Private Law: Security Devices

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Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol42/iss2/11
PLEDGE AND ASSIGNMENT

Practitioners often style certain security devices as both an "assignment and pledge." Although often used interchangeably by both judges and legislators, theoretically the two concepts are distinct. A pledge is a giving of possession to secure a loan; an assignment is a true transfer of title. The Assignment of Accounts Receivable Act provides that a perfected assignment under the Act will be treated as a pledge.

Because security devices are stricti juris, security devices must be properly drafted and perfected in order to affect third parties. The problem of how to obtain a security device on a partnership interest arose in American Bank & Trust Co. v. Louisiana Savings Association. In that case a "nominee" corporation was formed to acquire a ground lease on property belonging to a third person. In actuality, the property was being developed by a partnership, each of the three partners owning an equal share of the partnership and of the corporation. The nominee corporation was to act as agent for the partnership in the financing of the construction. One of the partners borrowed funds from the plaintiff bank and "secured" the loan by an "assignment and pledge" of his partnership interest. The partner did not pledge the stock of the corporation, nor was any mortgage placed upon the property. The "assignment and pledge" document was then recorded in the parish conveyance books.

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4. 231 La. at 374, 91 So. 2d at 571.
5. 231 La. at 374, 91 So. 2d at 571.
8. Civil Code article 3183 requires that a debtor's property is to be divided pro-rata between his creditors unless there exist "some lawful causes of preference."
9. 386 So. 2d 96 (La. App. 3d Cir. 1980).
The court, noting that, under the instrument, the bank did not assume any obligations of the partner but merely was to receive the partner's interest "in any income" produced, held that the document could not have been a pledge. Rather, the court held that the document was an assignment which served as "a security device." The court then reasoned that since the assignment had been recorded in the parish conveyance records, the bank acquired a "privilege" effective against third parties upon recordation.

The court's language and reasoning is somewhat puzzling. If the document was an "assignment," then no "privilege" would ever arise because an assignment cannot, by definition, be a security device. An assignment is a sale; a pledge is a security device.

Perhaps the results of the case can be justified on the grounds that sections 4321 to 4324 of Title 9 of the 1950 Louisiana Revised Statutes authorizes a pledge of incorporeal rights not evidenced by a written instrument. The interest is perfected as to third parties under this statute by the execution of a written act of pledge, and, in some cases, recordation. In the alternative, it may be argued that the right to receive income accruing to a partnership interest is a type of "account receivable" contemplated by the Louisiana Accounts Receivable Act. In such an instance, the assignment could have been perfected by recording a "statement of assignment" in the prescribed form in the parish conveyance records.

11. 386 So. 2d at 104-05.
12. Id. at 105.
13. Id. at 111.
14. The court relied upon the case of Dauzat v. Simmesport State Bank, 167 So. 2d 681 (La. App. 3d Cir. 1964), for the proposition that an assignment may serve as a security device. However, both the language of the Civil Code and the holding of Scott v. Corkern, 231 La. 368, 91 So. 2d 569 (1956) are clear. An assignment is a sale, a transfer of title; a pledge is a transfer of possession in order to grant security for a debt.
15. The partnership agreement in this case was not in writing. An instrument not evidenced in writing, however, can be written. The criteria for using sections 4321 to 4324 is whether the possession of the instrument gives the possessor any rights merely by possession, e.g., a negotiable note. If so, the pledge must be perfected under Civil Code article 3158. If not, then the pledge of written instruments whose mere possession does not accord the possessor any superior rights, cf. a lease, or partnership interest is perfected under sections 4321 to 4324.
16. LA. R.S. 9:3101 (Supp. 1952, 1964 & 1980) defines an account receivable as: any indebtedness, or part thereof, due to or arising out of the sale of goods or the performance of services, or the leasing of movable or immovable property, by the assignor in connection with any business, profession, occupation, or undertaking of the assignor that is carried on wholly or partly in the State of Louisiana, other than (a) indebtedness due to or arising out of claims in tort, and (b) indebtedness evidenced by a promissory note or a negotiable instrument, and (c) indebtedness secured by a mortgage, a chattel mortgage, or a pledge.
Judge Culpepper, in his dissent, makes a persuasive argument that while, as between the parties, some type of security interest may have arisen, the interest could not have affected third parties.

A question involving a secured interest in a lease arose in Department of Culture, Recreation and Tourism v. Fort McComb Development Corp.14 One of the arguments asserted in that case, in an attempt to have a mortgage of a lease cancelled, was that there had been confusion when the lease had been “assigned” to the mortgagee. The court held that the assignment “merely represented a security device in order to further secure the advance of money....”15 Since it was “only” a security device, there was no confusion and the mortgage of the lease remained valid.20

In light of the continued uncertainty of the jurisprudence, it is apparently not only desirable but advisable for the cautious practitioner to term a security device on property as to which there is no express statutory authority for the creation of security devices as both an “assignment and pledge.”

STOCK PLEDGE

In Defelice v. Garon,21 the issue was whether a contract denominated as a “voting trust agreement” sufficed as a pledge of stock if the voting trust itself did not meet the statutory requirements for such trusts. The court of appeals had held that a pledge had been created;22 however, the supreme court, in an opinion on rehearing, noted that certain facts had been presented to the court that rendered the case presumptively moot.23 Before remanding the case for a further determination of facts, the court did entertain the merits of the matter, and noted that even if the voting trust agreement could be reformed to create a pledge between the parties, such an issue was not properly determined by means of a summary judgment.24 The cautious practitioner is advised, in the creation of voting trust agreements, to expressly follow the conditions of the statute.25 Conversely, the creation of a stock pledge should be express. While no instrument is necessary to make a

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18. 385 So. 2d 1233 (La. App. 4th Cir. 1980).
19. Id. at 1236.
22. 395 So. 2d at 659.
23. Id. at 661-62.
24. Id. at 662-63.
pledge of stock effective as between the parties or as to the world,\textsuperscript{26} it is always advisable to have a document setting forth the true intent of the parties so there will be no dispute at a later date as to the type of security device created.

**PLEDGE OF NEGOTIABLE INSTRUMENTS**

Civil Code article 3156, unchanged since 1870, has required that, for a negotiable instrument to be pledged, it must be endorsed to the order of the pledgee if the instrument is not bearer paper. As a practical matter, a pledgee should insist upon such an endorsement so that he will have the right to enforce the pledge if it becomes due prior to the underlying obligation\textsuperscript{27} or if there is a default in the underlying obligation.\textsuperscript{28}

Some question has arisen whether, as to third parties, one can ever perfect a pledge of a negotiable instrument that has not been endorsed to the order of the pledgee. This question is particularly important now that Louisiana has adopted portions of the Uniform Commercial Code,\textsuperscript{29} because under the U.C.C. a holder of an instrument has a legal right to obtain an endorsement from the transferor at any time.\textsuperscript{30} The 1981 legislative amendment to Civil Code article 3156\textsuperscript{31} has obviated this problem by deleting the requirement that the instrument be endorsed prior to its being pledged.

**SURETYSHIP**

Most negotiable instruments in Louisiana contain “boilerplate” waivers by which endorsers bind themselves in solido with the maker, waive the benefits of division and discussion, and waive presentment, demand, and notice of protest.

While the law that applies to negotiable instruments in ostensibly the Uniform Commercial Code,\textsuperscript{32} differing courts have applied different rules to accommodation parties. Some courts look solely to the U.C.C. or its predecessor, the Negotiable Instruments Law.\textsuperscript{33}

\textsuperscript{26} LA. CIV. CODE art. 3158 (mere delivery of the stock is sufficient to make a pledge effective).
\textsuperscript{27} LA. CIV. CODE art. 3170.
\textsuperscript{28} LA. CIV. CODE art. 3157.
\textsuperscript{29} As adopted by Louisiana, articles 1, 3, 4, 5, 7 and 8 of the U.C.C are called the Louisiana Commercial Laws. LA. R.S. 10:1-101, added by 1974 La. Acts, No. 92, § 1.
\textsuperscript{30} LA. R.S. 10:3-201(3) (Supp. 1974).
\textsuperscript{31} As amended by 1981 La. Acts No. 315, § 1.
Some courts apply only the Civil Code articles on solidary obligations. Other courts have applied the law of suretyship as between accommodation endorsers and the law of solidary obligations as between accommodation co-makers. The practitioner has available differing lines of jurisprudence on which to rely, depending upon what position he seeks to assert. Examples of the continuing jurisdictional disputes as to what law to apply can be found in Smith v. White, Bourg v. Wiley, and Daigle v. Chaisson.

Both Smith and Bourg involved accommodation makers. In both instances an accommodation maker, who did not directly receive the benefit of the funds advanced under the note, paid the note without the necessity of a lawsuit. In both instances the accommodation maker filed suit against a co-maker to recover the funds that had been paid to the holder of the note.

In Bourg, the court used the rules governing solidary obligors and applied Civil Code article 2104 to grant the plaintiff contribution from the co-maker. The court reasoned that payment of the note by the plaintiff, an accommodation maker, extinguished the note; the court then found that thereby the plaintiff could pursue his remedy under the solidary obligation articles. The court expressly relied on the supreme court’s opinion in Aiavolasiti v. Versailles Gardens Land Development Co. for the proposition that the plaintiff could not collect his attorney’s fees from the co-maker.

The Bourg court was incorrect in holding that, under the U.C.C., payment by a co-maker extinguishes the note. Louisiana Revised Statutes 10:3-415 expressly provides that if an accommodation party pays an instrument, the party “has a right of recourse on the instrument against [the party accommodated].” This fact was noted in the Smith case and the court allowed the accommodation maker a right of recourse “on the instrument” against the principal maker for all sums paid, plus legal interest, but, nevertheless (without citing Aiavolasiti) denied attorney’s fees to an accommodation maker.

34. Wisconsin Capital Corp. v. Trans World Land Title Corp., 378 So. 2d 495 (La. App. 4th Cir. 1979).
40. (Emphasis added).
because the note contained no express provision allowing attorney's fees. Thus, the court in Smith applied the rules of the U.C.C., not the rules of suretyship or of solidary obligations.

The rationale of Smith is preferable to that in Bourg. The U.C.C. contains express provisions concerning the relationship between accommodation parties. There is therefore no need to resort to the law of suretyship or solidary obligations.61 The Smith court need not have concluded, however, that no attorney's fees are awardable when an accommodation maker sues his co-maker for indemnity. If the co-maker has a right to sue "on the instrument," he should have the right to all of the remedies available to a holder, since he is subrogated to the status of a holder when he sues "on the instrument."62 Therefore, the fact that the instrument itself does not expressly grant attorney's fees to accommodation makers appears to be irrelevant.

In the third case, Daigle, a husband and wife signed as accommodation endorsers along with a third party on a note of an individual. The individual maker became bankrupt and the husband and wife paid the note in order to avoid suit. The husband then brought suit against the remaining endorser seeking to collect, in the alternative, either all that the husband had paid on the note to the original holder or one-half of that amount. The appellate court awarded the plaintiff a one-third recovery representing defendant accommodation endorser's virile share, but the court refused to grant the plaintiff's attorney's fees. The court considered but rejected the argument that Revised Statutes 10:3-415(5)63 allows an accommodation endorser who pays the right to collect attorney's fees from his co-endorser. The court construed the statute as applying only to rights of an endorser against the maker, not against other accommodation endorsers.64 The court expressly followed the rules

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61. La. R.S. 10:1-103 (Supp. 1974) provides that, "Unless displaced by the particular provisions of this Title, the other Laws of Louisiana shall apply."

The comment of the Louisiana State Law Institute provides: The original U.C.C. text was rejected because it refers to concepts and terms either unknown to Louisiana or having different meaning in Louisiana. The thrust of the section is that the rest of Louisiana law implements the commercial law if a situation is not covered by the commercial Law. The Louisiana version says this without limitations.

62. La. Civ. Code art. 2161 provides: "Subrogation takes place of right: . . . [fore the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it."

63. La. R.S. 10:3-415(5) (Supp. 1974) provides: "An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party."

64. The court stated: The rule which Section 3-415(5) makes clear is that an accommodation party is not
set forth by the supreme court in *Aiavolasiti* and limited the recovery to the virile share of the actual funds paid by the accommodation endorser to discharge the debt plus legal interest. The court noted that *Aiavolasiti* treated accommodation endorsers as sureties as between themselves, and therefore applied the rules of contribution between sureties under article 3058 of the Civil Code. The court further followed *Aiavolasiti* in permitting contribution even though no lawsuit had been filed prior to payment because of the jurisprudentially created rule that a lawsuit is not a prerequisite to contribution if a co-surety had knowledge that the debt was due or consented to payment. The court in *Daigle* indicated that perhaps the endorser would have been entitled to attorney's fees had he claimed these in his prayer.

It is submitted that the court in *Daigle* could have avoided the conclusion that the U.C.C. contains “no provisions for indemnification or contribution amongst accommodation indorsers, once the presumption of Louisiana Revised Statutes 10:3-414(2) is overcome...” While the presumption in section 3-414(2) is that an accommodation endorser is entitled to 100 percent indemnity from the endorser who signs above him, this presumption is rebuttable. If an endorser is entitled to pay an instrument and sue the maker “on the instrument” (which suit on the “instrument” should give the endorser the right to attorney’s fees, since he would be subrogated to the rights of the holder of the instrument), it is a questionable policy distinction to deny attorney’s fees when the suit is against a

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45. *La. Civ. Code* art. 3058 states:

> When several persons have been sureties for the same debtor and for the same debt, the surety who has satisfied the debt, has his remedy against the other sureties in proportion to the share of each; but this remedy takes place only when such person has paid in consequence of a lawsuit instituted against him.

46. The jurisprudential rule was created in the case of *Leigh v. Wright*, 192 La. 224, 187 So. 649 (1939).

47. The plaintiff apparently had prayed for attorney’s fees in his claim for indemnification but omitted this prayer from his contribution claim. 396 So. 2d at 578.

48. 396 So. 2d at 577.


co-endorser. In fact, as a policy matter, such a rule would discourage endorsers from ever paying the holder without a lawsuit, because such actions would force the accommodation party to bear his own legal costs of any subsequent action against the maker (as resulted from the holding of the Smith case) or against an accommodation party (as in Daigle and Bourg).

Because the U.C.C. is a uniform law enacted in all fifty states, the jurisprudence interpreting its provisions should be persuasive authority. Other states have held that an accommodation party is entitled to attorney’s fees, whether he sues the maker or other accommodation parties.51

Until this matter is clarified by the Louisiana Supreme Court or by legislation, the cautious practitioner will want to be careful about advising an accommodation endorser to pay the instrument if there is any question that the other accommodating parties or the maker may be reluctant to pay. It may be better to wait until a lawsuit, with all its detrimental effects, in order to bring all the parties before the court at one time and to avoid making a party who is initially willing to pay bear the costs of attorney’s fees in a subsequent action to collect in contribution or indemnity “on the instrument” from others. Further, if an accommodation endorser does decide to pay, the practitioner will want to be sure that there is notice to the other accommodation parties under the provisions of Civil Code article 3058 in the event the court determines that this article should be applied to the facts.

The current uncertainty about the applicable law in the suretyship area also extends to continuing guarantees. In Parrino v. Parrino,52 a husband, his wife, and a third party signed a continuing guaranty for a corporation. When the corporation was unable to pay, the husband and wife paid the obligation and then sued the third guarantor. The third guarantor contended that Civil Code article 3058 prohibits contribution from a co-surety if payment was made in the absence of a lawsuit. The court held that the plaintiff had stated a cause of action for contribution, notwithstanding the express terms of article 3058, because the language of the guaranty agreement “created a solidary obligation, not only with the principal debtor but among the sureties themselves.”53 Relying upon obiter dictum in the supreme court’s decision in Louisiana Bank & Trust Co., Crowley v. Boutte,54 the court in Parrino noted that there is no need to wait until a lawsuit until being entitled to contribution from a

52. 393 So. 2d 761 (La. App. 1st Cir. 1980).
53. Id. at 763.
54. 309 So. 2d 274 (La. 1975).
It is interesting to note that the Parrino court did not refer to the supreme court's later opinion in Aiavolasiti, which had expressly held that while the language of a continuing guaranty may make the guarantors liable in solido to the creditor, as between themselves they remain but sureties. 56

Under both Boutte and Aiavolasiti, the rule that emerges is that, from the creditor's view, co-sureties bound in solido are viewed as solidary obligors; however, as between themselves, "solidary sureties" are merely sureties. As a result of these cases, and of Parrino, there are now apparently two jurisprudentially created exceptions to the express language of Civil Code article 3058. A co-surety is entitled to contribution even if he pays the creditor without being sued if either (a) he is a "solidary surety," or (b) the other surety had knowledge of the payment or consented to it.

It is submitted that to avoid further confusion in the future, article 3058 of the Civil Code should be amended to expressly provide for contribution between sureties without the necessity of a lawsuit being filed by the creditor; it should also allow the paying surety to recover attorney's fees if provided for in the principal obligation.

CREATION OF A SURETYSHIP CONTRACT

A contract of suretyship must be in writing; it may not be oral. 57 A contract which creates a principal obligation (as opposed to an accessory obligation such as suretyship), however, may be oral. 58 Therefore, the question in enforcing an oral promise is whether it is a principal obligation or whether it is merely an offer to pay the debt of a third person should that third person default. Seashell, Inc. v. Simon, 59 found that an individual had merely guaranteed debts of a corporation rather than undertaking a second, independent obligation to pay the corporation's open account. Since the individual's promise was not in writing, it could not be enforced against him.

COLLATERAL MORTGAGES

The purpose of a collateral mortgage is twofold. First, it allows the mortgagor to secure a fluctuating line of credit without the execution of additional acts of mortgage. 60 Second, it protects the

55. Id. at 764.
56. 371 So. 2d 755 (La. 1979).
57. LA. CIV. CODE art. 2278(3).
58. LA. CIV. CODE arts. 1762, 1771 & 2278.
lender by giving him a secured position on the property as of the
date of the pledge of the collateral mortgage note, even though ad-

vances may not take place until some point in the future. In
deciding whether the parties intended future loans to be secured by
the collateral mortgage, one must look to the intent of the parties at
the time the pledge was given.

Since the collateral mortgage note is a negotiable instrument, the
pledge is perfected by mere delivery of the collateral mortgage
note. To help prove intent of the parties, however, a collateral
pledge agreement is always advisable. In Tallulah Production
Credit Association v. Turner, there was a collateral pledge agree-
ment as well as physical delivery of the collateral mortgage note;
however, when future loans were made, the handnotes did not refer
to the collateral pledge agreement. The court held that there is no
"requirement of a written connection between the subsequent loan
and a pledged collateral mortgage note." The court's view is sound
because there is no need to have any written connection between
any loan and the pledged collateral mortgage note. Indeed, a hand-

62. Id.
63. Typically, the collateral mortgage note is bearer paper payable on demand.
This allows it to be collected or sued upon anytime there is a default in the handnote
or other principal obligation. LA. CIV. CODE art. 3170. Cf. Central Bank v. Bishop, 375
So. 2d 149 (La. App. 2d Cir.), cert. denied, 378 So. 2d 435 (La. 1979); Rubin, supra note
39, at 583.
64. LA. CIV. CODE art. 3158 states in part:
[It] is further provided that whenever a pledge of any instrument . . . is made to
. . . secure any other obligations or liabilities of the pledger to the pledgee, then
existing or thereafter arising, up to the limit of the pledge, and the pledged in-
sstrument or item remains and has remained in the hands of the pledgee, the in-
sstrument or item may remain in pledge to the pledgee . . . to secure, at any time
any renewal or renewals of the original loan or any part thereof or any new or ad-
ditional loans, even though the original loan has been reduced or paid, up to the
total limit which it was agreed should be secured by the pledge, and, if so desired
or provided, to secure any other obligations or liabilities of the pledger to the
pledgee, then existing or thereafter arising up to the limit of the pledge, without
any added notification or other formality, and the pledge shall be valid as well
against third persons as against the pledger thereof, if made in good faith: . . .
such . . . additional loans and advances . . . shall be secured by the collateral to
the same extent as if they came into existence when the instrument . . . was
originally pledged and the pledge was made to secure them.
(emphasis added).
67. Id. at 888 (emphasis in the original).
68. LA. CIV. CODE art. 3158.
note is not even necessary, since the principal obligation secured by
the pledge need not be in writing.69

Most negotiable instruments contain a provision automatically
accelerating the entire amount upon default. In some negotiated
transactions, however, the parties may agree to a provision that
grants the borrower a grace period in which to make payments
before a default occurs. Fabacher v. Hammond Dairy Co., Inc.70 in-
volved such a situation. A handnote was secured by the pledge of a
collateral mortgage package. The handnote provided:

In the event the Maker fails to pay any installment when due,
the holder thereof at its option may upon 10 days written notice
to the Maker, hereby declare all installments immediately due
and payable.71

Upon default the creditor proceeded by executory process. The
court held that executory process was not available because there
was no authentic evidence of the giving of notice to the maker.

Executory proceedings are strictly construed72 and, with limited
exceptions,73 every item must be proven by authentic evidence.74 The
Fabacher court did not accept the verified petition as "authentic
evidence" of the notice.75

As a practical matter, a notice that is sent by the mail cannot be
given in "authentic" form. Certainly the debtor will not execute an
authentic act that he has received notice. The creditor can only ex-
cute an authentic act which states that notice was mailed and attach
to the petition a true copy of the letter along with any certified
return receipt that is received. The only practical difference be-
tween this authentic act and a verified petition is that an authentic
act is executed before a notary and two witnesses, while the
verified petition is normally executed merely in affidavit form.

69. No handnotes were in existence in New Orleans Silversmiths, Inc. v. Toups,
261 So. 2d 252 (La. App. 4th Cir.), writ refused, 262 La. 309, 263 So. 2d 47 (1972); and,
the court still enforced the collateral mortgage. The only statutory requirement of any
kind of connexity between the handnote and the security is a criminal provision ap-
picable only to banks. LA. R.S. 6:239 (1950).
70. 399 So. 2d 87 (La. App. 4th Cir. 1980).
71. Id. at 92.
72. Reed v. Meaux, 292 So. 2d 557 (La. 1973); Myrtle Grove Packing Co. v. Mones,
226 La. 287, 76 So. 2d 305 (1955); Commercial Credit Corp. v. Nolan, 385 So. 2d 1246
73. LA. CODE CIV. P. art. 2637.
74. As to evidence that is "deemed" authentic, see LA. CODE CIV. P. art. 2636.
75. The requirement for an authentic act is contained in Civil Code article 2234.
If such a clause is negotiated in a note, it is advisable for the lender, prior to proceeding by executory process, to either execute some "authentic" evidence of the giving of notice or, in the alternative, to attach a copy of the letter to the petition and have the petition verified in authentic form.

FORECLOSURE ON MORTGAGES

A mortgage, by its very nature, is indivisible. Therefore, a mortgage placed on property by one who owns only a partial, undivided interest extends over the entire tract. Beene v. Wilbur held that if property is partitioned by lisitation and the mortgagee is not named a party in the lisitation suit, his mortgage continues to exist over the property as a whole after partition. The court relied on Civil Code article 1338 which relegates mortgagees to the proceeds of the sale by lisitation only when the "holders of such mortgages, liens, and privileges be made parties to such judicial partition."

At a judicial sale of property owned by one who is only a partial owner, a question arises as to what is the proper bid price. At any judicial sale with appraisal, a two-fold test must be met. The property must be sold for the greater of (a) two-thirds of its appraised value, or (b) an amount sufficient to satisfy both the costs of the sale and any mortgages, liens, or privileges that are superior to the seizing creditor's encumbrance. Of course, the seizing creditor, if he holds a first mortgage, may allow the property to be sold even though the price is not sufficient to satisfy his mortgage, as long as the two-thirds rule is met. These rules apply whether the mortgagor owns a complete or partial interest in the property.

In Barnard v. Barnard the court invalidated a judicial sale of a judgment debtor's one-half interest in property. The amount that had been bid at the sheriff's sale (without appraisal) was not sufficient to pay off a superior mortgage on the entire tract although the bid had been for more than one-half of the outstanding balance on the superior mortgage. The holding of Barnard means that if property is subject to a $1 million superior mortgage, and if the portion

76. LA. CIV. CODE art. 3282.
78. 388 So. 2d 435 (La. App. 2d Cir.), writ denied, 393 So. 2d 738 (La. 1980).
79. LA. CODE CIV. P. art. 2336.
80. LA. CODE CIV. P. art. 2337.
81. LA. CODE CIV. P. art. 2338.
82. 391 So. 2d 939 (La. App. 2d Cir. 1980).
belonging to the owner of an undivided .125 interest is seized by an
inferior creditor, the minimum bid price at the sheriff’s sale would
be at least $1 million.83

The 1981 Legislature amended articles 2298 and 2751 of the
Code of Civil Procedure84 to expressly allow attorney’s fees if an in-
junction is granted halting a sale under a writ of fieri facias or a
sale by executory process.85 The court has the discretion to award
attorney’s fees, but only if it finds that the seizure was “wrongful.”86

EXECUTORY PROCESS

*Myers v. United States*87 involved a determination of when a
federal tax lien survives a sale by executory process. A first mort-
gage was held by a bank. The debtor defaulted and the bank in-
stituted executory proceedings. At the time of the filing of the suit
for executory process, there was a federal tax lien recorded against
the property. After the institution of executory proceedings, but
more than thirty days prior to the sheriff’s sale, a second federal tax
lien was placed on the property. No notice was ever given to the
Internal Revenue Service of the suit. The bank purchased the property
at the sheriff’s sale and the clerk of court cancelled the inscription
of all inferior encumbrances, including both federal tax liens. The
bank then sold the property to the plaintiff, Myers. After Myers
purchased the property, the government served the original debtor
with a levy and served a notice of seizure on Myers. Myers contended
that the levy was wrongful because the second tax lien,88 recorded
after the institution of executory proceedings, was properly cancelled
after the sheriff’s sale.

83. If the property is sold with appraisal, the price bid must also be at least two-
thirds of the appraised value. LA. CODE CIV. P. art. 2336.
85. These acts legislatively overrule *General Motors Acceptance Corp. v. Meyers*,
385 So. 2d 245 (La. 1980).
86. The comments to Act 302 state:
The second paragraph of this Article, which was enacted in 1981, is intended to
give the trial judge the discretion to award damages and attorney’s fees where
the seizure through executory process was wrongful. It is not intended to require
that damages and attorney’s fees be awarded in every case where an injunction is
issued, for example, where an injunction is issued because of a technical deficiency
or a technical error.
While no similar comment is found under Act 301, because the language of both acts is
substantially identical concerning the award of attorney’s fees, presumably the same
interpretation of what constitutes a “wrongful” seizure is applicable.
87. 647 F.2d 591 (5th Cir. 1981), aff’g 483 F. Supp. 1154 (W.D. La. 1980). The lower
court opinion was noted in Rubin, supra note 21, at 398, and criticized in Note,
88. Meyers conceded that the first tax lien should not have been cancelled. 647
F.2d at 597.
The court rejected Myers’ contention, holding that Louisiana’s executory process is not a “judicial proceeding” under federal tax law and therefore the failure to notify the government meant that not only the first but also the second tax lien survived the sheriff’s sale.

In light of the decision in Myers, the title examiner may want to carefully check all erasures of mortgages and liens that occur by virtue of sale pursuant to executory proceedings to make sure that the Internal Revenue Service was timely notified and that therefore the erasure of the federal tax lien was effective.

THE DEFICIENCY JUDGMENT ACT

The Deficiency Judgment Act prevents a creditor from pursuing a debtor personally following liquidation of any collateral securing the loan unless there is a judicial sale with appraisal. The public policy the Act represents has been interpreted to make the requirement mandatory whether the sales are by judicial proceedings without appraisal or occur as a result of private sales. Whether the protection of the Deficiency Judgment Act extends to endorsers, guarantors, and sureties has been the subject of litigation from which two divergent lines of jurisprudence emerge. The most recent case is General Motors Acceptance Corp. v. Smith which holds that sureties are protected by the Deficiency Judgment Act. Therefore, the creditor was prevented from collecting the deficiency from a surety after a sale that was not by judicial process with appraisal.

89. As defined in 26 I.R.C. § 7425(a).
90. I.R.C. § 7425 distinguishes between “judicial proceedings” and “other sales.” A federal tax lien filed after the institution of foreclosure proceedings in “judicial sales” will be discharged even though the government is not notified; however, a federal tax lien filed after the institution of foreclosure in “other proceedings” will be valid and will survive the sale if the lien is filed “30 days prior to the sheriff’s sale.” The court concluded that the phrase “judicial proceedings,” as used in the federal statute, applies only to judicial sales pursuant to plenary judicial proceedings embodying the procedures associated with a complete and formal hearing on the merits, as distinguished from a more informal summary determination. Louisiana’s executory process is unquestionably a “judicial proceeding” in the literal sense—it does require judicial, or at least quasi-judicial, involvement; but it falls far short of the plenary judicial proceedings described in the committee reports.

647 F.2d at 599.

93. For a discussion of the two conflicting lines of jurisprudence see, Comment, Deficiency Judgments in Louisiana, 40 Tul. L. Rev. 1094 (1975).
94. 399 So. 2d 1285 (La. App. 4th Cir. 1981).
The language of the Deficiency Judgment Act applies to "a mortgagee or other creditor." In *Justice v. Caballero*, this language was held sufficiently broad to include a creditor whose note was secured by a vendor's privilege; however, in *Ouachita Equipment Rental v. Baker Brush Co.*, it was held to be not broad enough to include an equipment lessor. Relying on the supreme court's decision in *Executive Car Leasing Co. of New Orleans v. Allorex Corp.*, the court in *Ouachita Equipment* held that the public policy behind the Deficiency Judgment Act was simply not applicable to leases. The implicit assumption is that there is no "sale" when the lessor repossesses his own property, even though the lessee is liable for accelerated future rentals or stipulated liquidated damages.

**PRIVATE WORKS ACT**

*P.H.A.C. Services, Inc. v. Seaway International, Inc.* held that subcontractors who furnish labor and materials used in constructing living quarters for use in an offshore drilling platform are entitled to a privilege under the Private Works Act. The court reasoned that the platform was a "building" or "other construction." The court rested its interpretation on the Louisiana Supreme Court's holding that a fixed drilling platform is a building within the meaning of Civil Code article 2322 and upon the fact that the corresponding term for building found in French Civil Code article 518 "particularly applies to structures which serve as habitations." The court's opinion is narrowly drawn. The opinion may leave room for an argument that portable or submersible drilling platforms, or drilling platforms not used for habitation, may not be the kinds of immovables upon which Private Works Act claims may be asserted.

For the first time in almost sixty years the Private Works Act has been completely overhauled. Acts 1981, No. 724 completely reenacted and amended Louisiana Revised Statutes 9:4801 et seq.

In 1977 House Concurrent Resolution No. 150 directed the Law Institute to clarify the often confusing and contradictory terms of

96. 393 So. 2d 866 (La. App. 4th Cir. 1981).
97. 388 So. 2d 477 (La. App. 2d Cir. 1980).
98. 279 So. 2d 169 (La. 1973).
99. 388 So. 2d 117 (La. App. 1st Cir. 1980).
101. 393 So. 2d at 122.
102. The Private Works Act was enacted by 1922 La. Acts, No. 139; all the provisions were modified substantially by 1926 La. Acts, No. 298.
the Private Works Act. For almost four years, the Law Institute worked on drafting an acceptable proposal. The Institute's efforts throughout were to restate the law so as to preserve its basic policy decisions, and to place the law into some type of logical and consistent theoretical framework. After extensive discussion and revisions, the Law Institute's bill was submitted to the legislature by Representatives Simoneaux and Gaudin, and by Senator Casey.

Practitioners who are accustomed to the old Act will find no basic surprises or substantial alterations. As originally proposed, and as subsequently enacted, the new law preserves the policy provisions of the old Act. The persons who are able to obtain privileges are unchanged. The rank of the privileges is unchanged. The need to record some type of notice in the public records of the entering into of a contract, and the need to record a notice of one's claim is also unchanged, although the specifics of what must be recorded are somewhat different.

The changes made by the legislature in response to the Law Institute's proposal were minimal. Hearings were first held by the House Committee on Civil Law and Procedure. The bill at that time contemplated eliminating the dual filing periods in which 30 days was allowed to file lien claims if the contract was recorded, and 60 days if no contract was timely recorded; House Bill 900 provided a single 45 day period. Although minor technical amendments were made to the bill in the House Committee, the major change was to extend the single 45 day period to 60 days.

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103. House Concurrent Resolution No. 150 of the 1977 regular session of the Louisiana Legislature reads:

WHEREAS, the lien laws under Title 9 of the Louisiana Revised Statutes of 1950 are complex and often times confusing and contain many duplications; and WHEREAS, in order to provide better enforcement of the provisions of the lien laws in this state an in-depth study should be made of every aspect of the lien laws with a view toward a more clear and workable statement of these laws.

THEREFORE BE IT RESOLVED by the House of Representatives of the Legislature of the State of Louisiana, the Senate thereof concurring, that the Louisiana Law Institute is hereby authorized and directed to study and propose a revision of the lien laws under Title 9 of the Louisiana Revised Statutes of 1950 so as to clarify and simplify the lien laws and the enforcement thereof.

BE IT FURTHER RESOLVED that the Louisiana Law Institute be requested to submit a written report of its study, together with any specific proposals for legislation to the 1978 regular session.

104. Memorandum of October 8, 1979 from Tom Harrell, reporter of the Private Works Act, to members of the Louisiana Law Institute Security Devices and Advisory Committee. The original of this document can be examined at the Louisiana Law Institute, Paul M. Hebert Law Center, Louisiana State University.

105. See, for example, the minutes of the meeting of the Louisiana State Law Institute's Council on November 7 and 8, December 12 and 13, 1980.

When the bill reached the Senate Committee the single 60 day period was reduced to 30 days. In addition, some concern arose as to whether those who did grading and clearing work on property should be accorded a privilege. Under the provisions of the old Act, those who did grading work were not accorded a privilege. The Law Institute's draft sought to incorporate the substance of old Louisiana Revised Statutes 9:4819 prior to its 1979 amendments by reinstating a privilege for grading and clearing work. Amendments made on the floor of the Senate after it left the Senate committee substantially accomplished this goal.

Of course, no mere "restatement" of any complex statute can ever be accomplished without making some substantive changes. In an effort to compare the provisions of the old Act with those of the new, following this article is a side-by-side overview of the new and old Acts. It is by necessity perfunctory, but it is hoped that it will give practitioners a handy reference guide with which to analyze the new Act, which goes into effect on January 1, 1982.
AN OVERVIEW OF THE NEW PRIVATE WORKS ACT

OLD ACT

(a) R.S. 9:4801, 4812. Contractors, subcontractors, laborers, materialmen, subcontractors of subcontractors, materialmen of subcontractors, (but not materialmen of materialmen) and lessors of movable property or equipment if there is a written contract. Also protected are architects and consulting engineers.

NEW ACT

(a) R.S. 9:4801, 4811. Same categories essentially; however, the Act differentiates between those who have a contractual relationship with the owner (9:4801) and those who have a contractual relationship with or through the contractor (9:4802). The law is unchanged that materialmen (now called "sellers") are protected whether their materials are used in construction and incorporated into the work, or are consumed during the construction process, or in machinery or equipment used at the job site.

(b) Materialmen of materialmen are still denied a privilege. R.S. 9:4802 (A)(3).

(c) If a contractor performs personal services himself, his privilege is still that of a contractor; he cannot treat himself as a “laborer” to get a stepped-up rank. Comment (C) to R.S. 9:4801.
2. **DOES THE OWNER HAVE PERSONAL LIABILITY?**

(a) Yes. He always has personal liability to those with whom he has a contractual relationship.

(b) He also has personal liability to all those protected by the Act. R.S. 9:4806, 4812.

3. **DOES THE CONTRACTOR HAVE PERSONAL LIABILITY?**

(a) Yes, he is always liable to those with whom he has a contractual relationship.

(b) The old law was unclear about when a contractor had personal liability to those with whom he had no privity of contract. R.S. 9:4814(C).

(d) Professionals covered include licensed architects and registered or certified surveyors and engineers.

(a) Yes. He always has personal liability to those with whom he has a contractual relationship. R.S. 9:4801.

(b) He also has personal liability to all of those who are protected by the Act. R.S. 9:4802(A).
AN OVERVIEW OF THE NEW PRIVATE WORKS ACT

4. **ARE THE CONTRACTOR AND THE OWNER BOUND TOGETHER?**

(a) Unclear as to the nature of the obligation and whether the laws of solidary obligations apply.

(a) R.S. 9:4802(A), (E). While the owner and the contractor may both have personal liability under the Act to those with whom neither one nor both have privity of contract, their liability is solidary "only in the imperfect sense. It is not intended that the technical rules regulating the obligations of principals bound in solido prescribed by Civil Code articles 2901 et seq. apply to such relationship." Comment (e) to R.S. 9:4802.

5. **WHO GETS A PRIVILEGE?**

(a) The general contractor does not get a privilege unless there is a timely recorded contract. R.S. 9:4801, 4812.

(b) All others protected by the Act get a privilege whether or not the contract is recorded.

(a) The privilege extends only to those to whom the owner is liable under the Act. R.S. 9:4801, 4802. The privilege falls if the owner avoids personal liability by complying with the Act. In some cases, however, there may be no privilege even though the owner remains personally liable to a claimant. See Comment (C) to R.S. 9:4823.
6. How Can the Owner Be Protected?

(a) The owner is always personally liable to those with whom he has direct contracts.

(b) The owner can avoid personal liability to all other claimants only if he properly records the contract with a bond, for the amount legally required, furnished by a solvent surety of the general contractor. R.S. 9:4806.

(b) A general contractor will get a privilege on jobs under $25,000. R.S. 9:4811(D). If the job exceeds $25,000, he does not get a privilege unless he has timely filed a notice of contract. R.S. 9:4811. A non-general contractor need not record to get the privilege (Comment (a) to R.S. 9:4808); filing the contract, however, allows the contractor to be "deemed a general contractor." R.S. 9:4808(B). This allows the scope of his work to be treated as a separate contract and also imposes upon him the liabilities of a general contractor.

(a) Unchanged from old law. R.S. 9:4801.

(b) No recordation of a contract is required. Rather, a notice of contract is filed. R.S. 9:4811. There are statutory requirements for the notice, but errors or omissions will not invalidate the notice in the absence of proof of "actual prejudice." R.S. 9:4811(B).
AN OVERVIEW OF THE NEW PRIVATE WORKS ACT

(c) Therefore, an owner incurs personal liability and has a privilege on his property if the contract is not recorded (R.S. 9:4801, 4812); if the contract is recorded untimely (R.S. 9:4801, 4812); if the bond is filed untimely (R.S. 9:4806, 4812); if the bond is in the wrong amount (R.S. 9:4806); or if the surety is not solvent at the time the bond is called upon (R.S. 9:4806).

7. PROCEDURE FOR INITIAL FILING TO PROTECT THE OWNER

(a) There must be a contract in writing. R.S. 9:4801.

(b) It must be signed.

(c) Unchanged from old law. However, failure to record the bond will not affect the validity of the notice of contract as fixing the rank of claimants as to third parties. R.S. 9:4811(C), and Comment (C) to R.S. 9:4811.

(a) There must be a written notice of contract.

(b) The contents of the notice are prescribed by statute (R.S. 9:4811); however, error or omission will not invalidate the notice unless "actual prejudice" is shown. R.S. 9:4811(D).

The requirements of the notice are that it:

(1) Shall be signed by the owner and contractor.

(2) Shall reasonably identify the im-
movable upon which the work is to be performed.
(3) Shall identify the parties and give their mailing address.
(4) Shall state the price of the work or, if no price is fixed, describe the method by which the price is to be calculated and give an estimate of it.
(5) Shall state when payment of the price is to be made.
(6) Shall describe in general terms the work to be done."

(c) Same. R.S. 9:4831.

(d) Recordation must occur before the work begins; however, the 30 day requirement has been deleted. R.S. 9:4811. “Work” is defined in R.S. 9:4808.

(e) Same (R.S. 9:4812); however, the failure to file the bond does not affect the validity of the notice concerning any matter except the owner’s personal liability. R.S. 9:4811(c); 4812(A).
8. **What Size Bond Is Required?**

(a) On a contract up to $10,000, the bond must be the amount of the contract.

(b) If the contract exceeds $10,000 and is less than $100,000, the bond must be not less than 50% of the contract, but must be for at least $10,000.

(c) If the contract exceeds $100,000 but is less than $1 million, the bond must be not less than 33 1/3% of the amount of the contract.

(d) If the contract is over $1 million, the bond must be not less than 25% of the contract.

(a) Unchanged (terminology is now "price," not "contract"). R.S. 9:4812 regulates the size of the bond.

(b) Unchanged.

(c) If the price exceeds $100,000 and is not more than $1 million, the bond must be 33 1/3% of the price but not less than $50,000.

(d) If the price exceeds $1 million, the bond must be 25% of the price but not less than $333,333.

9. **What If The Bond Is Not Recorded?**

The owner has personal liability (R.S. 9:4806) but the surety remained bound, as did the general contractor. R.S. 9:4807, 4814.

As to those with whom the owner has a privity of contract, he is always liable. R.S. 9:4801. As to those with whom the owner has no privity of contract, the surety, the owner, and the contractor all remain liable. R.S. 9:4802, 4813.
10. **Who Is Protected by the Bond?**

(a) The owner for performance of the work and claimants for money owed. R.S. 9:4802.

(b) The surety is liable to the claimants under the Act for payment of all claims, whether or not the contract and bond are properly recorded, in the following order:

(1) First, pro-rata to those claimants who timely file their claims, give written notice to surety of their claims within this time period, and bring suit within a year of the owner's recordation of notice of acceptance or default.

(a) The Act distinguishes between "performance and payment" bonds and mere "payment" bonds. It is presumed that any bond given is a "performance and payment" bond unless performance is expressly excluded. R.S. 9:4812(C). The filed bond will be deemed to comply with the Act, and therefore the surety can't contractually limit his liability; however, the surety can't be held liable for more than the face amount of the bond if the bond complies with the Act. R.S. 9:4812(D).

(b) Unchanged. R.S. 9:4813.

(1) First, pro-rata to those claimants who timely file their claims, give notice to the owner and bring suit within 1 year of the time to file claims (not the date of recordation of owner's notice of termination). R.S. 9:4813. There is no requirement of
AN OVERVIEW OF THE NEW PRIVATE WORKS ACT

notice to the surety but the surety cannot be sued before the expiration of the time to file claims unless the surety has been given 30 days' notice. R.S. 9:4813(D).

(2) Second, in order of filing suit to the following two groups if they file suit against the surety within 1 year of the owner's recordation of notice of acceptance or default:

(i) To those claimants with a direct contractual relationship with the general contractor who did not timely file their claims;

(ii) To those claimants with no direct contractual relationship with the general contractor who did not timely file claims if they gave written notice to the general contractor by registered or certified mail of

(2) Second, to those who do not timely claim a privilege but to whom the contractor is liable, in order of their presenting their claim against the surety. R.S. 9:4813(B). No need to file suit to get in line for payment; mere notice to the surety is sufficient.
their claims within 30 days after the owner's recordation of the notice of acceptance or default.

11. HOW CAN CLAIMANTS ASSERT THEIR PRIVILEGES?

(A) General Contractor
(1) Gets privilege only if contract is timely recorded.
(2) Serve the owner with a sworn detailed statement of the claim by registered mail or personal service. R.S. 9:4802.
(3) Record the sworn statement of the claim in the parish where the work has been done within 60 days after filing of owner's notice of termination. R.S. 9:4822(B).

(3) Third, to the owner. R.S. 9:4813(B).

*Terminology Change: Unsworn Notice of Termination as opposed to notice of acceptance or default. R.S. 9:4822(E).

(A) General Contractor
(1) Unchanged (R.S. 9:4822) except that no recordation is needed for contracts under $25,000. R.S. 9:4811. Those who are mere "contractors" need not have recorded notice of contract. See Comment (a) to R.S. 9:4808.

(2) File unsworn statement of claim. Deliver a copy of the claim to the owner. R.S. 9:4822(A), (B).
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after the owner’s recordation of notice of acceptance or default.

(B) Claimants Other Than General Contractor

(1) If the contract was timely recorded:

(a) Serve the owner with a sworn detailed statement of the claim by registered mail or personal service (R.S. 9:4802).

(b) Record the sworn statement of the claim in the mortgage records of the parish where the work has been done within 30 days after the owner’s recordation of the notice of acceptance or default.

(B) Claimants Other Than General Contractor

(1) If the notice of contract was filed, whether timely or not:

*To preserve a claim against contractor, be sure to give statement of claim to the contractor. R.S. 9:4823(B).

This section applies only to those with whom the owner does not have contractual privity.

(a) File unsworn (R.S. 9:4822(G)) statement of claim and deliver a copy to owner if his address is known R.S. 9:4822(A).

(b) 30 days to record after filing of notice of termination. R.S. 9:4822(A).
(2) If the contract was not timely recorded or not recorded at all:

(a) Serve the owner with a sworn detailed statement of the claim by registered mail or personal service. R.S. 9:4812.

(b) Record the sworn statement of the claim in the mortgage records of the parish where the work has been done within 60 days after the owner's recodnation of the notice of acceptance or default, or if there is no notice recorded, within 60 days of the last work performed or materials furnished on the jobsite.

(2) If no notice of contract was recorded: This section applies to all claimants regardless of whether they have contractual privity with the owner; it is also the exclusive section dealing with claims of those who have direct contractual privity with the owner.

(a) File unsworn (R.S. 9:4822(G)) statement with claim; no need to serve owner.

(b) 60 days to file from filing of notice of termination, or, if no notice, from substantial completion or abandonment. R.S. 9:4822(C).

12. WHAT ARE THE REQUIREMENTS FOR THE CONTENTS OF A RECORDED CLAIM?

The claim had to be a "sworn detailed statement . . . showing the total amount" of the claim. R.S. 9:4802.

There is no requirement that the claim be in affidavit form. The statutory requirements are set forth in R.S. 9:4822(G). The claim:
AN OVERVIEW OF THE NEW PRIVATE WORKS ACT

"(1) Shall be in writing.
(2) Shall be signed by the person asserting the same or his representative.
(3) Shall reasonably identify the immovable with respect to which work is performed or movables or services were supplied or rendered and the owner thereof.
(4) Shall set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it including the person for whom or to whom the contract was performed, material supplied, or services rendered."

Comment (g) to R.S. 9:4822 notes: "Technical defects in the notice should not defeat the claim as long as notice is adequate to serve the purposes intended."

13. Extinguishment Of Privilege

A privilege, once properly asserted, is extinguished:

A privilege, once properly asserted, is extinguished:
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(a) Unless the claimant files a lawsuit within 1 year of recordation of the claim and files a notice of lis pendens in the same time period. R.S. 9:4802.

(b) If a concursus is invoked and the bond is found to be sufficient. R.S. 9:4804, 4805.

(c) The claim is bonded out after the fact by the owner or general contractor. R.S. 9:4841, 4842.

(d) Issue of subrogation unclear.

(a) Unless a suit has been filed within one year from the expiration of the time to file claims (not from date a claim was filed). R.S. 9:4823(A). Notice of lis pendens is required to preserve the claim against third persons, but not against the owner. R.S. 9:4833(F). The required contents of the notice of lis pendens are set forth in the statute. R.S. 9:4833(F).

(b) Unchanged. R.S. 9:4841.

(c) Any "interested person," not just the owner or contractor, may bond out claims. This bond may be by a legal surety, may be in cash, or may be in federally insured certificates of deposit. R.S. 9:4835, 4823(D), (E).

(d) A lien or privilege is extinguished by the extinction of the obligation it secures. R.S. 9:4823(A); however, payment can result in legal subrogation. See Comment (b) to R.S. 9:4802.
14. **Can There Be More Than One General Contract Or More Than One Job On The Site?**

(a) The old Act contemplated only work done on adjacent (although not contiguous) tracts of land owned by a single owner and performed by a single general contractor under a single construction contract. See *Louisiana National Bank v. Triple R. Contractors, Inc.*, 345 So. 2d 7 (La. 1977).

(b) There may be multiple general contractors and multiple jobs. Any contractor may be "deemed a general contractor," if a notice of his contract is recorded. R.S. 9:4807(B), 4808(B). Therefore, if both a notice of contract and a bond are filed, "the work to be performed under the contract is conclusively deemed to be a separate work even though it may be part of a larger project being carried out by the owner. Accordingly, with respect to such work the time for filing claims, the liability of the surety, and all other aspects of the Act will be determined independently even though in the absence of such filing the work might be considered part of a larger and single work." Comment (b) to R.S. 9:4807.
15. How Do Private Works Act Claimants Rank?

(a) *As between themselves*

By nature. R.S. 9:4809.

(b) *As to the world*

(1) Ad valorem taxes or local assessments for public improvements. R.S. 9:4802(B), 4812.

(2) Laborer's Privilege. R.S. 9:4801(B), 4812.

(3) Mortgages and Vendor's Privileges effective before the Private Works Act privileges become effective. R.S. 9:4801(B), 4812.

(4) All other Private Works Act privileges (R.S. 9:4801(B), 4812) except the general contractor, architect, and engineer (R.S. 9:4813).

(5) General contractor, architect, and engineer.

(a) *As between themselves*

By nature. Comment (b) to R.S. 9:4821.

(b) *As to the world*

(1) Same. R.S. 9:4821(1).

(2) Same. R.S. 9:4821(2).

(3) Same. R.S. 9:4821(3). The specific provisions of the old law dealing with the effective dates of collateral mortgages or mortgages to secure future advances have been deleted in favor of the rule that all mortgages and vendor's privileges rank in accordance with general law. Comment (d) to R.S. 9:4821.

(4) Same. R.S. 9:4821(4).

(5) Same. R.S. 9:4821(5).
AN OVERVIEW OF THE NEW PRIVATE WORKS ACT

14. WHEN DO PRIVATE WORKS ACT PRIVILEGES START TO AFFECT THIRD PARTIES?

At the earlier of:
(1) Proper and timely recordation of contract and bond; OR
(2) Work begins or materials furnished. R.S. 9:4801, 4802, 4813.

(1) No definition of “work.”
(2) It does not include test pilings or grading. R.S. 9:4819(A)(2).

17. WHEN DOES WORK BEGIN?

At the earlier of:
(1) Notice of contract filed; filing of bond is irrelevant. R.S. 9:4802(A)(1), 4811(C); OR

(2) Same. R.S. 9:4820(A)(2); however, test pilings, grading and clearing is considered a separate “work” entitling the grading or clearing contractor to a separate privilege that ranks as to third persons only from the date of the filing of the claim. R.S. 9:4808(C).

(3) It does not include work or materials less than $100. R.S. 9:4819(A)(1).
(4) Separate rules if there is renovation work. R.S. 9:4819(A)(2).

(3) Same. R.S. 9:4820(A)(2).
(4) Same. R.S. 9:4820(B).
(5) A “no work” affidavit by an architect, licensed civil engineer, or registered land surveyor conclusively protects third persons who record mortgages or privileges immediately afterward or within 2 business days before. R.S. 9:4819(A)(3).

Yes, lessors of movable property or equipment used in erection, construction, improvement or repair of private property had a privilege against the land and improvements. R.S. 9:4801.1. The requirements were:

(A) The lease must be written.
(B) If the lease was not with the owner of the property, copies of the lease must have been sent to the owner and all those through whom the lessee has authority to work on the property within 10 days of the execution of the lease.
(C) The lessor must have claimed

(5) Same. R.S. 9:4820(C).

Yes. R.S. 9:4801(5); 4802(G).

(A) Same. R.S. 9:4801(5), 4802(G).
(B) If the lease is not with the owner of the property, copies of the lease must be given to the owner of the property; copies of the lease must be given to owner and the contractor within 10 days after the movables are placed on the immovable (not within 10 days of execution of the lease). R.S. 9:4802(G).
(C) Same. R.S. 9:4822.
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(D) If the leased equipment was not being used, the owner could terminate the privilege by giving the lessor written notice of nonuse.

(E) The privilege is limited to "only that part of the rentals accruing during the time the movable is located at the site of the immovable for use in a work." R.S. 9:4803(B).

19. WHAT HAPPENS IF AN IMPROPER CLAIM IS RECORDED?

(a) The owner can have the claim and the privilege it gives erased from the mortgage records. R.S. 9:4821.

(b) The owner can also get reasonable attorney's fees necessary to enforce erasure of the claim if he gives the claimant a written request by certified mail to cancel the claim, states the reason why the claim is improper, and the claimant does not cancel the claim within 30 days after receipt of the request. R.S. 9:4821.

(b) Time limit is now 10 days. The request can be made by the owner or "other interested person." The claimant who fails to erase his claim is liable for damages and attorney's fees. R.S. 9:4833(B).
20. **Does the Owner Get Any Written Notice of His Possible Liability Before Entering Into a Contract?**

(a) Only owners who are having homes constructed or who have residential home improvements made get a notice, whether or not the contract is to be recorded. R.S. 9:4851.

(b) The “Notice of Lien Rights” is given by the general contractor to the owner in a form set forth in the Act.

(c) The general contractor’s failure to give this notice will not affect the rights of claimants under the Act; however, the general contractor may become liable to the owner for damages and reasonable attorney’s fees.

21. **May the Owner Withhold a Percentage of the Contract Until Completion of the Job?**

The Act makes no provision for a “hold back.” Therefore, the entire matter is governed by the terms of the contract.

(a) The new Act does not amend the Residential Truth-in-Construction Law, R.S. 9:4851 et seq.