



The Nuts and Bolts of the Louisiana Private Works Act

Presented by Anthony J. Gambino, Jr.

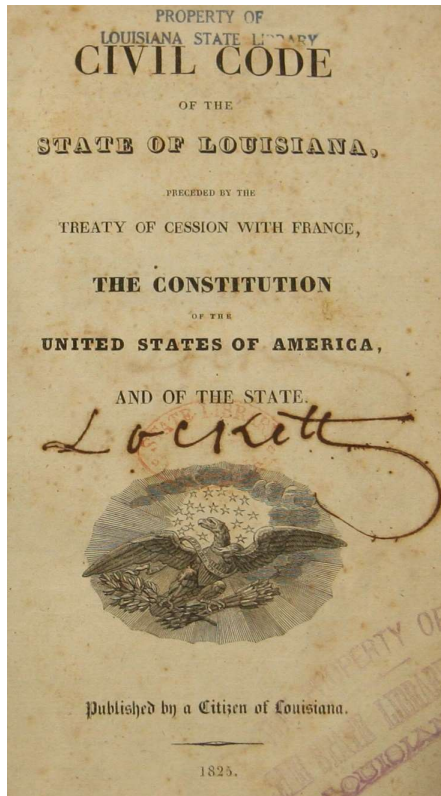
phelps

Louisiana's History of Protecting Construction Workers

- For more than two centuries, Louisiana law has protected those who perform work on immovable property.
- Those who perform labor or supply materials are granted the right to seize and sell immovable property and obtain a privilege on the proceeds of the sale.
- The original protections were borrowed from the French Civil Code, which protected architects, undertakers, bricklayers, and other workmen who construct, rebuild, or repair buildings and other works.



Louisiana's History of Protecting Construction Workers



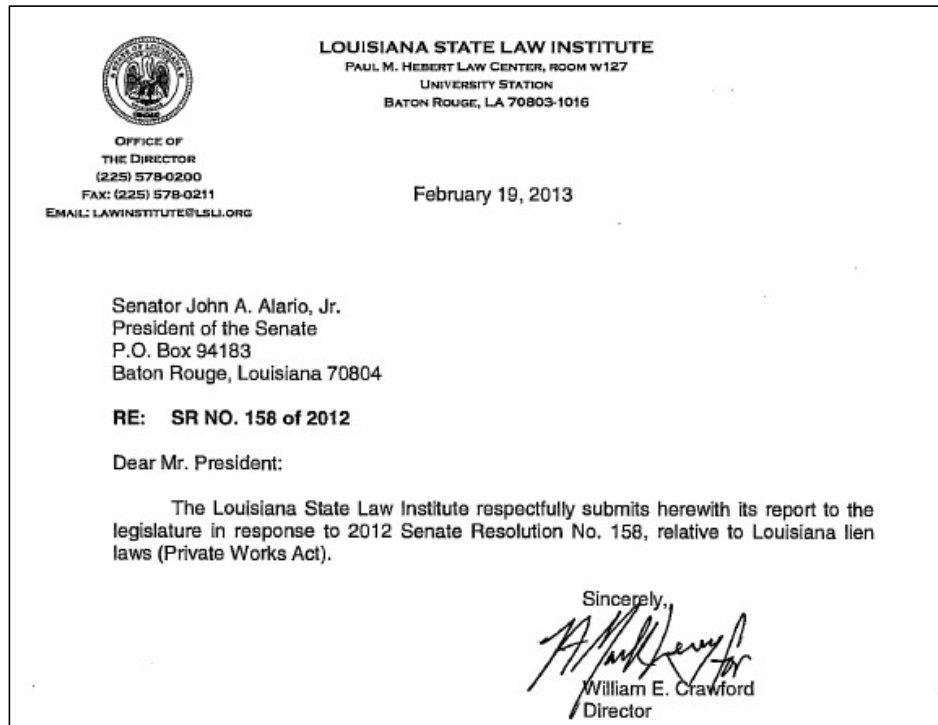
- The French Civil Code protections found their way into the Louisiana Digest of 1808 and were expanded in the 1825 and 1870 Civil Codes.
- The Louisiana Supreme Court has said that the privilege “exemplifies the intelligent sense of justice which distinguishes the civil law.” *Baltimore v. Parlange*, 23 La. Ann. 365, 367 (La. 1871).

What is the Louisiana Private Works Act (LPWA)?

- The Louisiana legislature enacted the original version of the LPWA in 1922. Act. No. 139.
- In 1950, a uniform numbering scheme was put into place and the provisions of the LPWA were assigned to La. R.S. 9:4801 *et seq.*
- The LPWA was revised almost every year resulting in a disorganized set of rules.
- Due to the lack of organization, the Louisiana Law Institute recommended a comprehensive revision, which was enacted in 1981.



A new push to revise the LPWA



- Following the 1981 revision, the Legislature continued to amend the Act, but the revisions became less frequent.
- In 2013, at the request of the Louisiana State Senate, the Louisiana State Law Institute submitted a report that studied the “placement and structure” of the LPWA.
- The Law Institute’s Security Devices Committee recommended an overhaul of the LPWA to address the legislative amendments, ambiguities, and inconsistencies

The 2019 Revision

- The 2019 revision was aimed at restoring the integrity and cohesiveness of the statute and eliminate inconsistencies and unintended consequences.
- Please note the retroactive impact of the 2019 revision. 2019 Act 325, sec. 7, *et seq.*

HLS 19RS-634

ORIGINAL

2019 Regular Session

HOUSE BILL NO. 203

BY REPRESENTATIVE GREGORY MILLER

(On Recommendation of the Louisiana State Law Institute)

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

PRIVILEGES/LIENS: Provides relative to privileges on immovables

Interpreting the LPWA to Protect Construction Workers



- The LPWA is in derogation of general contract law. As such, it must be strictly construed.
- However, in interpreting the Act, courts will not overlook the “fundamental aim of the act, which is to protect materialmen, laborers and subcontractors who engage in construction and repair projects.” *Hibernia Nat’l Bank v. Belleville Historic Dev.*, 815 So.2d 301, 305 (La. App. 4 Cir. 2002).
- This means that purely technical objections cannot defeat the purpose of the Act

Key Players in the LPWA

- Owner
- Contractor
- General contractor
- Subcontractor
- Professional Consultant
- Professional Subconsultant

La. R.S. 9:4806 *et seq.*



Owner

- The LPWA provides a broad definition of “Owner.”
 - “An owner, co-owner, naked owner, usufructuary, other holder of a servitude, possessor, lessee, or other person having the right to use or enjoy an immovable or having an interest therein shall be deemed to be an owner under this Part.” La. R.S. 9:4806(A).
- Comment (a) recognizes that the definition of “Owner” is “broader than the meaning ordinarily given to that term.” Notice that a usufructuary and a lessee can be considered an owner.



Owner



Limitations

- The definition has several limitations.
 - Only the owner who contracted with the contractor and owners who expressly agreed in writing to the price and the work will be liable. La. R.S. 9:4806(B).
 - The privilege granted affects only the interest in or on the immovable enjoyed by the other whose obligation is secured by the privilege. *Id.* at 4806(C).
 - The privilege granted on a lessee's rights in the lease or buildings is inferior to the rights of the lessor. *Id.* at 4806(D).

Contractor and General Contractor

Contractor

- Contractor has a fairly simple definition.
 - “A contractor is one who contracts with an owner to perform all or part of a work.” La. R.S. 9:4807(A).

General Contractor

- General contractor is more nuanced.
 - A general contractor is a contractor who either (1) contracts to perform all or substantially all of a work or (2) is deemed a general contractor by R.S. 9:4808(B). La. R.S. 9:4807(B).
 - Section 4808(B) relates to the filing of a notice of contract, which will be discussed later.

Professional Consultant and Subconsultant

- Unlike many states, the LPWA even protects design professionals.
- A “professional consultant” is a professional surveyor, professional engineer, or licensed architect who is engaged by the owner or by a contractor or subcontractor. La. R.S. 9:4810(5).
- A “professional subconsultant” is engaged by a professional consultant. La. R.S. 9:4810(6).



Subcontractor



- A subcontractor is one who, by contract made directly with a contractor, or by a contract that is one of a series of contracts emanating from a contractor, is bound to perform all or a part of a work contracted for by the contractor. La. R.S. 9:4807(C).

Basic Protections – Privileges and Claims (9:4801)

- The following persons have a **privilege** on an immovable to secure the obligation of the owner arising out of the work:
 - **Contractors, for the price of their work;**
 - **Certain laborers;**
 - **Certain sellers of movables;**
 - **Certain lessors of movables; and**
 - **Professional consultants engaged by the owner and professional subconsultants of those professional consultants**



Basic Protections – Privileges and Claims (9:4802)



The following persons have a **claim** against the **owner** and **contractor** to secure the obligation arising out of the work:

Subcontractors

Certain laborers

Certain sellers of
movables

Certain lessors of
movables

Certain professional
consultants and
professional
subconsultants
engaged by the
contractor or
subcontractor



The claims against the owner are secured by a privilege on the immovable.

LPWA Documents



- The LPWA permits (or requires) the filing of numerous documents.
- Some of these documents are **absolutely necessary** to preserve a claimant's rights under the Act.
- These documents include: a notice of contract, payment bond, a "no work" affidavit, a notice of termination, a statement of claim or privilege, a notice of pendency of action (*lis pendens*), and a release bond.
- All of these documents must be filed in the **mortgage** records of the parish where the immovable is located. La. R.S. 9:4831(A).

The Notice of Contract



The “notice of contract” is one of the more important LPWA documents from the perspective of the owner and the general contractor.



From the owner’s perspective, when the notice of contract is timely filed along with a payment bond, the owner is relieved of claims and privileges of those with whom he has no privity. La. R.S. 9:4802(C).



From both the owner and general contractor’s perspective, it shortens the time period in which a claimant must file a claim (if a notice of termination is filed) from 60 to 30 days. La. R.S. 9:4822.

Notice of Contract – A Serious Consequence for the GC



- The general contractor must also consider a major change in the 2019 revision.
- If the contract with the owner will exceed **\$100,000**, a notice of contract **must** be filed before starting work or the general contractor is **deprived** of a privilege under the Act. La. R.S. 9:4811(D).
- This legislative change overruled case law (e.g., *Burdette v. Drushell*, 837 So.2d 54 (La. App. 1 Cir. 2002), which still allowed a general contractor to assert a claim to the extent he performed work other than supervisory work.

The Substance of the Notice of Contract (La. R.S. 9:4811(A))



Must be filed before starting work



Must be signed by the owner and contractor



Must contain a complete property description of the immovable upon which the work is to be performed and the name of the project, if any



Identify the parties and give their mailing address



State the price of the work and when payment is to be made



Describe the general terms of the work

NOTICE OF CONTRACT

On this 15th day of December 2022 pursuant to Louisiana Revised Statute 9:4811, notice is hereby given that a Construction Contract has been entered into by and between:

Owner 123, LLC whose mailing address is 42 Wallaby Way in New Orleans, Louisiana, hereinafter sometimes referred to as "**Owner**"

and

Contractor ABC, LLC whose mailing address is 4 Privet Drive in Baton Rouge, Louisiana, hereinafter sometimes referred to as "**Contractor**,"

which Contract provides:

I. THE CONTRACT

Owner and Contractor have entered into a construction contract dated December 6, 2022 (the "**Construction Contract**").

II. THE PROPERTY

The Construction Contract is for work to be performed on the real property ("**Property**") described in Exhibit "A" attached hereto and made a part hereof. The work to be performed by Contractor pursuant to the terms of the Construction Contract shall be performed on the Property.

III. THE PROJECT

Under and pursuant to the terms and provisions of the Construction Contract, the Contractor agrees to furnish all materials, to do and perform all work, and to construct, build, finish and deliver in a workmanlike manner the Project known as the College Apartments on the Property.

IV. CONTRACT PRICE

In consideration for the work to be performed by Contractor under this Contract, Owner binds and obligates itself to pay the Contractor for the full and faithful performance of all of the work described in the Contract. The Contract price is \$23 million. The Contract Price shall be paid by Owner to Contractor in installments in accordance with the provisions of the Contract.

V. COMPLETION OF PROJECT

It is agreed that the project shall be complete on or before the expiration of 365 consecutive calendar days from the date set forth in the Contract for the commencement of the work.

This Notice of Contract executed in the City of _____, State of _____ on this ____ day of _____.

OWNER: _____

CONTRACTOR: _____

Notice of Termination – Starts the Clock



- When the project is substantially complete, the owner and contractor should file a notice of termination – even if a notice of contract was not filed.
- If a notice of contract was timely filed, the filing of the notice of termination starts the clock for parties to file a claim. Claimants will have **thirty (30) days** to file. The general contractor will get sixty (60) days.
- If a notice of contract was timely filed but a notice of termination is **not** filed, a claimant will have **six (6) months** from substantial completion or abandonment of the work. The general contractor will get seven (7) months.

The Substance of a Notice of Termination (La. R.S. 9:4822(E))



Must contain a complete property description of the immovable upon which the work was performed or reference the notice of contract by registry number and the names of the parties as they appear in the notice of contract.



Signed by the owner or the owner's representative



Certify that the work was substantially complete, the work was abandoned, the general contractor is in default, or that the general contractor was terminated.

Statement of Claim or Privilege

The statement of claim or privilege is the most essential document contemplated by the Act.

The statement of claim or privilege is commonly referred to as a “lien.”

It **must** be timely filed in the mortgage records of the parish in which the immovable is located in order to preserve the claim.

Two main purposes: (1) informs the owner and contractor of the claim and (2) informs third parties who might have or acquire an interest in the immovable

Substance of a Statement of Claim or Privilege (La. R.S. 9:4822(H))

In writing

Signed by the person
asserting the claim or his
representative

Contain a reasonable
identification of the
immovable

Set forth the amount and
nature of the obligation,
including for whom the
contract was performed,
the materials provided, or
services rendered

Identify the owner

Notices for Certain Claimants



- The 2019 revision organizes and somewhat modifies notice requirements that were previously scattered around the LPWA. See La. R.S. 9:4804
- Failure to provide this required notice can extinguish a claim in whole or in part.
- Some of the claimants have additional notice requirements, including, *inter alia*:
 - Professional Consultant and Subconsultants
 - Lessors of Movable

Notice of Professional Consultants and Subconsultants

- Generally, professional consultants and subconsultants “shall” deliver written notice to the owner within thirty (30) days after the date of being engaged.
- The notice must include
 - The name and address of the claimant;
 - The name and address of the person who engaged the claimant; and
 - The general nature of the work to be performed by the claimant
- No notice is required by a person who is directly engaged by the owner.



Notice of Lessors of Movables



- The 2019 revision improved the situation for lessors of movables (e.g., man lift, crane, fork lift, etc.).
- Now, the lessor must deliver notice to the contractor (and owner if there is a notice of contract) that the lessor intends or has leased movables to a contractor or subcontractor for use in the work.
- No rigid deadline is established for the notice, but note the 30 day restriction.
- The notice shall include:
 - Name and address of the lessor;
 - Name and address of the lessee; and
 - A general description of the movables
- No notice is required to a person who is a party to the lease

How to Give Proper Notice

- Prior to the 2019 revision, notice requirements varied greatly depending on the type of claimant.
- The revision modified this and reorganized the notice requirements to bring some uniformity to the notice rules.
- Today, notice is governed by 9:4842 and the provisions that follow.
- First, a communication or document is received when it comes into the possession of the person to whom it was sent.
- Second, a communication or document is deemed to have been given when it is properly deposited in the U.S. mail by certified or registered mail.
- The Act provides for proper mailing addresses, but as an alternative, you can give notice at the person's registered office or the address of its principal business establishment in Louisiana as reflected in the Sec. of State's records.



The image shows a U.S. Postal Service Certified Mail Receipt form. The form is divided into several sections. On the left, there is a vertical green bar with the text "CERTIFIED MAIL" and a barcode. The main body of the form is white with green headers and footers. The header includes "U.S. Postal Service™ CERTIFIED MAIL® RECEIPT Domestic Mail Only" and a website link "www.usps.com®". Below the header, there is a section for "OFFICIAL USE" with a "Postmark Here" box. The form contains several checkboxes for services like "Return Receipt (hardcopy)", "Return Receipt (electronic)", "Certified Mail Restricted Delivery", "Adult Signature Required", and "Certified Mail Restricted Delivery S". There are also fields for "Certified Mail Fee", "Total Postage and Fees", "Sent to", "Street and Apt, W, or PO Box No.", and "City, State, ZIP+4®". The footer includes "PS Form 3800, April 2015 PSN 7525-02-000-9001" and "See Reverse for Instructions".

Enforcement of a Claim or Privilege

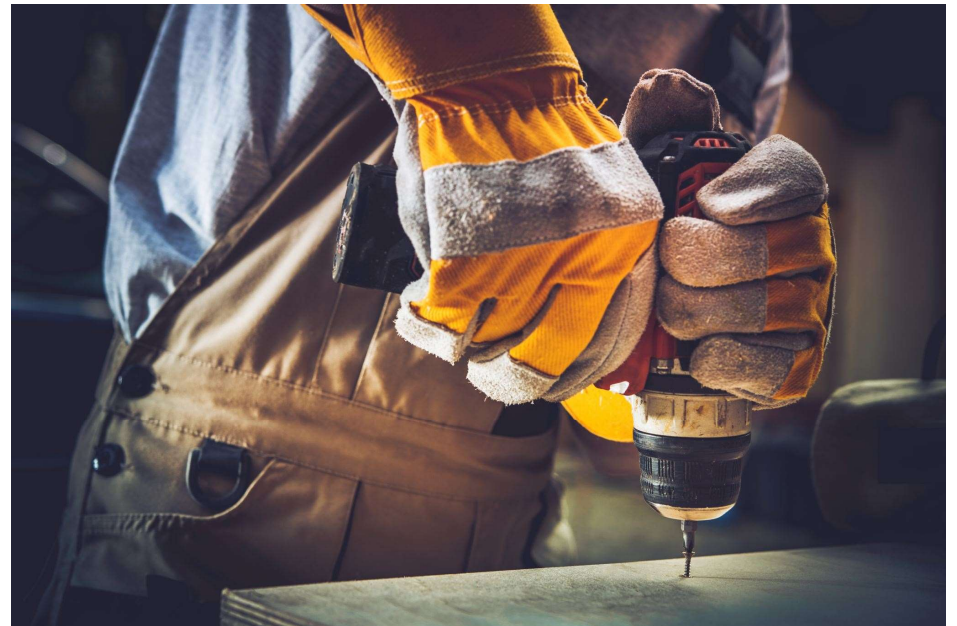


- A privilege or claim granted by the Act is “extinguished” if the claimant does not institute an **action** within one year after filing the statement of claim or privilege.
- While not completely clear from the text of the Act, the safest interpretation is that instituting an “action” means filing an ordinary lawsuit in court. Thus, instituting a demand for arbitration may not be enough – even if that is what the contract requires.
- You will also want to file a notice of pendency (La. R.S. 9:4833(E)) within the same one year period. The notice is governed by La. Code Civ. Proc. art. 3752.

Legislative Change – Surety Defenses

In *Bear Industries v. Hanover Ins.*, the Louisiana First Circuit held that a surety could not assert a “pay if paid” clause to defeat payment to a subcontractor on the basis that the contractor has not received full payment from the owner. 241 So.3d 1159, 1166 (La. App. 1 Cir. 2018).

In 2024, the Legislature added La. R.S. 9:4812(F)(1) in response. Now a surety can assert “any defense to the principal obligation that its principal could assert except lack of capacity or discharge in bankruptcy of the principal obligor.”



Resources

- David Cromwell, *Reworking Louisiana's Private Works Act*, 80 La. L. Rev. (2020).
- Michael Rubin, *Ruminations on the Louisiana Private Works Act*, 58 La. L. Rev. (1998).

Questions?