them if a timely notice of contract and payment bond are filed before the commencement of work.[189] If work has not yet commenced, the Act provides a mechanism whereby a prematurely filed notice of contract may be canceled, provided that certain requirements concerning the filing of a no-work affidavit are satisfied.[190]

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185. LA. REV. STAT. ANN. § 9:4808(C) (2020).

186. *Id.* § 9:4820(A)(2).

187. *Id*. As discussed *supra* in Section III.C, if such work is performed by some other contractor, it is deemed to be a separate work. *Id.* § 9:4808(C). This distinction is important in the determination of when those who perform preliminary site work must file statements of claim and privilege. If the preliminary site work is a separate work, then the completion of the preliminary site work will mark the commencement of the filing period. On the other hand, if the preliminary site work is performed by the contractor who will erect the building, then those who perform preliminary site work for the contractor will have the same period of time to file a statement of claim or privilege following completion of the entire work, as is afforded to other claimants. *See Id.* § 9:4808 cmt. d.

188. *Id.* § 9:4820(A). Persons intending to acquire rights in an immovable are entitled to conclusively rely upon facts recited by a qualified inspector in a properly filed affidavit to the effect that work on the immovable has not yet commenced. *See id.* § 9:4820(C). The term "qualified inspector" is defined in *id.* § 9:4810(7).

189. *Id.* § 9:4802(C).

190. *Id.* § 9:4832(C)(2).

Finally, when work begins determines whether the 2019 revision will apply to the work because the transitional rules of the revision provide that most of its provisions apply only to works commenced after January 1, 2020.[191]

*E. Substantial Completion and Abandonment of Work*

Another important determination to be made under the Act is whether and when a work has been substantially completed or abandoned. Where no notice of termination has been filed, these events mark the beginning of the periods within which claimants must file statements of their claims or privileges, as will be discussed later in this Article.[192]

The Private Works Act has contained rules concerning the meaning of "substantial completion" of a work since 1964.[193] These rules, which were expanded in the 1981 Act,[194] were substantively unchanged by the 2019 revision, though they were relocated within the Act.[195] A work is substantially completed when one of two events occur. The first is when the last work is performed on, or the last materials are delivered to, the immovable or to the specified area of the immovable with respect to which a partial notice of termination has been filed. The second of the events constituting substantial completion is when the owner accepts the improvement or possesses or occupies the immovable or the area of the immovable specified in a partial notice of termination, even though minor matters or errors remain to be finished or resolved. According to the case law, "if the only work remaining on the date the owner occupies the premises is minor 'punch list' items, substantial completion occurs on that date."[196] Conversely, "[o]ccupancy of the property does not trigger the beginning of the period for filing liens if major or consequential

191. Act No. 325, §6, 2019 La. Acts. *See infra* Part IX.

192. LA. REV. STAT. ANN. § 9:4822(A)(2), (B)(2), (C)(2), (D)(2). For this reason, claimants may request that the owner notify them of the substantial completion or abandonment of the work, and the owner must do so within 10 days. *See id.* §§ 9:4822(I), (J).

193. Act No. 317, 1964 La. Acts 676.

194. *See* LA. REV. STAT. ANN. § 9:4822(H), (I) (2019). *See also id.* § 9:4822 cmt. h (2007).

195. *Id.* § 9:4809(A) (2020).

196. C & S Safety Systems, Inc. v. SSEM Corp., 843 So. 2d 447, 452 (La. Ct. App. 4th Cir. 2003).

construction items are unfinished or major remedial work remains to be done."[197]

In *Urban's Ceramic Tile, Inc. v. McLain*, the court considered whether a house for which a "long punch list" of items remained but possession of which had been taken by the owners had been substantially completed for purposes of the Act.[198] The punch list of items included, among other things, insulation, indoor and outdoor paint, installation and repair of lighting, and installation of trim and molding.[199] According to the court, "substantial completion may be found even though deficiencies exist," and "the extent of the defect or nonperformance, the degree to which the purpose of the contract is defeated, the ease of correction, and the use or benefit of the work to be performed" should be considered in determining whether a work has been substantially completed.[200] Ultimately, the court held that although some of the items on the punch list at issue, including "laying the attic insulation, attaching the washer and dryer, and installing the garage doors" constituted "larger projects," these punch list items did "not defeat the intended use of the house," and the project had therefore been substantially completed.[201]

A similar conclusion was reached by the court in *E. Smith Plumbing, Inc. v. Manuel*, which held that the home at issue had been substantially completed when the new owners "moved into and began living in" it, despite the fact that "merely 'minor or inconsequential' items of work such as installation of a light fixture" remained to be performed.[202] In *Southmark Corp. v. Ellis Millwork, Inc.*, however, the court held that the installation of ceiling lighting in an office building "is a major and consequential part of the construction" and "not minor or remedial in nature."[203] Because the owner's tenant had moved into the office building when major work, as opposed to "minor or inconsequential" matters, remained to be performed, the court held that substantial completion did not occur until the unfinished work was completed.[204]

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197. Southmark Corp. v. Ellis Millwork, Inc., 535 So. 2d 507, 509 (La. Ct. App. 2d Cir. 1988).

198. Urban's Ceramic Tile, Inc. v. McLain, 113 So. 3d 477, 482 (La. Ct. App. 2d Cir. 2013).

199. *Id.*

200. *Id.*

201. *Id.*

202. E. Smith Plumbing, Inc. v. Manuel, 88 So. 3d 1209, 1216–17 (La. Ct. App. 3d Cir. 2012).

203. Southmark Corp. v. Ellis Millwork, Inc., 535 So. 2d 507, 510 (La. Ct. App. 2d Cir. 1988).

204. *Id.*

In addition to its expansion of the concept of "substantial completion" of the work, the 1981 Act added a definition of "abandonment" of the work, the substance of which was also unchanged by the 2019 revision. A work is abandoned by the owner when he terminates the work and notifies those who are working on the project that he no longer desires to continue it or when he otherwise objectively and in good faith manifests the abandonment or discontinuance of the project.[205] In *Jonesboro State Bank v. Tucker*, the case cited in the comments to the 1981 Act, all work on the project ceased for lack of funds, and the court explained that "any unexplained and complete cessation of all work" on a project should be treated as "a manifestation of intent on the owner's part to abandon the project."[206] In *Evangeline Brokerage Co., Inc. v. Lewis*, the court applied the *Jonesboro* court's reasoning in determining that, where "all work activity ceased on the project" at the time the last worker left the project, the work was abandoned within the meaning of the Private Works Act.[207] In *Nu-Lite Electrical Wholesalers, LLC v. Alfred Palma, Inc.*, the court considered the issue of whether abandonment of work by a subcontractor to whom materials were supplied is sufficient to trigger the period within which the materials supplier must file its statement of claim or privilege, or whether the Act instead requires "abandonment of the entire project by

205. LA. REV. STAT. ANN. § 9:4809(B) (2020).

206. Jonesboro State Bank v. Tucker, 381 So. 2d 578, 581 (La. Ct. App. 2d Cir. 1980). The court's holding was to some extent premised upon the rule of strict construction applicable to the Private Works Act and other lien statutes.

207. Evangeline Brokerage Co. v. Lewis, 539 So. 2d 1311, 1314 (La. Ct. App. 3d Cir. 1989). In reaching the conclusion that the *Jonesboro* approach provided for the most equitable results, the court provided a brief history of several jurisprudential tests that had developed for purposes of determining the actions that constitute abandonment under the Act. *Id.* The first of these tests was the "hope of completion" test, which posited that the filing period did not begin to run until "the owner manifested an intent to abandon the project." *Id. See also* Stanley v. Falgoust, 398 So. 2d 1240 (La. Ct. App. 4th Cir. 1981). According to the *Jonesboro* court, concern arose about the difficulty in determining the date of abandonment under this test, as well as the existence of "indefinitely lingering" filing periods in cases where the owner "stopped work on a project but manifested no intent to abandon," which ultimately led to the development of the "same contract test" by the court in *Clegg Concrete, Inc. v. Kel-Bar, Inc*, 393 So. 2d 178 (La. Ct. App. 1st Cir. 1980). As explained by the court in *Evangeline*, this rule provided that the 60-day filing period begins to run for works under a given contract or contractor when that contractor "discontinues work on the project," regardless of whether work is later resumed with a new contractor. *Evangeline*, 539 So. 2d at 1314.

the owner or general contractor."[208] In reaching its conclusion that the default of a subcontractor on its portion of the work does not equate to abandonment of the work, the court determined that, for purposes of commencing the filing period, the "entire single, continuous project" must be abandoned.[209]

*F. Residential Work*

As originally enacted, the 1981 revision did not distinguish between residential works and other types of works. This changed to some degree in 1991, when the legislature amended the Act to impose notice requirements on sellers of movables used in connection with a residential work. The amendment provided that for their Private Works Act privileges to arise, sellers of movables sold for use in work for residential purposes were required to deliver to the owner a notice of nonpayment at least 10 days before filing their statements of claim or privilege.[210] The amendment also provided that, where notice of contract was not filed, the period within which a seller of movables on a work for residential purposes was allowed to file his statement of claim or privilege was extended from 60 to 70 days.[211] The 1991 amendment did not, however, provide any guidance as to what constituted "work on an immovable for residential purposes," as opposed to other types of work performed under the Act.[212]

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208. Nu-Lite Electrical Wholesalers, LLC v. Alfred Palma Inc., 878 So. 2d 660, 662 (La. Ct. App. 1st Cir. 2004).

209. *Id.* at 662–63.

210. Act No. 1024, 1991 La. Acts 3298, *adding* former LA. REV. STAT. ANN. § 9:4802(G)(2). Notices of nonpayment provided by sellers of movables used in connection with work for residential purposes were required to contain information such as the seller's name and address, a general description of the movables provided, a description sufficient to identify the immovable upon which work was performed, and a written statement of the seller's lien rights.

211. Act No. 1024, 1991 La. Acts 3298, *adding* LA. REV. STAT. ANN. § 9:4822(D)(2).

212. Thus, it was unclear whether the amendment might apply to the construction of large residential apartment complexes or other multi-unit dwellings. The wording of the reference to work for residential purposes also created an ambiguity as to whether that reference was intended to limit the applicability of the amendment to residential works or was included merely for emphasis. *See* Hawk Field Servs., L.L.C. v. Mid Am. Underground, L.L.C., 94 So. 3d 136 (La. Ct. App. 2d Cir. 2012), *writ denied*, 99 So. 3d 652 (La. 2012) and Standard Materials, L.L.C. v. C & C Builders, Inc., 2010 WL 5479903 (La. Ct. App. 1st Cir. 2010) (interpreting the provision to apply only to residential works).

While drafting the 2019 revision, the Law Institute's Security Devices Committee determined that both the notice requirement and the extended filing period added in 1991 should be suppressed because of their limited applicability to only sellers of movables, as opposed to other claimants. The Committee could discern no policy justification for requiring that a homeowner receive notice of nonpayment from sellers but not from other claimants entitled to a privilege under the Act, nor for allowing sellers, but not other claimants, a potential 70-day filing period.[213] The Committee also felt that the requirement of notice of nonpayment before filing was a trap for the unwary seller, who might easily lose his claim and privilege out of a lack of awareness of the rather obscure notice requirement. Thus, as submitted to the legislature, House Bill No. 203 of 2019 eliminated both former Louisiana Revised Statutes §§ 9:4802(G)(2) and 4822(D)(2).[214]

Nevertheless, during the legislative session, a provision was added that restored certain elements of the former law applicable to residential works, but without a limitation to sellers and without any mandate that notice of nonpayment be given before filing.[215] As enacted, Louisiana Revised Statutes § 9:4822(D) provides that, on a residential work for which a timely notice of contract was not filed, the period within which a claimant must file his statement of claim or privilege is extended from 60 to 70 days if the claimant gives notice of nonpayment to the owner within the 60-day period that would otherwise apply and at least 10 days before filing his statement of claim or privilege.[216] Significantly, the Act does not require that notice of nonpayment be given. If the claimant elects not to give notice of nonpayment, or if a claimant attempts to do so but fails to satisfy the requirements of Louisiana Revised Statutes § 9:4822(D), the claimant will simply lose the benefit of the 10-day extension and will be required to file his statement of claim or privilege within 60, rather than 70, days.[217]

In conjunction with the addition of Louisiana Revised Statutes § 9:4822(D), the legislature also added a definition of "residential work." For purposes of the Private Works Act, residential works are those for the construction, improvement, modification, or repair of immovables

213. Minutes of the June 17, 2016 Meeting of the Security Devices Committee, Louisiana State Law Institute (June 22, 2016) (on file with the Law Institute).

214. H.B. 203, 2019 Leg., Reg. Sess. (La. 2019).

215. LA. REV. STAT. ANN. § 9:4822(D) (2020).

216. The operation of this provision is discussed more fully *infra* in Section IV.D.4.

217. LA. REV. STAT. ANN. § 9:4822(A); *see also id.* § 9:4822 cmt. g.

occupied or designed to be occupied as single- or double-family residences.[218]

Within the Private Works Act is a series of five statutory provisions that appear under the rather lofty heading of the Residential Truth in Construction Act.[219] These provisions require contractors on projects consisting of "residential home improvements"[220] to inform homeowners, before they sign a contract for the work, of the possible "lien rights" arising under the Private Works Act, but a contractor's failure to give the required notice does not affect the lien rights of any claimant, apparently even those of the contractor himself.[221] Although the Law Institute considered several possible means of giving additional protection to innocent homeowners, who often lack the practical ability to protect themselves by requiring residential contractors to furnish payment bonds,[222] the 2019 revision ultimately made only one change to these provisions: the prescribed form of the required notice was wholly rewritten and simplified, without use of legal jargon, in an effort to make the substance of the notice more understandable to those without training in the law.[223]

*G. Immovables*

Historically, the privileges created by the Private Works Act operated only upon immovables and arose only from work upon immovables. Before the 2019 revision, the Private Works Act did not attempt to define what constitutes an immovable but instead left that determination to other law, primarily the Civil Code.[224] Tracts of land are, of course, immovable, as are their component parts.[225] Buildings are immovable, regardless of

218. *Id.* § 9:4810(8).

219. *Id.* §§ 9:4851–55 (2007).

220. This term is defined in Louisiana Revised Statutes § 9:4851(B).

221. *Id.* §§ 9:4852–54.

222. *See* Minutes of the June 15, 2018 Meeting of the Security Devices Committee, Louisiana State Law Institute (June 19, 2018); Minutes of the August 17, 2018 Meeting of the Security Devices Committee, Louisiana State Law Institute (Aug. 29, 2018) (on file with the Law Institute).

223. LA. REV. STAT. ANN. § 9:4852(A) (2020).

224. Special legislation has provided, or clarified, that certain types of property are not to be considered immovable, regardless of the degree of attachment to the ground. *See, e.g.*, *id.* §§ 9:1149.1, *et seq*. (2018) (manufactured homes considered to be movable until filing of a declaration of immobilization); § 9:1106 (storage tanks placed on land by someone other than the landowner considered to be movable).

225. LA. CIV. CODE art. 462 (2020).

whether they belong to the owner of the ground or to another person.[226] Constructions other than buildings, however, are immovable only when they belong to the owner of the ground.[227] When these other constructions belong to someone who is not the owner of the ground, they are characterized as movables under the Civil Code.[228]

As applied to the Private Works Act as it existed before the 2019 revision, this characterization could sometimes lead to anomalous consequences. If someone performed work on a structure, such as a tower, that was owned by the owner of the ground, he was afforded a privilege upon not only the tower itself, but also the tract of land of which it was a component part. This privilege existed regardless of whether the work caused a physical alteration of the land or was limited to the tower itself. If, on the other hand, the identical tower was owned by someone other than the landowner, such as a lessee or holder of a servitude, then the tower was characterized as a movable under the Civil Code. Accordingly, if someone performed work for the owner of the tower causing a physical alteration of the ground, such as the installation of its foundations in the ground, he would have a privilege under the Private Works Act, but that privilege would encumber only the incorporeal right, usually a lease or servitude, held by the person who owned the tower. The privilege would not extend to the tower itself because it was movable.[229] Moreover, if the claimant worked only on the actual tower, as in the case of a painter who paints the tower, the claimant would have no privilege at all under the Private Works Act because the thing that he worked on was movable and his work was therefore totally outside the scope of the Act.

The legislature likely never intended these anomalous results. As enacted in 1926, the Act granted a privilege to persons providing labor or materials for "the erection, construction, repair or improvement of any building, *structure* or other immovable property" and provided that the privilege extended to "the land and improvements."[230] The Act did not differentiate whether the "structure" was owned by someone other than the landowner. This is not surprising because, until the revision of the law of property in 1978, buildings as well as other constructions, regardless of whether owned by the owner of the ground or someone else, were

226. *Id.* arts. 463–64.
227. *Id.* art. 463.
228. *Id.* art. 475; *see also* LA. CIV. CODE ANN. art. 464, cmt. d (2010).
229. A privilege might arise under other law upon the tower as a movable. *See, e.g.*, LA. REV. STAT. ANN. §§ 9:4501–02 (2020).
230. Act No. 298, 1926 La. Acts 552 (emphasis added).

immovable by their nature.[231] The 1978 revision changed this classification in the case of such other constructions owned by someone other than the landowner, thereby creating the anomaly. The 1981 revision of the Private Works Act seems not to have taken this change in property law into account. Evidence of this exists in a provision of the 1981 revision subordinating a "privilege granted by this Part upon a lessee's rights in the lease or buildings and *structures*" to the rights of the lessor.[232] Those "structures" must clearly be something other than a building and, as property of the lessee rather than the landowner, would necessarily be movable. The Act seemed to presuppose that the privileges it created would attach to the structure without actually providing for that result. [233]

The 2019 revision addressed the problem by defining the term "immovable" for purposes of the Act to include, in addition to property defined by the Civil Code as immovable, any construction that is permanently attached to the ground and that would be classified by law as immovable if it belonged to the landowner.[234] This definitional approach

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231. LA. CIV. CODE art. 464 (1870) ("Lands and buildings or other constructions, whether they have their foundations in the soil or not, are immovable by their nature."). *See* Industrial Outdoor Displays v. Reuter, 162 So. 2d 160 (La. Ct. App. 4th Cir. 1964) (classifying a commercial billboard sign structure as an "other construction" and holding it to be "an immovable by nature" under former Civil Code article 464); Continental Cas. Co. v. Associated Pipe & Supply Co., 279 F. Supp. 490 (E.D. La. 1967) (holding that a pipeline is an "other construction" that is governed by the Private Works Act because it "can only be considered an immovable" under former Civil Code article 464); P. H. A. C. Servs., Inc. v. Seaways Intern., Inc., 403 So. 2d 1199 (La. 1981) (discussing the provisions of former Civil Code article 464 and the changes made by the 1978 property revision before ultimately concluding that a "three story high permanent steel structure" designed to serve as living quarters for offshore workers is a building that "is therefore classified as an immovable" and subject to the Private Works Act).

232. *See* LA. REV. STAT. ANN. § 9:4806(D) (2019) (emphasis added).

233. Interestingly, the 1991 revision of the law of mortgage, undertaken a decade later, *did* take the 1978 change in property law into account by providing that a mortgage can encumber the rights of a lessee or servitude owner in "buildings or other constructions on the land." *See* LA. CIV. CODE art. 3286(3)–(4) (2020). Thus, these other constructions, although movable, are susceptible of encumbrance by mortgage.

234. LA. REV. STAT. ANN. § 9:4810(4) (2020). The law of accession affords similar treatment of constructions of this nature as immovables when they belong to someone other than the landowner. Where a principal thing consists of a movable construction permanently attached to the ground, its accessories include things that would be its component parts if the construction were immovable. LA. CIV. CODE art. 508.

to the problem has two effects: not only will the privilege attach to these other constructions, but work solely upon them will trigger the protections of the Act. Thus, in the example given above, persons involved in the installation or repair of the tower, regardless of whether their work involves only the tower itself rather than an alteration of the ground, will be afforded a privilege under the Act upon the servitude or lease held by the person who owns the tower, as well as upon the tower itself.[235]

As mentioned in Section III.C above, a "work" under the Act always involves a physical change in an immovable or its component parts, but this does not mean that land is always involved. For instance, a condominium unit is a corporeal immovable,[236] and repair work undertaken by a unit owner on his unit will trigger the protections of the Act. Because a building is always an immovable, construction or repair of a building constitutes a "work" under the Act even if the building has no connection at all with land.[237] The 2019 revision made clear, however, that the immovable must be located in Louisiana at the time of the work in order for the Act to apply.[238] Thus, general conflict of law principles cannot be asserted to export the Act to projects on real property in other states based on the argument that Louisiana's policies, such as those of protecting unpaid claimants who contribute to the improvement of an immovable, would be most seriously impaired if its law were not applied to a project in another state.[239]

### *H. Complete Property Description*

As originally enacted, the 1981 Private Works Act required all filings under the Act to "reasonably identify" the immovable upon which work was performed.[240] The Act gave no indication of what form such a

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235. Because the structure, as a movable, may be subject to encumbrances, such as security interests arising under the Uniform Commercial Code, the 2019 revision includes a new rule to rank these competing interests, as discussed *infra* in Section VII.C. *See* LA. REV. STAT. ANN. § 9:4821(D).

236. *See* YIANNOPOULOS, *supra* note 143, § 7:42.

237. P. H. A. C. Servs., Inc. v. Seaways Intern., Inc., 403 So. 2d 1199 (La. 1981).

238. LA. REV. STAT. ANN. § 9:4808(A).

239. *See id.* § 9:4808 cmt. b. Nevertheless, as that official revision comment observes, work on a building that is located in Louisiana at the time of the work but is later moved outside the state is subject to the Act. *See P. H. A. C. Servs., Inc.*, 403 So. 2d 1199.

240. *See, e.g.*, LA. REV. STAT. ANN. §§ 9:4811(A)(2), 9:4822(E)(1), 9:4822(G)(3) (1982).

reasonable identification might take or what degree of specificity was required.

The Act was amended in 1983[241] to require filings that refer to an immovable to contain a description of the immovable "sufficient to clearly and permanently identify the property."[242] The amendment also provided examples of descriptions that satisfy this requirement, including references to the lot, square, subdivision, or the township and range.[243] Since 1983, the Act has also specifically provided that a mere municipal address is insufficient.[244] A 1988 amendment to the Act went even further, requiring that a notice of contract contain a "legal property description" of the immovable.[245] The amendment supplied no definition of that term.

The 2019 revision introduced the term "complete property description," which it defines as a description that, if contained in a properly filed mortgage, would be sufficient for the mortgage to be effective as to third persons.[246] Thus, in a scant three dozen words, the Act incorporates all of the jurisprudence that has interpreted the Civil Code's requirement that a mortgage "must state precisely the nature and situation" of the mortgaged immovable.[247] The 2019 revision requires the use of a

241. Act No. 589, §1, 1983 La. Acts 1179.

242. LA. REV. STAT. ANN. § 9:4831(C) (1983).

243. *Id*.

244. *Id*. *See also* Tee It Up Golf, Inc. v. Bayou State Constr., LLC, 30 So. 3d 1159 (La. Ct. App. 3d Cir. 2010); Boes Iron Works, Inc. v. Spartan Bldg. Corp., 648 So. 2d 24 (La. Ct. App. 4th Cir. 1994); Norman H. Voelkel Constr., Inc. v. Recorder of Mortgages for East Baton Rouge Parish, 859 So. 2d 9 (La. Ct. App. 1st Cir. 2003).

245. Act No. 685, §1, 1988 La. Acts 1774. The same Act amended LA. REV. STAT. ANN. §9:4811(B) to provide that the improper identification of the immovable was prima facie proof of actual prejudice by a claimant or other person acquiring rights in an immovable.

246. LA. REV. STAT. ANN. § 9:4810(3) (2020). A non-uniform provision of the Louisiana Uniform Commercial Code uses a similar formulation for prescribing the type of immovable property description that must be contained in fixture filings and financing statements affecting as-extracted collateral or standing timber. *See id.* § 10:9-502(b)(3).

247. LA. CIV. CODE art. 3288 (2020). *See, e.g.*, H.J. Smith & Sons v. Baham, 102 So. 657 (La. 1925); Consolidated Ass'n of Planters of Louisiana v. Mason, 24 La. Ann. 518 (1872); Mid-State Homes, Inc. v. Knapp, 156 So. 2d 122 (La. Ct. App. 3d Cir. 1963). The words "nature and situation" originated in the *Loi du 11 brumaire An* VII (*1er novembre* 1798), which required a conventional mortgage to describe "*la nature et la situation*" of each of the mortgaged immovables. The intent was to break with past custom, which had conferred upon any notarial act evidencing an obligation the effect of a general mortgage upon all present and

complete property description in all filings that are made by the owner or contractor, such as notices of contract and notices of termination.[248] An affidavit of no work must also contain a complete property description.[249] Filings by other persons may contain a complete property description but, as under the 1981 Act, are required to contain only a reasonable identification of the immovable.[250] The Act provides that a mere municipal address qualifies as neither a complete property description nor a reasonable identification of the immovable.[251]

Before its revision in 2019, the Act specifically provided that a notice of termination could, in lieu of stating a full description of the immovable, refer to the recordation data of the filed notice of contract to which it related and that such a reference would suffice as an adequate identification of the immovable.[252] Perhaps from oversight, the Act did not expressly apply this same rule to other filings made subsequent to the notice of contract. The 2019 revision expands the rule to apply to those subsequent filings. If a notice of contract containing a complete property description of the immovable has been filed, reference in any subsequent filing to the recordation data of the notice of contract suffices as a complete property description in the subsequent filing and would certainly also constitute a reasonable identification of the immovable. If the filed notice of contract contains at least a reasonable identification of the immovable, reference in a subsequent filing to the notice of contract is sufficient as a reasonable identification of the immovable in the subsequent filing.[253]

It is, of course, possible that a notice of contract may contain neither a complete property description, as the law requires, or even a reasonable identification of the immovable. In that event, a claimant who has chosen to describe the immovable in his statement of claim or privilege by a mere

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future immovables of the obligor, even without a stipulation of a mortgage. *See* 21 G. BAUDRY-LACANTINERIE & P. DELOYNE, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL, *Du nantissement, des privilèges et hypothèques et de l'expropriation forcée, Tome Premier*, Introduction, p. I, XXXI–XXXII (2d ed.1899). These words were later incorporated into the Code Napoleon upon its adoption and appear in the 1825 and 1870 Louisiana Civil Codes, as well as its present Civil Code. CODE CIVIL [C. CIV.] art. 2191 (Fr.) (1804); Louisiana Civil Code of 1825, art. 3273; Louisiana Civil Code of 1870, art. 3306; LA. CIV. CODE art. 3288 (2020).

248. *See* LA. REV. STAT. ANN. §§ 9:4811(A)(2); 9:4822(E), (G); 9:4831(B).
249. *Id.* § 9:4831(B).
250. *Id.* §§ 9:4822(H)(3), 9:4831(B).
251. *Id.* § 9:4831(B).
252. *Id.* § 9:4822(E)(1) (2019).
253. *Id.* § 9:4822(E)(1) (2020).

reference to the recorded notice of contract has not satisfied the requirement for a reasonable identification of the immovable in his statement of claim or privilege. It would be unfair to third persons for this deficient statement of claim or privilege to suffice to preserve the claimant's privilege against them, and the 2019 revision expressly provides that the privilege is not preserved under those circumstances as to any third person having or acquiring an interest in the immovable. An innovation in the revision, however, partially rescues the claimant from the consequences of his error by providing that the statement of claim or privilege, even though containing a deficient description of the immovable, will nevertheless be sufficient to preserve all rights of the claimant against the owner, the contractor, and the surety.[254] As the official revision comments explain, this rule prevents an owner from profiting from his own error in giving an insufficient description of the immovable in the notice of contract.[255]

*I. Professional Consultants and Professional Subconsultants*

As enacted, the 1981 Act granted a privilege to registered or certified surveyors or engineers and licensed architects employed by the owner for the price of their professional services, but it did not employ any sort of special terminology to refer to these professionals.[256] In 1987, an amendment to the Act extended this privilege to professional subconsultants, who were defined in Louisiana Revised Statutes § 9:4801 as registered or certified surveyors or engineers or licensed architects employed by the "prime professional."[257] In 1989, the legislature amended the Act to grant a claim and privilege in favor of "[p]rime consultant registered or certified surveyors or engineers, or licensed architects, . . . employed by the contractor or a subcontractor" for the price of their professional services.[258] A claim and privilege was also granted to the professional subconsultants of these prime consultants. The amendment defined "professional subconsultants" in Louisiana Revised Statutes § 9:4802 as registered or certified surveyors or engineers or licensed

254. *Id.* § 9:4831(D). Another instance in which a claimant's privilege is lost as to third persons but where his claims against the owner, contractor, and surety are preserved occurs when a claimant files a timely suit on his claim but fails to file a timely notice of the pendency of the suit in the mortgage records. *See id.* § 9:4833(E).

255. *Id.* § 9:4831 cmt. d.

256. *See id.* §§ 9:4801, 9:4820 (1982).

257. Act No. 685, 1987 La. Acts 1657.

258. Act No. 41, 1989 La. Acts 287.

architects employed by the "prime consultant."[259] Thus, until the 2019 revision, the term "professional subconsultant" was defined twice in the Act, and the terms "prime professional" and "prime consultant" were used without definition.

The 2019 revision retained a definition of "professional subconsultant" and added a definition of "professional consultant." For purposes of the Private Works Act, a professional consultant is a professional surveyor, professional engineer, or licensed architect engaged by the owner or by a contractor or subcontractor.[260] A professional subconsultant is a professional surveyor, professional engineer, or licensed architect engaged by a professional consultant.[261]

These definitions of professional consultant and professional subconsultant are important because the Act grants rights to only those professionals who qualify as a professional consultant or professional subconsultant. Where a professional consultant or professional subconsultant is a juridical person, claims and privileges arise under the Act in favor of the juridical person, rather than its individual employees.[262] Thus, if an engineering firm is engaged by the owner and subcontracts a portion of the engineering services to another engineering firm, both firms will be entitled to a privilege under Louisiana Revised Statutes § 9:4801. None of the individual engineers employed by either firm will be entitled to any rights under the Act; their rights will be strictly against their respective employers.

The inclusion of professional subconsultants within the ambit of Louisiana Revised Statutes § 9:4801 creates the only instance in which a person not in privity with the owner is granted a privilege under that section. Despite the absence of a direct contractual relationship between these professional subconsultants and the owner, their privilege is included in Louisiana Revised Statutes § 9:4801, rather than Louisiana Revised Statutes § 9:4802, because their work does not arise out of a contract between the owner and a contractor. This is also the only instance in which a claimant is given a privilege under the Act when he has no personal claim, whether contractual or statutory, against the owner. And accordingly, this creates the only instance in which a privilege arising

259. Act No. 41, 1989 La. Acts 287, *enacting* LA. REV. STAT. ANN. § 9:4802(A)(5)(a).

260. LA. REV. STAT. ANN. § 9:4810(5) (2020). The revision substituted "professional" in place of "registered or certified" when referring to surveyors or engineers in order to conform to the designations currently used by those professions. *Id.*

261. *Id.* § 9:4810(6).

262. *Id.* § 9:4803(D).

under the Act does not secure an obligation of the owner.[263] Because the owner is not personally obligated to professional subconsultants of a professional consultant that the owner directly engaged, the privilege arising in favor of those professional subconsultants must necessarily secure an obligation owed by someone other than the owner; specifically, it secures the obligations owed to them by the professional consultant who engaged them.

Louisiana Revised Statutes § 9:4802 grants both a claim and privilege against the owner, as well as a claim against the contractor, in favor of professional consultants engaged by the *contractor or a subcontractor*, and also in favor of the professional subconsultants of those professional consultants, for the price of their professional services rendered in connection with the work.[264]

Several provisions of the Act treat the claims and privileges established in favor of professional consultants and their professional subconsultants differently from those afforded to other claimants.[265] As will be discussed in Section VII.D below, their privileges rank behind the privileges of most other Private Works Act claimants and are not effective as to third persons until a statement of claim or privilege is filed. Professional consultants and their professional subconsultants are also required to give notice to the owner within 30 days of their engagement in order to be entitled to rights under the Act, unless they were directly engaged by the owner.[266]

## IV. FILING REQUIREMENTS

The Private Works Act requires or permits the filing of several different documents in connection with a work: a notice of contract, a payment bond, a "no-work" affidavit, a notice of termination, a statement of claim or privilege, a notice of pendency of action, and a release bond, all of which are filed in the mortgage records of the parish of the immovable upon which the work is to be performed.[267] Each document will be discussed in turn below.

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263. Other privileges granted by Louisiana Revised Statutes § 9:4801 secure the contractual obligations of the owner, and privileges granted by Louisiana Revised Statutes § 9:4802 secure the personal claims that that section grants them against the owner. *See id.* § 9:4802(B).

264. *Id.* § 9:4802(A)(5).

265. *Id.* §§ 9:4820(D), 9:4821(B)(3).

266. *Id.* § 9:4804(A).

267. *Id.* § 9:4831(A).

*A. Notice of Contract*

The Act contemplates, and even appears to require, that an owner will file a notice of contract prior to the commencement of work.[268] The notice must contain certain basic statutorily prescribed information, such as the names and addresses of the owner and contractor, a complete property description of the immovable,[269] the name of the project,[270] the price of the work or the method by which the price is to be calculated and an estimate of it, when payment of the price is to be made, and a general description of the work to be done. The contract itself can be recorded, rather than a notice of contract, provided that it contains the prescribed information.[271]

The purposes of a notice of contract are two-fold. First, the notice gives a potential claimant important information that is needed to file his statement of claim or privilege, such as the names and addresses of the responsible owner and the contractor, as well as a description of the immovable upon which the work is to be performed. Indeed, rather than describing the immovable property in his statement of claim or privilege, the claimant can simply make reference to the recordation of the filed notice of contract.[272]

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268. *Id.* § 9:4831(C).

269. Prior to the 2019 revision, the Act required that the notice contain "the legal property description of the immovable." Under the 2019 revision, the notice must state a "complete property description," a term that is now defined in LA. REV. STAT. ANN. § 9:4810(3). *See supra* Section III.H.

270. Under the 2019 revision, the name of the project must be given only if the project actually has a name. *See* LA. REV. STAT. ANN. § 9:4811(A)(2).

271. Often, the contract itself fails to contain a proper description of the immovable and for that reason will not satisfy the requirements of the law. *See, e.g.*, Thompson Tree & Spraying Serv., Inc. v. White-Spunner Constr., Inc., 68 So. 3d 1142 (La. Ct. App. 3d Cir. 2011). Nevertheless, it remains a common, though ill-advised, practice for owners and contractors to file the contract itself, rather than a notice of contract, without taking care to include a sufficient description of the immovable.

272. But if the notice of contract to which the statement of claim or privilege refers does not itself contain at least a reasonable identification of the immovable, that reference will be insufficient to preserve the claimant's privilege against third persons. LA. REV. STAT. ANN. § 9:4831(C). Nevertheless, as discussed *supra* in Section III.H, a statement of claim or privilege that refers to a filed notice of contract for an identification of the immovable will be sufficient to preserve the claimant's personal claims against the owner, the contractor, and the surety, even if the identification of the immovable in the notice of contract does not constitute a reasonable identification. *Id.* § 9:4831(D).

The other purpose of a notice of contract is to serve as notice to third persons of the potential existence of privileges arising under the Act.[273] Although this purpose is worthwhile, it must not be inferred that the absence of the filing of a notice of contract means that third persons acquiring rights in the immovable will take free of privileges arising under the Act. To the contrary, provided that a statement of claim or privilege is ultimately filed before expiration of the applicable filing period, a privilege arising under the Act is effective against third persons, without recordation, from the moment work commences, even if notice of contract is never filed and even if the third person acquires rights in the immovable long before the statement of claim or privilege is filed.[274] If notice of contract is filed, however, the date of its filing is an important factor in the determination of when Private Works Act privileges arising from the work become effective as to third persons[275] and, accordingly, their ranking against third persons.[276]

Although filing a notice of contract is not absolutely mandated by the Act, whether a notice of contract is properly filed has important consequences. First, the owner is relieved of claims and privileges of those who are not in privity of contract with him if a timely notice of contract, with a payment bond attached, is filed before commencement of the work.[277] Second, filing a notice of contract automatically causes the work comprehended within the contract to be considered as a separate work for purposes of the Act and causes the contractor to be considered as a general contractor under the Act, even if the contractor is not responsible for the

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273. *Exposé des Motifs*, *supra* note 56; LA. REV. STAT. ANN. § 9:4811 cmt. d (2020).

274. LA. REV. STAT. ANN. § 9:4820(A). It has long been the rule under the Private Works Act and its predecessors that privileges arising under those statutes are effective against third persons from the moment the privilege arises, even without recordation, provided that a statement of the privilege is ultimately filed within the time required by law. *See* Gleissner v. Hughes, 95 So. 529 (La. 1922). The Act itself, however, contains two exceptions to this rule: privileges arising under Louisiana Revised Statutes §§ 9:4801(5) and 9:4802(A)(5) in favor of professional consultants and their subconsultants are not effective as to third persons until a statement of claim or privilege is filed. LA. REV. STAT. ANN. § 9:4820(D). The same rule applies to privileges arising from preliminary site work. *See id.* § 9:4808(C).

275. *Id.* § 9:4820(A)(1).

276. *Id.* § 9:4821(A)(2).

277. *Id.* § 9:4802(C). For the owner to be relieved of liability, the surety must remain solvent through the time the owner moves for a judgment of discharge of further responsibility after completion or abandonment of the work. *Id.* § 9:4841(C).

entire construction project.[278] Third, the periods for filing statements of claim or privilege for claimants under Louisiana Revised Statutes § 9:4802 are shortened to 30 days, but the 30-day period does not commence to run until a notice of termination is filed.[279] The final consequence arises when notice of contract is not filed and the contract is a general contract that exceeds $100,000: in that event, the general contractor is deprived of a privilege under the Act.[280]

To have the effect of relieving an owner of claims and privileges in favor of those claiming under a general contractor, and of preserving the general contractor's right to a privilege, the notice of contract must be filed in a timely manner, that is, before the commencement of work.[281] As mentioned above, another effect of filing notice of contract is the shortening to only 30 days of the period within which claimants under Louisiana Revised Statutes § 9:4802 are required to file their statements of claim or privilege.[282] As the 1981 Act was originally enacted, this effect resulted from the filing of a notice of contract, even if it was untimely. This rule was an intentional change in the law that existed at that time, and the official revision comments to the 1981 revision explicitly indicated that, under that revision, an owner could file notice of contract simultaneously with a notice of termination in order to achieve the effect of requiring claimants to file within the shorter filing period.[283] This could create a trap for unwary claimants who might have reasonably believed from the fact that notice of contract was not filed at the inception that the filing period would be a full 60 days. A legislative amendment in 1988 restored the requirement that the notice of contract must be filed in a timely

278. *Id.* § 9:4808(B).

279. *Id.* § 9:4822(B). Under the 2019 revision, an outer filing date of six months from substantial completion or abandonment—or seven months in the case of a general contractor's privilege—is imposed. *See* discussion *infra* in Section IV.D.4.

280. LA. REV. STAT. ANN. § 9:4811(D). As discussed *supra* in Section I.F and note 153, the 2019 revision raised the threshold from $25,000 to $100,000 and, at the same time, legislatively overruled the rationale of cases that had allowed a general contractor to assert a privilege for that portion of the work that he did himself rather than subcontracting to others. *See supra* note 154 (discussing Burdette v. Drushell and Tharpe and Brooks, Inc. v. Arnott Corp.).

281. LA. REV. STAT. ANN. §§ 9:4802(C), 9:4811(A), (D). A surety bond conforming to the requirements of the Act must also be attached to the filed notice of contract, as discussed below. *Id.* § 9:4802(C).

282. *Id.* § 9:4822(A) (1982).

283. *Id.* § 9:4822 cmt. a (2007).

manner to have the effect of reducing the filing period to 30 days.[284] The 2019 revision continued this rule.[285]

For the notice of contract to have the effect of relieving an owner of claims and privileges arising under Louisiana Revised Statutes § 9:4802, it must, in addition to being timely filed, have attached to it at the time of filing a payment bond conforming to the requirements of the Act. Nevertheless, it was clear under the 1981 Act—and it remains equally clear under the 2019 revision—that the failure of the owner to attach a payment bond does not cause a notice of contract to be improperly filed. This is explicitly provided in the text of the Act.[286] Of course, if no payment bond is attached to the notice of contract, its filing will not relieve the owner of claims and privileges arising through the general contractor, but the other effects mentioned above will still be achieved.[287]

The 2019 revision made one change in the consequences of the failure to attach a bond. Under the law in effect prior to the 2019 revision, if notice of contract with a contractor who would not otherwise qualify as a general contractor was filed in a timely manner, that contractor would be deemed to be a general contractor, and his work would be deemed to be a separate work, but only if a proper bond was attached to the notice of contract. The Security Devices Committee of the Law Institute could discern no policy reason why this effect should flow only when a bond is attached to the contractor's notice of contract,[288] nor any logical connection between the provision of a bond and the consequences of separateness of the contractor's work or his treatment as a general contractor. Accordingly, the 2019 revision eliminated the condition that a bond must be attached to the notice of contract in order for these consequences to result.[289]

Although the Act makes clear that notice of contract must be filed before work commences to be considered timely,[290] it sets no limit on how far in advance of the commencement of work that the notice of contract can be filed. When notice of contract is filed before work commences, its filing establishes the date that privileges arising from the work will become effective as to third persons and will prevent a later-filed mortgage

284. Act No. 685, 1988 La. Acts 1774, *amending* LA. REV. STAT. ANN. § 9:4822(A).

285. LA. REV. STAT. ANN. § 9:4822(B) (2020).

286. *Id.* § 9:4811(C).

287. *Id.* § 9:4802(C).

288. Minutes of the March 4, 2016 Meeting of the Security Devices Committee, Louisiana State Law Institute (Mar. 18, 2016) (on file with the Law Institute).

289. LA. REV. STAT. ANN. § 9:4808(B).

290. *Id.* § 9:4811(A).

from being accorded priority over those privileges.[291] If his construction lender's mortgage was not previously filed, the owner may find his ability to obtain construction financing for the project seriously impaired.

Provided that work has not already begun, the Act supplies a mechanism by which the improvidently filed notice of contract can be canceled so that the construction lender's mortgage can then be filed followed by a second notice of contract, thereby permitting the lender to achieve the first priority that construction lenders typically require as a condition of financing. Prior to the 2019 revision, this was achieved by filing a "mutual release" along with an affidavit from an engineer, architect, or surveyor that work had not commenced "at a specified time subsequent to the filing of the contract."[292] The 2019 revision retains this concept but corrects an apparent error in the former provision.[293] The critical point in time for a determination of whether work had commenced should not be any randomly selected point in time after filing of the notice of contract but rather should be the time when the request for cancellation of the notice of contract is filed.[294] Thus, the revision contemplates a two-step process to achieve cancellation.[295] First, a request for cancellation signed by the owner and contractor must be filed, and, within four business days afterward, a no-work affidavit from a "qualified inspector" must be filed, stating that, as of any specified time following the filing of the request for cancellation, work had not begun.[296] When this process is followed, the notice of contract that is canceled has no effect,[297] and the date of filing of a subsequent notice of contract is considered to be the date of filing of notice of contract for purposes of the Act.[298]

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291. *Id.* §§ 9:4820(A), 9:4821(A)(2).

292. *Id.* § 9:4811(E) (2019), *added by* Act No. 729, 2003 La. Acts 2470.

293. *Id.* § 9:4832(C).

294. *Id.* § 9:4832 cmt. b.

295. *Id.* § 9:4832(C).

296. The terms "business day" and "qualified inspector" are defined in Louisiana Revised Statutes § 9:4810.

297. LA. REV. STAT. ANN. § 9:4832(D).

298. *Id.* § 9:4820(E). The Act does not expressly provide what occurs when the affidavit is false, and, contrary to its assertions, work had in fact begun before filing of the request for cancellation. That result can, however, be easily inferred from the provisions of the Act. Under those circumstances, the canceled notice of contract is still without effect, but privileges arising from the work will nevertheless continue to have effect against third persons from whatever date work actually began. If the affidavit is false, that date is necessarily some point in time prior to the filing of the request for cancellation. In other words, Private Works Act privileges will have effect from the moment work began, as though

A notice of contract ceases to have effect five years after it is filed, unless it is reinscribed within that time.[299] Unlike reinscriptions of mortgages,[300] an untimely reinscription of a notice of contract is not permitted.[301]

*B. No-Work Affidavits*

Since 1966, the Private Works Act has permitted the filing of an affidavit from an architect, engineer, or surveyor to the effect that work on an immovable has not begun.[302] Given that the commencement of work is a critical element of the determination of when privileges arising under the Act take effect against third persons, and accordingly their ranking, the facts established by such an affidavit are of great importance to a third person who might desire to obtain a mortgage or other interest in the immovable. Originally, only lenders were permitted to rely upon such an affidavit, but the 1981 revision expanded this protection to apply to any person "acquiring or intending to acquire a mortgage, privilege, or other right, in or on an immovable."[303] So long as the affidavit was filed before or within two business days after the filing of the mortgage, privilege, or other document creating the rights in question, the 1981 revision provided that the correctness of the facts recited in the affidavit could not be controverted to affect the priority of the rights of the person for whom the affidavit was given. Thus, the effect of the affidavit, if timely filed, was to preclude a Private Works Act claimant from claiming priority on the ground that work had in fact begun as of the time of the inspection, despite the recitations of the affidavit. The two business-day period was expanded to four business days in 1988.[304]

Even though the no-work affidavit could be filed before the mortgage, careful practitioners were wary of relying on an affidavit filed before the

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the notice of contract had never been filed. A second notice of contract filed later will not change this. *See id* § 9:4832 cmt. c.

299. *Id.* § 9:4834. The 2019 revision made no substantive change to this provision, but it did clarify that successive reinscriptions are permitted. *See id.* § 9:4834 cmt.

300. *See* LA. CIV. CODE art. 3365 (2020).

301. LA. REV. STAT. ANN. § 9:4834.

302. Act No. 507, 1966 La. Acts 1062. Immediately prior to the 1981 revision, this provision was codified at Louisiana Revised Statutes § 9:4819(A)(3). The provision is quoted at length in *Louisiana National Bank of Baton Rouge v. Triple R Contractors, Inc.*, 345 So. 2d 7 (La. 1977).

303. LA. REV. STAT. ANN. § 9:4820(C) (1982).

304. Act No. 999, 1988 La. Acts 2698.

mortgage. The reason was that, while filing the affidavit before the mortgage would preclude a potential Private Works Act claimant from contending that at the moment of the inspection work had not begun, he would not be precluded from asserting that, *as of the very next moment in time*, work was in fact in progress. This assertion would be correct, given that work actually had begun at some time prior to the inspection, notwithstanding the recitations in the affidavit. Thus, if the affidavit was recorded before the mortgage, or if it recited a time of inspection before the time of recordation of the mortgage, the mortgagee was still exposed to the risk of priming Private Works Act privileges. The perception of this risk led to the practice of "bookending," in which affidavits would be obtained and filed both before and after the filing of the mortgage, so that the facts recited in the later affidavit would be the essential facts needed to establish the mortgage's priority.

Act 425 of 2012 attempted to address this problem through the addition of former subsection D of Louisiana Revised Statutes § 9:4820. That subsection provided that the person obtaining the no-work affidavit was given "priority in accordance with R.S. 9:4821," regardless of whether work was actually begun after the effective date and time of the affidavit. The provision presupposed that Louisiana Revised Statutes § 9:4821 grants priority to the person obtaining the affidavit, but that was not necessarily so; indeed, that was not so when work had actually begun before the time the mortgage is filed. Thus, it could be legitimately questioned whether subsection D achieved its intended goal. [305]

305. Other criticisms could also be leveled against former Subsections C and D of Louisiana Revised Statutes § 9:4820. Subsection C required that the no-work affidavit be filed within four business days after its execution and that the mortgage be filed before or within four business days of the filing of the affidavit. This gave rise to the possibility that a total of eight business days might elapse between the execution of the affidavit and the filing of the mortgage that is to be given priority on the basis of the affidavit. For instance, the affidavit might be executed on Friday, May 17, 2019, filed four business days later on Thursday, May 23, 2019, followed by the filing of the mortgage itself an additional four business days later on Thursday, May 30, 2019 (Monday, May 27, being a legal holiday). Thus, a total of 13 calendar days could elapse between the time the affidavit was executed and the time the mortgage was filed—a substantial period of time during which there might be a significant possibility that work had actually begun. But the problem was actually much worse, for there was nothing in these provisions that imposed a temporal requirement upon the actual inspection itself. Thus, in the example just given, the inspection might actually have occurred on January 1, 2019. So long as the inspector did not actually execute an affidavit until May 17, the mortgage filed on May 30 would arguably still have priority.

To remedy the deficiencies in these provisions, the 2019 revision added the presumption that was missing from them: if a no-work affidavit from a qualified inspector is timely filed, the underlying facts recited in the affidavit are deemed not only to be "true at the time of the inspection" but also "*to remain true* at the time of the filing of the mortgage, privilege, or other document" creating rights in favor of the person obtaining the affidavit. The correctness of these facts cannot be controverted to affect the priority of that person's rights.[306] Bookending should thus no longer be necessary, so long as the no-work affidavit obtained before the filing of the mortgage is itself filed in a timely manner.

Although the 1981 Act as originally enacted provided that a no-work affidavit must be filed within a very short window of time before or after the filing of the mortgage, a subsequent legislative change effectively removed the limit on how long the affidavit might be filed after the mortgage is filed.[307] Thus, the no-work affidavit might not be obtained and filed until months, or even years, after the mortgage had been filed. The 2019 revision requires a no-work affidavit to be filed within four business days before or within four business days after the filing of a mortgage if the affidavit is to be conclusively relied upon by the mortgagee.[308] The Security Devices Committee consciously made the policy decision to restore an outer time limit on the filing of the affidavit. A no-work affidavit has the potential effect of depriving Private Works Act claimants of priority to which they are legitimately entitled. If a mortgagee wishes to have the conclusive benefit of a no-work affidavit, to the prejudice of innocent claimants, the committee felt that the mortgagee should have the burden of arranging the inspection and recording the affidavit near the time of its mortgage, rather than as an afterthought.[309] Of course, if the mortgage truly was recorded before work began and before notice of contract was filed, the mortgagee will still be able to establish the priority

306. LA. REV. STAT. ANN. § 9:4820(C) (2020) (emphasis added). The mortgage would, however, be subordinate to privileges of laborers, given that those privileges always have priority over mortgages.

307. Act No. 999, 1988 La. Acts 2698 (changing the time period within which the affidavit must be filed from two to four business days and changing the event that triggered this time period from "the filing of the mortgage, privilege, or other document creating the rights" to "the execution of the affidavit").

308. LA. REV. STAT. ANN. § 9:4820(C).

309. Minutes of the March 24, 2017 Meeting of the Security Devices Committee, Louisiana State Law Institute (Mar. 28, 2017) (on file with the Law Institute).

of his mortgage based upon the actual facts,[310] but he will not be able to use a no-work affidavit as conclusive proof.

Question has arisen in the jurisprudence as to whether a mortgagee can avail himself of the benefits of a no-work affidavit when the mortgagee has actual knowledge of the falsity of the recitations in the affidavit. In *C & J Contractors v. American Bank & Trust Co*.,[311] the court held that a no-work affidavit is designed to protect only an innocent mortgagee or other third person who either did not inspect the property or had no actual knowledge that work had begun. Where that person had actual knowledge to the contrary, he did not actually rely on the no-work affidavit and could not claim its benefits. The court felt that to hold otherwise would encourage the abuse of a provision of law that "was not meant to provide technical immunity to mortgage holders that have actual knowledge that a project is well under way, who wish to use the affidavit only to protect their interest and usurp the rights of lienholders when a project fails."[312]

Apparently because of fear of the exact reach of the court's holding in *C & J Contractors*, the legislature responded by amending the text of the Act to allow the third person obtaining the no-work affidavit to have the benefit of its conclusive effects "unless actual fraud by such person is proven."[313] Although the term "actual fraud" appears undefined in Louisiana law,[314] the 2019 revision retained this provision as it was written in order to avoid implying that a change in the law on this point was intended. The term "actual fraud" presumably requires something more than mere constructive knowledge that the affidavit may be incorrect; a person's actual knowledge of its falsity is required in order to defeat the person's ability to rely on the affidavit.[315]

As discussed in Section IV.A above, a no-work affidavit is required when an owner and contractor seek to cancel a prematurely or improvidently filed notice of contract.[316] The affidavit must recite that

310. LA. REV. STAT. ANN. § 9:4821(A)(2).

311. C & J Contractors v. American Bank & Trust Co., 559 So. 2d 810 (La. Ct. App. 1st Cir. 1990), *writ denied*, 562 So. 2d 318, 332 (La. 1990).

312. *Id.* at 814.

313. Act No. 370, 1991 La. Acts 1314, *amending* LA. REV. STAT. ANN. § 9:4820(C). *See* KeyBank Nat'l Ass'n v. Perkins Rowe Associates, L.L.C., 823 F. Supp. 2d 399, n.11 (M.D. La. 2011).

314. For the definition of fraud in the Louisiana Civil Code, see LA. CIV. CODE art. 1953 (2020).

315. For an explanation of the meaning of "actual fraud" in this context, see Rubin, *supra* note 58.

316. LA. REV. STAT. ANN. § 9:4832(C) (2020).

work had not begun as of a specified time subsequent to their request for cancellation of the notice of contract.

Whether obtained for purposes of establishing the priority of a mortgage or canceling a prematurely filed notice of contract, a no-work affidavit must contain a complete property description of the immovable.[317] Curiously, and likely as the result of oversight, the 1981 Act did not specify in which records no-work affidavits were to be filed.[318] Although the nearly universal practice has been to record no-work affidavits in the mortgage records, this omission in the Act might have led to an inference that filing in the conveyance records was necessary and appropriate under the articles on registry found in the Civil Code.[319] The 2019 revision, however, makes clear that no-work affidavits, like all other filings under the Act, are filed in the mortgage records.[320]

### *C. Notice of Termination*

After the notice of contract, a notice of termination is one of the most important filings that an owner makes under the Act, for its filing marks the commencement of the delays allowed to claimants to file their statements of claim or privilege.[321] The required content of a notice of termination changed only slightly with the 2019 revision. It must identify the work and contain a complete property description of the immovable, rather than a mere reasonable identification as under former law, but the notice of termination may refer to a filed notice of contract to satisfy either or both of these requirements.[322] The notice of termination must be signed by the owner who contracted the work or his successor in title, or their representative; the Act does not require that it be signed by the contractor or an architect.[323]

The notice of termination must certify that at least one of several events has occurred. As under prior law, two of these events are the substantial completion or abandonment of the work.[324] Another is the general contractor's default under his contract.[325] The 2019 revision adds

317. *Id.* § 9:4831(B).
318. *Id.* § 9:4831(A) (1982).
319. LA. CIV. CODE art. 3346(A) (2020).
320. LA. REV. STAT. ANN. § 9:4831(A) (2020).
321. *Id.* § 9:4822(A)–(D).
322. *Id.* §§ 9:4822(E)(1), 9:4831(B), (C).
323. *Id.* § 9:4822(E)(2).
324. *Id.* § 9:4822(E)(3)(a)–(b).
325. *Id.* § 9:4822(E)(3)(c). Before the 2019 revision, the notice could certify that "a contractor" was in default under his contract. According to the revision

yet another triggering event: a termination of the general contractor's contract even if no default has occurred, such as a termination for convenience.[326]

The text of the Act does not itself address the consequence of an owner's filing a notice of termination in bad faith or, specifically, whether the bad faith filing will start the running of the delays within which statements of claim or privilege must be filed. As they did before the 2019 revision, the official revision comments assert that the delays will begin to run in the event that rights of third persons are involved, but the owner should not be allowed to profit from his own bad faith actions. Thus, the delays will not commence to run as to him. Nothing in the 2019 revision alters this outcome; as before, the commencement of the filing periods is not conditioned upon a good faith filing or the actual occurrence of the triggering events that the notice of termination certifies have occurred. The 2019 revision does, however, make clear that the facts recited in the notice, if made in good faith, are conclusively established only for purposes of the Act and not for other purposes.[327] If litigation ensues between the owner and general contractor, the owner's unilateral statement in a notice of termination that the general contractor defaulted should certainly not be given conclusive effect in that litigation.[328]

As will be discussed in Section IV.D below, if notice of contract has been filed, the filing of a notice of termination is required to commence the running of the 30-day period within which claimants under Louisiana Revised Statutes § 9:4802 must file statements of claim or privilege.[329] As much as the owner, the general contractor has an interest in the commencement of the running of this period. After all, it is the contractor who has ultimate statutory responsibility for these claims and must indemnify the owner against them.[330] Until the 2019 revision, however, the general contractor had no means at his disposal to force the owner to file notice of termination when work had been substantially completed or abandoned. Given that the filing period did not commence to run until a

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comments, multiple contractors can be involved on a single work, and only a default by the general contractor should trigger the filing of a notice of termination. *See id.* § 9:4822 cmt. h. Of course, if a contractor has filed notice of his contract, he is by definition a general contractor, and his work is a separate work. *See id.* § 9:4808(B).

326. LA. REV. STAT. ANN. § 9:4822(E)(3)(d).

327. *Id.* § 9:4822(E)(4).

328. *See id.* § 9:4822 cmt. i.

329. *Id.* § 9:4822(B).

330. *Id.* § 9:4802(A), (F).

notice of termination was filed, the general contractor could remain exposed to liability for these claims indefinitely.

The 2019 revision introduced a mechanism by which the general contractor can force the owner to file a notice of termination to commence the running of the filing period when the work has been either substantially completed or abandoned. Under those circumstances, the Act requires the owner to file a notice of termination within 10 days after receipt of a request from the general contractor. If the owner fails to do so, the general contractor can, by summary proceeding conducted against the owner, obtain a judgment decreeing that the work has been substantially completed or abandoned. Once rendered and filed, the judgment itself has the effect of a notice of termination, provided that the judgment properly identifies the immovable and the work.[331]

The 1981 revision continued, and somewhat expanded, a provision of the Act permitting a notice of termination as to "a specified portion or area of work."[332] The purpose of this provision was to permit truncation of the filing period applicable to those claimants who had provided labor or materials with respect to that area of the work. The drafters of the 1981 revision did not intend for the filing of a notice of partial termination to have the effect of relieving the area described in the notice from privileges of those who had done, or in the future might do, work elsewhere on the immovable.[333]

Nevertheless, a legislative change made in 2003 appears to have had that precise goal in mind.[334] That change had the potential, however, to bring about results that might prove to be extremely unfair to those who had provided, or had contracted to provide, labor or materials elsewhere on the project. Because those claimants had not worked on the area described in a notice of partial termination, the filing of the notice did not trigger a requirement that they file statements of claim or privilege, and indeed they might not at that time even have had a claim that they could present. Yet, once the truncated filing period ran following the filing of the notice of partial termination, their privileges would no longer

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331. *Id.* § 9:4822(F). There is no need for the judgment to direct the owner to execute and file a notice of termination.

332. *Id.* § 9:4822(F) (1982).

333. *See id.* § 9:4822 cmt. f (2007).

334. *See* Act No. 729, 2003 La. Acts 2470 (adding a final sentence to subsection F: "Once the period for preserving claims and privileges has expired and no liens have been timely filed, the portion or area of work described in the notice of termination shall be free of the claims and privileges of those doing work on the area described in the notice of termination, as well as those doing work elsewhere on the immovable being improved."). *Id*.

encumber the area of the immovable described in the notice. In effect, therefore, they could be deprived of a portion of their collateral, without their consent, midway through a project.[335]

The 2019 revision restored the original meaning of the provision by deleting the sentence that had been added by the 2003 amendment.[336] At the same time, the revision removed an ambiguity that had been contained in the provision since the 1981 revision.[337] It is now clear that a notice of partial termination may be filed only with respect to a specified *geographical area* of the immovable and not a specified component of the work, such as the pouring of a building's foundation or the installation of its mechanical systems. As is the case with all notices of termination, the 2019 revision requires that a notice of partial termination set forth a complete property description of the immovable.[338] Where a notice of partial termination is filed, its filing marks the commencement of the delays within which those who provided labor or materials on the specified area of the immovable must file their statements of claim or privilege. The notice of partial termination does not otherwise free that area of the immovable of privileges arising under the Act. A notice of partial termination also does not divide a project into separate works.[339] If an owner wishes for such a division to occur, he should, at the inception, enter into separate contracts and file notices of each of the contracts. Doing so will cause all of them to constitute separate works.[340]

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335. As the provision existed prior to the 2019 revision, it could also have the unintended effect of an inadvertent resubdivision of the immovable. If a person working elsewhere on the immovable later enforced his privilege through a sheriff's sale, the property sold at the sheriff's sale would be only that part of the immovable outside of the portion that had been described in the notice of partial termination. With the 2019 revision, this is no longer a possibility because the privilege of such a claimant will continue to encumber the entire immovable as it was configured when work commenced.

336. LA. REV. STAT. ANN. § 9:4822(G) (2020).

337. *See* Donald J. Tate, *The New Private Works Act: An Operational Sketch*, 8 S.U. L. REV. 133, 141–43 (1981).

338. LA. REV. STAT. ANN. § 9:4822(G).

339. KeyBank Nat'l Ass'n v. Perkins Rowe Associates, L.L.C., 823 F. Supp. 2d 399, 413 (M.D. La. 2011) ("[T]his provision merely speeds up the limitations period for filing liens. Section 4822(F) says nothing about creating separate 'work,' and therefore this provision has no affect on whether—instead of when—a contractor may use that work to relate back the effective date of its lien.").

340. LA. REV. STAT. ANN. § 9:4808(B).

### *D. Statement of Claim or Privilege*

#### *1. Purposes*

A statement of claim or privilege is the essential document that a Private Works Act claimant must file in order to preserve the substantive rights that the Act grants to him, which include a privilege upon the immovable in the case of all claimants and a personal claim against the owner, contractor, and surety in the case of those claimants listed in Louisiana Revised Statutes § 9:4802.[341] Of course, it is the law itself that creates those substantive rights; the filing of a statement of claim or privilege does not create those rights but rather merely preserves them.

A statement of claim or privilege serves two purposes.[342] First, it informs the owner and contractor of the fact that the claimant has not been paid and asserts a claim, privilege, or both. Second, it apprises third persons who might have or acquire an interest in the immovable of the existence of the claim or privilege.[343]

#### *2. Formal and Substantive Requirements*

The required content of a statement of claim or privilege is specified in the Act and was largely unchanged by the 2019 revision. The statement

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341. *Id.* § 9:4822. The 2019 revision uses the words "statement of claim or privilege" consistently throughout the Act to refer generically to the filing that a claimant under either Louisiana Revised Statutes § 9:4801 or Louisiana Revised Statutes § 9:4802 is required to make in order to preserve his privilege, and, if he is a claimant under Louisiana Revised Statutes § 9:4802, to preserve his personal claim against the owner, contractor, and surety. A claimant under Louisiana Revised Statutes § 9:4801 is given only a privilege by the Act, whereas a claimant under Louisiana Revised Statutes § 9:4802 almost always holds both a personal claim and a privilege. The use of the words "statement of claim or privilege" in the Act is not intended to imply which of these rights a claimant might enjoy or whether he holds only one or both of them.

342. *See, e.g.*, Mercantile Nat'l Bank of Dallas v. J. Thos. Driscoll, Inc., 195 So. 497 (La. 1940); Simms Hardin Co., L.L.C. v. 3901 Ridgelake Drive, L.L.C., 119 So. 3d 58 (La. Ct. App. 5th Cir. 2013); Hibernia Nat'l Bank v. Belleville Historic Dev., L.L.C., 815 So. 2d 301 (La. Ct. App. 4th Cir. 2002).

343. Until expiration of the applicable filing period, however, third persons cannot rely on the absence of a statement of claim or privilege because privileges arising under the Act are effective as to third persons from the inception of the work, even without a filing, provided that a statement of claim or privilege is ultimately filed before expiration of the filing period. *See* LA. REV. STAT. ANN. § 9:4820(A).

must be in writing and be signed by the claimant,[344] but the Act does not require that it take the form of an affidavit, as was required prior to the 1981 revision. The statement must contain a reasonable identification of the immovable,[345] identify the responsible owner,[346] and set forth "the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it."[347]

The degree of specificity that is necessary to identify the amount and nature of the claim has recently been the subject of a seemingly endless spiral of cases that attempt to distinguish each other. In *Hibernia National Bank v. Belleville Historic Development, L.L.C.*,[348] the court held that a general contractor's statement of claim or privilege asserting that it was owed a specified sum of money for furnishing "labor material to construct [21] condominium units" on an identified immovable was sufficient to preserve the general contractor's privilege, but another panel of the same court later distinguished this holding in *Bradley Electric Services, Inc. v. 2601, L.L.C.*,[349] finding a supplier's statement of claim or privilege to be inadequate where it stated that a lump sum was owed "for services rendered." In so holding, the court cited a similar holding in *Tee It Up Golf, Inc. v. Bayou State Construction, L.L.C.*,[350] in which the court held that a mere indication of a lump sum amount owed for "Materials Supplied" does not satisfy the statutory requirement. The *Tee It Up Golf* holding was itself distinguished by the court in *Simms Harden Co., L.L.C. v. 3901 Ridgelake Drive, L.L.C.*,[351] which found to be sufficient subcontractors' statements of claim or privilege for specific amounts of money owed for "electrical and lighting work," "wall preparation and general painting work," and "plumbing installation work" performed on a condominium development, even though the statements did not particularly identify the work performed on each specific condominium unit.

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344. *Id.* § 9:4822(H)(1), (2).
345. *Id.* §§ 9:4822(H)(3), 9:4831(B).
346. *Id.* § 9:4822(H)(5).
347. *Id.* § 9:4822(H)(4).
348. Hibernia Nat'l Bank v. Belleville Historic Dev., L.L.C., 815 So. 2d 301 (La. Ct. App. 4th Cir. 2002).
349. Bradley Elec. Servs., Inc. v. 2601, L.L.C., 82 So. 3d 1242 (La. Ct. App. 4th Cir. 2011).
350. Tee It Up Golf, Inc. v. Bayou State Constr., L.L.C., 30 So. 3d 1159 (La. Ct. App. 3d Cir. 2010).
351. Simms Hardin Co., L.L.C. v. 3901 Ridgelake Drive, L.L.C., 119 So. 3d 58 (La. Ct. App. 5th Cir. 2013).

In *Jefferson Door Co., Inc. v. Cragmar Construction, L.L.C.*,[352] a supplier's statement of claim or privilege was held to be insufficient where it stated that a specified amount was owed for "certain materials consisting of but not limited to trim, millwork, etc." and made reference to itemized invoices that were purportedly, but not actually, attached to the statement of claim or privilege. In response to the *Jefferson Door* decision, the legislature in 2013 added a sentence clarifying that the Act does not "require a claimant to attach copies of unpaid invoices unless the statement of claim or privilege specifically states that the invoices are attached."[353] This amendment may, however, miss the mark. The issue is not the consequence of a failure to attach invoices or whether they are required at all, but rather what is required to constitute a sufficient description of the basis of the claim, with or without supporting invoices.[354]

In the 2019 revision, the legislature did not alter the sentence added by the 2013 amendment, nor did it alter the remainder of the paragraph to which it was appended. Accordingly, existing jurisprudence remains relevant in judging the sufficiency of a statement of claim or privilege. It should be remembered that the purpose of a statement of claim or privilege is merely to apprise the owner, and also third persons, of the identity of the person making a claim, the amount of the claim, and the basis for the claim. As its name implies, in a statement of claim or privilege, the claimant must certainly *state* his claim, but he is not required to *prove* it. In considering whether a statement of claim or privilege is adequate to satisfy the minimum requirements of the law, the courts should bear in mind the cautionary note that they have announced in other contexts when applying the Private Works Act: although the Act is to be strictly construed, "care must be taken not to overlook the legislative intent and

352. Jefferson Door Co., Inc. v. Cragmar Constr., L.L.C., 81 So. 3d 1001 (La. Ct. App. 4th Cir. 2012).

353. Act No. 277, § 1, 2013 La. Acts 1822. Arguably, the amendment by implication *added* a requirement to the Act: where a statement of claim or privilege refers to attached invoices, they must actually be attached or else the statement will be found deficient, perhaps even if the statement without the invoices would otherwise sufficiently describe the basis of the claim within its four corners. *Id.*

354. It might be questioned whether the true deficiency in the statement of claim or privilege under consideration in *Jefferson Door* was not so much the failure to attach invoices as it was the use of a supergeneric description of the materials that the claimant had supplied: "certain materials consisting of but not limited to trim, millwork, etc." *Jefferson Door Co.*, 81 So. 3d 1001.

fundamental aim of this act which is to protect materialmen, laborers and subcontractors who engage in construction and repair projects."[355]

As mentioned above, a statement of claim or privilege must identify the owner who is responsible for the claim.[356] In many cases, that person is the owner of the immovable, but that is not always the case. As discussed in Section III.A above, an "owner" for purposes of the Act can be a usufructuary, holder of a servitude, lessee, or even a mere possessor having no juridical link to the immovable other than the fact of his possession.[357] In some instances, the owner responsible for claims arising under the Act may be a person who has no interest of record in the immovable, such as the lessee under an unrecorded lease.[358] In those cases, determining the name of the correct owner to include in a statement of claim or privilege can present a significant challenge for the claimant, who may have no available means of determining who the responsible owner is, given that a record search would be of no assistance to him.

To ease the task of preparing a statement of claim or privilege when the responsible owner has no interest of record in the immovable, the 2019 revision allows a claimant in that situation to identify as the owner in his statement of claim or privilege the person who appears of record to own the immovable.[359] This is, however, a permissive rather than mandatory rule, and it provides the claimant with alternatives. If the responsible owner has no interest of record in the immovable, the claimant's statement of claim or privilege may identify the owner as the person who appears of record to own the immovable, even if the claimant actually knows the name of the responsible owner. Alternatively, the claimant may instead identify the responsible owner, even though the responsible owner has no interest of record in the immovable.[360] The intent of this rule is merely to

355. Bayer Indus., Inc. v. Hanover Ins. Co., 241 So. 3d 1159 (La. Ct. App. 1st Cir. 2018); Bernard Lumber Co., Inc. v. Lake Forest Constr. Co., Inc., 572 So. 2d 178 (La. Ct. App. 1st Cir. 1990); Keller Bldg. Products of Baton Rouge, Inc. v. Siegen Dev., Inc., 312 So. 2d 182 (La. Ct. App. 1st Cir. 1975).

356. LA. REV. STAT. ANN. §§ 9:4806(B), 9:4822(H)(5) (2020).

357. *Id.* § 9:4806(A).

358. *See* Cajun Contractors, Inc. v. EcoProduct Solutions, L.P., 182 So. 3d 149 (La. Ct. App. 1st Cir. 2015).

359. LA. REV. STAT. ANN. § 9:4822(H)(5).

360. The Act does not condition the availability of these alternatives on the absence of a filed notice of contract identifying the owner. Because filings in Louisiana are indexed by name, rather than by tract, a third person would likely have considerable difficulty finding a notice of contract filed by a person who has no interest of record in the immovable if the third person does not already know that person's name from sources outside of the public records.

facilitate the filing of a statement of claim or privilege; an identification of the record owner in a statement of claim or privilege when that owner is not the responsible owner, even though specifically authorized by the Act under these circumstances, creates neither substantive claims against him nor a privilege upon his interest in the immovable.[361]

*3. Filing Periods Under the 1981 Act*

To have effect, a statement of claim or privilege must be filed in a timely manner. As revised in 1981, the Act set forth a fairly simple formula for determining the deadlines for filing statements of claim or privilege. If notice of contract was filed, claimants who were given a claim or privilege under Louisiana Revised Statutes § 9:4802 were required to file within[362] 30 days after the filing of a notice of termination.[363] Provided that a general contractor complied with the requirement to record notice of his contract, he was allowed a period of 60 days after the filing of notice of termination within which to file his statement of claim or privilege.[364] All other claimants, including § 4802 claimants on a work for which notice of contract was not filed and other persons granted a privilege under either Louisiana Revised Statutes § 9:4801 or Louisiana Revised Statutes § 9:4802, were allowed 60 days to file, but the 60-day period ran from the

361. LA. REV. STAT. ANN. § 9:4822 cmt. l. An owner of an immovable who is named in a statement of claim or privilege under this rule but who has no responsibility for the claim is entitled to have the statement of claim or privilege canceled as to him and his interest in the immovable by making a request for cancellation under Louisiana Revised Statutes § 9:4833. The partial cancellation will, however, have no effect as to claims against the responsible owner. *See id.* § 9:4833 cmt. b.

362. The use of the word "within" in the 1981 Act led to an argument that a statement of claim or privilege could not be filed *before* the commencement of the 30-day period. That argument was rejected in *Paul Hyde, Inc. v. Richard*, 854 So. 2d 1000 (La. Ct. App. 4th Cir. 2003), which held that a claimant is not required to defer filing until the commencement of the delays for filing. The 2019 revision consistently uses the formulation "no later than," rather than "within," in order to eliminate any basis for this argument. *See, e.g.*, LA. REV. STAT. ANN. § 9:4822(A)–(C).

363. LA. REV. STAT. ANN. § 9:4822(A) (1982). Originally, the 1981 revision did not require that notice of contract be filed in a timely manner as a condition of the applicability of the 30-day filing period; however, a legislative amendment in 1988 added that condition. *See* Act No. 685, § 1, 1988 La. Acts 1774.

364. LA. REV. STAT. ANN. § 9:4822(B) (1982).

filing of notice of termination or, if no notice of termination was filed, from substantial completion or abandonment of the work.[365]

As straightforward as these timeliness requirements might appear, they required substantial interpretation by the jurisprudence. One issue to be addressed was whether, on a project for which notice of contract was filed, the filing period for § 4802 claimants would end 60 days after substantial completion in the absence of the filing of notice of termination. The argument for this interpretation was essentially premised upon the assertion that the reference to "other persons granted . . . a claim and privilege under R.S. 9:4802" in the provision of the Act containing the 60-day rule[366] must necessarily refer to § 4802 claimants on a project for which notice of contract was filed because, otherwise, this reference would be to an empty set. Courts considering this argument consistently rejected it, holding that, where notice of contract had been filed, the filing of a notice of termination was required to start the filing period and that, in the absence of a notice of termination, the filing period never began to run.[367] Despite the wording of the provision containing the 60-day rule, this appears to have been the intent of the 1981 revision.[368]

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365. *Id.* § 9:4822(C). The 60-day rule applied to "[t]hose persons granted a claim and privilege by R.S. 9:4802 for work arising out of a general contract, notice of which is not filed, and other persons granted a privilege under R.S. 9:4801 or a claim and privilege under R.S. 9:4802." As discussed below, this wording contained an ambiguity that had to be addressed in the jurisprudence.

366. *Id.*

367. Bernard Lumber Co., Inc. v. Lake Forest Constr. Co., Inc., 572 So. 2d 178 (La. Ct. App. 1st Cir. 1990) (rejecting arguments that former Louisiana Revised Statutes § 9:4822(C), which referred to claimants under Louisiana Revised Statutes § 9:4802, operated to impose an outer deadline of 60 days after substantial completion in all cases); Rowley Co., Inc. v. Southbend Contractors, Inc., 517 So. 2d 1260 (La. Ct. App. 4th Cir. 1987) (holding that where a notice of termination is deficient because of the lack of a proper description of the immovable, it is ineffective to start the running of the filing period); *see also In re* Whitaker Constr. Co., Inc., 439 F.3d 212 (5th Cir. 2006) (which, citing both *Bernard Lumber* and *Rowley*, rejected an argument that the reference in former § 4822(C) to "other persons granted . . . a claim or privilege under R.S. 9:4802" limited the applicability of the 30-day filing period to those situations in which both a notice of contract and a notice of termination were filed).

368. *See* LA. REV. STAT. ANN. § 9:4822 cmt. a (2007): "If a notice of contract is filed, a notice of termination is always required to commence the 30 day time for filing." This sentence, which states merely that the 30-day period commences only upon the filing of notice of termination, does not, however, exclude the possibility that the claimant might also be subject to the 60-day period.

Another issue that arose was the period within which general contractors were required to file statements of their privileges—an issue that was complicated by a 1988 amendment to the Act requiring a general contractor to file within 60 days after "the filing of the notice of termination or substantial completion of the work."[369] Upon a casual reading, this language certainly suggested that either the filing of notice of termination or the fact of substantial completion would commence the running of the general contractor's 60-day filing period, though such an interpretation would mean that a general contractor, who was originally allowed 30 days longer than § 4802 claimants to file his statement of privilege, would in certain cases have a much shorter period within which to do so. This interpretation was rejected in *Golden Nugget Lake Charles, L.L.C. v. W. G. Yates & Sons Construction Co.*,[370] which held that, just as is the case with § 4802 claimants, a notice of termination is required to start the filing period applicable to a general contractor when notice of contract has been filed. Although also based on policy arguments, the court's rationale was to a large degree predicated upon its observation that the 1988 amendment that had added the reference to substantial completion in the filing rule applicable to general contractors also made a similar insertion in other provisions of the Act, and, in those other provisions, it was obvious that "notice of termination or substantial completion of the work" was a reference to two alternative titles of a document rather than two distinct events.[371]

The rule under the 1981 revision that, when notice of contract had been filed, the filing period for § 4802 claimants and general contractors would commence to run only upon filing of a notice of termination had a potential destabilizing effect on title to immovable property because, as the cases observed, if the period has not begun to run, it cannot expire.[372] The implications of this rule were brought into sharp focus by the holding in *Thompson Tree & Spraying Service, Inc. v. White-Spunner Construction,*

369. Act No. 685, §1, 1988 La. Acts 1774.

370. Golden Nugget Lake Charles, L.L.C. v. W.G. Yates & Sons Constr. Co., 850 F.3d 231 (5th Cir. 2017).

371. The court specifically cited Louisiana Revised Statutes § 9:4822(F), which, after the 1988 amendment, read as follows: "A notice of termination or substantial completion of the work may be filed from time to time with respect to a specified portion or area of work."

372. *See Rowley*, 517 So. 2d at 1261.

*Inc.*[373] In that case, a filed contract and a filed notice of termination[374] both suffered from the same defect—the lack of a property description of the immovable upon which the work was performed. Fifteen months after the notice of termination was filed, an unpaid subcontractor filed a statement of claim or privilege. Reasoning that both the notice of contract and the notice of termination were defective for lack of a proper description of the immovable, the trial court held that the applicable filing period was 60 days from substantial completion and that the subcontractor's statement of claim or privilege was therefore untimely.[375] The court of appeal reversed, citing a provision of the Act to the effect that an error or omission in a notice of contract does not cause it to be improperly filed in the absence of a showing of actual prejudice by a claimant or other person acquiring rights in the immovable.[376] That same provision states that an improper identification of the immovable is prima facie proof of actual prejudice. Nevertheless, the court held that the notice of contract, despite its lack of a property description, was sufficient for purposes of triggering the rule that the 30-day filing period commences to run only upon filing of a notice of termination. The court reasoned that the presumption of prejudice is for the benefit of the claimant and cannot be turned against him to his detriment.[377] As for the notice of termination, which also lacked a property description, the court simply observed that it was ineffective. Accordingly, because notice of contract was filed but no effective notice of termination was filed, the subcontractor's filing period had never commenced to run, and its statement of claim or privilege, though filed 15 months after the purported notice of termination, was timely.[378]

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373. Thompson Tree & Spraying Serv., Inc. v. White-Spunner Constr., Inc., 68 So. 3d 1142 (La. Ct. App. 3d Cir. 2011).

374. The notice of termination was actually styled as a "certificate of substantial completion." *Id.* at 1145.

375. LA. REV. STAT. ANN. § 9:4822(C) (1982).

376. *Id.* § 9:4811(B) (2020).

377. The court also held that the presumption, even if applied, was rebutted by the subcontractor's proof that it suffered no prejudice from the absence of a property description in the filed contract.

378. As support for its rationale, the court cited a similar holding from the Fourth Circuit in *Rowley Co., Inc. v. South Bend Contractors, Inc.*, 517 So. 2d 1260 (La. Ct. App. 4th Cir. 1987), and acknowledged that, under similar facts, the First Circuit had reached the opposite conclusion in *Norman H. Voelkel Construction, Inc. v. Recorder of Mortgages*, 859 So. 2d 9 (La. Ct. App. 1st Cir. 2003), which had held that where both notice of contract and a notice of termination lacked a property description, the applicable filing period was 60 days from substantial completion. The *Thompson Tree* court distinguished *Norman H. Voelkel Construction, Inc.*, on the ground that, in the latter case, the claimant did

That the identical defect would cause one filing made under the Act to be wholly ineffective but have no effect on the effectiveness of another may seem surprising. But what is disconcerting about *Thompson Tree* is not that specific holding but rather the adverse effect that the filing rules under the 1981 Act, as so interpreted, could have on titles to immovable property. It is a widespread practice for owners and contractors to file the entire construction contract rather than the short-form notice of contract contemplated by the Act. Just as frequently, they file an architect's certificate of substantial completion at the end of the work, rather than the notice of termination that is prescribed under the Act. Usually, neither filing contains a property description beyond a mere municipal address. Under the *Thompson Tree* holding, this practice—common as it may be—causes the filing period for § 4802 claimants and general contractors to never begin to run, with the result that statements of claim or privilege could conceivably be filed years after the work is complete, even to the prejudice of third persons acquiring rights in the immovable in the interim.

*4. Filing Periods Under the 2019 Revision*

To address these problems and ambiguities, the 2019 revision embarked upon a fresh start in the formulation of the filing rules applicable to statements of claim or privilege, retaining the familiar 30-day and 60-day periods but at the same time imposing an outer filing deadline that applies when no notice of termination is filed. The revision first states, as a general rule, that all claimants under the Act must file no later than 60 days after the filing of a notice of termination of the work, if one is filed, or 60 days after the date of substantial completion or abandonment of the work, if no notice of termination is filed.[379] The revision then sets forth three exceptions to this general rule.

First, if notice of contract has been timely filed, § 4802 claimants must file statements of claim or privilege no later than 30 days after the filing of a notice of termination or, if no notice of termination is filed, no later than six months after the substantial completion or abandonment of the work.[380] The 2019 revision retained the requirement under former law that, in addition to filing, a § 4802 claimant must also deliver a copy of the statement of claim or privilege to the owner within the filing period, if a notice of contract containing the owner's address was timely filed.[381]

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not rebut the presumption of prejudice arising under Louisiana Revised Statutes § 9:4811(B).

379. LA. REV. STAT. ANN. § 9:4822(A).

380. *Id.* § 9:4822(B).

381. *Id.*

The second exception to the general timeliness rule applies to general contractors, who must file a statement of claim or privilege no later than 60 days after the filing of a notice of termination, if one is filed, or no later than seven months after the substantial completion or abandonment of the work if notice of termination is not filed.[382] Of course, as discussed in Section III.B above, a general contractor under a contract exceeding $100,000 has no right to file a statement of claim or privilege unless notice of his contract was timely filed. General contractors under contracts for a lesser amount are covered by this exception only if they elected to file notice of contract; otherwise, they are subject to the general 60-day rule.

Though presented differently in the drafting of the Act, these filing deadlines are nearly identical in substance to those in effect prior to the 2019 revision, with the exception of the addition of the six- and seven-month deadlines applicable to § 4802 claimants and general contractors, respectively, when notice of contract has been filed. As the official revision comments reflect, the six- and seven-month periods are outer deadlines and are by no means an extension of the filing periods that applied before the revision.[383] They serve the purpose of causing the filing period to have an end date when the owner neglects to file a notice of termination of a work for which notice of contract was filed. For instance, under the facts of *Thompson Tree* discussed above, the unpaid subcontractor would have been allowed to file a statement of claim or privilege until the expiration of six months after substantial completion of the work, which presumably occurred shortly before the time of filing of the faulty certificate of substantial completion. Thus, its statement of claim or privilege filed 15 months after the filing of the certificate of substantial completion would have been untimely. Of course, if a proper notice of termination is filed, the 30-day period applicable to § 4802 claimants and the 60-day period applicable to general contractors will commence to run with its filing, and the claimant will not have the ability to wait six or seven months after substantial completion to file a statement of claim or privilege.

The final exception to the general rule is the one that, as previously mentioned, was added by an amendment made during the legislative session that enacted the 2019 revision. This exception, which applies only to residential works for which no notice of contract was filed, provides that if a seller or lessor with a privilege under Louisiana Revised Statutes § 9:4801 or any § 4802 claimant gives notice of nonpayment to the owner before expiration of the 60-day filing period and then waits at least 10 days

382. *Id.* § 9:4822(C).
383. *See id.* § 9:4822 cmt. c.

before filing his statement of claim or privilege, his filing period is extended to 70 days.[384] As discussed in Section III.F above, the notice of nonpayment is not, however, mandatory, and a claimant who is content to file within the 60-day period may do so without having first given notice of nonpayment to the owner.

This rule contains two potential traps for the unwary claimant. First, the extension is available only in the case of residential works and then only when no notice of contract has been timely filed. Thus, a claimant who wishes to avail himself of the extension must be certain that no notice of contract has been filed.[385] The second potential trap is that the claimant must wait 10 days after giving notice of nonpayment before filing his statement of claim or privilege. This rule creates the anomaly of a window of "black-out" dates during which a claimant may *not* effectively file a statement of claim or privilege. For instance, suppose that the claimant gives notice of nonpayment to the owner 55 days after substantial completion. The claimant may, if he chooses, file a statement of claim or privilege that very day or on any of the next five days, up through 60 days after substantial completion. Alternatively, he could wait 10 days and file 65 to 70 days after substantial completion, and, under those circumstances, his statement of claim or privilege would be timely based on his entitlement to an extension under the 70-day filing rule. What he *cannot* do is file only on the 61st through 64th days because, if he does so, he will not have satisfied the conditions of the 70-day filing rule. This is so because he will not have waited the requisite 10 days between giving notice of nonpayment and filing his statement of claim or privilege. Thus, by the time he files on one of those days, the 60-day period will still apply and, unfortunately for him, will have already expired. Of course, a claimant can avoid this anomaly altogether by giving notice of nonpayment no later than the 50th day or, as is always his right, by filing on or before the 60th day after substantial completion.

*5. Necessity of Filing*

As mentioned above, the proper filing of a statement of claim or privilege within the applicable filing period is essential for the preservation of the claimant's claim against the owner and his privilege on the owner's interest in the immovable. In the case of a § 4802 claimant,

384. *Id.* § 9:4822(D).

385. Of course, if notice of contract was filed, the applicable filing period for § 4802 claimants would be the 30-day period provided by Louisiana Revised Statutes § 9:4822(B), rather than the 60-day period provided by Louisiana Revised Statutes § 9:4822(A).

however, filing is not essential to preserve the claimant's rights against the contractor and surety, provided that a statement of claim or privilege is delivered to the contractor within the filing period.[386] In the absence of filing, however, the claimant's rights against the owner and privilege upon the immovable will both be extinguished.[387]

*6. Request for Notice of Commencement of Filing Periods*

As is clear from the preceding discussion, the filing of a notice of termination is of paramount importance to a claimant because it usually marks the commencement of the running of the delays within which the claimant must file his statement of claim or privilege. As originally enacted, the 1981 Act did not provide claimants with a means of requiring an owner to inform them of the filing of notice of termination, and they were apparently put to the task of continually searching the public records to determine whether a notice of termination had been filed. A legislative amendment in 1988 sought to protect § 4802 claimants against the possibility of a surprise commencement of the filing period by allowing them to give notice to the owner of an obligation arising out of the work.[388] Once a § 4802 claimant gave this notice, the owner was required to notify the claimant within three days after the substantial completion or abandonment of the work or the filing of a notice of termination. If the owner failed to do so within 10 days after the commencement of the filing period, the owner was liable for all costs and attorney fees incurred by the claimant in establishing and enforcing the claim. Significantly, this was the only penalty that was provided, as the amendment did not state that the failure caused either continued personal liability of the owner or an extension of the filing period. Accordingly, the courts held that the owner's non-compliance did not affect an extension of the filing period,

386. *See* LA. REV. STAT. ANN. § 9:4823(B) (providing for the preservation of a claimant's rights against the contractor and surety when a statement of claim or privilege is delivered to the contractor within the filing period, even if the statement of claim or privilege is never filed).

387. *Id.* § 9:4823(A)(1). A claimant who has lost his rights against an owner for failure to file a timely statement of claim or privilege is not entitled to recover against the owner under a theory of unjust enrichment. *See* E. Smith Plumbing, Inc. v. Manuel, 88 So. 3d 1209, 1213–15 (La. Ct. App. 3d Cir. 2012); Pinegrove Elec. Supply Co., Inc. v. Cat Key Constr., Inc., 88 So. 3d 1097 (La. Ct. App. 5th Cir. 2012); Newt Brown, Contractor, Inc. v. Michael Builders, Inc., 569 So. 2d 288 (La. Ct. App. 2d Cir. 1991).

388. Act No. 685, § 1, 1988 La. Acts 1774, *adding* LA. REV. STAT. ANN. § 9:4822(K)–(L).

even as to the owner himself.[389] Thus, the remedy provided by the amendment was ill-suited to protect the claimant against the harm that arose from the owner's non-compliance: the claimant could not enforce his claim if he failed to file within the filing period and, at most, had a right to recover attorney fees.[390]

Under the 2019 revision, a § 4802 claimant can request that an owner give the claimant notification of the substantial completion or abandonment of the work or the filing of a notice of termination.[391] Once this request is made, the owner is required to notify that claimant within 10 days after the occurrence of either event. If the owner does not do so and the claimant fails to file a statement of claim or privilege in a timely manner, that failure does not extinguish the personal claim against the owner, and the claim remains enforceable against the owner provided that suit is brought to enforce it within one year after the expiration of the filing period. Nevertheless, the filing period is not extended, and if the claimant fails to file within the filing period, the privilege will be lost.[392] If the claimant does file within the filing period despite the owner's failure to give notice, then he has suffered no harm, and the ordinary rules apply. An owner's failure to comply with his obligation to give notice does not preserve the claimant's rights against the contractor or surety; those rights will be extinguished unless the claimant either files a statement of claim or privilege or delivers a statement of claim or privilege to the contractor within the applicable filing period.[393]

*E. Notice of Pendency of Action*

Filing a statement of claim or privilege within the filing period is only the first step that a claimant must take to preserve his rights under the Act. As will be discussed more fully in Section VI.A, the claimant must institute suit on his claim within one year after the date he filed his

389. Buck Town Contractors & Co. v. K-Belle Consultants, L.L.C., 216 So. 3d 981 (La. Ct. App. 4th Cir. 2016); Byron Montz, Inc. v. Conco Constr., Inc., 824 So. 2d 498 (La. Ct. App. 4th Cir. 2002).

390. *Buck Town Contractors* allowed attorney fees in pursuing the claim, even though the claim itself was dismissed; *Byron Montz* did not.

391. LA. REV. STAT. ANN. § 9:4822(I)–(J).

392. If the Act had provided for an extension of the filing period or the preservation of the privilege notwithstanding the claimant's failure to file within the filing period, third persons would potentially be prejudiced, for they would have no knowledge of either the claimant's request for notice or the owner's failure to give it.

393. *See* LA. REV. STAT. ANN. § 9:4823(B), discussed *supra*.

statement of claim or privilege.[394] Moreover, to preserve the effectiveness of his privilege against third persons, the claimant must also file, within the same one-year period, a notice of pendency of action in the mortgage records.[395] The required content of a notice of pendency of action is prescribed by the Code of Civil Procedure.[396] In addition to satisfying those requirements, the notice of pendency of action must refer to the claimant's recorded statement of claim or privilege.[397] In the absence of a timely filed notice of pendency of action, the claimant's privilege will lose its effect as to third persons—even those with actual knowledge of it—but the claim and privilege will nonetheless remain enforceable against the owner and contractor.[398]

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394. *Id.* § 9:4823(A)(2). As the 1981 Act was originally enacted, the one-year period ran from the expiration of the filing period, rather than the actual date of filing of the claimant's statement of claim or privilege. An amendment to the Act in 2012 caused the one-year period to run from the date of filing of the claimant's statement of claim or privilege, and the 2019 revision maintained that rule. *See* Act No. 394, §§ 1–2, 2012 La. Acts 2111.

395. LA. REV. STAT. ANN. §§ 9:4831(A), 9:4833(E).

396. LA. CODE CIV. PROC. art. 3752.

397. LA. REV. STAT. ANN. § 9:4833(E). On this point, the 2019 revision removed a provision of prior law that stated that the claimant's notice of pendency of action had to identify the recorded notice of contract if one was filed, and, if no notice of contract was filed, the claimant could instead identify his recorded statement of claim or privilege. This change removes the burden that the claimant effectively had under prior law to search the records to determine, at his peril, whether notice of contract had been filed.

398. Under the Louisiana public records doctrine, actual knowledge is no substitute for recordation, and an unrecorded instrument usually has no effect against a third person, regardless of whether the third person knows of its existence. *See* McDuffie v. Walker, 51 So. 100 (La. 1909). There is, however, case law to the effect that a third person with actual knowledge of the pendency of a suit affecting an immovable is bound by its outcome, even if no notice of pendency of action was filed. *See* Richardson Oil Co. v. Herndon, 102 So. 310 (La. 1924); Cannata v. Bonner, 982 So. 2d 968 (La. Ct. App. 3d Cir. 2008). *But see* LA. CODE CIV. PROC. art. 3751 cmt. b (1960) (expressing an intent to overrule *Richardson Oil* legislatively) and William V. Redmann, *Louisiana Law of Recordation*: *Some Principles and Some Problems*, 39 TUL. L. REV. 491, 509–11 (1965) (expressing doubt that the "legislative overruling" was accomplished). *See also* MELISSA T. LONEGRASS, SANDI VARNADO, & CHRISTOPHER K. ODINET, SALE, LEASE, AND ADVANCED OBLIGATIONS: CASES AND READINGS 175–77 (Carolina Academic Press 2019). Nevertheless, the Private Works Act expressly provides that a privilege arising under the Act ceases to have effect as to third persons in the absence of a timely filed notice of pendency of action and makes no exception for third persons with actual notice of the action. LA. REV. STAT.

*F. Cancellation of Filings*

After a statement of claim or privilege has been filed, the owner or contractor usually has an interest in having the statement of claim or privilege removed from the records as soon as possible. Loan agreements and mortgages almost always require the owner to do so; leases frequently require a tenant who undertakes work to remove statements of claim or privilege shortly after they are filed; and standard form building contracts contain a stipulation that the contractor will cause statements of claim or privilege filed by others to be released. Of course, a release can be obtained by paying the claimant the full amount owed, but the owner or contractor often either disputes the claim or does not have available sufficient information to determine whether the claim is valid. The Private Works Act provides a means by which the owner, contractor, or any other interested person can obtain the release of a statement of claim or privilege by either posting a surety bond in an amount equal to 125% of the principal amount of the claim or depositing cash in the same amount with the recorder of mortgages.[399] The recorder is tasked with more than the ministerial duty of receiving the security and canceling the statement of claim or privilege; the recorder must determine whether the terms and amount of the bond, or the amount of cash, is in conformity with the requirements of the Act. If the recorder finds that they are, he then cancels the statement of claim or privilege, as well as any notice of pendency of action that may have been filed with respect to an action instituted to enforce the claim.[400]

The effect of this cancellation varies depending on the identity of the person who provided the release bond or cash security. If the owner did so, then the cancellation extinguishes the privilege upon the owner's property but has no effect on the personal claims arising under the Act

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ANN. § 9:4833(E). Thus, if the claimant neglects to file a timely notice of pendency of action, his privilege is lost even as to those third persons who knew about the pendency of his suit to enforce it, unless they are actually parties to the suit. *See* Triangle Pac. Corp. v. Nat'l Bldg. & Contracting Co., Inc., 652 So. 2d 552 (La. Ct. App. 1st Cir. 1995); C & J Contractors v. Am. Bank & Trust Co., 559 So 2d 810 (La. Ct. App. 1st Cir. 1990).

399. LA. REV. STAT. ANN. § 9:4835(A). In all 64 parishes of Louisiana, the clerk of the district court is the ex officio recorder of mortgages. *See* LA. CONST. art. V, § 28(A) (2011); LA. REV. STAT. ANN. § 44:71 (2018). In this Article, the title "recorder of mortgages," rather than the more common title of "clerk of court," will be used for the sake of consistency with the text of the Private Works Act.

400. LA. REV. STAT. ANN. § 9:4835(B) (2020).

against either the owner or the contractor.[401] If, on the other hand, it was a contractor or subcontractor who furnished the security, then both the privilege and the personal claim against the owner are extinguished.[402] The personal claim against the contractor arising under the Act, as well as any contractual claim that might exist against either the contractor or a subcontractor, are not extinguished.[403]

An amendment made to the Act in 1985 required any person who filed a release bond or other security to give notice of the filing to the owner, the claimant, and the contractor.[404] With some drafting changes, the 2019 revision continued this requirement, but neither the 1985 amendment nor the 2019 revision specifies any consequence of a failure to give notice when required.

Of course, statements of claim or privilege are sometimes untimely or otherwise improper, or they may have ceased to have effect for lack of filing of a timely notice of pendency of action. The Act allows an owner or other interested person to demand cancellation when a statement of claim or privilege is improperly filed or asserts a claim or privilege that is extinguished.[405] If the claimant fails to file a request for cancellation of the statement of claim or privilege within 10 days after his receipt of the demand, the owner or other person making the demand is entitled to proceed by summary process to obtain a judgment canceling the statement of claim or privilege and also granting an award of attorney fees against the claimant.[406]

The 2019 revision supplemented this rule with an additional provision that applies in the specific case of an owner who is identified in a statement of claim or privilege but who has no responsibility for the claim. This could arise in a number of contexts. For instance, a naked owner may be named in a statement of claim or privilege when in fact it was the usufructuary who contracted the work. A statement of claim or privilege may name the lessor when it is in fact the lessee under a recorded lease who should have been named. The work may have been contracted by an "owner" who has no interest of record in the immovable, such as a lessee under an unrecorded lease, and, as discussed in Section IV.D.2 above, under those circumstances the 2019 revision specifically permits the claimant to name the record owner of the immovable in his statement of

401. *Id.* § 9:4823(D).

402. *Id.* § 9:4823(E). This provision was changed in the 2019 revision to apply to release bonds filed by subcontractors, as well as those filed by contractors.

403. *Id.* § 9:4823(C), (E).

404. Act No. 556, § 1, 1985 La. Acts 1024.

405. LA. REV. STAT. ANN. § 9:4833(A)(1).

406. *Id.* § 9:4833(B)–(C).

claim or privilege.[407] Finally, unsure of the identity of the responsible owner, the claimant might have named several owners out of an abundance of caution in the hope of including the correct one. In all of these situations, a person who is named as the owner in a statement of claim or privilege but who has no responsibility for the claim may require the claimant to file a request for partial cancellation of the statement of claim or privilege insofar as it affects that person and his interest in the immovable.[408] If the claimant fails to comply, the owner who has no responsibility for the claim can proceed by summary process to obtain a judgment ordering cancellation and also recover attorney fees from the claimant. Such a cancellation is, however, limited in its effect to the person who obtains the judgment and does not affect the validity of the statement of claim or privilege as to any other owner who may have responsibility for the claim.[409]

As mentioned in Section IV.E above, if the claimant fails to file a notice of pendency of action within one year after filing his statement of claim or privilege, his privilege ceases to have effect as to third persons.[410] The Act states that the recorder of mortgages shall cancel a statement of claim or privilege upon his receipt of a proper request for cancellation or upon being ordered to do so by a judgment of the court.[411] Prior to the 2019 revision, an argument could have been made that these means of obtaining cancellation were exclusive and displaced the more general provisions of the Civil Code that allow cancellation of an instrument that has lost its effectiveness against third persons for failure of timely reinscription.[412] The 2019 revision addressed this issue through the addition of a provision requiring the recorder to cancel the recordation of the statement of claim or privilege upon receipt of a signed, written application for its cancellation if the effect of recordation of the statement of claim or privilege has ceased for lack of timely filing of a notice of pendency of action.[413] As the official revision comments indicate, the application need

407. *See id.* § 9:4822(H)(5).
408. *Id.* § 9:4833(A)(2).
409. *Id.*; *see also id.* § 9:4833 cmt. b.
410. *Id.* § 9:4833(E).
411. *Id.* § 9:4833(D).
412. *See* LA. CIV. CODE art. 3367 (Supp. 2019). The Private Works Act does not contemplate or require that a statement of claim or privilege must be reinscribed; instead, its effect against third persons is continued by the filing of a timely notice of pendency of action. *See* LA. REV. STAT. ANN. § 9:4833(E).
413. LA. REV. STAT. ANN. § 9:4833(E). As discussed more fully *infra* in Part IX, this change applies retroactively to works that were commenced before the January 1, 2020, effective date of the Act. *See* Act No. 325, § 9, 2019 La. Acts.

not be accompanied by an authorization for cancellation from the claimant, nor is a judgment ordering cancellation required under this provision.[414]

As discussed in Section IV.A, the Act provides a mechanism by which a notice of contract can be canceled before work has begun.[415] The Act also permits the cancellation of a notice of contract after the expiration of the period for filing statements of claim or privilege following filing of a notice of termination, and the 2019 revision made no substantive change to those provisions of the Act. If notice of termination has been filed and no statement of claim or privilege is filed before the expiration of 30 days thereafter, and if the contractor concurs or acknowledges that he has been paid in full, any person is entitled to obtain the cancellation of the notice of contract.[416] The contractor's concurrence is not required if more than 60 days have elapsed after the filing of the notice of termination and the contractor has not filed a statement of claim or privilege.[417] As the official revision comments indicate, if a statement of claim or privilege was filed but subsequently canceled before the request for cancellation of the notice of contract is made, the statement of claim or privilege is considered as having never been filed for purposes of determining entitlement to the cancellation of the notice of contract.[418]

## V. NOTICE REQUIREMENTS

The 2019 revision to the Act added Louisiana Revised Statutes § 9:4804, a new provision containing notice requirements applicable to a variety of categories of Private Works Act claimants, such as lessors, professional consultants and subconsultants, sub-subcontractors, residential claimants, and all § 4802 claimants. These notice requirements were previously found in disjointed provisions scattered somewhat haphazardly throughout the Act. Not only has the location of these notice requirements been centralized, but they have been either simplified or relaxed in many cases.

### *A. Lessors*

Since 1975, the Private Works Act has contained a provision stating that those who lease movables to someone other than the owner must provide a notice to the owner in order to be entitled to rights under the

414. *See* LA. REV. STAT. ANN. § 9:4833 cmt. d.
415. *See id.* § 9:4832(C).
416. *Id.* § 9:4832(A).
417. *Id.* § 9:4832(B).
418. *Id.* § 9:4832 cmt. a.

Act.[419] The first such provision required the lessor to provide a copy of the lease contract to the owner or contractor, or their agents or representatives, within 10 days after the execution of the contract in order for the privilege arising in the lessor's favor under the Act to be valid.[420]

The 1981 Act largely retained this requirement, providing that in order to assert his claim under Louisiana Revised Statutes § 9:4802, a lessor of movables to a person other than the owner had to deliver a copy of the lease to both the owner and the contractor not more than 10 days after the movables were first placed at the site of the immovable for use in a work. The official revision comments to the 1981 Act explained that the purpose of this provision was to notify the owner and contractor that the equipment being used at the site of the immovable was leased and could therefore be creating liability for them.[421] The Act was amended in 1991 to provide that this requirement had to be satisfied for *the privilege to arise*, rather than for *the claim to be asserted*.[422] The implication of this change was that the claim established by the Act in favor of the lessor could persist even when the lessor's failure to give notice caused a loss of his privilege. Whether that was the actual intent of the legislature is questionable, but the provision was interpreted to have precisely that meaning.[423]

In 2013, the notice requirement was expanded to cover privileges granted by Louisiana Revised Statutes § 9:4801 and to require the lessor of movables to deliver notice, rather than a copy of the lease, to the owner and contractor.[424] The expansion of the notice requirement to leases that give rise to privileges under Louisiana Revised Statutes § 9:4801 is curious indeed, given that those leases are necessarily between the lessor and the owner. The owner would presumably not need to be notified of the existence of a lease to which he is a party, and the contractor would have no responsibility for, and therefore no need to be notified of, a lease entered into directly between the owner and lessor.

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419. *See* Act No. 673, 1975 La. Acts 1467.

420. *Id*.

421. LA. REV. STAT. ANN. § 9:4802 cmt. g (2007).

422. Act No. 1024, 1991 La. Acts 3298, *amending* LA. REV. STAT. ANN. § 9:4802(G).

423. *See* Hawk Field Servs., L.L.C. v. Mid Am. Underground, L.L.C., 94 So. 3d 136 (La. Ct. App. 2d Cir. 2012), *writ denied*, 99 So. 3d 652 (La. 2012).

424. Act No. 357, 2013 La. Acts 2130, *amending* LA. REV. STAT. ANN. § 9:4802(G)(1). The 2013 amendment also specified the required contents of this notice: the name and mailing address of both the lessor and the lessee, a description sufficient to identify the movables placed at the site of the immovable, the terms of rental and payment, and the signatures of both the lessor and the lessee.

The requirement of giving notice within 10 days potentially led to inequitable results. The 10-day period ran from when leased movables were first placed at the site, not from when the specific movable in question was placed there. Thus, if a lessor leased a rather inexpensive item of equipment to a subcontractor for a short period of time, making the conscious decision that the amount of rent that would be due was not worth the trouble of giving notice to the owner and contractor, and then he later leased another item of equipment at a greater rental rate or for a longer term on the same project, he might find that he had already lost his privilege for failure to have given notice within 10 days after leased movables were *first placed* at the site.

The 2019 revision simplified—and to some extent relaxed—the notice requirements that the Act imposes upon lessors. First, the Act does not require notice when a lessor leases directly to the owner and is granted a privilege under Louisiana Revised Statutes § 9:4801; instead, the notice requirement applies only to lessors having a claim and privilege under Louisiana Revised Statutes § 9:4802.[425]

For those lessors, the 2019 revision relaxed the form, content, and timing of the notices they are required to give. The Act now requires a lessor having a claim and privilege under Louisiana Revised Statutes § 9:4802 to deliver to the contractor—and to the owner if notice of contract was properly filed—notice that the lessor has leased or intends to lease movables to a contractor or subcontractor for use in the work.[426] The notice must include the names and addresses of the lessor and the lessee and a general description of the movables.[427] The Act no longer requires that the notice be signed by both the lessor and the lessee, nor does the Act require that the notice set forth the terms of rental and of payment. That information, if of interest to the recipient of the notice, is available upon the recipient's request, as discussed below.

The 2019 revision removed the strict 10-day deadline within which the notice must be given by the lessor, instead providing that, if the notice is given more than 30 days after the movables leased by the lessor are first placed at the site of the immovable, the lessor's claim and privilege will be limited to rents accruing after the notice is given.[428] In other words, a lessor of movables who fails to provide a timely notice will no longer automatically lose the entirety of his privilege under the Act, as was

425. LA. REV. STAT. ANN. § 9:4804(B)(1) (2020); *see also id.* § 9:4804 cmt. c.

426. *Id.* § 9:4804(B)(1).

427. *Id*.

428. *Id*. As originally proposed by the Law Institute, the applicable time period was 20 days; this was, however, extended to 30 days during the legislative process. *See* H.B. 203, 2019 Leg., Reg. Sess. (La. 2019).

provided under former law; rather, his claim and privilege will be limited to rents accruing after the notice is given.[429] The 2019 revision also expressly provided that a lessor is not required to deliver notice to an owner or contractor who is a party to the lease, a proposition expressed in the official revision comments to the 1981 Act but not in the Act itself.[430]

The revised Act contains a new provision creating a mechanism by which owners and contractors who have received a notice from a lessor can request additional information about movables leased for use in work on the immovable. Specifically, the Act requires that within 15 days after receipt of a request by an owner or contractor, a lessor of movables granted a claim and privilege under Louisiana Revised Statutes § 9:4802 must provide a description sufficient to identify all of the leased movables that remain at the site of the immovable and for which rents remain owing.[431] A lessor who fails to provide a timely and accurate response loses his claim and privilege to the extent of any damages suffered by the person making the request as a result of the failure or inaccuracy.[432] An amendment made during the legislative process provides that a lessor is required to respond to a request made by an owner or contractor only if the lessor has already given a notice under Louisiana Revised Statutes § 9:4804(B) to the person making the request.[433]

*B. Professional Consultants and Professional Subconsultants*

As mentioned in Section III.I, a 1987 amendment to the Private Works Act granted a privilege under Louisiana Revised Statutes § 9:4801 to professional subconsultants of surveyors, engineers, and architects engaged by the owner. The amendment provided that, for this privilege to arise, a professional subconsultant was required to give notice to the owner within five working days after his engagement.[434] In 1989, the Act was

429. *See* LA. REV. STAT. ANN. § 9:4802(G)(1) (2019); *see also id.* § 9:4804 cmt. c (2020); Hawk Field Servs., L.L.C. v. Mid Am. Underground, L.L.C., 94 So. 3d 136 (La. Ct. App. 2d Cir. 2012), *writ denied*, 99 So. 3d 652 (La. 2012).

430. *See* LA. REV. STAT. ANN. § 9:4802 cmt. g (2007) (explaining that the notice requirements applicable to lessors of movables "should not be construed to require that a copy of the lease will have to be separately delivered to the contractor or owner who is for some reason already a party to it.").

431. *Id.* § 9:4804(B)(2) (2020).

432. *Id*.

433. *Id*.

434. Act No. 685, 1987 La. Acts 1657, *amendin*g LA. REV. STAT. ANN. § 9:4801(5). The notice was required to state the professional subconsultant's name and address, the name and address of his employer, and the general nature of the

again amended to add a parallel provision to Louisiana Revised Statutes § 9:4802, granting a claim and privilege to "[p]rime consultant registered or certified surveyors or engineers, or licensed architects, . . . employed by the contractor," as well as the professional subconsultants of those prime consultants.[435] This amendment conditioned the existence of the claim and privilege upon the giving of a notice by the prime consultant or professional subconsultant to the owner within 30 working days after his employment.[436]

The 2019 revision largely retained the substance of these notice requirements but relocated them to Louisiana Revised Statutes § 9:4804. Under Louisiana Revised Statutes § 9:4804(A), to be entitled to a claim or privilege under the Act, a professional consultant or professional subconsultant must give written notice to the owner within 30 days after his engagement in connection with the work, stating his name and address, the name and address of the person who engaged him, and the general nature of the work he was engaged to perform. The 2019 revision also added one exception to this general rule: notice is not required to be given by a professional consultant whom the owner directly engaged.[437] Because the owner is a party to the contract by which such a professional consultant is engaged, requiring the professional consultant to give notice of his engagement to the very person who engaged him would serve little purpose.

### *C. Sub-Subcontractors*

An amendment in 1988 to the Private Works Act provided that, before any claimant not in privity of contract with the contractor would have a right of action against the contractor, the claimant was required to record his statement of claim or privilege in the mortgage records and provide written notice to the contractor "stating with substantial accuracy the amount claimed and the name of the party to whom the material was

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work he was engaged to perform. A subsequent amendment the following year changed the time period within which this notice had to be given from five working days after the subconsultant was employed to 30 days after the subconsultant entered into a written contract of employment. Act No. 713, 1988 La. Acts 1826.

435. Act No. 41, 1989 La. Acts 287, *enacting* LA. REV. STAT. ANN. § 9:4802(A)(5).

436. *Id*. The notice was required to state the name and address of the prime consultant or professional subconsultant, the name and address of his employer, and the general nature of the work he was engaged to perform.

437. LA. REV. STAT. ANN. § 9:4804(A).

furnished or supplied or for whom the labor or service was done or performed."[438] Among others, this provision applied to lower-tier subcontractors who contracted with another subcontractor.

The Law Institute determined that this provision should be suppressed on account of its incompatibility with other provisions of the Act.[439] Specifically, the provision, which was found in former Louisiana Revised Statutes § 9:4822(J), required a remote claimant to file his statement of claim or privilege before his right of action against the contractor or surety would arise, yet Louisiana Revised Statutes § 9:4823(B) conferred upon the claimant rights against the contractor and surety even if his statement of claim or privilege was never filed, provided that the claimant delivered his statement of claim or privilege to the contractor within the filing period. To remove this conflict, House Bill No. 203 of 2019, as submitted to the legislature, eliminated Louisiana Revised Statutes § 9:4822(J).[440]

Nevertheless, during the legislative session, a provision was added that restored certain elements of former law. Unlike former law, this provision, Louisiana Revised Statutes § 9:4804(D), does not require a sub-subcontractor to file his statement of claim or privilege for his right of action against the contractor or surety to arise. The provision does, however, require a subcontractor in privity of contract with another subcontractor but not with the contractor to give notice to the contractor at least 30 days before filing suit against the contractor, stating with substantial accuracy the amount claimed and the name of the other subcontractor for whom the labor or service was done or performed.[441] A sub-subcontractor who fails to satisfy the requirements of this provision will have no right of action to enforce his claim under the Act against the contractor or the surety.[442]

### *D. Residential Claimants*

As discussed in Section III.F, a 1991 amendment to the Act mandated that sellers of movables used in connection with a residential work give notice of nonpayment to the owner at least 10 days before filing a statement of claim or privilege and extended to 70 days the period within

438. Act No. 685, 1988 La. Acts 1774, *enacting* LA. REV. STAT. ANN. § 9:4822(J).

439. Minutes of the June 17, 2016 Meeting of the Security Devices Committee, Louisiana State Law Institute (June 22, 2016) (on file with the Law Institute).

440. H.B. 203, 2019 Leg., Reg. Sess. (La. 2019).

441. LA. REV. STAT. ANN. § 9:4804(D).

442. *Id*.

which they were permitted to file their statements of claim or privilege.[443] Although these requirements were eliminated by House Bill No. 203 of 2019 as proposed by the Law Institute,[444] a provision was added during the legislative session that allowed certain claimants on residential works to give notice of nonpayment to the owner within the original 60-day filing period and, by doing so, to extend the period within which they must file their statements of claim or privilege to a total of 70 days.

Thus, as discussed in Section IV.D.4, the 2019 revision permits—but does not require—sellers and lessors of movables granted a privilege by Louisiana Revised Statutes § 9:4801, as well as all claimants granted a claim and privilege by Louisiana Revised Statutes § 9:4802, to give notice of nonpayment to the owner in connection with a residential work for which a timely notice of contract was not filed.[445] If this notice of nonpayment is given before the expiration of the 60-day filing period that would otherwise apply and at least 10 days before the statement of claim or privilege is filed, then the 60-day filing period is extended to 70 days.[446] The notice of nonpayment must set forth the amount and nature of the obligation giving rise to the claim and privilege in order for this 10-day extension to apply.[447] This provision applies only to residential works, which, as discussed in Section III.F, are now defined in the Act.[448]

### *E. Section 4802 Claimants on Works for Which Notice of Contract Was Filed*

As previously discussed, claimants under the Act must file statements of their claims or privileges within a specified period of time in order to preserve their claims and privileges. In addition to these filing requirements, if a notice of contract was properly filed, the Act also requires persons granted a claim and privilege under Louisiana Revised Statutes § 9:4802 to deliver a copy of their statement of claim or privilege to the owner, provided that his address is given in the notice of contract.[449] Such notice must be given no later than 30 days after the filing of a notice

443. Act No. 1024, 1991 La. Acts 3298, *enacting* LA. REV. STAT. ANN. §§ 9:4802(G)(2), 9:4822(D)(2).

444. *See* H.B. 203, 2019 Leg., Reg. Sess. (La. 2019). *See also* Minutes of the June 17, 2016 Meeting of the Security Devices Committee, Louisiana State Law Institute (June 22, 2016) (on file with the Law Institute).

445. LA. REV. STAT. ANN. § 9:4822(D).

446. *Id*.

447. *Id*.

448. *Id.* § 9:4810(8).

449. *Id.* § 9:4822(B).

of termination of the work or, if a notice of termination is not filed, no later than six months after the substantial completion or abandonment of the work.[450] These time periods are the same time periods applicable to the filing of the statement of claim or privilege itself, and a claimant's failure to satisfy these notice requirements will result in the loss of his claim and privilege under the Act.

In addition to this requirement, which applies to all claimants under Louisiana Revised Statutes § 9:4802, another provision of the Act imposes a special notice requirement upon the seller of a movable sold to a subcontractor where notice of contract was properly filed. The substance of this requirement was added in 1999[451] and was merely clarified by the 2019 revision. Specifically, the seller of a movable sold to a subcontractor is required to give both the owner and the contractor notice of nonpayment of the price of the movable no later than 75 days after the last day of the calendar month in which the movable was delivered to the subcontractor.[452] This notice of nonpayment must contain the name and address of the seller, the name and address of the subcontractor, a description of the movable, and a statement of the unpaid balance owed to the seller.[453] The 2019 revision clarified that the failure of the seller of a movable sold to a subcontractor to provide such notice will result in the loss of the seller's claim and privilege for the price of the movable.[454]

*F. Mechanisms of Notice*

Just as the notice requirements applicable to claimants were scattered throughout the Private Works Act, so too were the rules concerning the means by which notices were required to be given. Before the 2019 revision, the Act, as it had been amended, contained several provisions requiring certain claimants to send notices to certain recipients by certified or registered mail at certain addresses. For example, Louisiana Revised Statutes § 9:4802(G)(3) required sellers of movables to give notice of nonpayment by certified mail, return receipt requested, to the owner and

450. *Id*.

451. Act No. 1134, 1999 La. Acts 3017, *enacting* LA. REV. STAT. ANN. § 9:4802(G)(3).

452. LA. REV. STAT. ANN. § 9:4804(C); *see also* AP Interiors, L.L.C. v. Coryell Cty. Tradesmen, L.L.C., 239 So. 3d 393 (La. Ct. App. 4th Cir. 2018) (rejecting arguments that the 75-day notice provision applied only to residential projects).

453. LA. REV. STAT. ANN. § 9:4804(C).

454. *Id*.

general contractor at their last known addresses.[455] In contrast, Louisiana Revised Statutes § 9:4822(J) required claimants not in privity of contract with the contractor to give written notice of their claims by registered or certified mail, postage prepaid, to the contractor at any place the contractor maintained an office in Louisiana. Additionally, Louisiana Revised Statutes § 9:4835(C) required parties who filed bonds or other security to give notice by certified mail to the owner and contractor at the address of the immovable and to the lienholder at his address.

All the while, the Private Works Act contained a general notice provision in Louisiana Revised Statutes § 9:4842 to the effect that a notice given under the Act is deemed to have been given when it is delivered to the recipient or when it is properly deposited in the United States mail for delivery to the recipient by certified or registered mail. This statute also provided that the notice may be addressed to the owner, contractor, or surety at the address given in a properly filed notice of contract and to a claimant at the address given in a statement of claim or privilege or in a notice given by the claimant in accordance with the provisions of the Act. The enactment of the special rules mentioned above concerning the mechanisms of giving notices suggests that the drafters of those rules might have overlooked the existence of the general rule in Louisiana Revised Statutes § 9:4842.

The 2019 revision suppressed the numerous provisions concerning the means by which notice must be given in specific circumstances and instead enacted a single set of provisions, beginning with Louisiana Revised Statutes § 9:4842. This section now sets forth the general rule that, for purposes of the Act, the delivery of a communication or document is accomplished when it is actually received by the recipient or when it is deemed to have been given or delivered in accordance with the newly enacted provisions that follow.[456] The revised provision incorporates new terminology—"communication or document"—as opposed to notice, even though a communication includes a notice.[457]

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455. *See id.* § 9:4802(G)(2) (2019) (requiring sellers of movables in connection with residential works to give notice of nonpayment via registered or certified mail, return receipt requested, to the owner).

456. *Id.* § 9:4842 (2020). The revised notice provisions no longer include, within the treatment of the word "delivery," the presumption that proof of delivery of movables at the site of the immovable is prima facie evidence that the movables became component parts of, or were used on, the immovable. This presumption was moved, without substantive change, to new Louisiana Revised Statutes § 9:4846.

457. *See id.* § 9:4842 cmt. b.

The provisions that follow Louisiana Revised Statutes § 9:4842 set forth the specific means by which communications or documents must be given or delivered under the Act. Those provisions begin with Louisiana Revised Statutes § 9:4843, which is patterned after Civil Code article 1938 and provides that a communication or document is received when it comes into the possession of the recipient or someone authorized by him to receive it. This provision incorporates elements of former law and differs from the provisions that follow in that, under Louisiana Revised Statutes § 9:4843, the critical point in time is when the communication or document is *actually received* by the recipient, as opposed to when the communication or document is *transmitted* by the sender.

In contrast, Louisiana Revised Statutes § 9:4844 sets forth two circumstances under which a communication or document will be deemed to have been given or delivered upon transmission by the sender: when the communication or document is sent by certain types of United States mail or when it is sent by commercial courier. Specifically, the statute provides that a communication or document is deemed to have been given or delivered when it is deposited in the United States mail for delivery to the recipient by certified or registered mail or by another means of delivery for which the postal service registers and tracks the mailing.[458] Of course, the sender may also use other types of United States mail to send the communication or document, but in those cases, the communication or document will not be deemed to be given or delivered as of the time of transmittal but rather as of the time of actual receipt in accordance with Louisiana Revised Statutes § 9:4843. The sender will also have the burden of proving actual receipt.

Similarly to communications sent by certified or registered mail, a communication or document that is sent by commercial courier is deemed to have been given or delivered when it is deposited with the commercial courier for delivery to the recipient, but the statute contains an added requirement that the communication or document must be received by the recipient within a reasonable period of time.[459] In conjunction with this provision, the 2019 revision defined "commercial courier" to mean juridical persons whose primary purpose is the delivery of letters and parcels.[460] This definition of commercial courier is broad enough to include national companies, such as Federal Express and United Parcel Service, as well as regional companies and even local delivery companies.

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458. *Id.* § 9:4844(A). This provision recognizes that the United States Postal Service may devise new forms of delivery in the future that meet these requirements.

459. *Id.* § 9:4844(B).

460. *Id.* § 9:4810(2).

Because the definition is so broad, the imposition of the additional requirement that the communication or document be received within a reasonable period of time is intended to ensure that it is the sender—not the recipient—who bears the risk of using an unreliable commercial courier.[461] What constitutes a reasonable period of time is left for the court to determine according to the circumstances, but if the communication or document is received after a reasonable period of time, the sender will lose the benefit of delivery as of the moment of transmittal rather than receipt. Under those circumstances, the notice will still be effective as of the time of its actual receipt. If, however, the notice is never received after being deposited with the commercial courier, notice will not have been effectively given.

Louisiana Revised Statutes § 9:4844 specifies the addresses to which communications or documents under the Act must be sent. Communications or documents may be addressed to an owner, contractor, or surety at the address provided in a properly filed notice of contract or attached bond and to a claimant at the address provided in a properly filed statement of claim or privilege.[462] Alternatively, communications or documents may be addressed to any of these parties at an address contained in a previous communication with respect to the work, but this address must be one that has been designated by the recipient as an address for notice.[463]

If those addresses are not available, communications or documents may be addressed to: (1) the owner or contractor at the address of the place of business through which the contract between them was made; (2) the surety at the address of the office through which the bond was issued; or (3) the claimant at the address of the place of business through which the contract with him concerning the work was made.[464] Additionally, communications or documents may be addressed to the owner, contractor, surety, or claimant at any other address held out by these parties as the place for receipt of communications related to the work.[465]

As a fail-safe, when the intended recipient is a juridical person that is incorporated, formed, or organized under Louisiana law or is registered or

461. *See* Minutes of the April 27, 2018 Meeting of the Security Devices Committee, Louisiana State Law Institute (May 3, 2018) (on file with the Law Institute).

462. *Id.* § 9:4844(C).

463. *Id*. *See also* Minutes of the April 27, 2018 Meeting of the Security Devices Committee, Louisiana State Law Institute (May 3, 2018) (on file with the Law Institute).

464. LA. REV. STAT. ANN. § 9:4844(D)–(E).

465. *Id*.

authorized to do business in Louisiana, communications or documents can always be addressed to the recipient's registered office, principal office, principal place of business, or principal business establishment in Louisiana as reflected on the records of the secretary of state, as alternatives to any other address that might be a permissible notice address for the recipient.[466]

The final statute in the series of notice provisions is Louisiana Revised Statutes § 9:4845, which permits delivery of communications or documents by electronic means. This section provides that a communication or document is deemed to have been given or delivered when it is delivered by electronic means to a recipient who has consented to that method of delivery in connection with the work.[467] Whether the recipient has consented to receive a communication or document electronically will be determined according to the context and surrounding circumstances, including the conduct of the parties.[468]

Louisiana Revised Statutes § 9:4845 specifies the three ways in which a communication or document may be sent electronically: (1) by facsimile transmission to a specified telecopier number; (2) by delivery to a specified electronic mail address; or (3) by entry into a specified electronic information processing system that satisfies the requirements of the Louisiana Uniform Electronic Transactions Act (LUETA).[469] In the case of both facsimile and electronic mail transmissions, the sender must also receive a confirmation of receipt,[470] but this required receipt is merely one indicating delivery and not the "read receipt" that is customary with respect to email communications.[471] In fact, neither the Private Works Act nor LEUTA requires the recipient to read or retrieve the electronic communication or even to be aware of the fact that it has been received; rather, the electronic communication is considered to be received the moment it reaches the intended recipient's fax number, email address, or electronic information processing system.[472]

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466. *Id.* § 9:4844(F).

467. *Id.* § 9:4845.

468. *See id.* § 9:4845 cmt. b; *see also id.* § 9:2605(B)(2) (2018). For examples of conduct that may be sufficient to indicate the recipient's consent to receive electronic communications, see *id.* § 9:2605 cmt. e.

469. LA. REV. STAT. ANN. § 9:4845 (2020).

470. *Id*.

471. *See* Minutes of the June 15, 2018 Meeting of the Security Devices Committee, Louisiana State Law Institute (June 19, 2018) (on file with the Law Institute).

472. *See* LA. REV. STAT. ANN. §§ 9:4845 cmt. c; 9:2615(E) (2018); 9:2615 cmt. e (2018); *see also In re* Tillman, 187 So. 3d 445 (La. 2016).

## VI. ENFORCEMENT

In keeping with its basic policy objective of ensuring that those who contribute to the improvement of an immovable are paid for the value of their work, the Private Works Act contemplates several mechanisms for the enforcement of the claims and privileges it creates. These enforcement mechanisms include the filing of suit, the initiation of a concursus proceeding, the imposition of liability upon the contractor's surety, and the assessment of attorney fees. Each of these mechanisms will be discussed more specifically below, along with a discussion of the topic of subrogation.

### *A. Suit*

The Act mentions the usual means of enforcement of a claim or privilege—through an ordinary suit—only in the negative: a claim and the privilege securing it are extinguished if a suit is not filed against the owner before the expiration of one year after the date that the claimant filed his statement of claim or privilege.[473] The suit for enforcement is an ordinary action governed by the Code of Civil Procedure[474] and typically seeks both a money judgment for the amount owed and recognition of the claimant's privilege. When the plaintiff in the suit claims a privilege, he is entitled to have the immovable subject to the privilege seized before judgment under a writ of sequestration upon posting security in an amount set by the court.[475] If the plaintiff succeeds in obtaining a judgment against the owner, the judgment can be enforced by sale of the immovable at a

473. LA. REV. STAT. ANN. § 9:4823(A)(2) (2020). As discussed *supra* in Section IV.E, in order to preserve the effect of the privilege against third persons, the claimant must also, within the same one-year period, file a notice of pendency of action in the mortgage records; however, this step is not necessary for the preservation of the claims against the owner, contractor, or surety. *See id.* § 9:4833(E).

474. If the claimant could produce an authentic act evidencing the privilege and importing a confession of judgment, there would appear to be no preclusion of the use of executory process to enforce the privilege. *See* LA. CODE CIV. PROC. art. 2632 (2002). Nevertheless, perhaps because of the practical difficulty of satisfying the requirements for use of executory process, there do not appear to be any reported cases in which executory process has been used or even attempted to enforce a Private Works Act privilege.

475. *Id.* arts. 3571, 3574 (2020).

sheriff's sale under a writ of *fieri facias* issued after expiration of the delays for taking a suspensive appeal.[476]

Suit can be, and usually is, also filed against the contractor and the surety, as well as against any person who may have contractual responsibility for payment to the claimant. A suit against these parties alone, however, will not preserve the plaintiff's claim against the owner or the plaintiff's privilege upon the immovable.[477]

There are two instances in which the Private Works Act, as revised in 2019, requires that notice be given to a defendant before suit is filed. First, as discussed previously, a sub-subcontractor who has no privity of contract with the contractor must give the contractor notice of his claim at least 30 days before filing suit against the contractor or surety, identifying the amount of the claim and the subcontractor with whom he contracted.[478] Without such notice, the claimant has no right of action against the contractor or surety. The second instance in which the Act requires notice before suit can be filed applies in the case of a suit against the surety before expiration of the filing period. A claimant who wishes to bring an action against the surety during the filing period must deliver a copy of his statement of claim or privilege to the surety at least 30 days before filing suit against the surety.[479] Otherwise, his suit is premature until expiration of the filing period.[480]

As mentioned in Section IV.D.5 above, if a § 4802 claimant delivers his statement of claim or privilege to the contractor within the filing period but does not file the statement of claim or privilege, his claims against the contractor and surety, but not his claim against the owner or his privilege,

476. *See generally id.* arts. 2291 *et seq*. (2002). Because the plaintiff's recourse is not limited to the immovable upon which the work was performed, the judgment can also be enforced by seizure and sale of any other non-exempt property of the parties cast in judgment.

477. *See* Wright v. Fontana, 290 So. 2d 449 (La. Ct. App. 2d Cir. 1974) (recognizing the error of an attorney who filed suit against the construction company to whom the attorney's former client had supplied materials but failed to name the owner of the property as a defendant in the suit, thereby leading to the loss of the former client's privilege under the Private Works Act).

478. LA. REV. STAT. ANN. § 9:4804(D). This requirement, which was added by a legislative amendment made during the course of the enactment of the 2019 revision, replaced a requirement under prior law that a claimant having no direct contractual relationship with the contractor must file his statement of claim or privilege within the filing period and give notice to the contractor within 30 days after filing it. *See id.* § 9:4822(J) (2019).

479. *Id.* § 9:4813(D) (2020).

480. *Id.* § 9:4813 cmt. c.

are nevertheless preserved, even in the absence of filing.[481] Under these circumstances, a parallel rule alters the usual rule that a claim is extinguished if suit is not filed against the owner within one year after the filing of the statement of claim or privilege.[482] Where the claimant delivers his statement of claim or privilege to the contractor within the filing period, it is not essential for the claimant to file suit against the owner within one year, as the Act otherwise requires,[483] to preserve his rights against the contractor or surety. For that limited purpose, it suffices for the claimant to file suit against the contractor or surety within one year after the date of expiration of the filing period.[484] The deadline for filing suit runs from the expiration of the filing period, rather than the date of filing of the claimant's statement of claim or privilege, as is the usual rule, for the obvious reason that under these circumstances no statement of claim or privilege was filed. It is also for this reason that the Act provides that the surety's liability on its bond is extinguished as to any person, other than the owner, who fails to file suit against the owner, contractor, or surety no later than one year after expiration of the filing period.[485]

*B. Concursus*

The enforcement mechanism that the Act contemplates is a concursus proceeding initiated after expiration of the filing period.[486] The concursus is conducted contradictorily among the owner, contractor, surety, and all persons who have preserved their claims by filing a statement of claim or privilege within the filing period.[487] When the owner convokes the

481. *Id.* § 9:4823(B).

482. *See id.* § 9:4823(A)(2).

483. *Id*.

484. *Id.* § 9:4823(B).

485. *Id.* 9:4813(E). As the revision comments observe, however, this does not mean that the claimant can always wait until just before the one-year anniversary of the expiration of the filing period to bring suit against the surety. If Louisiana Revised Statutes § 9:4823(B) does not apply and no suit is filed against the owner before the expiration of one year after the claimant filed his statement of claim or privilege, the claimant's rights against the owner, contractor, and surety will all be lost by operation of Louisiana Revised Statutes § 9:4823(A)(2). *See id.* § 9:4813 cmt. d.

486. *Id.* § 9:4841(A). A Louisiana concursus is analogous to a federal interpleader action. The procedural rules applicable to concursus proceedings are found in LA. CODE CIV. PROC. arts. 4651 *et seq*. (1998).

487. LA. REV. STAT. ANN. § 9:4841(A). Filing a concursus is not mandatory, however, and a claimant may, if he chooses, proceed instead to a direct suit against

concursus, he may, but need not, deposit into the registry of the court all remaining amounts that he owes to the contractor.[488] The owner does not have the exclusive right to convoke the concursus; it can be initiated by any interested person, such as the contractor, the surety, or a claimant.[489]

A concursus initiated under the Act has its greatest utility when it is convoked by an owner who has complied with the Act's requirements of filing a notice of contract and bond before commencement of the work. If the owner has done so and has deposited all remaining contract sums into the registry of the court, he is entitled to move for a judgment discharging him from any further responsibility and ordering the cancellation of all statements of claim or privilege filed against the immovable.[490] The motion is tried in a summary proceeding, and a suspensive or devolutive appeal from any judgment rendered on the motion may be taken as a matter of right, without the need for the trial court to designate the judgment as final.[491]

Even if the owner has not filed a timely notice of contract and bond, he is still permitted, within the concursus, to move for a judgment canceling any untimely or improperly filed statements of claim or privilege.[492] Under those circumstances, however, he is not entitled to a judgment discharging him from further responsibility or limiting his liability to the amount of the remaining contract funds.

The owner's attorney is entitled to recover his fees incurred in initiating the concursus from the contractor and surety, and these fees may be paid out of the funds deposited into the registry of the court, but only after all properly preserved claims have been satisfied.[493] If a claimant initiates the concursus when no one else has done so within 90 days after expiration of the filing period, the claimant's attorney is similarly entitled to recover his fees incurred in initiating the concursus from the contractor and surety.[494]

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the owner, contractor, or surety. *See* Levingston Supply Co. v. Am. Employers Ins. Co., 198 So. 416 (La. Ct. App. 1st Cir. 1940).

488. LA. REV. STAT. ANN. § 9:4841(B).

489. *Id.* § 9:4841(A).

490. *Id.* § 9:4841(C)–(D). As the official revision comments observe, the owner bears the risk of the surety's insolvency until a judgment on this motion is rendered. *See id.* § 9:4841 cmt. c.

491. *Id.* § 9:4841 cmt. b. *Cf.* LA. CODE CIV. PROC. art. 1915(B) (2014).

492. LA. REV. STAT. ANN. § 9:4841(D)(1).

493. *Id.* § 9:4841(F).

494. *Id.* As when the owner's attorney is awarded his fees, the fees awarded to a claimant's attorney may be paid from any funds deposited into the registry of the court, but only after all properly preserved claims have been satisfied.

A surety that convokes a concursus proceeding is required to deposit into the registry of the court an amount equal to 125% of all claims that have been preserved through the filing of timely statements of claim or privilege, but in no event more than the full amount of the bond.[495] After all claimants have answered or have failed to answer within the delay fixed by the court, the surety may, upon order of the court, withdraw all amounts it had deposited in excess of 125% of the claims that remain.[496]

*C. Liability of the Surety*

The 2019 revision made no substantive change to the provisions of the Act bearing upon the nature and extent of the surety's liability.[497] Through the issuance of a payment bond, the surety guarantees the payment up to the aggregate amount expressed in the bond of claims of the owner, all persons having a claim under the Act against the contractor, and all persons to whom the contractor is contractually liable.[498] A payment bond stands as security for claims made by § 4802 claimants. Although the owner is the obligee of the bond, the owner is not within the class of persons granted a right of action under the bond for his own losses.[499] As a legal suretyship, the bond is deemed to conform to the requirements of the Act, notwithstanding any provision of the bond to the contrary.[500] A

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495. *Id.* § 9:4841(E). This amount is commonly referred to as the "penal sum" or "penal amount" of the bond. *See, e.g.*, *In re* Whitaker Constr. Co., Inc., 439 F.3d 212 (5th Cir. 2006); L & A Contracting Co., Inc. v. Ram Indus. Coatings, Inc., 762 So. 2d 1223 (La. Ct. App. 1st Cir. 2000).

496. LA. REV. STAT. ANN. § 9:4841(E). The 2019 revision eliminated the reference in prior law to a judgment of default against claimants who did not answer because no judgment of default is obtained in a concursus. Instead, if a claimant does not answer, the court sets a delay allowing him a second opportunity to do so, and he is estopped from asserting his claim if he does not answer within the delay set by the court. *See* LA. CODE CIV. PROC. arts. 4656–57 (2020).

497. Although the 2019 revision deleted the statement in Louisiana Revised Statutes § 9:4835(A) that a surety does not have the benefit of division or discussion, this deletion had no substantive effect because suretyship law now provides, as a general proposition, that a surety has no such rights. *See* LA. CIV. CODE art. 3045 (2020).

498. LA. REV. STAT. ANN. § 9:4812(C).

499. Roy Anderson Corp. v. 225 Baronne Complex, L.L.C., 280 So. 3d 730 (La. Ct. App. 4th Cir. 2019).

500. LA. REV. STAT. ANN. § 9:4812(D); *see also* LA. CIV. CODE art. 3066 (2020). Thus, where a bond issued for a contractor contained a provision that suit must be brought within two years from the date of the bond, that provision was displaced by

surety is liable on its bond even if the bond is not actually attached to the filed notice of contract and even if no notice of contract is filed.[501] Although only a payment bond is required to fulfill the requirements of the Act, a bond provided under the Act is deemed to guarantee the contractor's performance under the contract to the owner, unless the bond expressly provides otherwise.[502]

An agreement between the owner and contractor for an extension of time for the contractor's performance of the work does not extinguish the surety's obligation.[503] Other modifications of the contract, or changes in the work, do not extinguish the obligations of the surety to persons other than the owner. If the surety is materially prejudiced by a change to which it did not consent, it is relieved of any liability to the owner and is entitled to be indemnified by the owner for any resulting loss or damage.[504]

Before the 2019 revision, the Act did not specify the qualifications of a surety issuing a payment bond, other than a requirement that the surety be solvent. The 2019 revision provides that, on contracts in which the price of the work exceeds $100,000, the bond must be issued by a surety company licensed to do business in Louisiana.[505] Another change made by the 2019 revision is that the amount of the bond must be at least as great as the total contract price, rather than the tiered percentages of the contract price that applied under prior law.[506]

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Louisiana Revised Statutes § 9:4813(D), which allows suit to be brought against the surety within one year after the expiration of the period for filing statements of claim or privilege. *See* Peter M. Trapolin & Associates, Architects v. Twin City Federal Savings and Loan Ass'n, 488 So. 2d 1191 (La. Ct. App. 4th Cir. 1986). On the other hand, where a bond is issued by a subcontractor for the benefit of a contractor, it is not a legal suretyship given in accordance with the Act, and such a time limitation is enforceable. *See* Con-Plex, Div. of U.S. Indus., Inc. v. Vicon, Inc., 448 So. 2d 191 (La. Ct. App. 1st Cir. 1984); Landis & Young v. Gossett & Winn, 178 So. 760 (La. Ct. App. 2d Cir. 1937).

501. LA. REV. STAT. ANN. § 9:4813(C).

502. *Id.* § 9:4812(C)(2). In contrast to a payment bond, a performance bond is not a legal suretyship, and the language of the performance bond controls the extent of the surety's liability under it. *Roy Anderson Corp.*, 280 So. 3d 730.

503. LA. REV. STAT. ANN. § 9:4812(E)(1). Nevertheless, under general suretyship law, a surety has the right to require security when the principal obligation would be due but for an extension of its term to which the surety did not consent. *See* LA. CIV. CODE art. 3053(4) (2020).

504. LA. REV. STAT. ANN. § 9:4812(E)(2).

505. *Id.* § 9:4812(A). This is the same qualification that applies to sureties issuing bonds to obtain the release of statements of claim or privilege under Louisiana Revised Statutes § 9:4835(A).

506. *Id.* § 9:4812(B).

Even though the surety's bond is now required to be issued in an amount equal to the contract price, it remains possible for the aggregate amount of all claims arising from a work to exceed the amount of the bond. In that circumstance, the Act provides a hierarchy of payment. First, those persons who preserved their claims by filing a timely statement of claim or privilege in the mortgage records are paid, with payment being made to them on a pro-rata basis if the bond is insufficient to satisfy all of their claims.[507] After those claims are paid in full, payment is made to those persons who did not preserve their claims by filing a statement of claim or privilege but to whom the contractor is otherwise liable.[508] These claims are not paid pro rata but rather in the order in which they are presented to the surety, and the surety is therefore able to pay valid claims in this category as soon as they are presented. Finally, after all other claims have been satisfied, payment is made to the owner.[509]

The surety's liability to all claimants other than the owner is extinguished if the claimant fails to institute an action against the owner, contractor, or surety no later than one year after the expiration of the filing period.[510] Nevertheless, as discussed in Section VI.A above, the claimant does not always have the ability to institute suit throughout the entirety of that one-year period. If the claimant files a statement of claim or privilege against the owner at some point before the last day of the filing period, he will have only one year from the time of filing within which to institute suit against the owner, and his failure to do so will extinguish his rights against all persons.[511] The joinder of a claimant to a concursus proceeding

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507. *Id.* § 9:4813(B)(1).

508. *Id.* § 9:4813(B)(2). This category includes claimants who did not file a statement of claim or privilege within the filing period but preserved their claims against the contractor and surety by delivering the statement of claim or privilege to the contractor within the filing period. *See id.* § 9:4823(B).

509. *Id.* § 9:4813(B)(3).

510. *Id.* § 9:4813(E). In *Metropolitan v. Landis*, 627 So. 2d 144 (La. 1993), the Louisiana Supreme Court held that the one-year time period within which a claimant must institute an action under Louisiana Revised Statutes § 9:4813 is peremptive rather than prescriptive. The issue presented to the Court was whether a general contractor's repeated acknowledgments of a debt owed to the claimant subcontractor interrupted prescription as to both the general contractor and its surety. *Id.* at 147. Determining that the one-year period is peremptive, rather than prescriptive, the Court held that the period could not be interrupted or suspended, and a suit filed after expiration of the period is therefore untimely. *Id.* at 148.

511. There is an exception to this rule, however, if the statement of claim or privilege is delivered to the contractor within the filing period. *See* LA. REV. STAT. ANN. § 9:4823(B). In that event, the claimant has a period of one year from the expiration of the filing period within which to bring suit against the contractor and

satisfies the requirement for the institution of an action, even if the claimant is not the plaintiff in the concursus.[512]

*D. Attorney Fees*

The claims and privileges arising under the Act do not secure a claimant's attorney fees, whether the claimant asserts entitlement to attorney fees by contract or by statute.[513] The 2019 revision contains an express statement to that effect.[514] Thus, even if a supplier sells materials on open account to a contractor or subcontractor, the supplier is not entitled to recover attorney fees from the owner under the open account statute[515] or to assert a privilege upon the immovable for payment of attorney fees. The Act does not, however, preclude a claimant from recovering attorney fees from any person responsible for them under law outside of the Private Works Act. Thus, if an owner has directly purchased materials on open account from a supplier, the owner may well be responsible for the supplier's attorney fees under the open account statute, but there would still be no privilege upon the immovable securing the award of attorney fees.[516]

The Private Works Act itself provides for an award of attorney fees in a few instances, such as when a claimant fails to request cancellation of an improperly filed or lapsed statement of claim or privilege[517] or when an owner or claimant convokes a concursus.[518]

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surety. *Id*. Nevertheless, if the claimant did not file his statement of claim or privilege in the mortgage records within the filing period, his claim against the owner and his privilege upon the immovable will be lost, regardless of the filing of a timely suit against the contractor or surety. *See id.* § 9:4823(A)(2).

512. *Id.* § 9:4823(F); *see also id.* § 9:4813 cmt. e.

513. *See* Accusess Envtl., Inc. v. Walker, 185 So. 3d 69, 78 (La. Ct. App. 1st Cir. 2015); Byron Montz, Inc. v. Conco Constr., Inc., 824 So. 2d 498, 504 (La Ct. App. 4th Cir. 2002).

514. *See* LA. REV. STAT. ANN. § 9:4803(C).

515. *Id.* § 9:2781 (2018). *See* E. Smith Plumbing, Inc. v. Manuel, 88 So. 3d 1209, 1213–15 (La. Ct. App. 3d Cir. 2012) (finding that subcontractors might have been entitled to an award of attorney fees and costs under the open account statute from the general contractor with whom they contracted but that these amounts were not recoverable from the owners). *See also Accuess Envtl., Inc.*, 185 So. 3d 69.

516. LA. REV. STAT. ANN. § 9:4803(C).

517. *Id.* § 9:4833(B).

518. *Id.* § 9:4841(F).

*E. Subrogation*

Occasionally, a contractor or subcontractor who has discharged an obligation that was owed to a claimant attempts to assert subrogation to the claimant's claims and privileges arising under the Act, often for the purpose of gaining a more favorable priority than the contractor or subcontractor has in his own right. For instance, in *Pringle-Associated Mortgage Corp. v. Eanes*,[519] a subcontractor, after paying its own employees the amounts it owed them, sought to claim subrogation to their laborer's privileges to the prejudice of a mortgagee who had priority over the privilege that the subcontractor was accorded by the Act. On rehearing, the Louisiana Supreme Court rejected the subcontractor's claim of subrogation, citing the general rule that one cannot be subrogated to the rights of the obligee of an obligation as to which he is the principal obligor.[520]

An alternative ground for the Court's holding in *Pringle-Associated Mortgage Corp.* was that a laborer is not a creditor of the owner until he files his statement of claim or privilege and that there can thus be no subrogation to a laborer's rights until the laborer has done so. This rationale was based on the wording of the pre-1981 Act, which provided that a laborer had a personal claim against the owner "for a period of one year from the filing of his claim" and that the presentation and recordation of his claim in the manner required by the Act would "create in his favor a privilege on the land and improvements."[521] Notably, the present Private Works Act contains no similar pre-condition, providing instead that filing

519. Pringle-Associated Mortg. Corp. v. Eanes, 226 So. 2d 502 (La. 1969).

520. *See also* LA. CIV. CODE ANN. art. 1829 cmt. d (2008). The Louisiana Supreme Court would later have occasion to reach a similar holding in *Bayou Pierre Farms v. Bat Farms Partners, III*, 693 So. 2d 1158 (La. 1997), in which the Court, analogizing to its prior ruling under the Private Works Act in *Pringle-Associated Mortgage Corp. v. Eanes*, held that an agricultural laborer's privilege protects only the individuals who actually perform agricultural labor rather than the partnership employing them. *But see* Tee It Up Golf, Inc. v. Bayou State Constr., LLC, 30 So. 3d 1159 (La. Ct. App. 3d. Cir. 2010), which, without citing either *Pringle-Associated Mortgage Corp.* or *Bat Farms*, allowed a corporate general contractor in a Private Works Act case to claim the laborer's privileges of its own employees. This portion of the Court's opinion was only dicta because the Court correctly found that the general contractor's statement of claim or privilege, which contained only a municipal address of the immovable, was defective. *Id.* at 1162. The official revision comments to the 2019 revision indicate an intent to repudiate this dicta in *Tee It Up Golf, Inc*. *See* LA. REV. STAT. ANN. § 9:4802 cmt. h.

521. *Id.* § 9:4812 (1966).

is necessary only to preserve claims and privileges, rather than to create them.[522]

The 2019 revision makes clear that a contractor or subcontractor who discharges a claim arising under the Act may not assert subrogation, whether legal or conventional, to the claimant's claim under the Act or his privilege upon the immovable.[523] As the official revision comments indicate,[524] allowing them to do so would be inconsistent with the indemnities that they owe under the Act.[525] The preclusion of subrogation applies regardless of whether, as in *Pringle*, the contractor or subcontractor is the principal obligor of the obligation. For instance, if a contractor, in response to a claim made against him by a supplier to a subcontractor, pays the obligation owed to the supplier, he may not assert subrogation to the supplier's claim against the owner or the supplier's privilege on the immovable. The Private Works Act does not, however, preclude him from asserting subrogation to the supplier's contractual right against the responsible subcontractor who failed to pay the supplier.[526]

Similar rules apply under the 2019 revision to a surety that pays a claimant to whom the surety is liable. The surety is legally subrogated to the claimant's contractual rights but may not assert by subrogation his claims or privileges arising under the Act.[527] The Act does not, however, preclude the surety from asserting subrogation to the owner's rights under suretyship law.[528]

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522. *Id.* § 9:4822 (1982). Nevertheless, a few cases decided long after the 1981 revision have continued to cite *Pringle-Associated Mortgage Corp*. for the proposition that a claim and privilege does not arise in favor of a claimant until he files a statement of claim or privilege. *See* Century Ready Mix Corp. v. Boyte, 968 So. 2d 893 (La. Ct. App. 2d Cir. 2007); First Thrift and Loan, L.L.C. v. Griffin, 954 So. 2d. 269 (La. Ct. App. 2d Cir. 2007). The error in this reasoning is apparent from two provisions of the Act stating that certain narrow classes of privileges arising under the Act are not effective *as to third persons* until a statement of claim or privilege is filed. LA. REV. STAT. ANN. §§ 9:4808(C) and 9:4822(D) (1982); *see now id.* §§ 9:4808(C) and 9:4820(D) (2020). If no claim or privilege arising under the Act were effective *even between the parties* until filing, these provisions would be both unnecessary and meaningless.

523. LA. REV. STAT. ANN. § 9:4802(F) (2020).

524. *Id.* § 9:4802 cmt. h.

525. *Id.* § 9:4802(F).

526. *Id*.

527. *Id.* § 9:4813(F).

528. *Id.* § 9:4813 cmt. g.

## VII. EFFECTIVENESS OF PRIVILEGES AGAINST THIRD PERSONS AND RANKING

The issue of the ranking of a Private Works Act privilege against other encumbrances is inextricably linked to the issue of when the privilege becomes effective against third persons. Private Works Act privileges are generally effective against third persons, without recordation, as of the earlier of the date of commencement of work or the date of filing notice of contract, and they are inferior to only those mortgages and vendor's privileges that previously became effective against third persons.[529] The 2019 revision did not alter this basic rule or its numerous exceptions. The revision did, however, wholly rewrite the ranking provision of the Act in an effort to make it more consistent with the general regime that exists under other Louisiana law for the ranking of encumbrances upon immovables.

### *A. Effectiveness of Private Works Act Privileges Against Third Persons*

It is perhaps a common belief among Louisiana practitioners that privileges upon immovables, like mortgages,[530] quite naturally rank according to the dates of their filing, with the result that they are necessarily inferior to those encumbrances that were previously recorded but superior to those encumbrances recorded afterward. This belief, to the extent that it exists, is a misconception of the regime that the Civil Code actually establishes. The Civil Code provides that privileges take effect against third persons from the date of registry,[531] but they have priority over mortgages, even previously recorded mortgages, provided that the act or other evidence of the secured obligation is recorded in a timely manner.[532] Among themselves, the ranking of privileges is determined by the nature of each of the competing privileges, with privileges of the same nature being paid concurrently.[533] The time within which filing of a

529. *Id.* §§ 9:4820–21.

530. LA. CIV. CODE art. 3307(3) (2020).

531. *Id.* art. 3274.

532. *Id.* arts. 3186 and 3274. *See* Lawyers Title Ins. Corp. v. Valteau, 563 So. 2d 260 (La. 1990); Verret v. Rougeau, 579 So. 2d 1239 (La. Ct. App. 3d Cir. 1991); *see also* PLANIOL & RIPERT, *supra* note 9, No. 3139, at 700: "Because of their nature, the privilege necessarily ranks all mortgages established on the same immovable, although anterior to it. This is provided by [French Civil Code] Art. 2095, which provides that the privilege is the right to be preferred to the other creditors, even mortgages."

533. LA. CIV. CODE arts. 3187–88.

privilege must occur in order to be considered timely is generally governed by Civil Code article 3274: seven days from the date of the act or obligation when registry is required in the same parish in which the act was passed or the obligation originated; otherwise, 15 days.[534]

Statutes creating specific privileges often create exceptions to these general rules, such as by providing that those privileges will take their ranking based on the dates of their filing.[535] The Private Works Act itself creates exceptions to the general rules of the Civil Code: most of the privileges the Act creates are effective against third persons without recordation,[536] from the earlier of the time of filing of notice of contract or the time of commencement of the work,[537] provided that the privileges are preserved by filing a statement of claim or privilege within the filing periods the Act prescribes.[538] The Act also includes its own self-contained ranking rules to rank privileges arising under it against other privileges and mortgages.[539]

In *Gleissner v. Hughes*,[540] the Court considered an objection to the constitutionality of the 1916 predecessor to the Private Works Act,[541] which at the time provided that a privilege arising under its provisions and recorded within 45 days after the owner's acceptance of the work had priority over all other privileges and encumbrances, even those that had been recorded before work began. At the time, the Louisiana Constitution

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534. *Id.* art. 3274.

535. *See, e.g.*, LA. REV. STAT. ANN. § 9:1123.115 (2018) (privilege in favor of condominium association); *id.* § 9:1145 *et seq.* (2018) (privileges in favor of an association of property owners); *id.* § 9:4870 (2007) (privileges arising from work on oil, gas, and water wells); *id.* § 47:1577 (2004) (general privileges securing state tax obligations). Some statutes grant the special privileges they create full or partial priority over pre-existing encumbrances. *See, e.g.*, *id.* § 30:2205(F) (2020).

536. Exceptions to the recordation requirement apply to a number of other privileges on immovables as well. For instance, some of the general privileges established by the Civil Code, such as those securing funeral charges and expenses of the last illness, are effective against third persons without any recordation at all. *See* LA. CONST. art. XIX, § 19 (1921); *see also* Joseph Dainow, *Civil Code and Related Subjects: Security Devices*, 22 LA. L. REV. 322, 323 (1962) ("The so-called 'public records' doctrine has taken such a strong hold on the minds of the legal profession that, with the aid of a little wishful thinking and a lot of legal pyro-techniques, there develops a blind spot which refuses to see the established exceptions.").

537. LA. REV. STAT. ANN. § 9:4820(A).

538. *Id.* § 9:4822.

539. *Id.* § 9:4821.

540. Gleissner v. Hughes, 95 So. 529 (La. 1922).

541. Act No. 229, 1916 La. Acts 494.

of 1913[542] provided that "[n]o mortgage or privilege on immovable property shall affect third persons, unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law."[543] The Court held that, although the privileges asserted by the Private Works Act claimants certainly could not affect third persons unless recorded, the constitutional provision left to the legislature the determination of the manner and time within which the privileges must be recorded in order to bind third persons. Citing article 3274 of the Civil Code as an example of another instance in which the legislature had allowed a delay for recording a privilege, the Court held that the 1916 Act was simply an enlargement of the filing period otherwise provided in the general rule expressed in article 3274.

Four years later, the Court in *Capital Building & Loan Association v. Carter* followed *Gleissner*.[544] Citing its earlier holding in *Gleissner* and the analogous provision of the Constitution of 1921,[545] the Court held that "[u]nder this provision a lien or privilege *may affect third persons during the period in which it is not of record*, if, eventually, it is recorded in the manner and within the time prescribed by law."[546] The Court found that the 30-day filing requirement that existed under the 1922 predecessor to the Private Works Act applied and that, because the materialmen did not file within it, they held no privilege on the property. Because the Court held that the materialmen had no privilege, what it said about the effect against third persons of unfiled privileges during the period prescribed for their filing might rightly be considered dicta; however, that objection cannot be raised to the nearly contemporaneous holding of the Court in

542. LA. CONST. art. 186 (1913).

543. The identical provision had been contained in article 176 of the 1879 Constitution and later appeared in article XIX, section 19, of the 1921 Constitution. This provision was continued in force as a statute following the adoption of the Constitution of 1974 and still exists as statutory law today as article XIX, section 19, of the Constitution Ancillaries.

544. Capital Bldg. & Loan Ass'n v. Carter, 113 So. 886 (La. 1927). Under the facts of the case, a lot owner, acting as his own contractor, erected a residence on the lot using materials supplied by two materialmen. After completion, he sold the property to a building and loan association, which immediately resold the property to a third person, retaining a vendor's privilege that was timely recorded. Three months after completion, the materialmen filed claims under the 1922 predecessor to the Private Works Act, which generally provided for a 30-day lien filing period but was unclear as to what the filing period was in the case of a work performed by the owner himself.

545. LA. CONST. art. XIX, § 19 (1921).

546. Capital Bldg. & Loan Ass'n 113 So. 886, 888 (La. 1927) (emphasis added).

*Central Lumber Co. v. Schroeder*,[547] in which the materialman did in fact file within the 30-day filing period. According to the Court, "[s]ince the privilege was recorded within the time and in the manner prescribed by law, *it affected third persons during the period in which it was not of record*."[548] As authority for this proposition, the Court cited the constitutional provision as well as its prior holdings in both the *Gleissner* and the *Capital Building & Loan Association* cases.[549] Professor Daggett interprets these holdings as establishing the principle that the legislature has the prerogative of prescribing the time within which privileges on immovables must be recorded, and, if a privilege is recorded within the prescribed time, it is effective against third persons *during the period of time that it is not of record*.[550] Interestingly, this line of cases impresses upon the 1870 Code a meaning that was explicitly stated in the 1825 Code[551] but was removed in the 1870 revision, which substituted in place of that explicit statement a provision, found in present article 3273, that privileges are valid against third persons from the date of the recording of the act or evidence of the indebtedness.[552]

As the Private Works Act existed before the 2019 revision, most privileges arising under it took effect against third persons from the earlier to occur of the commencement of work or the filing of notice of contract, provided that statements of claim or privilege were later filed within the filing periods provided in the Act.[553] This rule was unchanged under the

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547. Central Lumber Co. v. Schroeder, 114 So. 644 (La. 1927).

548. *Id.* at 646 (emphasis added).

549. Though not cited in any of the Supreme Court decisions discussed above, the Orleans Court of Appeal had previously reached a similar holding based upon nearly identical reasoning. Pratt v. Damon Castle Hall Co., 2 Pelt. 67, 70 (Orleans Ct. App. 1918). Ruling on the effectiveness of a paving lien recorded within the 60-day period allowed for its recordation, the court analogized to article 3274 and held that "[t]he property was also affected with the privilege, without recordation, *as regards third persons* during sixty days after the issuance of the certificate, because the law, by its very letter, accorded the contractor these sixty days within which to record his privilege." *Id.* at 72–73 (emphasis added).

550. *See* DAGGETT, *supra* note 13, § 72, at 296–321.

551. Articles 3240 and 3241 of the 1825 Code provided that a privilege was valid against third persons *from the date of the act* if recorded within a specified period of time. LA. CIV. CODE arts. 3240–3241 (1825).

552. *See generally* Wheelright v. St. Louis, N.O. & Ocean Canal Transp. Co., 17 So. 133 (1895). That change might, however, be explained by the fact that the 1870 Code originally shortened the period for recording a privilege to the very day on which the contract giving rise to the privilege was entered into; thus, there was no need for the provision on retroactivity of a timely filing.

553. LA. REV. STAT. ANN. § 9:4820(A) (2019).

2019 revision,[554] although the filing periods themselves were slightly altered, as discussed earlier in this Article.[555] Thus, the Private Works Act continues to constitute an exception to the general rules set forth in Civil Code article 3274, and the act adopting the 2019 revision recognizes both this specific exception and the existence of other exceptions through the addition of a sentence to that article specifically stating that its provisions are subject to exceptions provided by legislation.[556]

Not all privileges arising under the Private Works Act are, however, effective against third persons retroactively to the commencement of work. The 2019 revision continued to provide two exceptions to that general rule. First, privileges in favor of architects, engineers, and surveyors have no effect as to third persons acquiring rights in the immovable before their statements of claim or privilege are filed.[557] The second exception applies in the case of privileges established by the Act in favor of those engaged in site preparatory work. Those privileges also have no effect against third persons until a statement of claim or privilege preserving them is filed.[558] These exceptions effectively subordinate Private Works Act privileges held by professional consultants and subconsultants, as well as those arising from site preparatory work, to mortgages that may be filed between the commencement of work and the filing of the claimant's statement of claim or privilege, and they also cause the loss of those privileges if the immovable is sold before a statement of claim or privilege is filed. These exceptions do not, however, affect the ranking of those Private Works Act privileges against other privileges arising under the Act. Once Private Works Act privileges are properly preserved and made effective against third persons through the filing of a

554. *Id.* § 9:4820(A) (2020).

555. *Id.* § 9:4822(A)–(D).

556. LA. CIV. CODE art. 3274 (2020).

557. LA. REV. STAT. ANN. § 9:4820(D). Prior to the 2019 revision, this rule, which has existed since at least the 1922 Act, was found in Louisiana Revised Statutes § 9:4822(D)(1)(b). *See* Act No. 139, §12, 1922 La. Acts 290. The 2019 revision expanded the rule to apply to all professional consultants and subconsultants, rather than only those engaged directly by the owner.

558. LA. REV. STAT. ANN. § 9:4808(C). The same rule applied prior to the 2019 revision. Site preparatory work is also deemed to be a separate work to the extent it is not a part of the contractor's work. *Id.* This means that in most cases the filing period for privileges arising out of site preparatory work will commence to run following completion of the preparatory work, rather than completion of the entire project.

statement of claim or privilege, they are entitled to the ranking given them by the Act, as discussed in Section VII.B below.[559]

*B. Ranking of Private Works Act Privileges Against Other Encumbrances upon the Immovable*

The date that privileges arising under the Act become effective against third persons is an important factor in the determination of their ranking against other encumbrances, but it is not wholly dispositive. The 2019 revision did not change the basic ranking rules of the Act. Essentially, laborer's privileges have priority over all mortgages and other privileges, except privileges securing certain enumerated charges owed to governmental bodies. Other privileges arising under the Act are likewise subordinate to privileges securing those governmental charges, and they are also subordinate to mortgages and vendor's privileges that became effective as to third persons before those Private Works Act privileges become effective as to third persons. In other words, privileges arising under the Act in favor of claimants other than laborers are superior to all mortgages and vendor's privileges except those that were effective as to third persons prior to the commencement of work or filing of notice of contract.[560] The 2019 revision made no substantive change in these rules.

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559. *Id.* § 9:4821.

560. As it existed immediately before the 1981 revision, privileges arising under the Act were ranked behind those bona fide mortgages and vendor's privileges that had been "duly recorded before the work or labor is begun." Act No. 298, 1926 La. Acts 552, 559 (quoted in Hortman-Salmen Co. v. White, 123 So. 709, 710 (La. 1929)). Thus, actual recordation of a mortgage at the moment of commencement of the work was the paramount consideration. A few years before the 1981 revision of the Private Works Act, the court in *American Bank & Trust Co. in Monroe v. F & W Construction, Inc.*, was presented with the issue of the ranking of Private Works Act privileges against a collateral mortgage that had been recorded before commencement of work but without contemporaneous pledge of the collateral note. 357 So. 2d 1226 (La. Ct. App. 2d Cir. 1978). Construing the law in effect at the time, the court held that the collateral mortgage under these circumstances was not a *bona fide* mortgage that would prime privileges arising out of work begun before the collateral note was pledged. Mindful of this holding, the redactors of the 1981 revision of the Private Works Act changed the ranking rule to provide that Private Works Act privileges—other than those in favor of laborers—are inferior to mortgages and vendor's privileges "that are effective against third persons before the privileges granted by [the Act] are effective." LA. REV. STAT. ANN. § 9:4821 (1982). For a discussion of the application of this rule under the 1981 Act, see Rubin, *supra* note 58, at 610. Since the time of the 1981 Act, the legislature has codified the rules governing when a

What has changed in the 2019 revision is the *manner* in which the Act presents these ranking rules. Before the 2019 revision, the 1981 Act set forth, in schematic style, a single hierarchy of all possible competing encumbrances, including privileges arising under the Act.[561] For those yearning for simplicity, nothing could have been more clear. One problem, however, was that many lawyers and even some judges were sometimes tempted to look to the ranking provision of the Private Works Act, rather than the Civil Code and other relevant authority, to resolve ranking problems, even where no Private Works Act privilege was involved.[562] Another problem was that the ranking scheme under the 1981 revision was based, at its foundation, upon the invalid premise that, as a rule, mortgages outrank all privileges other than vendor's privileges and Private Works Act privileges. Indeed, as discussed above, the general rule of ranking privileges against mortgages is the opposite.[563]

Yet another problem was that this schematic chart of priorities had the effect of reordering priorities in certain cases, based on the fortuity of whether a Private Works Act privilege existed. Suppose, for instance, that long before any work is undertaken, a homeowner becomes delinquent on dues owed to his homeowners' association, which files a sworn detailed statement of its claim in the mortgage records in order to preserve its privilege. Later, a mortgage is recorded. Unquestionably, the homeowners' association's privilege has priority over the mortgage.[564] Now suppose that, while this state of facts exists, the homeowner hires a laborer to make repairs to his residence and fails to pay $100 in wages owed to the laborer, who then files a statement of claim or privilege under the Private Works Act. Under the law in effect prior to the 2019 revision, the ranking of the homeowners' association's privilege against the

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collateral mortgage becomes effective against third persons. LA. REV. STAT. ANN. § 9:5551 (2007). On the ranking issue, the 2019 revision makes no change in the law and retains nearly the identical wording that was found in the 1981 Act.

561. This ranking scheme was an innovation of the 1981 Act. Previous law did not purport to rank all mortgages and privileges against each other but instead provided that privileges arising under the Act were superior to all other mortgages and privileges, except for mortgages and vendor's privileges recorded before work began. *See* Act No. 298, 1926 La. Acts 552.

562. *See, e.g.*, Brandner v. New Orleans Office Supply Center, Inc., 654 So. 2d 858 (La. Ct. App. 4th Cir. 1995) (Schott, C.J., concurring).

563. *See* LA. CIV. CODE arts. 3186, 3269, and 3274 (2020). *See, e.g.*, Devron v. His Creditors, 11 La. Ann. 482 (1856) (holding that, in cases where the movables and unencumbered immovables of a debtor are insufficient to pay the general privileges, they are paid from the properties subject to mortgages, beginning with the least ancient and descending to the most ancient).

564. LA. REV. STAT. ANN. §§ 9:1145–48 (2018).

mortgage was instantly reordered: the laborer had first priority, and the homeowners' association's privilege was reordered behind the mortgage, based on the fortuity of the existence of a Private Works Act privilege. One advantage to the ranking scheme of the 1981 Act was that its all-inclusive hierarchical ranking minimized the instances of circular priorities. This advantage came with a price, however, in the form of the reordering of priorities that would otherwise have existed.[565]

The 2019 revision takes the approach that it is not the province of the Private Works Act to resolve the ranking of all competing encumbrances upon an immovable, particularly where no Private Works Act privilege is at issue. Instead, the ranking rules of the Act are limited in their scope to ranking privileges arising under the Act against other encumbrances and among themselves. Under the 2019 revision, a Private Works Act privilege continues to rank behind those privileges securing enumerated governmental charges. As a general rule, Private Works Act privileges rank ahead of all other privileges and ahead of all mortgages. The exception to this general rule is that a Private Works Act privilege, other than one in favor of a laborer, is inferior to mortgages and vendor's privileges that became effective as to third persons before the Private Works Act privilege becomes effective as to third persons. Substantively, this is the identical rule that was in effect before the 2019 revision.

As discussed in Section VII.A, the date that Private Works Act privileges become effective as to third persons is governed by the Act itself.[566] It is not always a simple matter to determine from the public records when competing encumbrances become effective as to third persons. For instance, a collateral mortgage does not become effective as to third persons until the *later* to occur of registry of the collateral mortgage or the perfection of a security interest in the collateral mortgage note.[567] Thus, the public records alone will usually not be a reliable

565. This advantage will be in some cases sacrificed, at least in theory if not in practicality, under the ranking rules of the 2019 revision. In the example given above, a vicious circle would exist if, instead of a laborer, a contractor had filed a statement of claim or privilege under the Act. The contractor would outrank the homeowners' association but not the mortgagee, and the mortgagee would outrank the homeowners' association.

566. *See* LA. REV. STAT. ANN. §§ 9:4808(C), 9:4822(A), (D) (2020).

567. *Id.* § 9:5551 (2007). *See* discussion *supra* note 560. In contrast, it is clear that a mortgage securing future advances has effect as to third persons from the moment of recordation, even if nothing is secured by the mortgage at that time. *See* KeyBank Nat'l Ass'n v. Perkins Rowe Associates, LLC, 823 F. Supp. 2d 399 (M.D. La. 2011).

indicator of the date that a collateral mortgage takes effect against third persons.

In the case of a vendor's privilege, a lack of clarity in the law exists. Suppose that, on a Friday afternoon, a closing occurs in which a purchaser acquires an immovable under an act of credit sale that is not recorded in the conveyance or mortgage records until the following Monday morning. In the meantime, on Saturday, a contractor hired by the new owner begins work for the construction of a building upon the immovable. The roofing subcontractor, who is not paid for work performed many months later, timely files a statement of claim or privilege within the filing period following substantial completion of the work. In a ranking dispute between this subcontractor and the unpaid vendor, it is not certain who would prevail. The vendor's privilege was timely filed within the seven-day window provided by Civil Code article 3274, but it was not of record at the moment work began. What is unclear under the law is whether the vendor's privilege was effective as to third persons from the time of execution of the act of credit sale, given that the act of credit sale was ultimately filed in a timely manner, or only from the date on which filing occurred. In the former case, the vendor's privilege would outrank the subcontractor's privilege, but in the latter case, it would be the subcontractor who would have priority. Convincing arguments can be made to support either position.[568]

The date on which a Private Works Act privilege is preserved by the filing of a claimant's statement of claim or privilege usually does not affect its ranking against other encumbrances. Most privileges under the Act take effect against third persons, and therefore enjoy ranking, based on the date work commenced or notice of contract was filed, not based on the date of filing of the statement of claim or privilege.[569]

The 2019 revision retained, but significantly clarified, a special ranking rule that had been contained in the Private Works Act since 1966.[570] This rule, which is now found in Louisiana Revised Statutes § 9:4820(B), applies only to works for the addition, modification, or repair

568. For a detailed analysis of this ranking issue, see Cromwell, *supra* note 31, at 1238–48.

569. There are exceptions to this rule in the case of privileges arising from site preparatory work and privileges in favor of professional consultants and subconsultants. *See* LA. REV. STAT. ANN. §§ 9:4808(C), 9:4820(D).

570. Act No. 507, 1966 La. Acts 1062, *enacting* LA. REV. STAT. ANN. § 9:4819(A)(2). *See also* LA. REV. STAT. ANN. § 9:4820 cmt. b (2007) (explaining that the 1981 revision incorporated the substance of this provision as § 9:4820(B) but made significant clarifications concerning the effect of the rules originally set forth in the former provision).

of an existing structure, and then only if no notice of contract is filed with respect to the work. The rule provides that when work is suspended for 30 days or more on such a project,[571] that part of the work performed before the suspension is deemed, *for ranking purposes only*, to constitute a separate work from that part performed after work resumes.

Consistent with this concept, Louisiana Revised Statutes § 9:4820(B), as modified by the 2019 revision, specifies that a claimant[572] who is entitled to a privilege with respect to work performed before the suspension must file a statement of claim or privilege within 60 days after the onset of the suspension in order to maintain his priority over a mortgage or other right that became effective as to third persons after work initially began.[573] If he does not do so, the mortgage or other right will have priority over his privilege, even as to work performed before the suspension. Regardless of whether he does so, the mortgage will in any event have priority over any privilege arising in the claimant's favor from work performed after work resumes; this is consistent with the concept that the work before the suspension is deemed to be separate from that performed after the suspension, but only for the purposes of ranking the rights of third persons who acquired rights in the immovable before work resumes.

Where Louisiana Revised Statutes § 9:4820(B) applies, it is not imperative for a claimant to file a statement of claim or privilege within 60 days after the onset of the suspension of work; he is permitted to file within the normal filing period following substantial completion or abandonment of the entire work and, by doing so, will preserve his privilege upon the immovable and his claims against the owner, contractor, and surety. But if he waits to file, he risks losing the priority of

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571. Under the statute, a work is considered suspended if the cost of the work done, in labor and materials, is less than $100 during a period of 30 days or more. *See* LA. REV. STAT. ANN. § 9:4820(B)(1) (2020).

572. Because laborer's privileges arising under the Act always have priority over mortgages and other privileges, they do not risk a loss of priority to an intervening mortgage when there is a 30-day cessation of work. *See id.* §§ 9:4820(B)(2), 9:4821(A)(2).

573. It should be noted that, if the claimant files a statement of claim or privilege within 60 days after the onset of the suspension of work, he will not only preserve his priority over an intervening mortgage, but the existence of the intervening mortgage will cause him to achieve priority over Private Works Act privileges—other than laborer's privileges—of those pre-suspension claimants who elect to defer filing until the substantial completion or abandonment of the project, as well as the privileges of all non-laborer claimants arising from post-resumption work. *See id.* § 9:4821(C).

his privilege to a mortgagee or other third person who acquires rights in the immovable at any point after work initially began and before it resumes.[574]

It is likely that the identical rules were intended by Louisiana Revised Statutes § 9:4820(B) as it existed before the 2019 revision;[575] however, the meaning of the former provision was certainly not easy to grasp from reading its text, which did not appear to convey completely or accurately the concepts that the official revision comment[576] ascribed to it.[577] Only a

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574. Moreover, as will be discussed more fully in Section VII.D below, he also risks having his privilege become subordinate to the privileges of those Private Works Act claimants who do elect to file within 60 days after the onset of the suspension of work in order to maintain their own priority over an intervening mortgage. *See* LA. REV. STAT. ANN. § 9:4821(C).

575. Before the 2019 revision, § 9:4820(B) provided as follows:

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

576. Comment (b) to former § 9:4820(B) stated as follows:

> Subsection B incorporates the substance of former R.S. 9:4819A(2). It clarifies certain aspects of the former provision. This section is irrelevant if a notice of contract for a work has been previously filed since under Subsection A(1) such filing fixes the effectiveness of the privileges as to all work done under its terms. In the absence of a filed contract, if a work of repair or renovation is suspended for more than thirty days, then as to third persons acquiring rights in or over the immovable (including mortgages) that part of the work done prior to the thirty day period will be considered a separate work from that conducted thereafter. The former law was unclear as to the effect of the previous work. If persons performing such work file their claims within sixty days of the date the prior activities cease they will enjoy priority over subsequent mortgages in the same manner as if the work had been completed. The provisions do not prevent them from awaiting final completion of the work to file their claims, but they may lose priority over intervening rights acquired during the time the work is temporarily suspended. Furthermore, the existence of such prior activity and the filing of claims for it will not give retroactive effect to work performed after the suspension ends insofar as the rights of third persons may have intervened.

577. First, from the text of former § 9:4820(B), it was not apparent that the provision applied only when notice of contract had not been filed. Second, the

single reported case cited the provision, finding it to be completely inapplicable to the facts before the court,[578] and commentary on the meaning of the provision was sparse.[579] The 2019 revision more clearly states the limited applicability of the provision to projects on existing structures for which no notice of contract is filed, its limited effect for ranking purposes only, and the filing options available to a claimant who has performed work on such a project before the onset of a suspension.

### *C. Ranking of Private Works Act Privileges Against Uniform Commercial Code Security Interests*

Prior to the 2019 revision of the Private Works Act, there was little opportunity for a privilege arising under the Act to come into competition with a security interest created under Chapter 9 of the Uniform Commercial Code (UCC).[580] The former operated exclusively upon immovables; the latter upon movables. It was, and is, certainly possible for goods subject to a Chapter 9 security interest to become component

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revision comment envisioned that suspension of work for any discreet 30-day period would cause a loss of priority as to all third persons who may have acquired rights in the immovable, but the text of the provision seemed to describe a period that was relative to the time that a *specific* third person acquired rights in the immovable. Finally, the revision comment indicated that a claimant had a choice as to when to file a statement of claim or privilege for amounts accruing prior to the suspension: either file within 60 days from the onset of the suspension, and thereby preserve the priority of his privilege over intervening rights of third persons, or file within the normal filing period following the end of the resumed work, in which event he would lose his priority over the rights of those third persons. The requirement of filing within 60 days after the commencement of the suspension might have been inferred from the statement that that the pre-suspension work was deemed to be a "distinct" work, but it was certainly not clear from the text of the provision that a claimant could await completion of the work and then file, preserving his priority over the rights of third persons other than "intervening rights acquired during the time the work is temporarily suspended." LA. REV. STAT. ANN. § 9:4820 cmt. (b) (2007).

578. KeyBank Nat'l Ass'n v. Perkins Rowe Associates, LLC, 823 F. Supp. 2d 399, 412 (M.D. La. 2011).

579. Rubin, *supra* note 58, at 584; Tate, *supra* note 337, 135–36.

580. LA. REV. STAT. ANN. § 10:9-101 *et seq.* (2016). It was, and is, however, possible for a Private Works Act privilege to attach to a thing that is made immovable only by declaration under Civil Code article 467. *See* Tate, *supra* note 337, at 141. But in that event, the thing that has been declared to be immovable would become a component part of the immovable and therefore a fixture as defined in Chapter 9 of the UCC, and it would be subject to the fixture priority rule of Chapter 9. *See* LA. REV. STAT. ANN. § 10:9-334.

parts of an immovable, or "fixtures" as they are known in the parlance of the UCC.[581] In that event, the security interest in the goods is lost, unless the secured party made a fixture filing before the goods became immobilized. Where the secured party does so, Chapter 9 contains a ranking rule[582] to rank the security interest that continues in the fixtures against the claims of "encumbrancers" of the immovable, such as the holder of a privilege upon the immovable.[583]

As discussed in Section III.G, the 2019 revision, by expanding the definition of the term "immovable" as used in the Act,[584] extended the reach of privileges arising under the Act to include not only land and buildings, but also other constructions that are permanently attached to the ground and that would be classified by law as immovable if they belonged to the landowner. When these other constructions are owned by someone other than the landowner, such as a lessee or holder of a servitude, they are characterized as movables under property law[585] and usually as equipment under the UCC.[586] Of course, this presents the possibility that these other constructions may already be encumbered by Chapter 9 security interests before Private Works Act privileges arise or may become encumbered by Chapter 9 security interests afterward. Chapter 9's ranking rule applicable to fixtures is not useful to rank a Chapter 9 security interest in these other constructions against Private Works Act privileges because fixtures are by definition goods that have become component parts of an immovable,[587] and these other constructions—being movable—are clearly not component parts of the immovable.[588]

The 2019 revision added a ranking rule to cover this isolated sphere of competition between privileges arising under the Act and Chapter 9 security interests. A Private Works Act privilege that attaches to movables—that is, to permanently attached constructions other than buildings when those other constructions are owned by someone who is not the owner of the ground—is inferior to a Chapter 9 security interest that was perfected before the privilege became effective against third persons or that is later perfected by a financing statement that was filed

581. LA. REV. STAT. ANN. § 10:9-102(a)(41).
582. *Id.* § 10:9-334.
583. *Id.* § 10:9-102(a)(32).
584. *Id.* § 9:4810(4) (2020).
585. LA. CIV. CODE art. 475 (2020); *see also* LA. CIV. CODE ANN. art. 464 cmt. d (2010).
586. LA. REV. STAT. ANN. § 10:9-102(a)(33) (2016).
587. *Id.* § 10:9-102(a)(41).
588. LA. CIV. CODE arts. 463, 475.

before the privilege became effective against third persons.[589] As explained in Section VII.A, the date that a Private Works Act privilege becomes effective against third persons is usually dependent on when work begins or when notice of contract is filed in the mortgage records, rather than on when a statement of claim or privilege is filed.[590] The date that a security interest is perfected is, of course, a matter governed exclusively by Chapter 9 of the UCC.[591]

This priority rule allows a secured party with a Chapter 9 security interest the benefit of the first-to-file-or-perfect rule that generally applies under Chapter 9,[592] provided that the secured party enjoys either continuous filing or perfection from the date that it first filed or perfected and provided that that date precedes the date on which competing Private Works Act privileges become effective as to third persons.[593] Of course, the ranking rule applies only to rank the secured party's security interest in the movable construction against the Private Works Act claimant's privilege in the same movable construction. The secured party has no security interest in the immovable itself. The Private Works Act claimant's privilege upon the immovable, and upon the lease or real right allowing the movable construction to exist on the immovable, would therefore not be subject to the security interest, regardless of when it became perfected.

*D. Ranking of Private Works Act Privileges Among Themselves*

The Private Works Act provides that the privileges it creates rank among themselves according to a specified hierarchy based upon their nature. Laborer's privileges have the highest priority, followed by the privileges of subcontractors, sellers, and lessors, all of which have equal ranking behind that of laborers. Those accorded the lowest tier of ranking include contractors, professional consultants, and professional

589. LA. REV. STAT. ANN. § 9:4821(D) (2020).

590. *Id.* § 9:4820(A). For exceptions to this rule, see *id.* §§ 9:4808(C), 9:4820(D).

591. *See id.* §§ 10:9-308 *et seq.* (2016). A Chapter 9 security interest is not perfected by a filing in the local mortgage records but rather by the filing of a financing statement in the UCC records of any parish clerk of court or, if the debtor is located in another state, by a filing with the proper filing office in that other state. *See id.* §§ 10:9-301(1), 10:9-501(a)(4).

592. *See id.* § 10:9-322(a)(1).

593. As comment (g) to Louisiana Revised Statutes§ 9:4821 indicates, the statute creating privileges for labor, services, or supplies provided in connection with oil, gas, and water wells contains a similar rule to rank those privileges against Chapter 9 security interests. *See id.* § 9:4870(B)(3) (2007).

subconsultants.[594] This hierarchy did not change with the 2019 revision, but the revision did fill a gap that had been created by a prior legislative amendment. As discussed in Section III.I, the legislature in 1989 amended Louisiana Revised Statutes § 9:4802 by adding a paragraph (A)(5), which granted a claim and privilege to surveyors, engineers, and architects engaged by a contractor and their professional subconsultants.[595] Apparently through inadvertence, the legislature failed to amend the ranking provision at the same time to provide a ranking for this newly created privilege. Under a literal application of the ranking statute as it existed before the 2019 revision, this privilege would rank behind those of all other Private Works Act claimants, including the contractor and surveyors, engineers, and architects engaged by the owner. The 2019 revision cured this apparent oversight by ranking the privileges of all professional consultants and subconsultants equally, regardless of whether they are engaged by the owner or contractor.[596]

When privileges arise under the Private Works Act from two or more *successive* works, an interesting ranking question arises: do privileges from the work that commences first outrank those arising from later works? Because privileges arising from the first work are effective as to third persons before those arising from later works, temptation exists to reach the conclusion that privileges arising from the first work must necessarily have priority.[597] That conclusion would be based upon the unspoken premise that privileges, like mortgages, rank in order of effectiveness against third persons. That premise is, however, untrue: as mentioned above, privileges as a rule rank among themselves according to their nature, rather than according to the order of their filing or effectiveness as to third persons, and privileges of the same nature rank concurrently.[598] Nothing in the Private Works Act, either before or after the 2019 revision, provides otherwise with respect to the ranking of one Private Works Act privilege against another.[599]

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594. The privilege of surveyors, engineers, and architects has ranked equally with that of the contractor since at least 1922. *See* Act No. 139, 1922 La. Acts 290.

595. Act No. 41, 1989 La. Acts 287.

596. LA. REV. STAT. ANN. § 9:4821(B)(3) (2020).

597. There are apparently no reported cases that have addressed this issue. In her treatise, Professor Daggett, without citation to authority, makes the observation that privileges arising from one work will "naturally" outrank those arising from a later work. *See* DAGGETT, *supra* note 13, §71, at 295.

598. *See* LA. CIV. CODE arts. 3187–88 (2020).

599. The Private Works Act *does* provide otherwise with respect to the issue of the ranking of privileges arising under the Act against vendor's privileges and other types of privileges. *See* LA. REV. STAT. ANN. § 9:4821(A).

Before the 2019 revision, the text of the Act did not specifically address this issue, though one of the official revision comments to the Act observed that "all claims of materialmen, subcontractors and lessors of movables rank equally (whether or not they arise out of the same work) and ahead of the privilege of the contractor and surveyors, architects, and engineers which also rank equally."[600] With the 2019 revision, this rule is made express in the text of the law itself.[601]

Nevertheless, in order to resolve a vicious circle that would sometimes result from a strict application of this rule, the revision includes an exception. Suppose that between the time of commencement of one work and the time of commencement of a later work on the same immovable, a mortgage is filed. Later, subcontractors from each of the two works file statements of claim or privilege. For the reasons just mentioned, the two subcontractors would ordinarily rank equally, even though they were involved with different works begun at different times. Of the two subcontractors, however, only the one involved with the first work would have priority over the mortgage. In this case, the Act includes a rule that resolves the vicious circle that would otherwise arise: because the first subcontractor has priority over the mortgage, he also has priority over all Private Works Act privileges that are subordinate to the mortgage.[602] Thus, under these circumstances, priority would go to the privilege of the subcontractor from the first work, followed by the mortgage, followed by the privilege of the subcontractor from the second work. This example demonstrates the importance of the definition of a "work."[603] If there had been only a single work that commenced before the mortgage was filed, rather than two successive works with an intervening mortgage, the privileges of both subcontractors would outrank the mortgage and would rank equally between themselves.

## VIII. CHANGES TO THE CIVIL CODE

The articles of the Civil Code providing for construction privileges remained unaltered for nearly a century after the legislature's enactment

600. *Id.* § 9:4821 cmt. b (2007).

601. *Id.* § 9:4821(B) (2020) ("[T]he privileges granted by this Part rank among themselves in the following order of priority, *regardless of whether they arise from the same work or different works and regardless of the dates on which the privileges become effective as to third persons*." (emphasis added)).

602. *Id.* § 9:4821(C).

603. *Id.* § 9:4808(A) ("a single continuous project for the improvement, construction, erection, reconstruction, modification, repair, demolition, or other physical change of an immovable").

of legislation effectively superseding them. As mentioned in Section I.D, the 1926 Act purported to exhaust the subject matter and to repeal all conflicting laws, including inconsistent provisions of the Civil Code.[604] Despite their continued presence in the Civil Code, these articles have truly been "dead letters," as the courts have held that they were impliedly repealed by the 1926 Act, even in the case of provisions not inherently in conflict with that Act.[605]

The 2019 revision recognized this reality by expressly repealing the entirety of Civil Code articles 2772, 2773, 2774, 2775, 2776, 3268, and 3272.[606] A number of other articles, however, contemplated the existence of the privileges created by the repealed articles but could not themselves be repealed outright. In those instances, the articles were modified to eliminate references to construction privileges created by the Civil Code.[607] In several of these modified articles, a reference to special privileges created by legislation was substituted. This reference would, of course, encompass privileges arising under the Private Works Act, all of which are special privileges.[608]

The revision of Civil Code article 3267 forced the legislature to address two apparent errors that have existed in that article since the adoption of the 1825 Civil Code. Prior to the revision, the article provided that, if the *movables* of a debtor were insufficient to satisfy vendor's privileges and construction privileges, those special privileges would be satisfied before most general privileges. As Professor Joseph Dainow argued long ago, the word "movable" in the article should have been "immovable."[609] When that substitution is read into the article, the

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604. Act No. 298, §16, 1926 La. Acts 552.

605. *See* Robertshaw Controls Co. v. Pre-Engineered Products, Co., Inc., 669 F.2d 298 (5th Cir. 1982) (holding that the "stop payment" provision of Civil Code article 2772 was impliedly repealed by the 1926 Act, even though the provision was not inherently inconsistent with that Act).

606. Act No. 325, §3, 2019 La. Acts.

607. Act No. 325, §2, 2019 La. Acts, *amending* LA. CIV. CODE arts. 3249, 3267, 3269, and 3274. The amendment to article 3249 also repealed an anachronistic privilege created under paragraph 4 of that article in favor of persons working on the construction or repair of levees. The last reported case to interpret that provision is *Wheelright v. St. Louis, N.O. & Ocean Canal Transportation Co.*, 19 So. 591 (La. 1896), which involved a claim by the sheriff for the cost of heavy expenditures that he had incurred while the property was under seizure in a suit instituted by the purported privileged creditor.

608. *See* LA. CIV. CODE arts. 3249, 3267, 3269 (2020).

609. Dainow, *supra* note 34. As Professor Dainow observes, the only other Civil Code that appears to have replicated this error is the Civil Code of Argentina. *Id.* at 378. The redactors of the Argentine Civil Code are known to have borrowed

meaning of the article is that special privileges on immovables are paid in preference to general privileges, other than those general privileges specifically listed in the article. The 2019 revision corrected that error, and the article now provides what was almost certainly intended from the inception.

The other apparent error in the article had been noted, seemingly for time immemorial, by an asterisk in the printed volume of the Revised Statutes claiming the existence of an error in the English translation of the French text and indicating that the word "debts" should be "creditors."[610] The Law Institute considered this claim of error but decided that the word "debts" was appropriate because the things to which "debts" stand in juxtaposition are "charges," which are clearly themselves debts rather than creditors.[611] The Law Institute's decision on this point is supported by the language of the Projet of the 1825 Civil Code, which used the French word "*créances*" rather than "*créanciers*" in the French version of the article, while using "debts" in the English version.[612] Because a *créance* is a debt, and not a creditor, there was no inconsistency in the two versions contained in the Projet. When the 1825 Code was actually adopted, the error that crept in appears to have been made in the French, rather than the English, version of the article. For these reasons, in the 2019 revision, a conscious decision was made to leave the word "debts" in the article, rather than substituting "creditors."

As discussed in Section VII.A, the 2019 revision also amended Civil Code article 3274, which provides the general rule that a privilege upon an immovable is not effective as to third persons until recorded and enjoys priority over mortgages only if recorded within a short window of time. As amended, the article now recognizes that these rules are subject to exceptions provided by legislation.[613] The Private Works Act is itself an example of legislation creating exceptions to the article.

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provisions from the Louisiana Civil Code, among others. *See* Rolf Knutel, *Influences of the Louisiana Civil Code in Latin America*, 70 TUL. L. REV. 1445, 1462 (1995–96).

610. The phrase in question reads: "in preference to other privileged debts of the debtor, even funeral charges, except the charges for affixing seals, making inventories, and others which may have been necessary to procure the sale of the thing."

611. Minutes of the April 27, 2018 Meeting of the Security Devices Committee, Louisiana State Law Institute (May 3, 2018) (on file with the Law Institute).

612. Projet of the Civil Code of Louisiana of 1825, p. 378.

613. LA. CIV. CODE art. 3274 (2020).

## IX. TRANSITIONAL PROVISIONS OF THE 2019 REVISION

The 2019 revision became effective January 1, 2020, and it applies prospectively to works begun on or after that date, other than those for which notice of contract was filed before that date. With the limited exceptions discussed below, the Act as it existed prior to the 2019 revision will continue to apply even after January 1, 2020, to works that were begun before that date or for which a notice of contract was filed before that date.[614]

As mentioned in Section IV.D, one of the goals of the revision was to promote the stability of land titles by providing an outer date for the filing of statements of claim or privilege arising from works for which notice of contract was filed. As discussed previously, under the Act as it existed prior to the 2019 revision, where notice of contract was filed, the delays for filing did not commence to run upon substantial completion of the work but rather ran only from the date of filing a notice of termination. If no notice of termination was filed, the filing period never expired. The 2019 revision changed this rule by imposing an outer deadline that is reckoned from the date of substantial completion or abandonment of the work, even in the absence of filing of a proper notice of termination.[615]

If the revision were wholly inapplicable to works begun before January 1, 2020, the titles of immovables on which those works were performed would not benefit from this curative effect, and the filing periods applicable to those works would continue to remain open indefinitely—until the owner actually files a notice of termination. To address this, the revision provides a special outer filing date for works for which a notice of contract was filed before January 1, 2020.[616] If, in the case of any such work, a notice of termination was also filed prior to January 1, 2020, then the filing period already began to run at the time the revision became effective, and the revision provides that the filing rules under pre-revision law will continue to apply.[617] This is so because the application of those rules will be sufficient to bring about a prompt termination of the filing period.

If, on the other hand, no notice of termination was filed before January 1, 2020, the filing period clearly would not have commenced to

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614. Act No. 325, §6, 2019 La. Acts.

615. LA. REV. STAT. ANN. § 9:4822(B)(2) (2020).

616. Act No. 325, §7, 2019 La. Acts. If no notice of contract is filed before that date, then under the Act as it existed before the 2019 revision, the filing period would run from the date of substantial completion or abandonment, and the application of the new curative provision is unnecessary.

617. Act No. 325, §7(A), 2019 La. Acts.

run under pre-revision law, even if the work was actually completed months or even years earlier. For that reason, the revision provides two special filing rules for those works. If the work was substantially completed or abandoned before January 1, 2020, even though no notice of termination was filed before that date, then claimants must file within the filing period that would have applied under pre-revision law—that is, 30 or 60 days after the date that a notice of termination is ultimately filed, depending upon the type of claimant—but in no event may the filing be made later than July 31, 2020, in the case of a general contractor or later than June 30, 2020, in the case of all other claimants.[618] If the pre-existing work was not completed or abandoned, and no notice of termination is filed, until after January 1, 2020, the filing periods provided by the 2019 revision are simply made applicable, despite the general non-retroactivity of the revision.[619] The act adopting the 2019 revision specifically provides that a failure to file within these periods causes the loss of the claimant's claim and privilege under the Private Works Act.[620] Of course, contractual rights would not be lost.

The effect of these rules is that, where a pre-existing work on a project for which notice of contract was filed was substantially completed before January 1, 2020, the filing period will in all events end no later than July 31, 2020, for general contractors and no later than June 30, 2020, for other claimants, even if no notice of termination is ever filed.[621] This effect will result whether substantial completion occurred at some point between the adoption of the revision and its January 1, 2020, effective date or whether substantial completion occurred many years earlier.

Another exception to the general rule of non-retroactivity exists in the case of the rules ranking Private Works Act privileges among themselves and against other encumbrances upon an immovable. Chaos would reign if differing ranking regimes were allowed to rank encumbrances bearing

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618. Act No. 325, §7(B), 2019 La. Acts.

619. Act No. 325, §7(C), 2019 La. Acts.

620. Act No. 325, §7(D), 2019 La. Acts.

621. Legislation enacted in response to the COVID-19 public health emergency may have had the effect of extending one or both of these deadlines slightly. *See* Act No. 162, §1, 2020 La. Acts, enacting LA. REV. STAT. ANN. §§ 9:5828-30 (2020). In addition to extending prescriptive and peremptive periods that would otherwise have expired on or before July 5, 2020, the legislation ratified a gubernatorial proclamation that had suspended all "legal deadlines" until at least April 13, 2020, without specifying the effect of the suspension or limiting its reach to periods that would otherwise have expired during the period of suspension." *See* State of Louisiana, Executive Department, Proclamation Number JBE 2020-30.

upon the same property. Accordingly, the revision provides that the changes to the ranking rules found in Louisiana Revised Statutes § 9:4821 are retroactive. There may be a rare case in which this retroactive application of the ranking rules would deprive a claimant, mortgagee, or other privilege holder of rights that have already vested. Both for reasons of fairness and for the purpose of avoiding an unconstitutional impairment of vested rights, the 2019 revision provides that the new ranking provision is not to be applied retroactively where such application would cause the divestiture of vested rights.[622]

The final instance of retroactivity involves the amendments that the 2019 revision made to Louisiana Revised Statutes § 9:4833.[623] Apart from purely stylistic changes, the revision effected two changes of substance in that section. The first was the addition of a procedure allowing an owner who is improperly named in a statement of claim or privilege to require cancellation of the statement of claim or privilege insofar as it affects that owner and his interest in the immovable.[624] This procedure is made available to owners who were improperly named under filings made with respect to works that were begun before the effective date of the revision. The other change was the addition of language making clear that the recorder of mortgages is required to cancel a statement of claim or privilege upon request when its effect has ceased for lack of timely filing of a notice of pendency of action.[625] In this instance as well, there is no reason why this provision should not also be applied retroactively to pre-existing works in order to facilitate the removal from the public records of statements of claim or privilege that have lost their effectiveness against third persons.

## CONCLUSION

Doubtless, it remains as true today as in the time of Goethe that a building should be properly situated, securely founded, and successfully executed. But, as this Article has sought to demonstrate, it is equally important that contractors, subcontractors, materials suppliers, equipment lessors, laborers, professional consultants, and others who contribute to the improvement of an immovable be compensated for their contributions. Founded in the civil law's "intelligent sense of justice"[626] and shaped through three major revisions amid countless legislative amendments,

622. Act No. 325, §8, 2019 La. Acts.
623. Act No. 325, §9, 2019 La. Acts.
624. LA. REV. STAT. ANN. § 9:4833(A)(2) (2020).
625. *Id.* § 9:4833(E).
626. City of Baltimore v. Parlange, 23 La. Ann. 365, 366 (1871).

Louisiana's Private Works Act has consistently promoted the basic policy of protecting the rights of those persons to payment, while at the same time delicately balancing the interests of owners, lenders, contractors, and other persons having interests arising from private works.

As was the case with prior revisions of the Act, the impetus for the 2019 revision was a perception that piecemeal legislative amendments over the years had generated confusion, inconsistencies, unintended results, and pointless complexity. Toward the ends of removing confusion and restoring the Act's integrity and cohesiveness, the 2019 revision made substantial progress, particularly through the use of more precise language to achieve the results that are intended and the elimination of duplicative or conflicting provisions. The 2019 revision also succeeded in eliminating a number of unnecessary traps for unwary claimants, though, as pointed out in the discussion above, it might have created one of its own for residential claimants. Additionally, the 2019 revision represents a step toward modernization of the law, particularly through its accommodation of electronic means of communication. To the extent that one of its goals was simplification, however, the 2019 revision can claim only marginal success, for the Act remains nearly as complex as ever. Of course, this complexity exists not merely for its own sake, but rather because of a sentiment by those with an interest in the proper working of the Act that complex rules are needed to achieve fairness under the multitude of circumstances and claimants that it covers.

Earlier revisions of the Private Works Act were themselves followed by innumerable legislative amendments, leading each time to a perception of confusion and disorder beckoning for yet another revision. Likely, and perhaps inevitably, proposals will continue to be made over the years to come for further legislative changes to the Act. It is the authors' hope that this Article will serve as a useful resource not only in its discussion of the changes that were made by the 2019 revision but also in its broader treatment of the policies and mechanisms of the Private Works Act and its significance in Louisiana law.