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## The Nebraska Construction Lien Act: Which Way to Lien?

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# The Nebraska Construction Lien Act: Which Way To Lien?

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### I. INTRODUCTION

The Nebraska Construction Lien Act, sections 52-125 to -159 of

the Nebraska Revised Statutes,<sup>1</sup> became effective on January 1, 1982.<sup>2</sup> The Act is modeled after article 5 of the Uniform Simplification of Land Transfers Act (USLTA),<sup>3</sup> and provides the exclusive mechanism for securing nonconsensual liens "against real estate by reason of improvements made thereon."<sup>4</sup> Nebraska is the only state which has adopted this model legislation,<sup>5</sup> and the provisions apply only to improvements made after the effective date of the Act.<sup>6</sup>

## II. MECHANICS' LIEN DEVELOPMENT

Mechanics' liens are exclusively statutory creations.<sup>7</sup> Although

1. NEB. REV. STAT. §§ 52-125 to -159 (Supp. 1982) [hereinafter cited as the Act]. NEB. REV. STAT. § 52-125 states that the lien provisions shall be cited as the Nebraska Construction Lien Act. The drafters of the Uniform Simplification of Land Transfers Act (USLTA) adopted the term "construction lien" from a Wisconsin lien statute, and explained its action by stating:  
This title, taken from a Wisconsin modification of its mechanics' lien laws, is adopted because the title "[m]echanics' [l]iens" improperly implies that laborers are the primary beneficiaries of mechanics' lien laws. With the payment of wages weekly or bi-weekly by contractors (as is the universal custom today) wage claimants no longer loom large in mechanics' lien situations.  
USLTA art. 5, introductory comment, at 62 (1977).
2. NEB. REV. STAT. §§ 52-125 to 159 (Supp. 1982).
3. USLTA was approved and recommended for enactment in all fifty states by the National Conference of Commissioners on Uniform State Laws at its annual conference in Vail, Colorado, on July 29 to August 5, 1977. The USLTA was later approved by the American Bar Association at its annual meeting in New Orleans, Louisiana, on February 14, 1978. "The purposes of the Act include the furtherance of the security and certainty of land titles, the reduction of the costs of land transfers, the balancing of the interests of all parties in the construction lien area, and the creation of a more efficient system of public land records." USLTA, prefatory note, at 3 (1977).
4. NEB. REV. STAT. § 52-126 (Supp. 1982).
5. Although Nebraska is the only state which has enacted article 5 of the USLTA, Florida has similar lien legislation which served as the model for article 5. USLTA art. 5, introductory comment, at 62 (1977). For a comparison of Florida law and article 5, see *The Uniform Land Transactions Act and The Uniform Simplification of Land Transfers Act: Potential Impact on Florida Law*, 10 STETSON L. REV. 21 (1980).
6. Real estate improvements performed prior to January 1, 1982, are governed by Nebraska's prior mechanics' lien law, NEB. REV. STAT. §§ 52-101 to -114 and §§ 52-121, -122 (1978) (repealed 1982).  
"Any person performing any labor or furnishing any material, machinery, or fixtures before January 1, 1982, may enforce any lien authorized under any statute repealed by this act as though such repeal had not occurred." NEB. REV. STAT. § 52-158 (Supp. 1982).
7. S. PHILLIPS, A TREATISE ON THE LAW OF MECHANICS' LIENS ON REAL AND PERSONAL PROPERTY 3 (2d ed. 1883); Stone, *Mechanics' Liens in Iowa*, 30 DRAKE L. REV. 39, 41 (1980-81); Urban & Miles, *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Prior-*

this concept was well developed in the civil law,<sup>8</sup> it was never recognized at common law or in equity.<sup>9</sup> The first mechanics' lien statute in the United States was enacted in Maryland in 1791,<sup>10</sup> and today, all fifty states have such legislation.<sup>11</sup> Nebraska statutorily recognized the mechanics' lien concept even prior to statehood<sup>12</sup> and it has existed continuously to the present time.<sup>13</sup>

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ity, 12 WAKE FOREST L. REV. 283, 286 (1976); Comment, *Mechanics' Liens—Potential Pitfall for the Homeowner*, 62 KY. L.J. 278, 279 (1973) [hereinafter cited as Comment, *Mechanics' Liens*]; Comment, *The Release Bond Statutes: Achieving Balance in the Mechanics' Lien Laws*, 28 U.C.L.A. L. REV. 95, 97 (1980) [hereinafter cited as Comment, *The Release Bond Statutes*]; Note, *Mechanics' Liens in Virginia*, 29 VA. L. REV. 121 (1942).

8. Note, *supra* note 7, at 121; Note, *Pre-Lien Notice Requirements: An Exception?*, 1977 DET. C.L. REV. 725, 727 [hereinafter cited as Note, *An Exception*].

9. See *supra* text accompanying note 7.

10. Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. PA. L. REV. 1083 (1931-32); Frank & McManus, *Balancing Almost Two Hundred Years of Economic Policy Against Contemporary Due Process Standards—Mechanics' Lien Law in Maryland After Barry Properties*, 36 MD. L. REV. 733, 735 (1977); Note, *supra* note 7, at 122. The concept of the mechanics' lien dates back to ancient Rome. The French Code Napoleon accorded liens to masons, architects, contractors, and others employed in the building of houses. See Cushman, *supra*, at 1083; Note, *supra* note 7, at 121-22.

As stated in the text, Maryland passed the first mechanics' lien statute in the United States. Upon the recommendation of Thomas Jefferson and James Madison, this statute was enacted to stimulate and encourage the construction of Washington D.C. It gave a lien to the "undertaker, or workmen, employed by the person for whose use the house shall be built." 1791 Md. Laws, ch. 45, § 10; Cushman, *supra*, at 1083. For a general discussion of the history of mechanics' liens, see S. PHILLIPS, *supra* note 7, at 17; Cushman, *supra*, at 1083; Cutler & Shapiro, *The Maryland Mechanics' Lien Law Its Scope and Effect*, 28 MD. L. REV. 225 (1968); Frank & McManus, *supra*, at 735-36; Note, *supra* note 7, at 121-23.

11. Comment, *Mechanics' Liens*, *supra* note 7, at 278; Comment, *The Release Bond Statutes*, *supra* note 7, at 95; Note, *supra* note 7, at 122.

12. The Territory of Nebraska first codified the concept of mechanics' liens in 1855. 1855 GEN. LAWS OF THE TERRITORY OF NEB., Pt. II, Liens to Mechanics. This initial statute was a Pennsylvania-type lien in that it allowed a lien for the value of the labor on materials furnished, regardless of the amount already paid by the owner to the general contractor. See *infra* notes 28-34 and accompanying text.

13. In 1866, the theory of mechanics' liens was altered in Nebraska to reflect the New York-type system. See *infra* notes 28-34 and accompanying text. As a result, the property owner could not be held liable to lien claimants if payment had been made to the general contractor prior to the lien filing.

"[The] amount due may be recovered from said owner by the creditor of said contractor, in an action at law, and to the extent in value of any balance due by the owner to his contractor . . ." REV. STAT. OF THE TERRITORY OF NEB. ch. 35, § 5 (1866).

Nebraska's mechanics' lien philosophy ran a complete circle when the statutes were again amended in 1885 to follow the Pennsylvania-type system of affording liens for the full value of labor and materials supplied.

[I]f the contractor does not pay such person or sub-contractor for the

Mechanics' liens are designed to provide security to those who, by providing labor and materials, add value to real property.<sup>14</sup> This security results from affording the laborer or materialman a preference for payment over other encumbrances which the owner may place on the real estate.<sup>15</sup> Mechanics' lien statutes grant remedial rather than ownership rights in property.<sup>16</sup> In other words, the mechanics' lien claimant is given the right to collect monies owed, through foreclosure, and not by any right to possess or use the real property.<sup>17</sup> This right to foreclose, as opposed to a right of possession, distinguishes the mechanics' lien from other property interests.

The justification for placing a mechanics' lien claimant in a preferred position among creditors is that labor or materials contributed by the claimant, once incorporated into the real property, are not retrievable by him.<sup>18</sup> Unless the claimant can force a sale through foreclosure, the owner of the real property will be unjustly enriched to the extent of the value of the labor or materials contributed by the unpaid claimant.<sup>19</sup> The lien against the property is necessary to protect the claimant's interests because the claimant usually has no direct contract action against the property owner.<sup>20</sup>

Mechanics' liens were initially enacted to protect the interests

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same, such sub-contractor or person shall have a lien for the amount due for such labor or material, . . . and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days hereintofore specified.

COMP. NEB. STAT. ch. 54, § 2 (1885). Nebraska retained the Pennsylvania system of mechanics' liens from 1885 until the adoption of the Nebraska Construction Lien Act.

14. S. PHILLIPS, *supra* note 7, at 16; Comment, *Mechanics' Liens*, *supra* note 7, at 278; Note, *supra* note 7, at 122.

15. *Id.*

16. Stone, *supra* note 7, at 42; Note, *An Exception*, *supra* note 8, at 728.

17. Stone, *supra* note 7, at 42.

18. Roy F. Starnes Elec. Co. v. Hamilton-Brown Shoe Co., 350 Mo. 1178, 171 S.W.2d 580 (1943). "Mechanic's lien statutes . . . find their basis in the equitable principle that everyone who, by his labor and materials, contributes to the preservation or enhancement of the property of another, thereby acquires a right to compensation." Peters v. Halligan, 182 Neb. 51, 58, 152 N.W.2d 103, 108 (1967).

19. See, Note, *An Exception*, *supra* note 8, at 728.

20. Because subcontractors and materialmen customarily deal with the general contractor or other subcontractors and not the property owner, these parties have no cause of action against the owner based on contract. As a result parties at each level have payment claims only against parties at the next level "above" and performance claims only against parties at the next level "below." For performance the owner must look to the general contractor, and the general contractor to his subcontractors. For payment, the general contractors must look to the owner, the subcontractors to the general contractor, the materialmen to the subcontractors, and each workman to his own employer.

of laborers who, by their time and effort, materially increased the value of real property.<sup>21</sup> Today, because of the general practice of paying wages on a weekly or bi-weekly basis, state and federal wage and hour laws, and union involvement in the construction industry, laborers no longer require substantial protection in this area.<sup>22</sup> On the other hand, the industry has become more sophisticated and a greater number of "tiers" are utilized on the typical construction project.<sup>23</sup> As a result, mechanics' lien protection is now directed toward subcontractors<sup>24</sup> and materialmen.<sup>25</sup> The drafters of the USLTA recognized this change in emphasis when they adopted the term, "construction lien," rather than the traditional "mechanics' lien," to designate the right afforded the lien claimant.<sup>26</sup>

As previously noted, all fifty states now have mechanics' lien legislation.<sup>27</sup> These state statutes typically follow either the New York system or the Pennsylvania system, or are a hybrid of these two lien philosophies.<sup>28</sup>

Under the New York system, the amount of all mechanics' liens is limited to that part of the contract amount which remains to be paid by the owner to the general contractor at the time that notice of the lien is given.<sup>29</sup> The key characteristic of this system is that the owner does not face double liability for payments made to the

Dugan, *Mechanics' Liens for Improvements on Real Property*, 25 S.D.L. REV. 238, 240 (1980).

21. Honigman, *Law Revision Commission Report: Construction Debt Act To Replace Mechanics' Liens*, 56 MICH. ST. B.J. 429, 430 (1977); Stalling, *The Need For Special, Simplified Mechanics' Lien Acts Applicable To Home Construction*, 5 LAW & CONTEMP. PROBS. 592 (1938).
22. *Id.*
23. As the construction industry has become more specialized and sophisticated, a greater number of contracting levels have emerged. For example, the general contractor may have 25 subcontractors, each subcontractor may have 10 materialmen or sub-subcontractors, and each materialman or sub-subcontractor may have a number of suppliers.
24. A subcontractor is one who has contracted with the general contractor or a higher subcontractor in the project chain to supply labor and/or materials for the construction project. See generally S. PHILLIPS, *supra* note 7, at 92-8.
25. A materialman is one who has contracted to supply materials to the general contractor or a subcontractor. See generally S. PHILLIPS, *supra* note 7, at 92-8. For a general discussion concerning the shift of lien protection from the laborer to the subcontractor and materialman, see *supra* note 21.
26. See *supra* note 1.
27. See *supra* note 11 and accompanying text.
28. For a discussion of the New York system, the Pennsylvania system, and the hybrid system, see Cushman, *supra* note 10, at 1084; Comment, *Mechanics' Liens*, *supra* note 7, at 279; Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138, 139-47 (1958) [hereinafter cited as Comment, *Mechanics' Liens and Surety Bonds*]; Note, *supra* note 7, at 122.
29. Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 28, at 142.

general contractor prior to the filing of liens by subcontractors and materialmen.<sup>30</sup>

The Pennsylvania system represents the majority view and is less favorable to the interests of the property owner.<sup>31</sup> Unlike the New York system, liens may attach to the extent of the value of work performed rather than the amount still owned to the general contractor.<sup>32</sup> The theory underlying this system is that it is equitable "that he who furnishes material or labor in the construction of a building for the benefit of the owner should be made secure against the property,"<sup>33</sup> even if at some risk to the property owner. This system often results in "hidden liens" which may require the owner to pay twice for labor and materials incorporated into the real property.<sup>34</sup> The USLTA recognizes both lien philosophies and provides for an election as to lien amounts on nonresidential construction and improvements.<sup>35</sup>

Recently, mechanics' lien statutes have come under increased constitutional attack.<sup>36</sup> Although beyond the scope of this Comment, these attacks have been primarily the result of recent Supreme Court decisions emphasizing the need for due process guarantees when property is seized prior to a hearing.<sup>37</sup> The lien

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30. *Id.* at 143-44.

31. *Id.* at 144-46.

32. *Id.* Comment, *Mechanics Liens*, *supra* note 7, at 279.

33. Cushman, *supra* note 10, at 1084.

34. The concept of "hidden liens" can best be explained by way of an example. Typically, a property owner contracts with one general contractor for the construction or improvement of real property. Upon completion of the construction, the owner usually pays the general contractor in full. If the general contractor fails to pay the subcontractors or materialmen who have contributed to the project, they usually have the right to file a lien against the owner's property. The Pennsylvania system, including Nebraska's prior mechanics' lien law, would recognize the liens filed to the full fair market value of the labor or materials furnished. Such liens would be valid even if filed after the owner has paid the general contractor in full, as long as they are filed within the statutory guidelines. As a result, the lien claimants could force satisfaction through foreclosure, thereby causing the owner to pay twice for the labor or materials.

35. USLTA § 5-206 (1977). For a discussion of the § 5-206 election, see *infra* notes 212-14 and accompanying text.

36. *B. & P. Dev. v. Walker*, 420 F. Supp. 704 (W.D. Pa. 1976); *In re Thomas A. Cory, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976); *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla. 1974); *Spielman-Fond Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974); *Cook v. Carlson*, 364 F. Supp. 24 (D.S.D. 1973); *Connolly Dev., Inc. v. Superior Court of Merced County*, 41 Cal. App. 3d 543, 116 Cal. Rptr. 191 (1976); *Bankers Trust Co. v. El Paso Pre-Cast Co.*, 560 P.2d 457 (Colo. 1977); *Tucker Door & Trim Corp. v. Fifteenth St. Co.*, 235 Ga. 727, 221 S.E.2d 433 (1975); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976); *Carl A. Morse Inc. v. Rentar Indus. Dev. Corp.*, 85 Misc. 2d 304, 379 N.Y.S.2d 994 (Sup. Ct. 1976).

37. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v.*

statutes involved have been upheld only when sufficient procedural safeguards existed to protect the property owner and the general contractor.<sup>38</sup>

### III. A NEED FOR CHANGE?

It has been suggested that construction projects breed more litigation than any other single American activity.<sup>39</sup> This litigation naturally has led to calls for reform, and the subject of the mechanics' lien has been a controversial issue for many years.<sup>40</sup> As the construction industry slowed in the mid-seventies, "the 'mechanics lien' has enjoyed the renewed attention of those persons and institutions seeking to benefit from or to defend against its impact."<sup>41</sup> This renewed interest in lien legislation continued and reached its climax in Nebraska during the First Session of the Eighty-Seventh Legislature.<sup>42</sup>

Viable arguments exist both for and against mechanics' lien legislation.<sup>43</sup> Proponents of mechanics' liens argue that the special

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W.T. Grant Co., 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniaduch v. Family Fin. Corp.*, 395 U.S. 337 (1969).

38. For a discussion of the constitutionality of mechanics' liens, see Frank & McManus, *supra* note 10; Stern & Frantze, *Constitutionality of Mechanics' Lien Statutes*, 48 U.M.K.C. L. REV. 645 (1980); Comment, *The Constitutional Validity of Mechanics' Liens Under the Due Process Clause—A Reexamination After Mitchell and North Georgia*, 55 B.U.L. REV. 263 (1975); Comment, *The Constitutionality of Real Estate Attachments*, 37 WASH. & LEE L. REV. 701 (1980); Note, *The Colorado Mechanics' Lien Statute: Is Due Process Provided?*, 49 U. COLO. L. REV. 127 (1977).
39. See, Comment, *The Release Bond Statutes*, *supra* note 7, at 95.
40. The call for uniform legislation in this area dates back to 1925 when President Herbert Hoover, then Secretary of Commerce, appointed a committee to consider the necessity of a uniform mechanics' lien act. The first tentative draft of the Uniform Mechanics' Lien Act was prepared by the Standard State Mechanics' Lien Act Committee of the Department of Commerce in 1926. See Cushman, *supra* note 10, at 1085.
41. Urban & Miles, *supra* note 7, at 286.
42. During this legislative session, three bills were introduced by Senators Beutler and Pirsch to alter Nebraska's existing mechanics' lien laws. L.B. 512 and L.B. 513 were both variations of article 5 of the USLTA. L.B. 514 made numerous changes to Nebraska's pre-1982 statutes to afford additional protection to the homeowner. Debate on the proposed legislation was both long and heated. See generally *Hearings on L.B. 512, L.B. 513, and L.B. 514 Before the Judiciary Comm. of the Neb. Unicameral*, 87th Legis., 1st Sess. (1981).
43. In addition to the two primary arguments presented by lien proponents which are discussed in the text, other factors support such legislation. First, it is argued that "the vast majority of American businessmen and contractors are reputable, honest, and often willing to forego their legal rights to a mechanics' lien in order to preserve the good will which they enjoy in the community." Comment, *Mechanics' Liens*, *supra* note 7, at 283. As a result, it is reasoned that liens will not be enforced in any great degree. Second, proponents claim that liens are generally of no value because of superior rights



protection afforded by such legislation is necessary because the labor and materials incorporated into the real property are irretrievable upon default.<sup>44</sup> They argue that this distinguishes real property improvements from other commercial activity.<sup>45</sup> In addition, it is contended that the construction industry thrives only through the use of extensive short-term credit.<sup>46</sup> This granting of credit by the parties in the lower tiers of the construction project<sup>47</sup> naturally results in a risk of nonpayment to these parties.<sup>48</sup> If this risk cannot be negated by the filing of a lien, construction may slow and become more expensive.<sup>49</sup>

On the other hand, opponents of lien legislation argue that the construction industry does not need or deserve the special protection that mechanics' liens provide.<sup>50</sup> Other industries flourish without such protection, and lien opponents do not believe that the construction industry should be favored simply because the improvements take place on real property.<sup>51</sup> Opponents also contend that lien legislation encourages those parties occupying the lower tiers of the construction project to extend credit to unreliable parties above because they know they can receive payment from the owner through foreclosure.<sup>52</sup> Finally, and most importantly, "hidden liens" may require the property owner to pay twice for labor and materials incorporated into the real property.<sup>53</sup> Several commentators have designated the existence of hidden liens as the primary drawback of mechanics' lien legislation.<sup>54</sup> Because an extensive search will often not reveal the existence of such liens,<sup>55</sup> it has been argued that the "laws confer their protection largely at

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possessed by lenders. Because the owner will have knowledge of the lender, the hidden lien problem does not exist. Honigman, *supra* note 21, at 431.

44. See *supra* note 18 and accompanying text.

45. *Id.* See also Brown & Winckler, *The Construction Debt Act: A Critical Rejoinder*, 56 MICH. ST. B.J. 768, 770 (1977).

46. Because it is not feasible for the general contractor to pay the lower tier parties until he receives payment from the owner, extensive short-term credit is given to the general contractor by the subcontractors and materialmen. Stalling, *supra* note 21, at 597.

47. For a discussion of the tier concept, see *supra* note 23 and accompanying text.

48. See *supra* note 46.

49. Frank & McManus, *supra* note 10, at 785.

50. Comment, *The "Forgotten Man" of Mechanics' Lien Laws—The Homeowner*, 16 HASTINGS L.J. 198 (1964).

51. *Id.* at 218.

52. See Cutler & Shapiro, *supra* note 10, at 246.

53. Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 28, at 145.

54. See Cutler & Shapiro, *supra* note 10, at 246; Ervin, *Revised Mechanics' Lien Law; The Whys and Wherefores*, 37 FLA. B.J. 1095, 1095-96 (1963); Comment, *Mechanics' Liens*, *supra* note 7, at 286.

55. See Cutler & Shapiro, *supra* note 10, at 246.

the expense of the landowner."<sup>56</sup>

Several alternatives to mechanics' lien legislation have been proposed by commentators. The major suggestions have been bonding,<sup>57</sup> title insurance,<sup>58</sup> licensing,<sup>59</sup> lien waivers,<sup>60</sup> and escrow accounts.<sup>61</sup>

Bonding "provides an alternative to mechanics' liens as a method of protecting subcontractors and suppliers from the manifold risks of the construction industry."<sup>62</sup> If the general contractor defaults, the bonding surety is obligated to pay off the claims of the subcontractors and materialmen. Bonding has been used primarily within the realm of public construction,<sup>63</sup> but it has been suggested that it also be implemented for private use "[b]ecause the solvency of the corporate surety is virtually assured by statute and by self-regulation of the surety business, . . . [and this] can eliminate the need to resort to the owner's property by way of lien statutes."<sup>64</sup> While the bonding alternative is inviting, it is plagued with numerous practical problems. First, "the obligation of the surety is limited by the terms of the bond, which he dictates in

56. Comment, *The Release Bond Statutes*, *supra* note 7, at 97. See generally Comment, *supra* note 50.

57. See Dugan, *supra* note 20 at 243; Stone, *supra* note 7, at 87; Comment, *supra* note 50, at 200; Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 28, at 161.

58. See Ominsky, *The Mechanics' Lien Filed Despite a No-Lien Stipulation: Methods of Prevention and Removal*, 72 DICK. L. REV. 223, 240 (1968).

59. See Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 28, at 160-61.

60. See Dugan, *supra* note 20, at 265; Ominsky, *supra* note 58, at 236; Comment, *A Need for Statutory Control of Mechanics' Lien Waivers in Illinois*, 47 CHI. [-] KENT L. REV. 157 (1970).

61. See *infra* note 77 and accompanying text.

62. Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 28, at 141.

63. See *supra* note 57. Nebraska requires the filing of a bond for all contracts for the erecting and furnishing, or the repairing of any public building, bridge, highway, or other public structure or improvement . . . in a sum not less than the contract price, with a corporate surety company, conditioned for the payment of all laborers . . . and for the payment for the material and equipment rental which is actually used or rented in the erecting, furnishing, or repairing of the public structure or improvement or in performing the contract.

NEB. REV. STAT. § 52-118 (1978). This bonding for public construction was not altered by the Nebraska Construction Lien Act. The Nebraska Supreme Court has dealt with the statute in detail. See *Dukane Corp. v. Sides Constr. Co.*, 208 Neb. 227, 302 N.W.2d 721 (1981); *Rieschick Drilling Co. v. American Cas. Co.*, 208 Neb. 142, 303 N.W.2d 264 (1981); *Zimmerman's Elec., Inc. v. Fidelity & Deposit Co.*, 194 Neb. 248, 231 N.W.2d 342 (1975); *Ritzau v. Wiebe Constr. Co.*, 191 Neb. 92, 214 N.W.2d 244 (1974); *Boyd v. Benkelman Pub. Housing Auth.*, 188 Neb. 69, 195 N.W.2d 230 (1972); *Westinghouse Elec. Supply Co. v. Brookley*, 176 Neb. 807, 127 N.W.2d 465 (1964).

64. Comment, *Mechanics' Liens and Surety Bonds*, *supra* note 28, at 141.

most cases.”<sup>65</sup> Second, “the surety’s liability may be discharged by events over which the potential claimant has no control.”<sup>66</sup> Third, bonding will both “further complicate the already complex interrelationships of . . . rights on construction jobs”<sup>67</sup> and increase the ultimate cost to property owners.<sup>68</sup> This final factor could force many builders out of the home construction business, and, in turn, could lead to a shortage of housing.<sup>69</sup>

Title insurance as an alternative has recently become more feasible due to competition within the insurance industry.<sup>70</sup> Nevertheless, substantial problems exist with regard to the cost and coverage of title insurance policies.<sup>71</sup> The cost may make its use prohibitive and the nature of the coverage may differ substantially between carriers.

The effectiveness of licensing contractors is also questionable.<sup>72</sup> While it appears that unreliable contractors could be identified and regulated through licensing, this alternative does not address the difficulties that result due to changes in the construction economy unrelated to the merits of any particular contractor. In a depressed economy general contractors may default on their obligations to subcontractors due to cash flow problems, not because of unethical business practices. It would be “an administratively unfeasible task”<sup>73</sup> for licensing boards to maintain current data on the financial status of each contractor.

Use of lien waivers is more feasible under the Nebraska Construction Lien Act due to the fact that such a waiver does not require consideration.<sup>74</sup> This section alters prior Nebraska law which recognized the legality of lien waivers, but required that they be supported by consideration.<sup>75</sup> Although use of the lien waiver as an alternative to mechanics’ liens has been applauded by at least one commentator,<sup>76</sup> the principal drawback is the difficulty of identifying the subcontractors and materialmen involved on a construction project. This may require the owner to rely upon the general contractor to supply the identities, even though the

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65. Dugan, *supra* note 20, at 243.

66. *Id.*

67. *Id.* at 244.

68. See Comment, *supra* note 50, at 209.

69. *Id.*

70. See *Hearings on L.B. 512, L.B. 513, and L.B. 514 Before the Judiciary Comm. of the Neb. Unicameral*, 87th Legis., 1st Sess. (1981) (testimony of David Hunter).

71. See Brown & Winkler, *supra* note 45, at 772; Ominsky, *supra* note 58, at 240.

72. See *supra* note 59.

73. Comment, *Mechanics’ Liens and Surety Bonds*, *supra* note 28, at 161.

74. NEB. REV. STAT. § 52-144 (Supp. 1982).

75. *Westland Homes Corp. v. Hall*, 193 Neb. 237, 226 N.W.2d 622 (1975).

76. See Ominsky, *supra* note 58, at 241.

general contractor's credibility may itself be a matter of paramount concern to the owner.

The final lien alternative is the escrow account. While placing a certain percentage of the contract price in an escrow account until the date for filing liens has run would prevent double liability for the property owner, there are problems with this alternative. First, use of an escrow account requires that the property owner have sufficient sophistication and bargaining power to contract for such an arrangement with the contractor. Second, such a contractual arrangement may be unconstitutional in Nebraska.<sup>77</sup>

Although Nebraska's pre-1982 mechanics' lien law will be contrasted in detail with the Nebraska Construction Lien Act later in this Comment,<sup>78</sup> it is appropriate at this time to briefly outline the prior law to highlight the factors which led to enactment of the new Act. Nebraska's prior lien law made no distinction between residential and nonresidential improvements,<sup>79</sup> and the statutes were given "a liberal construction so . . . that everyone who, by his labor and materials, contributes to the enhancement of the property of another should be compensated."<sup>80</sup> A filed lien attached "at the commencement of the furnishing of material, or at the commencement of the performance of labor . . . and not from the beginning of the construction of the improvement."<sup>81</sup> After a lien had been filed, the claimant had two years to institute civil proceedings to

77. In *State v. McConnell*, 201 Neb. 84, 266 N.W.2d 219 (1978), the Nebraska Supreme Court citing *State ex rel. Norton v. Janing*, 182 Neb. 539, 156 N.W.2d 9 (1968), held: "[Section 52-123] does not make the general contractor an agent or trustee for laborers or materialmen in receiving payments from the property owner, nor does it make the amounts received a trust fund . . ." 201 Neb. at 91, 266 N.W.2d at 222. Although the court did not hold that a legislative statute creating such a trust would be unconstitutional, in *Norton* the court stated:

A statute that, in its practical operation, in effect declares that under any contract between the owner of property and a building contractor the payments that may be made to the latter shall not be absolutely his own to do with as he pleases, but shall be held by him in trust to pay debts due by him to certain preferred creditors, is unconstitutional in that it infringes upon the unalienable right of contract.

182 Neb. at 543, 156 N.W.2d at 11.

78. See *infra* notes 109-32 and accompanying text.

79. NEB. REV. STAT. §§ 52-101, -102 (1978) (repealed 1982).

80. *Omaha Nat'l Bank v. Continental W. Corp.*, 202 Neb. 238, 244, 274 N.W.2d 867, 870 (1979); See also *LaPuzza v. Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 N.W.2d 472 (1974); *Peters v. Halligan*, 182 Neb. 51, 152 N.W.2d 103 (1967); *Muenchau v. Swarts*, 170 Neb. 209, 102 N.W.2d 129 (1960).

81. *Krotter & Sailors v. Pease*, 161 Neb. 774, 781, 74 N.W.2d 538, 542 (1956). See also *Gilchrist v. Wright*, 167 Neb. 767, 94 N.W.2d 476 (1959); *Henry & Coatsworth Co. v. Fisherick*, 37 Neb. 207, 55 N.W. 643 (1893).

enforce the encumbrance.<sup>82</sup>

Nebraska's prior lien law was a Pennsylvania-type system,<sup>83</sup> and, accordingly, often resulted in the filing of hidden liens.<sup>84</sup> Because lien claimants had up to four months after completion of their work to file liens,<sup>85</sup> the general contractor could be paid in full prior to the filing of a lien. If for some reason the general contractor defaulted on his obligations to subcontractors and materialmen, these parties could file liens and force double payment by the property owner.<sup>86</sup> It was this problem of hidden liens which became the primary justification for a change in Nebraska's mechanics' lien law.<sup>87</sup>

#### IV. THE NEBRASKA CONSTRUCTION LIEN ACT

##### A. General Objectives

As previously discussed,<sup>88</sup> the Nebraska Construction Lien Act is modeled after article 5 of the Uniform Simplification of Land Transfers Act. While the legislative history of the Nebraska Act does not specifically adopt the comments of the USLTA, they are clearly applicable due to the near verbatim language appearing in these two pieces of legislation.<sup>89</sup> Therefore, continued reference

82. NEB. REV. STAT. §§ 52-103 to -104 (1978) (repealed 1982). *See also* Sorensen Constr. Co. v. Broyhill, 165 Neb. 397, 85 N.W.2d 898 (1957).

83. *See supra* notes 28-34 and accompanying text.

84. *Id.*

85. NEB. REV. STAT. § 52-102 (1978) (repealed 1982). *See also* LaPuzza v. Prom Town House Motor Inn, Inc., 191 Neb. 687, 217 N.W.2d 472 (1974); Occidental Sav. & Loan Ass'n v. Cannon, 184 Neb. 659, 171 N.W.2d 166 (1969).

86. NEB. REV. STAT. § 52-102 (1978) (repealed 1982). The statute provided that "the risk of all payments made to the original contractor shall be upon the owner until the expiration of the four months hereinbefore specified." *Id.*

In *Wickes Corp. v. Frye*, 202 Neb. 23, 273 N.W.2d 663 (1979), the court stated that "[t]he intent of the lien law is to protect the materialmen. The law puts the burden on the owner at his own risk to make certain that payment has been made for all materials delivered to the job." *Id.* at 31, 273 N.W.2d at 667-68. *See also* Westland Homes v. Hall, 193 Neb. 236, 226 N.W.2d 622 (1975); Paxton & Vierling Steel Co. v. Barmore, 187 Neb. 54, 187 N.W.2d 590 (1971).

87. *See generally* Hearings on L.B. 512, L.B. 513, and L.B. 514 Before the Judiciary Comm. of the Nebraska Unicameral, 87th Legis., 1st Sess. (1981). *See also supra* notes 52-56 and accompanying text.

88. *See supra* text accompanying note 3.

89. The only major provision of article 5 which was not adopted by the Nebraska Construction Lien Act was USLTA § 5-106 which defines the term "person related to." The Nebraska legislation also deleted some definitional terms and altered certain time requirements to conform with prior Nebraska lien law. Compare NEB. REV. STAT. § 52-127 (Supp. 1982) with USLTA § 5-102 (1977) (definitional sections); NEB. REV. STAT. § 52-137 (Supp. 1982) (providing for a 120-day lien filing period) with USLTA § 5-207 (1977) (providing for a 90-day lien filing period); NEB. REV. STAT. § 52-140 (Supp. 1982) (providing for

will be made to these comments.

The intent of the construction lien legislation has been articulated as follows:

The article on construction liens seeks to strike a fair balance between the interests of owners, lenders, building contractors, and sub-contractors. It puts construction liens on the public land records at as early as possible a date. Buyers and owners of residential real estate, who are likely to be unsophisticated about construction liens, are given special protection<sup>90</sup>

Article 5 of the USLTA is a "comprehensive, self-contained mechanics' lien statute, intended to replace completely the existing mechanics' lien statutes in states which enact it."<sup>91</sup> This intention was carried out in Nebraska by the near total substitution of the model legislation for the state's prior mechanics' lien statutes.<sup>92</sup> However, state law dealing with public building construction bonds was unchanged by the Nebraska Construction Lien Act.<sup>93</sup>

It has been suggested that article 5 will "require the greatest adjustment of the part of real estate practitioners and lending institutions,"<sup>94</sup> and because of its dynamic impact on the law of most states, it will "be the most controversial [section] of the entire Act."<sup>95</sup> Because article 5 attempts to compromise the conflicting positions of owners, lenders, general contractors, and subcontractors, it has been reasoned that it "left all of the parties somewhat unhappy."<sup>96</sup> Subcontractors and construction materials groups have expressed the most displeasure due to the additional pressures the legislation places on them.<sup>97</sup> This clash of interests was apparent in Nebraska during the long and heated hearings held on the proposed Nebraska Construction Lien Act;<sup>98</sup> and the prediction by one commentator that passage would be difficult proved

lien duration of two years) with USLTA § 5-210 (1977) (providing for lien duration of one year).

90. USLTA, prefatory note, at 4 (1977).

91. Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 Nw. U.L. REV. 359, 365 (1978).

92. The only sections of chapter 52 which were not repealed are NEB. REV. STAT. §§ 52-115 to -117 (1978) (dealing with railroad construction), NEB. REV. STAT. §§ 52-118 to -118.02 (1978) (dealing with public construction bonding), and NEB. REV. STAT. §§ 52-123 to -124 (1978) (concerning penalties for intentional failure to apply construction payments).

93. See *supra* note 92.

94. Comment, *supra* note 91, at 365.

95. Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 *Real Prop., Prob. & Tr. J.* 696, 715, (1978).

96. *Id.* at 717.

97. *Id.*

98. See generally *Hearings on L.B. 512, L.B. 513, and L.B. 514 Before the Judiciary Comm. of the Neb. Unicameral*, 87th Legis., 1st Sess. (1981).

accurate.<sup>99</sup>

## B. The Lien Claimant<sup>100</sup>

The Nebraska Construction Lien Act provides for the "attachment and enforceability of lien[s] against real estate in favor of a person furnishing services or materials under a real estate improvement contract."<sup>101</sup> As long as the improvement can be tied to the real estate improvement contract,<sup>102</sup> a lien arises in favor of the claimant "no matter how far removed he is from the contracting owner."<sup>103</sup> This provision differs substantially from prior Nebraska law.

Nebraska's pre-1982 lien law was based upon a tier concept, and liens were only afforded to claimants who were "clearly within the terms of the statute."<sup>104</sup> The general contractor occupied the first tier, the subcontractor the second, the sub-subcontractor the third, and so on. The statutes required that the labor or materials be furnished "to the contractor or any subcontractor."<sup>105</sup> As a result, it was held that a supplier of a subcontractor<sup>106</sup> and a supplier of a sub-subcontractor<sup>107</sup> were within the ambit of the statute, while a supplier of a supplier was not.<sup>108</sup> Although never specifically ad-

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99. See Note, *Future Advances Under the ULTA and the USLTA: The Construction Lender Receives a New Status*, 34 WASH. & LEE L. REV. 1027, 1028 (1977).

100. NEB. REV. STAT. § 52-127(1) (Supp. 1982) states that "[c]laimant shall mean a person having a right to a lien under sections 52-125 and 52-159 upon real estate and includes his or her successor in interest." *Id.* The Nebraska Supreme Court has defined the term "person" in the mechanics' lien context to mean all persons, natural or artificial, including corporations. *Chapman v. Brewer*, 43 Neb. 890, 899, 62 N.W. 320, 323 (1895).

101. NEB. REV. STAT. § 52-126 (Supp. 1982).

102. "Real estate improvement contract" is defined in NEB. REV. STAT. § 52-130 (Supp. 1982), and is discussed at notes 109-15 and accompanying text *infra*.

103. USLTA art. 5, introductory comment, at 63 (1977). "This Act does not, as did many prior lien laws, limit a lien to contractors in the first two, three, or four tiers below the owner." USLTA § 5-201 comment 1 (1977).

104. *Ideal Basic Indus. v. Juniata Farmers Coop. Ass'n*, 205 Neb. 611, 614, 289 N.W.2d 192, 194 (1980). The policy behind such an approach was two-fold. First, some claimants are so far removed from the contracting owner that the privilege of a lien is not extended to them. Second, by extending mechanics' lien protection to one not intended to fall within the statute, courts would be engaging in judicial legislation.

105. NEB. REV. STAT. § 52-102 (1978) (repealed 1982).

106. In *Vince Kess, Inc. v. Krueger Constr. Co.*, 202 Neb. 673, 276 N.W.2d 669 (1979), the court held that "one who supplies material used in the construction of an improvement is not excluded from the benefits of the mechanics' lien law solely because the materials so used were furnished to a subcontractor of a contractor." *Id.* at 675, 276 N.W.2d at 671.

107. *Zarrs v. Keck*, 40 Neb. 456, 58 N.W. 933 (1894).

108. In *Ideal Basic Industries*, 205 Neb. at 611, 289 N.W.2d at 192, the defendant entered into a construction contract with Farmland Industries, Inc. Farm-

dressed, Nebraska Supreme Court decisions seemed to indicate that the statutes were applicable, no matter how long the project chain, if each party met the definition of a subcontractor.

Today, it is no longer important to whom the labor or materials are furnished as long as they are supplied in regard to a real estate improvement contract.<sup>109</sup> The Act broadly defines such a contract to mean "an agreement to perform services, including labor, or to furnish materials for the purpose of producing a change in the physical condition of land or of a structure."<sup>110</sup> The "[p]reparation of plans, surveys, or architectural or engineering plans or drawings"<sup>111</sup> are afforded special protection because the statute applies to such work regardless of whether or not the plans are actually implemented.<sup>112</sup> The term real estate improvement contract does not include contracts that are "for the mining or removal of timber, minerals, gravel, soil, sod, . . . or . . . contracts . . . for the purpose of realizing upon the disposal or removal of the objects removed,"<sup>113</sup> or that involve "the planting, cultivation, or harvesting of crops."<sup>114</sup> In addition, although the Act does not define the term "services," "financing or activities in connection with financing" are specifically excluded.<sup>115</sup> While the real estate improvement contract is defined broadly, and a claim may be made by a general

land, as general contractor, contracted with the subcontractor, Jarvis, for all of the concrete work. One, Lambrecht, supplied Jarvis with the needed mixed concrete; Lambrecht purchased the necessary cement from the plaintiff, Ideal. The court strictly construed the statute and held: "[S]ection 52-101 et seq., . . . provide a lien only to materialmen who supply directly to the owner of the realty, the contractor, or a subcontractor. . . . We would be engaging in judicial legislation to extend the protection of the mechanic's [sic] lien to one more remote than a materialman to a subcontractor." *Id.* at 615-16, 289 N.W.2d at 194-5.

109. *See supra* note 103 and accompanying text. The policy for this is probably found in a compromise for the special protection allotted to those who qualify as protected parties. One of the objectives of the USLTA is to balance the interests of all parties in the construction lien area. USLTA, prefatory note (1977).

110. NEB. REV. STAT. § 52-130(1) (Supp. 1982).

111. NEB. REV. STAT. § 52-130(1)(f) (Supp. 1982).

112. This is special protection because it is generally required that the materials or labor be actually incorporated into the improvement for a lien to result. *See infra* notes 123-26 and accompanying text.

113. NEB. REV. STAT. § 52-130(2) (Supp. 1982). Therefore, a demolition contract, which would otherwise be a real estate improvement contract, will be disqualified if the primary purpose of the demolition is to make the materials available for sale or use.

114. *Id.*

115. NEB. REV. STAT. § 52-127(9) (Supp. 1982). Ancillary services in connection with improvement projects such as financing and legal work do not constitute real estate improvement contracts. *See* USLTA § 5-107 comment 2 (1977).



contractor, a subcontractor, or a materialman,<sup>116</sup> the existence of a contract must, nevertheless, be shown in order to establish a valid lien.

[A] lien arises only against an owner who has entered into a contract to have the work done. If no owner has contracted for the work . . . [or] if a prime contractor engages a subcontractor to do work beyond that contracted for by the owner, the subcontractor has no lien against the owner's real estate for the unauthorized work.<sup>117</sup>

Since only the real estate of an owner contracting for materials and services can be subject to a construction lien, it is crucial that the status of the contracting owner be shown. The Act provides that for the purpose of such a determination, "agency is presumed . . . between employer and employee, between spouses, between joint tenants, and among tenants in common."<sup>118</sup> The presumption is rebuttable by the owner, but only by "clear and convincing evidence to the contrary."<sup>119</sup>

When materials are furnished under a real estate improvement contract, the Act implements a two-prong analysis.<sup>120</sup> First, the materials must be "supplied with the intent . . . that they be used in the course of construction, or incorporated into"<sup>121</sup> the real estate improvement. The required intent may be "shown by the contract of sale, the delivery order, delivery to the site . . . or by other evidence."<sup>122</sup> Second, once the intent to incorporate has been demonstrated, the lien claimant must show that the materials were either: (1) actually "[i]ncorporated in the improvement or consumed as normal" construction waste;<sup>123</sup> (2) "[s]pecially fabricated for incorporation . . . and not readily resaleable;"<sup>124</sup>

116. *See supra* note 103 and accompanying text.

117. USLTA § 5-201 comment 1 (1977).

118. NEB. REV. STAT. § 52-128 (Supp. 1982).

119. *Id.*

120. NEB. REV. STAT. § 52-134(1) (Supp. 1982).

121. *Id.* USLTA § 5-204 comment (1977) sets forth the following example. "[A] lumber dealer who sells lumber to a contractor without knowing which of several jobs the contractor is purchasing the lumber for has no lien, even though he may be able to establish that the lumber was in fact, used on a particular project."

*But see* Great W. Mfg. Co. v. Hunter, 15 Neb. 32, 16 N.W. 759 (1833) (The case suggests that it is not necessary that material shall have been furnished under the express terms of a contract for the particular building on which a mechanics' lien is claimed. If the furnishing of materials is sufficient to create a liability, it is sufficient to create a lien.)

122. NEB. REV. STAT. § 52-134 (Supp. 1982).

123. NEB. REV. STAT. § 52-134(1)(b)(i) (Supp. 1982).

124. NEB. REV. STAT. § 52-134(1)(b)(ii) (Supp. 1982). This section is similar to the provision dealing with architectural plans in that it affords lien protection even though the materials are not incorporated. This was obviously done because the materials are worthless to the materialman in both instances regardless of incorporation. *See supra* notes 111-12 and accompanying text.

(3) "[u]sed for the construction or for the operation of machinery or equipment" used in construction;<sup>125</sup> or (4) "[t]ools, appliances, or machinery" used on the improvement.<sup>126</sup>

The Act further provides that the "delivery of materials to the site of the improvement . . . creates a presumption that they were used in the course of construction or were incorporated into the improvement."<sup>127</sup> This provision alters prior Nebraska law,<sup>128</sup> and is a substantial aid to materialmen, as they normally have no actual knowledge of incorporation independent of delivery. Consequently, the property owner is now required to rebut the presumption of incorporation with evidence that the materials were not actually used. Because the typical owner will have no firsthand knowledge of what materials are actually incorporated, he will generally be unable to rebut the presumption unless he is given such information by the general contractor.

Supplier groups argued that this presumption does not go far enough and urged that delivery should be conclusive of incorporation.<sup>129</sup> They reasoned that while the materialman will have superior knowledge as to materials actually delivered, he will generally have less information concerning incorporation than will the property owner. While neither party will typically be able to determine exact material incorporation through observation of the construction site, it is logical to assume that the owner will make periodic inspections of the job site and will at least have an opportunity to see whether the materials delivered are subsequently used on the improvement. This is especially true if the owner resides on the job site. The same cannot be said for the materialman, who after delivery has neither right nor reason to be on the construction site. Because proof of delivery is crucial under the new Act, accurate record keeping by materialmen is essential.

125. NEB. REV. STAT. § 52-134(1)(b)(iii) (Supp. 1982). The amount of the lien is decreased by the salvage value of the materials used under this section. *Id.*

126. NEB. REV. STAT. § 52-134(1)(b)(iv) (Supp. 1982). The amount of the lien under this section depends on whether the tools, appliances, or machinery are rented or purchased. *See* NEB. REV. STAT. § 52-134(3) (Supp. 1982).

127. NEB. REV. STAT. § 52-134(2) (Supp. 1982).

128. Under prior Nebraska law, the burden remained upon the lien claimant to show that the materials furnished were actually incorporated into the improvement. In *Lofholm v. Stoltenberg*, 178 Neb. 318, 133 N.W.2d 387 (1965), the court held:

The burden of proof is upon one claiming a mechanic's [sic] lien to show that the material furnished by him was used in the construction of the building, or that he delivered the material to the construction site under an agreement with the building contractor that it would be used in the construction of the building on which the lien is sought.

*Id.* at 322, 133 N.W.2d at 390 (citation omitted).

129. Pedowitz, *supra* note 95, at 720.

One commentator has rejected the view that delivery should be conclusive of incorporation on the grounds that "[m]aterials are sometimes repossessed" or are "transferred to and used on another project."<sup>130</sup> In such a situation it would unjustly enrich the materialman to be granted a lien for materials not actually used, and would also unfairly encumber the owner's real estate.<sup>131</sup> Furthermore, it has been suggested that creation of any presumption based upon delivery is "wholly unjustified"<sup>132</sup> and places an inequitable burden on the property owner. The argument is that it is unreasonable to assume that a contracting owner having a home built is going to have specific knowledge of what materials were delivered to the job site, let alone which ones were incorporated and which ones were not.

In any event, the controlling question in all situations where the delivery of materials is involved is the identification of the materials at the job site. Therefore, it is imperative that both owners and suppliers take special note of the materials that are delivered to the job site to provide themselves with maximum protection and to prevent unnecessary conflicts.

### C. Filing the Lien

A lien attaches only if recorded "not later than one hundred twenty days after [the] . . . furnishing of services or materials."<sup>133</sup> In keeping with the basic philosophy of article 5 that a purchaser should be able to determine the status of title from the record, the contents of the lien "must afford third parties sufficient notice of the existence and extent of lien liability."<sup>134</sup> The Act requires information similar to that required by the existing mechanics' lien laws of most states.<sup>135</sup> In fact, it has been stated that the requirements are "sufficiently simple so that a lawyer should not be necessary."<sup>136</sup>

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130. *Id.*

131. The general policy of the Act is to afford lien claimant status only if services or materials are actually incorporated into the project. See *supra* notes 123-26 and accompanying text.

132. Pedowitz, *supra* note 95, at 720.

133. NEB. REV. STAT. § 52-137(1) (Supp. 1982). Although the USLTA required filing within 90 days, the deadline was changed to 120 days to mirror prior Nebraska law which allowed four months to file. See NEB. REV. STAT. § 52-102 (1978) (repealed 1982).

134. Comment, *USLTA: Article 5 "Construction Liens" Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens*, 12 ST. MARY'S L.J. 113, 119 (1980). See Pedowitz, *supra* note 95, at 729.

135. Comment, *USLTA Article 5: Parts 3 & 4, Part 3: Recording*, 10 STETSON L. REV. 109, 114 (1980).

136. Pedowitz, *supra* note 95, at 727. *But cf.*, Cushman, *supra* note 10, at 1087 (when a layman prepares his own form, he has a fool for a client).

The lien must be signed by the claimant,<sup>137</sup> contain a description of the real estate subject to the lien,<sup>138</sup> the name of the property owner,<sup>139</sup> the name and address of the claimant,<sup>140</sup> the name and address of the person with whom the claimant contracted,<sup>141</sup> a general description of the services or materials contracted for,<sup>142</sup> the contract price,<sup>143</sup> the amount unpaid,<sup>144</sup> and the time the last services or materials were furnished.<sup>145</sup>

The lien contents are extremely important because the lien "may be destroyed if the information is inaccurate."<sup>146</sup> The owner's name is crucial because the lien is ineffective against third parties dealing with the property unless a record search under the owner's name would disclose the lien.<sup>147</sup> Similarly, the claimant is limited to the stated amount unpaid against both the owner and third parties subsequently taking an interest in the real estate.<sup>148</sup> Finally, the information concerning the time the last services or materials were furnished is important because of the 120-day filing deadline of section 52-137.<sup>149</sup> Although care must be taken to ensure that the lien contains all of the required information, this should be easily accomplished through the use of standardized office forms.<sup>150</sup>

The Act's lien filing requirements also simplify prior Nebraska law. Under pre-1982 lien law, the claimant was obligated to send the registered property owner notice of the lien filing, to file an affidavit attesting to such notice, and to file a written account detailing

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137. NEB. REV. STAT. § 52-147(1) (Supp. 1982).

138. *Id.* The real estate description need not establish the legal boundaries of the property involved but "must be sufficient to give notice to an examiner of the record that the particular real estate of the contracting owner is subject to a lien." USLTA § 5-303 comment 2 (1977).

139. NEB. REV. STAT. § 52-147(1) (Supp. 1982). For a discussion of the importance of this requirement, see *infra* notes 146-47 and accompanying text.

140. NEB. REV. STAT. § 56-147(1) (Supp. 1982).

141. *Id.*

142. *Id.* The reason for this requirement "is to give the owner or third parties a beginning point for making inquiries" to determine the claim's validity. USLTA § 5-303 comment 4 (1977).

143. NEB. REV. STAT. § 52-147(1) (Supp. 1982).

144. *Id.* For the importance of this requirement, see *infra* note 148 and accompanying text.

145. NEB. REV. STAT. § 52-147(1) (Supp. 1982). This requirement is tied to the 120-day filing deadline of NEB. REV. STAT. § 52-137 (supp. 1982). See *infra* note 149 and accompanying text.

146. Comment, *supra* note 134, at 120.

147. USLTA § 5-303 comment 3 (1977). This is compatible with the adequate notice theme of article 5. *Id.*

148. USLTA § 5-303 comment 4 (1977).

149. See Pedowitz, *supra* note 95, at 727. See *infra* note 145.

150. See Appendix A.

the items of labor and materials furnished.<sup>151</sup>

#### D. The Protected Party Concept

As previously stated, “[b]uyers and owners of residential real estate, who are likely to be unsophisticated about construction liens, are given special protection”<sup>152</sup> under the Nebraska Construction Lien Act. This unique protection is afforded through the concept of the protected party.<sup>153</sup> While this concept is the most prominent and significant change from prior Nebraska law,<sup>154</sup> commentators have called for special treatment of the homeowner for a number of years.<sup>155</sup>

A protected party is a person: (1) who contracts “to buy or to have improved, residential real estate all or part of which he or she occupies or intends to occupy as a residence;”<sup>156</sup> (2) “who contracts to give a real estate security interest” in such property;<sup>157</sup> (3) who is obligated on a contract to “buy or have improved residential real estate or on an obligation secured” by such property, if related to an individual “who occupies or intends to occupy all or part of the real estate as a residence”;<sup>158</sup> or (4) “who acquires residential real estate and assumes or takes subject to the obligation of a prior protected party . . . .”<sup>159</sup>

Several factors serve to expand the status of a protected party. First, “residential real estate” includes more than the family home,

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151. NEB. REV. STAT. § 52-103 (1978) (repealed 1982).

152. USLTA, prefatory note, at 4 (1977).

153. NEB. REV. STAT. § 52-129 (Supp. 1982). If the property owner is not a protected party, he is treated essentially the same as under prior Nebraska lien law. NEB. REV. STAT. § 52-136(a)-(b) (Supp. 1982) dictate that the lien amount against such a party will be the amount unpaid under the claimant's contract, and § 52-135(5) states that no notice of lien liability need to be given. The concept of the protected party, which is new to real property law, is sponsored by the commissioners who drafted the USLTA and the Uniform Land Transaction Act (ULTA). See Pedowitz, *supra* note 95, at 675.

154. Prior Nebraska law made no distinction between residential and commercial real estate in regard to mechanics' lien rights or protection. See *supra* note 79 and accompanying text.

155. See Stalling, *supra* note 21, at 592; Comment, *Mechanics' Liens*, *supra* note 7, at 284.

156. NEB. REV. STAT. § 52-129(1)(a) (Supp. 1982).

157. *Id.*

158. NEB. REV. STAT. § 52-129(1)(b) (Supp. 1982). The term “related to” has a special meaning under USLTA. It refers to relation by blood or marriage or, in the case of an organization or corporation, “control” of that organization. USLTA § 5-106 (1977). “Control” is not defined in the USLTA. However, it is suggested that the test of attribution under I.R.C. § 318 (CCH 1982) would be a possible definition. Comment, *USLTA Articles: Construction Liens* (pts. 1 & 2), 10 STETSON L. REV. 101, 102 n.7 (1980).

159. NEB. REV. STAT. § 52-129(1)(c) (Supp. 1982).

and is defined as real estate "containing not more than four dwelling units and [having] no nonresidential uses for which the protected party is a lessor."<sup>160</sup> In addition, condominium real estate qualifies regardless of the number of dwelling or nonresidential units.<sup>161</sup> Second, the real estate need not be occupied as a principal residence as long as its purpose is to provide a home.<sup>162</sup> Third, concurrent ownership, either by joint tenancy, tenancy in common, or tenancy by entirety does not affect protected party status regardless of whether or not the other owner is a protected party.<sup>163</sup>

Although contractors and materialmen have protested against the entire protected party concept,<sup>164</sup> most objections have concerned the expansive definition of residential real estate:

The model act seeks to provide protection for homeowners and home buyers through a 'protected party' provision. While we have no objection to protecting the individual homeowner from exposure to double payment, the proposed statute goes beyond the single dwelling and encompasses up to four residential units located on not more than three acres of land. Expanding such protection beyond the individual homeowner offers an opportunity for abuse and can lead to the general protection from liens of commercial home builders. There is no warrant for such an exception.<sup>165</sup>

It should be noted that among general homeowners there are two types of protected parties. A protected party purchaser is a person who buys a home which is already subject to a real estate improvement contract.<sup>166</sup> On the other hand, a protected party

160. NEB. REV. STAT. § 52-129(2) (Supp. 1982). The protected party does not lose that status if he operates the commercial activity taking place on the real estate. USLTA § 5-105 comment 3 (1977).

161. NEB. REV. STAT. § 52-129(2) (Supp. 1982).

162. USLTA § 5-105 comment 4 (1977) states that "[o]ccupied as 'a' residence instead of 'his principal' residence is used intentionally. An individual who has his voting residence in one state or county, a summer residence in another and a winter residence in a third may be a 'protected' party in each of the three jurisdictions."

163. USLTA § 5-105 comment 2 (1977).

164. The Executive Vice President of the National Lumber and Building Material Dealers Association, in referring to the protected party concept, stated:

It is a major incursion on lien rights and will destroy liens on a substantial percentage of residential construction and improvement work, or trigger wholesale recording of liens in such cases. Again, the greatest damage will be to the smaller suppliers and subcontractors who are most involved in residential work. None will be safe without recording the lien promptly upon first work or delivery. This will be difficult for contractors, and impossible for suppliers without major additional administrative expense, which would be passed on to owners. Large-scale denial of credit is highly likely. We cannot accept this provision, despite our recognition of occasional problems which construction liens create for home buyers.

Pedowitz, *supra* note 95, at 724.

165. *Id.* at 719.

166. NEB. REV. STAT. § 52-129(1)(a) (Supp. 1982).

contracting owner is a person who enters into a real estate improvement contract for the improvement of property he already owns.<sup>167</sup> The distinction is important in regard to priority<sup>168</sup> and amount.<sup>169</sup>

## E. Property Affected by the Lien: The Notice of Commencement and the Notice of Termination

### 1. Notice of Commencement

The amount and nature of real estate which is subject to lien liability should generally be controlled by the filing of a notice of commencement.<sup>170</sup> This procedure was adopted from the Florida mechanics' lien law<sup>171</sup> and is purely optional under the Nebraska

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167. NEB. REV. STAT. §§ 52-127(3), -129(1)(a) (Supp. 1982).

168. See *infra* notes 239-71 and accompanying text.

169. See *infra* notes 207-38 and accompanying text.

170. NEB. REV. STAT. §§ 52-133, -145 (Supp. 1982). Section 52-145 provides that the notice of commencement filed by the contracting owner must:

- (1) describe the real estate;
- (2) state the name and address of the contracting owner, his or her interest in the real estate, and the name and address of the titleholder if other than the contracting owner;
- (3) state that a lien subsequently recorded has priority from the date the notice is recorded; and
- (4) be denominated a notice of commencement and be signed by the contracting owner.

An example of a notice of commencement may be found in Appendix B. The comments to the USLTA illustrate how the notice of commencement can limit the amount of real estate subject to lien liability.

If, for example, a 100,000 square foot building is being built on a portion of a 40-acre tract, the notice of commencement could limit the lienable real estate to the 100,000 square feet on which the building sets and the surrounding land on which related work will be done. If, however, in a case in which there is a recorded notice of commencement describing a limited part of a single tract and improvement work outside the described part takes place, that work is not covered by the notice of commencement since the notice of commencement can apply only to the real estate described therein. If, in the case of the 100,000 square foot building, the notice of the commencement described 200,000 feet square with the building in the center and, as a part of the construction, an access road and sidewalks were built on owner's real estate outside the described 200,000 square feet, the lien arising for the road and sidewalks would not be limited to the real estate described in the notice of commencement. In that case, . . . the lien would be "on the contracting owner's real estate being improved or directly benefited." Under that language, a court might decide that all the owner's 40-acre tract was being "directly benefited" and allow a lien for the sidewalk and road improvements to be claimed against the entire tract.

USLTA § 5-203 comment 1 (1977).

171. See USLTA art. 5, introductory comment, at 62 (1977). This concept was developed to alleviate the difficulties inherent in the "visible commencement

Construction Lien Act.<sup>172</sup> A notice of commencement is not effective until it is recorded and it remains effective only until it lapses.<sup>173</sup> The notice will lapse at the earlier of its expiration date as determined by the notice itself<sup>174</sup> or the date it is terminated by a notice of termination.<sup>175</sup>

If a notice of commencement has been filed by the owner when a construction lien is recorded, the lien affects only the "contracting owner's real estate described in the notice of commencement."<sup>176</sup> On the other hand, if a lien is recorded when there is no notice of commencement covering the improvement pursuant to which the lien arises, the lien affects all of the "contracting owner's real estate being improved or directly benefited."<sup>177</sup> However, if a claimant, who records a lien while there is no notice of commencement filed, later records such a notice, his "lien is on the contracting owner's real estate described in the notice of commencement."<sup>178</sup> In addition, the Act provides that if the property "owner contracts for improvements on real estate not owned by him" as part of an improvement on his property or for the purpose of directly benefiting his property, the claimant will have "a lien against the contracting owner's real estate being improved or directly benefited to the same extent as if the improvement had been on the contracting owner's real estate."<sup>179</sup>

It will generally be to the owner's advantage to file a notice of commencement prior to construction because, by doing so, the owner may limit the real estate against which a subsequent lien

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approach" of determining lien priority. See Ervin, *supra* note 54, at 1096-97; Comment, *supra* note 135, at 110.

172. NEB. REV. STAT. § 52-145(5) (Supp. 1982) states that a notice of commencement "may" be filed by the contracting owner or any claimant entitled to file a lien if no notice has been filed by the owner.

173. NEB. REV. STAT. § 52-137(2) (Supp. 1982).

174. *Id.* NEB. REV. STAT. § 52-145(2) (Supp. 1982) sets forth the duration feature that may be included in a notice of commencement filed by the contracting owner. "The notice of commencement may state its duration, but if a duration is stated less than six months from the time of recording, the duration of the notice is six months. If no duration is stated, the duration of the notice is one year after the recording."

175. NEB. REV. STAT. § 52-146(1)(a)(iii) (Supp. 1982) provides that a notice of termination may be recorded by the contracting owner which specifies that the notice of commencement will terminate at a date which may not be less than 30 days after the notice of termination is recorded.

176. NEB. REV. STAT. § 52-133(1) (Supp. 1982).

177. NEB. REV. STAT. § 52-133(2) (Supp. 1982).

178. NEB. REV. STAT. § 52-133(3) (Supp. 1982).

179. NEB. REV. STAT. § 52-133(4) (Supp. 1982). "For example, work on streets in a subdivision contracted for by the developer after the streets had been dedicated to public use would create liens against the developer's lots being benefited." USLTA § 5-203 comment 5 (1977).



will attach.<sup>180</sup> The only limitation on the owner's right to limit the real estate on which later liens will attach is that the property "described must include all the real estate on which improvements are actually being made."<sup>181</sup> If the owner does not include all of the real estate subject to improvements, the Act provides for damages to those claimants wrongly deprived of benefits.<sup>182</sup>

If no notice of commencement is filed, a lien attaches to all of the owner's real estate which is improved or directly benefited.<sup>183</sup> This is a situation which should be avoided by the owner. The determination of what property is benefited will be decided by the finder of fact,<sup>184</sup> and it has been suggested that "it may be appropriate to resolve doubts on the issue in favor of lien claimants."<sup>185</sup> Finally, if the owner fails to record a notice of commencement, any claimant who is entitled to record a lien may, in addition, record a notice of commencement.<sup>186</sup>

If a claimant records a notice of commencement,<sup>187</sup> he may include as the real estate subject to liens "all or any part of the contracting owner's real estate being improved or directly benefited."<sup>188</sup> This would clearly be to the owner's disadvantage because such a recording may subject a greater portion of real estate to lien liability than would the owner's notice if one had been filed. Although this procedure affords the claimant the opportunity to subject to the lien the owner's entire tract on which the improvement is being made, risk is involved in such a designation. If the claimant conservatively estimates the real estate being improved, he diminishes the amount of security upon which all of the claimants must rely.<sup>189</sup> Conversely, if the claimant in bad faith overstates the real estate being improved or benefited, he runs the

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180. NEB. REV. STAT. § 52-145(3) (Supp. 1982). The limitation stated by the owner is effective only if the particular improvement to which it applies is "stated with sufficient specificity that a claimant, by reasonable inquiry," can determine whether his contract is covered by the notice of commencement. *Id.*

181. USLTA § 5-301 comment 2 (1977).

182. NEB. REV. STAT. § 52-157(1) (Supp. 1982) provides for the awarding of damages "if a person is wrongfully deprived of benefits" to which he is entitled under the Act.

183. *See supra* note 177 and accompanying text.

184. USLTA § 5-203 comment 2 (1977). "In such a determination, the relationship of the land on which the building is located to the rest of the tract, including use, status of title, and relative values would be relevant." *Id.*

185. *Id.*

186. NEB. REV. STAT. § 52-145(5) (Supp. 1982).

187. NEB. REV. STAT. § 52-145(5) (Supp. 1982) sets forth the information required in the claimant's notice of commencement. The information is similar to that required in the owner's notice. *See supra* note 170 and accompanying text.

188. NEB. REV. STAT. § 52-145(10) (Supp. 1982).

189. *See Comment, supra* note 134, at 124.

risk of forfeiting his lien rights.<sup>190</sup> If the real estate is overstated by the claimant, but no bad faith can be shown, "the notice is effective as to all the real estate described."<sup>191</sup> Because the owner may face a difficult burden of proof on this issue,<sup>192</sup> the argument urging filing of the notice by the owner is reinforced. In addition, even if bad faith can be shown, that bad faith will invalidate only the lien of the claimant who filed the notice of commencement.<sup>193</sup> All other claimants will be able to rely on, and attach their liens to, the overstated amount of real estate described in the notice.<sup>194</sup>

The elective nature of the notice of commencement procedure has been criticized by commentators. Because of the ease of which the owner can file the notice and the problems that are avoided if it is so filed, it has been suggested that owner recordation be made mandatory<sup>195</sup> or that claimants be empowered to force recordation by the property owner.<sup>196</sup> Objection has also been raised to this segment of the Act for its failure to require posting of the notice of commencement at the job site.<sup>197</sup> It has been argued that the posting requirement would be a beneficial addition to the provisions "since it would serve as an actual notice to those on the job and eliminate the continuing requirement to search the public records."<sup>198</sup>

Although this Comment has stressed the importance of notice of commencement recordation by the owner, it has been suggested that the notice is ineffective in the realm of home construction due to the relatively short period of time required for the building of a home.<sup>199</sup> While a notice of termination may need to be recorded

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190. NEB. REV. STAT. § 52-157(2) (Supp. 1982).

191. USLTA § 5-203 comment 3 (1977).

192. See *supra* notes 184-85 and accompanying text.

193. USLTA § 5-301 comment 2 (1977).

194. *Id.*

195. See Comment, *supra* note 134, at 134-35. It has been suggested that the Florida mechanics' lien law be adopted in this area to make the contracting owner's recordation mandatory. Failure to file the notice would subject the contracting owner to "lien liability in excess of the prime contract price." *Id.* at 135.

196. See Pedowitz, *supra* note 95, at 726. "The National Association of Credit Management suggested that the claimant be empowered to require that the contracting owner record a notice of commencement within five (5) days from the receipt of the claimant's request, under penalty of liability for damages or \$200, whichever is greater." *Id.*

197. *Id.*

198. *Id.*

199. Because the construction of a home usually takes only three to four months to complete, and the duration of a notice of commencement cannot be less than six months, see *supra* note 174, completion of construction will almost always occur before the notice lapses. As a result, a homeowner will be required to file a notice of termination to prevent the property from being sub-

when the construction period is shorter than the required duration of the notice of commencement,<sup>200</sup> in many situations, the additional filing requirement is an equitable trade-off for the security resulting from notice recordation by the owner.<sup>201</sup>

## 2. *Notice of Termination*

Although the notice of termination<sup>202</sup> is most important in the area of lien priorities,<sup>203</sup> it can serve to designate the real estate subject to lien liability in certain circumstances.<sup>204</sup> As previously stated, a lien claimant may record a notice of commencement upon the failure of the owner to do so. If the real estate claimed to be improved is overstated in the notice, but no bad faith on the part of the claimant can be shown, the notice is effective as to all the real estate described.<sup>205</sup> In this situation the owner may record a notice of termination as to the real estate that he wishes to remove from the notice of commencement. Although this procedure will not affect any liens filed prior to the effective date of the notice of termination, any subsequent liens will be limited to the reduced description of real estate.<sup>206</sup>

## F. Amount of the Lien: Protected Party Status and Notice of Lien Liability

When determining the amount, if any, of a claimant's lien it is necessary to ask two questions. First, is the contracting owner a

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ject to liens for a substantial period beyond the time a claimant would normally be entitled to assert a lien. See USLTA § 5-302 comment 1 (1977). Because the filing of a notice of termination is an elaborate process, many homeowners may refrain from filing a notice of commencement in the first instance.

200. For a discussion of the duration requirements of the notice of commencement, see *supra* note 174 and accompanying text.
201. If the improvement is on residential property that has substantially more area than the standard lot, it would be important to limit the real estate subject to lien liability. For example, if the owner owns multiple lots for the purpose of development, the inconvenience of filing a notice of termination is overshadowed by the possibility of having the entire property attached by lien claimants.
202. See Appendix C.
203. See *infra* notes 239-71 and accompanying text.
204. Recording the notice of termination requires a fairly elaborate procedure: (1) The notice must be recorded at least 30 days prior to the termination date; (2) all claimant's who have requested it must be furnished with the notice; (3) the notice must be published in the newspapers as provided by the statute; and (4) the owner must record an affidavit stating that publication has taken place. NEB. REV. STAT. § 52-146 (Supp. 1982). See also USLTA § 5-302 comment 2 (1977).
205. See *supra* notes 189-94 and accompanying text.
206. See USLTA § 5-203 comment 3 (1977).

protected party? Second, if so, is the owner a protected party purchaser or a protected party contracting owner?

If the contracting owner is not a protected party, he is treated essentially the same as under prior Nebraska law.<sup>207</sup> If the lien claimant records his lien within 120 days after his final furnishing of services or materials, the Act provides that the value of the lien is the amount "unpaid under the claimant's contract."<sup>208</sup> This complete liability exists regardless of whether the lien is filed by the prime contractor or by any other claimant.<sup>209</sup> In addition, nothing in the Act provides for notice of potential liens if the contracting owner is not a protected party.<sup>210</sup> As a result, a non-protected party may still be subject to hidden liens which can result in double liability of the property owner.<sup>211</sup> The USLTA offers two alternatives in this area.<sup>212</sup> Alternative A provides a mechanism by which hidden liens cannot be recorded against any contracting owner, protected party or not.<sup>213</sup> Alternative B limits this immunity from hidden liens and subsequent double liability to protected parties.<sup>214</sup> Nebraska opted for Alternative B and most probably did so on the assumption that commercial property owners could adequately protect themselves from the danger of hidden liens through superior bargaining power and business sophistication.

If the contracting owner is a protected party, it then becomes crucial to determine whether he is a protected party purchaser or a contracting owner.<sup>215</sup> If he is a protected party purchaser, he takes the property "free of all construction liens that are not of record" at the time his title document is recorded.<sup>216</sup> As a result, even if the claimant's lien is recorded within the statutory 120-day period following final performance, it is worthless if not on record at the time the real estate is sold to the protected party purchaser.

In essence, the Act totally eliminates the uncertainty concerning potential liens which plagued the home buyer under prior Ne-

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207. For a discussion of who qualifies for protected party status, see *supra* notes 152-69 and accompanying text.

208. NEB. REV. STAT. § 52-136(1) (Supp. 1982).

209. *Id.*

210. NEB. REV. STAT. § 52-135(5) (Supp. 1982).

211. If a non-protected party pays the prime contractor prior to the recordation of valid construction liens, foreclosure can subject the owner to double liability. As a result, notice of lien liability is only necessary when residential real estate is involved. See *infra* notes 220-35 and accompanying text.

212. USLTA § 5-206 alternatives A & B (1977).

213. See USLTA § 5-206 introductory comment to alternative B (1977).

214. *Id.*

215. For a discussion of these two concepts, see *supra* notes 166-67 and accompanying text.

216. NEB. REV. STAT. § 52-139(5) (Supp. 1982).

braska law. Today, the purchaser's only obligation is to perform a complete records search in the office of the Register of Deeds to ascertain if there are any existing liens. If none are found, the buyer can consummate the transfer, and the recording of his title effectively invalidates all subsequent liens.

The Act also serves to dictate the actions taken by the lien claimant. Because the risk of payments to the prime contractor followed by default of the party with whom the claimant has contracted now rests with the claimant, lien recordation is the only protection afforded the claimant in the realm of speculation homes.<sup>217</sup> As a result, claimants should file liens or estimated liens<sup>218</sup> at the time the contract is made whenever the party with whom they are dealing is not absolutely able to financially honor the contract.<sup>219</sup>

If the property owner is a protected party contracting owner rather than a purchaser, the Act affords the claimant additional protection through the use of the notice of lien liability.<sup>220</sup> The notice of lien liability may be given by the claimant to the contracting owner at any time after the claimant has entered into a contract under which a lien may be claimed,<sup>221</sup> but the notice is effective only when received by the owner.<sup>222</sup>

The notice must be in writing,<sup>223</sup> state the right to assert a lien,<sup>224</sup> include information concerning the claimant's right and the owner's property,<sup>225</sup> and contain the following warning informing

217. A speculation home is one being built for resale to an unidentified purchaser. In such a situation no effective notice of lien liability can be given because the identity of the protected party purchaser is unknown. *See infra* notes 220-35 and accompanying text.

218. The Act allows for the recordation of estimated liens. *See* NEB. REV. STAT. § 52-147(1)(f) (Supp. 1982).

219. The Act provides for the recording of liens immediately "after entering into the contract under which the lien arises." NEB. REV. STAT. § 52-137(1) (Supp. 1982). Therefore, in reality, any purchaser of a speculation home should be prepared to find encumbrances upon the property.

220. NEB. REV. STAT. § 52-135 (Supp. 1982); *see* Appendix D.

221. Use of the notice of lien liability by the claimant is entirely optional. *Id.*

222. The Nebraska Construction Lien Act does not define "receipt" or "received." USLTA states that "[a] person 'receives' a notice at the time it: (1) comes to his attention; or (2) is delivered at the place of business" through which the transaction is being conducted, or "any other place held out by him as the place for receipt." USLTA § 1-202(d) (1977).

Although no particular method of delivery has been required, the claimant should use certified mail with return receipt requested because his lien rights depend to a large extent on proof of receipt by the owner. *See* Pedowitz, *supra* note 95, at 721.

223. NEB. REV. STAT. § 52-135(1) (Supp. 1982).

224. *Id.*

225. *Id.* The notice must contain: (1) the name and mailing address of the claimant and the person with whom the claimant contracted; (2) the name of the

the owner that double liability may result if future payments are made that do not filter down to the claimant: "Warning. If you did not contract with the person giving this notice, any future payments you make in connection with the project may subject you to double liability."<sup>226</sup>

The effect of this notice is to warn the contracting owner of potential liens. After such a warning the owner can no longer argue that potential liens, although subsequently filed, are hidden liens. The owner also bears the risk for all post-notice payments for the improvements performed. In essence, the property owner is required to sequester enough of the prime contract amount to satisfy the amount unpaid to the claimant as indicated by the notice of lien liability.

The timing of the notice of lien liability will affect the collectable amount of the lien. The Act provides that the amount of a lien recorded against a protected party contracting owner, by a claimant other than the prime contractor, is the lesser of: (1) the amount unpaid under the claimant's contract; or (2) the amount unpaid under the prime contract at the time the owner receives the claimant's notice of lien liability.<sup>227</sup> Consequently, if the claimant sends a notice of lien liability to the owner upon first contracting to supply services and before the owner has made substantial payments to the prime contractor, the amount of his lien will be the unpaid portion of his contract. Conversely, if the claimant delays and implements a notice of lien liability after the owner has made significant payments to the prime contractor, the amount of his lien will be limited to the amount still unpaid to the prime contractor. If the owner has completely paid off his contract with the prime contractor prior to receiving notice from the claimant, the claimant's lien rights are worthless. As a result, the only way in which a protected party contracting owner can suffer double liability is if he receives notice of lien liability but still pays the prime contractor without reserving enough of the prime contract price to satisfy the claimant's subsequent lien.<sup>228</sup>

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owner; (3) a general description of the real estate against which the lien is claimed and the services or materials provided or to be provided; (4) a statement that the claimant has recorded a lien or that he is entitled to; and (5) the amount unpaid to the claimant. *See* NEB. REV. STAT. § 52-135(1)(a) through -135(g) (Supp. 1982). Remote claimants only need to include the name of the person they contracted with, not the parties in the contracting chain leading back to the owner. USLTA § 5-205 comment 3 (1977).

226. NEB. REV. STAT. § 52-135(1)(h) (Supp. 1982).

227. If the prime contractor records his lien within the prescribed statutory period, the lien is always for the unpaid part of his contract price regardless of the contracting owner's status. *See* NEB. REV. STAT. § 52-136(1) (Supp. 1982).

228. *See* USLTA § 5-206 alternative B, comment 1 (1977).

The notice of lien liability and the lien itself must be used in conjunction by the claimant to protect his lien rights. If the claimant has recorded a lien prior to sending a notice of lien liability to the owner, this fact must be included in the notice.<sup>229</sup> But, if no lien has been recorded, the claimant cannot rely on the mere notice to protect his status as a bona fide lien claimant. This is because the notice does not record the claimant's lien but only creates liability on the part of the owner to satisfy any lien that may be filed in regard to the claimant's furnishing of services or materials.<sup>230</sup> If no lien has been recorded, the owner's liability to satisfy such a lien is immaterial.<sup>231</sup>

Filing of the lien alone will also be inadequate to protect the claimant's lien rights in the event that good faith payments are made by the owner to the prime contractor.<sup>232</sup> If a lien has been recorded, but no notice is given, the inverse of the preceding paragraph occurs. Here, while the claimant would have a valid lien against the contracting owner, the lien would be worthless because the amount unpaid under the prime contract at the time the owner received notice of lien liability would have to be zero in the absence of any such notice sent by the claimant.<sup>233</sup>

The claimant may or may not want to file a lien immediately upon contracting to furnish services or materials. If it is certain that the protected party contracting owner is not going to sell the property, the claimant may wish only to send notice of lien liability without recording an actual lien. The claimant could then wait for payment from the prime contractor, and if it was not forthcoming, could still file a lien within 120 days of the final performance of services. In this way the claimant could avoid the bad public relations that may result in actually filing a lien against the real estate. Good public relations is extremely important if the claimant deals both with contractors and the public directly. On the other hand, contracting to furnish services or materials for the construction of a speculation home<sup>234</sup> is a different matter. Because a protected party purchaser takes the property free of all liens not on record at

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229. NEB. REV. STAT. § 52-135(1)(f) (Supp. 1982).

230. NEB. REV. STAT. § 52-137(1) (Supp. 1982).

231. Claimant groups have argued that because the notice of lien liability does not actually constitute a lien, it is an inadequate provision. See Pedowitz, *supra* note 95, at 720.

232. NEB. REV. STAT. § 52-136(5) (Supp. 1982) states that a payment is properly made to a prime contractor to the extent that the payment: (1) is made in good faith before receipt of the notice of commencement; or (2) if made after receipt of the notice, leaves unpaid a part of the prime contract sufficient to satisfy the total of all notices received.

233. See NEB. REV. STAT. § 52-136 (Supp. 1982).

234. See *supra* note 217 and accompanying text.

the time of transfer of title,<sup>235</sup> the claimant should always file a lien on this type of property immediately upon contracting to provide services or materials. This is especially true if the person with whom he contracts may not be able to honor the contract notwithstanding the funds received from this particular project.

The more difficult situation arises when the custom home becomes a speculation home. If the claimant sends a notice of lien liability to the custom owner, and the owner sells the property to a protected party purchaser prior to the claimant's recordation of a lien, the purchaser would take free of the claimant's subsequently filed lien.

This result seems somewhat inequitable because the claimant has complied with the procedure imposed on him, but loses all rights obtained through such compliance because of the subsequent sale by the owner. In light of this ever present potential to lose lien rights, the claimant must always weigh the negative public relations impact of filing an immediate lien against the possibility that the property will be transferred, thereby destroying the rights under the Construction Lien Act.

Because of the apparent unfairness to a claimant which is created when a custom home is subsequently changed to a speculation home, the law should perhaps be changed. One possible solution to this problem would be to have the notices transferred with the title. However, this procedure would be effective only if selling owners disclosed the notices before their homes were purchased. Otherwise, the "hidden lien" problem that plagued home buyers under prior law would exist.<sup>236</sup> In situations where a notice of commencement is in effect, the filing of a notice of termination by an owner would alert the claimant to file a lien before the title is transferred. But, as pointed out earlier, the notice of commencement will probably be little utilized in the residential setting.<sup>237</sup>

Another potential solution is to require prime contractors to inform claimants of possible transfers of title to protected party purchasers.<sup>238</sup> At the very least, there should be an affirmative duty

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235. See *supra* note 216 and accompanying text.

236. See *supra* note 53 and accompanying text.

237. See *supra* note 199.

238. NEB. REV. STAT. § 52-143(1) (Supp. 1982). This section requires prime contractors to furnish specific information concerning the real estate involved and the contracting owner to those claimants who request. The construction of this section set forth in the text is based on two policies. First, the basic policy behind construction liens is to protect those who have contributed to an improvement. Second, mechanics' lien laws are remedial in nature and should be liberally construed. See, e.g., *Johnson v. Olson*, 132 Neb. 778, 273 N.W. 201 (1937). The purpose of section 52-143(1) is to provide claimants with



on the part of the owner to inform claimants who have given notice of lien liability of the possibility of a transfer of title. This would give claimants of lien liability a reasonable length of time to file a lien on the property before the transfer takes place.

#### G. Lien Priority: The Notice of Commencement and Notice of Termination Revisited

Although the notice of commencement and notice of termination play a role in the determination of which property is affected by a recorded lien,<sup>239</sup> these concepts have their greatest impact on the issue of lien priority. Even if a lien is perfected by recordation, the claimant's chances of receiving the total amount due under his contract are dependent upon the following two-step analysis.<sup>240</sup> First, it is necessary to determine the lien amount according to the factors outlined in subsection F of this Comment.<sup>241</sup> Second, lien priority for that amount must then be ascertained.<sup>242</sup>

The method for determining priority under the Act has resulted in "little or no objection"<sup>243</sup> because its "treatment of construction liens conforms with most state mechanics' and materialmen's lien laws."<sup>244</sup> In general, lien priority is determined by the date of attachment. The "first in time" rule controls for liens attaching at different times, while liens attaching simultaneously have equal priority and share the foreclosure proceeds on a pro rata basis.<sup>245</sup> In turn, the time of attachment is dependent upon the concepts of notice of commencement and notice of termination.

##### 1. Notice of Commencement

If a lien is recorded while a notice of commencement is effective, the lien attaches as of the time the notice is recorded.<sup>246</sup> This rule controls even if visible commencement by the claimant occurs before the notice is recorded.<sup>247</sup> On the other hand, if a lien is re-

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a mechanism for acquiring information so they can secure their lien rights. See USLTA § 5-213 comment 1 (1977). A liberal construction of this section as announced in the text would accomplish this purpose. Also, the basic policy behind construction liens would be fulfilled.

239. See *supra* notes 170-206 and accompanying text.

240. USLTA § 5-208 comment 1 (1977).

241. See *supra* notes 207-38 and accompanying text.

242. See *infra* notes 263-71 and accompanying text.

243. See Pedowitz, *supra* note 95, at 723.

244. See Comment, *supra* note 134, at 131.

245. NEB. REV. STAT. § 52-138 (Supp. 1982).

246. NEB. REV. STAT. § 52-137(2) (Supp. 1982).

247. *Id.* This allows lien claimants who are waiting to perform but cannot due to the status of the construction project to achieve lien priority equal with those who begin work before them.

corded before there is an effective notice of commencement, the lien attaches at the earlier of visible commencement of the improvement or the recording of the lien.<sup>248</sup> The Act adds a unique provision to prevent a claimant from securing a superior priority date by recording his lien and then filing a notice of commencement. Any claimant who records a lien and then records a notice of commencement merely has equal priority with claimants who subsequently file while the notice is effective.<sup>249</sup> However, this provision does not guarantee equal priority for all lien claimants. If a claimant files his lien, and later a notice of commencement is recorded by the owner or another claimant, his lien attaches as of the date of his recording or visible commencement, whichever is earlier.<sup>250</sup> The claimant's lien would thus have priority over liens filed while the notice was effective.<sup>251</sup> Therefore, if a claimant is the first to record, he should not sacrifice his lien priority by also recording a notice of commencement.

Prior Nebraska law,<sup>252</sup> as well as the law of most states,<sup>253</sup> utilized a visible commencement approach to determine the time of attachment. The difficulty with using this approach was that it often resulted in hidden liens "during the period between the lien claimant's commencement of work and the recording deadline."<sup>254</sup> As a result, third parties who examined the public records had no notice of liens which could be filed after completion of the improvement.<sup>255</sup>

A recorded notice of commencement provides notice to third parties searching the record for potential liens against the real estate, and, therefore, alleviates the problem of hidden liens.<sup>256</sup> In addition, the notice will often result in equal priority of all claimants, which, under some circumstances, may provide the most eq-

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248. NEB. REV. STAT. § 52-137(3) (Supp. 1982). In the case of new construction, visible commencement occurs when reasonable inspection of the real estate would reveal materials, excavation, or preparation of an existing structure for new construction. In all other cases, visible commencement is determined by the circumstances of the case. See NEB. REV. STAT. § 52-137(4) through -137(5) (Supp. 1982).

249. See NEB. REV. STAT. § 52-138(3) (Supp. 1982).

250. NEB. REV. STAT. § 52-137(3) (Supp. 1982).

251. NEB. REV. STAT. § 52-138(2) (Supp. 1982).

252. See *Gilcrist v. Wright*, 167 Neb. 767, 94 N.W.2d 476 (1959); *Krotter & Sailors v. Pease*, 161 Neb. 774, 74 N.W.2d 538 (1956); *Henry & Coatsworth Co. v. Fisherick*, 37 Neb. 207, 55 N.W. 642 (1893).

253. See Comment, *supra* note 91, at 386.

254. *Id.* at 387.

255. *Id.*

256. *Id.* "The notice of commencement system permits third parties to rely on the record." USLTA art. 5, introductory comment (1977).

uitable result.<sup>257</sup> However, these are merely potential benefits due to the optional nature of notice of commencement recording.

## 2. *Notice of Termination*

It was previously stated that if there is no effective notice of commencement at the time a lien is recorded, the lien attaches at the earlier of visible commencement or recording of the lien.<sup>258</sup> There is one exception to this general rule. If there is no effective notice of commencement, and visible commencement occurs before or within thirty days after the lapse of a prior notice of commencement covering the improvement, the lien does not relate back to visible commencement.<sup>259</sup> Rather, if the lien is recorded within thirty days after the lapse of the last effective notice of commencement, the lien attaches when recorded. But, if the lien is recorded more than thirty days after the lapse of the prior notice, it attaches thirty-one days after termination of the notice.<sup>260</sup> Thus, a notice of termination can be used to lapse the notice of commencement and subordinate all subsequently recorded liens.

This exception provides persons who deal in real estate a mechanism for assuring that no construction claimant can later take priority over their interests.<sup>261</sup> For example, assume that an owner finishes construction of a building he intends to lease on June 1. The notice of commencement was recorded on January 1, and by its terms lapses on July 1. If the future lessee records his lease on July 15, no subsequent construction lien can take priority over his interest. If the exception did not exist, a subsequent lien would relate back to visible commencement and take priority over the lease.<sup>262</sup>

## 3. *Priority Among Lien Claimants*

The protected party contracting owner is subject to lien liability only to the extent of the contract price minus properly made payments.<sup>263</sup> As a result, this liability may be less than the total amount of liens filed against the real estate. If this occurs, lien priority is of paramount importance to the lienor. The priority of liens which attach at different times is in the order of attachment,<sup>264</sup> and the lien with the highest priority is satisfied in full

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257. Comment, *supra* note 91, at 387.

258. See *supra* note 248 and accompanying text.

259. NEB. REV. STAT. § 52-137(3) (Supp. 1982).

260. *Id.*

261. See USLTA § 5-207 comment 6 (1977).

262. *Id.*

263. See *supra* notes 227-28 and accompanying text.

264. NEB. REV. STAT. § 52-136(4) (Supp. 1982).

before the next prior lien participates in the distribution.<sup>265</sup> On the other hand, liens attaching at the same time share in the distribution on a pro rata basis.<sup>266</sup>

265. *See id.*

266. *Id.* One commentator has devised a formula to determine each claimant's share of the distribution if the claimants have equal priority:

$$\frac{\text{amount of claim}}{\text{total of equal priority claims}} \times \text{amount owed on the contract} = \text{claimant's pro rata share}$$

For example, suppose *X* claims a lien of \$600, *Y* a lien of \$800, and only \$1,000 is owed under the prime contract. The respective shares would be calculated as follows:

$$\begin{array}{r} \$ 600 \\ \hline \$1400 \end{array} \times \$1,000 = \$429 \text{ (X's claim)}$$

$$\begin{array}{r} \$ 800 \\ \hline \$1400 \end{array} \times \$1,000 = \$571 \text{ (Y's claim)}$$

Though liens which have priority are to be satisfied before subsequent liens, all liens recorded during the effective period of a particular notice of commencement have the same date of attachment and are therefore of equal priority.

Now consider how *X*'s and *Y*'s shares would be calculated after a foreclosure sale has yielded \$800. The shares would be calculated using this formula:

$$\frac{\text{amount claimant would have received from Step 1}}{\text{amount owed on the contract}} \times \text{amount available from foreclosure}$$

Using the same figures:

$$\begin{array}{r} \$ 429 \\ \hline \$1,000 \end{array} \times \$800 = \$343 \text{ (X's claim)}$$

$$\begin{array}{r} \$ 571 \\ \hline \$1,000 \end{array} \times \$800 = \$457 \text{ (Y's claim)}$$

The following formula may be used to combine the two steps even when more than one prime contractor is involved:

$$\frac{\text{amount claimed}}{\text{total claim on the particular contract}} \times \frac{\text{amount owed to particular prime}}{\text{total amount owed on all prime contracts}} \times \text{amount available in foreclosure}$$

#### 4. *Priority Between Construction Lienors and Other Claimants*

As against third party interests, the status of a construction lien claimant is that of "a purchaser for value without knowledge who had recorded at the time his or her lien attached."<sup>267</sup> This status is granted to the lien claimant whether or not he actually had knowledge of any prior interests before he recorded.<sup>268</sup> The two major exceptions to this rule of priority are future advances made pursuant to a construction security agreement,<sup>269</sup> and purchase of the real estate by a protected party purchaser.<sup>270</sup> The favorable treatment afforded the construction lender is justified by assuming that the security of the lender will indirectly benefit others involved on the construction project and reduce the cost of residential construction.<sup>271</sup>

#### H. Enforcement Provisions

A claimant has two years after the lien is recorded to enforce his lien.<sup>272</sup> If judicial proceedings are instituted during this period, the lien continues to be effective until the termination of the proceedings.<sup>273</sup> However, the owner or any other party having an interest in the real estate may demand that the claimant institute judicial proceedings within thirty days.<sup>274</sup> If this occurs, the lien lapses unless the claimant institutes proceedings within the thirty day period, or records an affidavit stating that the total contract price is not yet due.<sup>275</sup> All claimants who have recorded liens may join together as plaintiffs and those who do not join the suit as plaintiffs may be joined as defendants.<sup>276</sup> In addition, any claimant who records a lien after commencement of the proceedings may be joined as a defendant at any time before judgment.<sup>277</sup> The court may direct foreclosure by any method available, and shall do so

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Obviously, if the owner is willing to pay and foreclosure is not required, the second step of the process is not necessary. The numerator of the above fraction supplies the requisite formula. Comment, *supra* note 158, at 105.

267. NEB. REV. STAT. § 52-139(1) (Supp. 1982).

268. USLTA § 5-209 comment 1 (1977).

269. NEB. REV. STAT. § 52-139(3) (Supp. 1982).

270. NEB. REV. STAT. § 52-139(5) (Supp. 1982).

271. USLTA § 5-209 comments 2 & 3 (1977).

272. NEB. REV. STAT. § 52-140 (Supp. 1982). Although USLTA allowed only one year, this provision was changed to reflect prior Nebraska law.

273. *Id.*

274. *Id.*

275. *Id.*

276. NEB. REV. STAT. § 52-155(2) (Supp. 1982). USLTA made all recorded lien claimants required parties. USLTA § 5-401 comment 2 (1977).

277. NEB. REV. STAT. § 52-155(2) (Supp. 1982).

after determining the amount due to each claimant.<sup>278</sup>

In addition to the general lien enforcement provisions, under certain circumstances the Act also provides for the imposition of personal liability upon both owners<sup>279</sup> and claimants.<sup>280</sup> If an owner records a notice of termination before the improvements are substantially completed, he becomes personally liable to any claimant who is damaged because his lien was made ineffective by the premature termination.<sup>281</sup> Also, the Act provides that a claimant may lose his lien or be liable for damages if he records a lien in bad faith, overstates the lien amount, or refuses to execute a lien release when it is required.<sup>282</sup> Finally, any person may be awarded monetary or injunctive relief if "wrongfully deprived of benefits to which he is entitled" under the Act.<sup>283</sup>

### I. Additional Protections Afforded the Property Owner

In addition to its major safeguard from hidden liens, the Act provides various other protections for property owners. First, a bonding mechanism is provided which prevents filed liens from attaching to the real estate.<sup>284</sup> The bond may be procured by either the owner or the prime contractor so long as the surety company is authorized to do business in Nebraska.<sup>285</sup> A notice of the surety bond should be recorded<sup>286</sup> and the party procuring the bond must furnish a copy to any claimant upon request.<sup>287</sup> The Act provides that a claimant may proceed directly against the surety within one year of completion of performance if notice of the amount due has been given to the prime contractor.<sup>288</sup> This provision enables the owner to keep his title free of all liens if he wants to assume the expense of the bond. This may be practical if the owner anticipates a sale of the property in the foreseeable future. In addition, the owner may make procurement of the bond by the prime contractor a condition of the prime contract. While the typical homeowner would generally have insufficient bargaining power to demand such a provision, today's depressed construction industry may alter that situation.

Second, the Act provides for the release of a recorded lien upon

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278. NEB. REV. STAT. § 52-155(3) (Supp. 1982).

279. NEB. REV. STAT. § 52-156 (Supp. 1982).

280. NEB. REV. STAT. § 52-157 (Supp. 1982).

281. NEB. REV. STAT. § 52-156 (Supp. 1982).

282. NEB. REV. STAT. § 52-157 (Supp. 1982).

283. *Id.*

284. NEB. REV. STAT. § 52-141 (Supp. 1982).

285. *Id.*

286. NEB. REV. STAT. § 52-150 (Supp. 1982).

287. NEB. REV. STAT. § 52-141 (Supp. 1982).

288. *Id.*

the substitution of other collateral.<sup>289</sup> The substituted collateral is deposited in the office of the Clerk of the District Court and may be in the form of cash, certified check, bank draft, or surety bond.<sup>290</sup> The Clerk of the District Court issues a certificate of substituted collateral upon deposit which must be recorded in the office of the Register of Deeds.<sup>291</sup> Once such a certificate is filed, the real estate is released from the lien and the claimant's rights are transferred from the real estate to the substituted collateral.<sup>292</sup>

Finally, provision is made for the waiver of lien rights by claimants.<sup>293</sup> Such a waiver need not be supported by consideration, and is "valid and binding, whether signed before or after the materials or services were contracted for or furnished."<sup>294</sup> In addition, "[a]mbiguities in a written waiver are construed against the claimant."<sup>295</sup> Here again, in light of the depressed nature of today's construction market, it may be possible for the owner to effectively demand such a waiver from all potential claimants prior to construction.

## V. CONCLUSION

The Nebraska Construction Lien Act expands lien opportunities to a greater number of claimants, but at the same time, severely restricts claimants' ability to enforce liens against property owners. The subcontractor and materialman is thus shouldered with the decision of which way to lien. The claimant may either record his lien immediately and run the risk of causing negative public relations, or he can delay the recording and run the risk of losing his priority or the full value of his contribution. Thus, to protect the claimant, it becomes imperative for claimant's counsel to evaluate the pros and cons of the lien decision in light of all the relevant factors surrounding each construction project.

*Michael Cox '83*  
*Michael McCue '82*

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289. NEB. REV. STAT. § 52-142 (Supp. 1982); see Appendix E.

290. *Id.*

291. NEB. REV. STAT. § 52-151 (Supp. 1982); see Appendix F.

292. NEB. REV. STAT. § 52-142 (Supp. 1982).

293. NEB. REV. STAT. § 52-144(1) (Supp. 1982).

294. *Id.*

295. *Id.*

Appendix A\*
CONSTRUCTION LIEN

CONTRACTING OWNER OR SUCCESSOR IN INTEREST:

REAL ESTATE:

(Name)
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_

(Legal Description)
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_

CLAIMANT:

CLAIMANT CONTRACTED WITH:

(Name)
\_\_\_\_\_
(Address)
\_\_\_\_\_
(Phone)
\_\_\_\_\_

(Name)
\_\_\_\_\_
(Address)
\_\_\_\_\_
(Phone)
\_\_\_\_\_

SERVICES OR MATERIALS FURNISHED BY CLAIMANT: \_\_\_\_\_

\_\_\_\_\_
\_\_\_\_\_

CONTRACT PRICE: \$ \_\_\_\_\_ AMOUNT UNPAID: \$ \_\_\_\_\_

TIME LAST SERVICES OR MATERIALS FURNISHED: \_\_\_\_\_

\_\_\_\_\_  
Signature of Claimant

Subscribed and sworn to before me this \_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public

\* Appendices A through F are taken from R. Anderson & D. Pierson, Construction Lien Claims, prepared for the Seminar, Problem Solving in Real Estate Transactions, Nebraska Continuing Legal Education (Sept. 25, 1981).



Appendix B
NOTICE OF COMMENCEMENT

CONTRACTING OWNER:

REAL ESTATE:

(Name)
(Address)

(Legal Description)

TITLEHOLDER (if different than Contracting Owner):

(Name)
(Address)

IF A CONSTRUCTION LIEN IS RECORDED AGAINST ANY IMPROVEMENT COVERED BY THIS NOTICE OF COMMENCEMENT, THE LIEN WILL HAVE PRIORITY FROM THE TIME THIS NOTICE OF COMMENCEMENT IS RECORDED.

The duration of this notice of commencement is (not less than six months)

This notice of commencement is limited to (describe particular improvement project).

Signature of Contracting Owner

Subscribed and sworn to before me this \_\_\_ day of \_\_\_, 19\_\_.

Notary Public

Appendix C

TERMINATION OF NOTICE OF COMMENCEMENT

CONTRACTING OWNER:

REAL ESTATE:

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Legal Description)

\_\_\_\_\_  
(Address)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

TITLEHOLDER (if different than Contracting Owner):

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address)

\_\_\_\_\_

This notice of commencement recorded (date) as Instrument No. \_\_\_\_\_ is terminated as of (not less than thirty days after termination is recorded).

This termination applies only to the following described real estate:

\_\_\_\_\_  
(legal description)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Signature of Contracting Owner

Subscribed and sworn to before me this \_\_\_ day of \_\_\_\_\_,  
19\_\_.

\_\_\_\_\_  
Notary Public

Appendix D
NOTICE OF LIEN LIABILITY

OWNER:

REAL ESTATE:

(Name)
(Street address, legal description, or other identification)

(Street address, legal description, or other identification)

This is a notice of a right to assert a lien against the real estate for services or materials furnished in connection with an improvement of the real estate.

WARNING: IF YOU DID NOT CONTRACT WITH THE PERSON GIVING THIS NOTICE, ANY FUTURE PAYMENTS YOU MAKE IN CONNECTION WITH THIS PROJECT MAY SUBJECT YOU TO DOUBLE LIABILITY.

CLAIMANT:

CLAIMANT CONTRACTED WITH:

(Name)
(Address)
(Phone)

(Name)
(Address)
(Phone)

DESCRIPTION OF SERVICES OR MATERIALS:

TOTAL COST: \$ BALANCE DUE: \$ ON OR BEFORE:

ESTIMATED COST IF TOTAL COST NOT KNOWN:

(X) WE HAVE FILED A LIEN FOR THIS CLAIM, ON (date)
(X) WE HAVE NOT FILED A LIEN, BUT RESERVE THE RIGHT TO DO SO.

If a Notice of Termination is filed in connection with this improvement, Claimant must be notified in writing at least three weeks before the effective date of the notice.

DATED:

Appendix E
UNDERTAKING FOR TRANSFER OF
CONSTRUCTION LIEN TO OTHER SECURITY

\_\_\_\_\_ is the owner of the
following described real estate:

(legal description)
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_

A construction lien has been filed against the real estate in the sum of \$\_\_\_\_\_ by
\_\_\_\_\_ on \_\_\_\_\_, recorded as
Instrument No. \_\_\_\_\_ of the construction lien records of \_\_\_\_\_ County, Nebraska.
\_\_\_\_\_, as principal, and \_\_\_\_\_, as
surety, undertake to \_\_\_\_\_ in the sum of \$\_\_\_\_\_ that any
judgment or decree, with interest and costs, which may be rendered for the
satisfaction of the lien will be paid in full.

Dated \_\_\_\_\_.

\_\_\_\_\_
Principal

\_\_\_\_\_
Surety

Appendix F

IN THE DISTRICT COURT OF \_\_\_\_\_ COUNTY, NEBRASKA

(Title)

No. \_\_\_\_\_

CERTIFICATE OF DEPOSIT

\_\_\_\_\_, Clerk of the District Court of \_\_\_\_\_ County, Nebraska, certifies that \_\_\_\_\_ has deposited:

\_\_\_\_\_ the sum of \$ \_\_\_\_\_

\_\_\_\_\_ a surety bond in the amount of \$ \_\_\_\_\_, issued by \_\_\_\_\_

\_\_\_\_\_ against whom process can be served at: \_\_\_\_\_

\_\_\_\_\_ which is 115% of the total of the construction lien filed against the following described real estate:

(Legal Description)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

in the sum of \$ \_\_\_\_\_ by \_\_\_\_\_ on \_\_\_\_\_, recorded as Instrument No. \_\_\_\_\_ of the construction lien records of \_\_\_\_\_ County, Nebraska.

Upon the recording of this Certificate in the office of the Register of Deeds of \_\_\_\_\_ County, Nebraska, the lien will be transferred to the security on deposit with the Court, and the real estate will be released.

Dated \_\_\_\_\_.

\_\_\_\_\_  
Clerk of the District Court