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USLTA: Article 5 Construction Liens Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens .

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COMMENTS

USLTA: ARTICLE 5 "CONSTRUCTION LIENS" ANALYZED IN LIGHT OF CURRENT TEXAS LAW ON MECHANICS' AND MATERIALMEN'S LIENS

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I. INTRODUCTION

Mechanics' liens are statutory creations designed to give individuals in the construction industry a security interest in the improved real estate.[1]

1. Lippencott v. York, 86 Tex. 276, 280, 24 S.W. 275, 276 (1893). Mechanics' liens are based upon the theory that one who improves real estate of another under an express or implied contract should be afforded the security of a lien on the improved real estate. *Id.* at 280, 24 S.W. at 276; *see, e.g.*, Lake v. Fidelity & Deposit Co., 430 F.2d 1251, 1255 (5th Cir. 1970) (lien rights purely creatures of statutory law); State Sav. & Loan Ass'n v. Kauaian Dev. Co., 445 P.2d 109, 123 (Hawaii 1968) (mechanics' and materialmen's liens created by statute); Lytle v. Morgan, 270 N.W.2d 359, 361 (S.D. 1978) (purpose of mechanics' lien laws to secure or protect persons who improve property of others). One reason for this security

The first mechanics' lien laws were passed for the benefit of prime contractors.[2] As the construction industry grew, lien protection was extended to subcontractors and materialmen.[3] The creation of subcontractors' liens was controversial because individuals not in privity with the owner were given the right to enforce a lien to secure payment for services or materials rendered.[4] Consequently, conflicting contractual interests arose affecting the property rights of owners.[5] In response, voluminous and complex

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"is that labor and materials lose all further value to the laborer and materialmen once they are furnished and put into the house or building, but they usually enhance the value of the property to the benefit of the owner and those who take under him." Hayek v. Western Steel Co., 478 S.W.2d 786, 795 (Tex. 1972).

2. *See* 3 R. POWELL & P. ROHAN, THE LAW OF REAL PROPERTY ¶ 483, at 734 (1979) (lien security extended to master builders who contracted directly with owner); Comment, *Mechanics' Liens and Surety Bonds in the Building Trades*, 68 YALE L.J. 138, 138 (1958) (original mechanics' lien statutes originated in age when construction project was completed by craftsmen of single employer). As used in this comment, prime contractor, original contractor, and general contractor are synonymous terms used to designate the individual who contracts with the owner to improve real estate. Assuming primary responsibility for the construction project, the prime contractor usually contracts with others, known as subcontractors, to work on the construction project. *See* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 716 (1978).

3. *See* Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 411 (1977). *See generally* 3 R. POWELL & P. ROHAN, THE LAW OF REAL PROPERTY ¶ 483, at 734 (1979). The growth of cities in the nineteenth century necessitated greater numbers of workers in the construction industry. As a result statutes were enacted throughout the United States extending mechanics' lien protection "both geographically and with respect to the kinds of persons entitled to special benefits." 3 R. POWELL & P. ROHAN, THE LAW OF REAL PROPERTY ¶ 483, at 734 (1979). Subcontractors and materialmen are those who actually furnish services and materials for a construction project. These individuals may contract with the prime contractor or with other subcontractors. *See* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 716 (1978). For the purpose of this comment, the term subcontractor is used to refer to anyone who performs under a real estate improvement contract but does not contract directly with the owner of the real estate.

4. *See, e.g.*, Masten Lumber & Supply Co. v. Brown, 405 A.2d 101, 104 (Del. 1979) (when subcontractor may procure direct lien owner subject to double liability); Sandpiper N. Apartments v. American Nat'l Bank & Trust Co., 600 P.2d 332, 333 (Okla. 1979) (statutory construction trust fund limited to valid lien claimants); Kayhoe Constr. Corp. v. United Va. Bank, 257 S.E.2d 837, 840 (Va. 1979) (subcontractor's lien based upon giving notice of lien liability to owner); *cf.* Stalling, *The Need for Special, Simplified Mechanics' Lien Acts Applicable to Home Construction*, 5 LAW & CONTEMP. PROB. 592, 592-93 (1938) (mechanics' liens impose potential double liability on owners). *But cf.* Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1453 (1974) (technically, owner is stranger only in sense he is not named in subordinate contracts intended to accomplish results of prime contract).

5. *See, e.g.*, Harper v. J. & C. Trucking & Excavating Co., 374 So. 2d 886, 889 (Ala. Ct. App. 1978) (owner should be concerned with removing potential liens on title); C & W Elec., Inc. v. Casa Dorado Corp., 523 P.2d 137, 138 (Colo. Ct. App. 1974) (mechanics' lien statute extends greater protection by allowing *in rem* recovery against land as alternative to *in personam* contract action); Columbus Square Shopping Center Co. v. B & H Steel Co., 258

statutes were enacted to compromise the competing interests.[6] These statutes, however, caused considerable litigation and significant losses to lienors attempting to enforce liens.[7] As a result, subcontractors and materialmen have been plagued continuously by the inadvertent complexities of statutes enacted for their protection.[8]

The Texas approach is no exception.[9] The Republic of Texas established the security of a lien in 1839 for master builders and mechanics who performed under a written contract,[10] and extended lien benefits to subcontractors in 1844.[11] While the fundamental objectives remain the

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S.E.2d 600, 602 (Ga. Ct. App. 1979) (mechanics' lien statute does not require contract between landowner and materialman to obtain judgment *in rem); cf.* Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997, 999 (D. Ariz. 1973) (mechanics' lien only hinders owner's economic interest and does not take away possession or use pending final judgment), *aff'd*, 417 U.S. 901 (1974).

6. *See, e.g.*, CAL. CIV. CODE §§ 3110-3175 (Deering 1972 & Supp. 1979); FLA. STAT. ANN. §§ 713.01-.37 (West 1969 & Supp. 1979); WIS. STAT. ANN. §§ 289.01-.17 (West Supp. 1980). *See generally* CREDIT MANUAL OF COMMERCIAL LAWS, 1974, at 291-359 (1973) (summarizes mechanics' lien laws throughout United States).

7. *See, e.g.*, Harper v. J. & C. Trucking & Excavating Co., 374 So. 2d 886, 890 (Ala. Ct. App. 1978) (failure to comply with notice provision invalidated subcontractor's lien); Summit Lumber Co. v. Higginbotham, 586 S.W.2d 799, 802 (Mo. Ct. App. 1979) (mechanics' lien failed because lien statement did not contain information required by statute); Spartan Concrete Corp. v. Harbour Valley Homes, Inc., 420 N.Y.S.2d 14, 15 (App. Div. 1979) (mechanics' lien expired by operation of law since notice of pendency was never extended). *See generally* Comment, *Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals*, 47 MISS. L.J. 437, 438 (1976) (rights of lienors in private construction contracts frequently litigated issues); Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 411-12 (1977) (Florida's mechanics' liens jeopardized by complexity of statute).

8. *See, e.g.*, Pioneer Nat'l Title Ins. Co. v. Exten Assoc., Inc., 403 A.2d 283, 286 (Del. 1979) (proof of written contract necessary to obtain mechanics' lien); W. N. Robbins Elec., Inc. v. Intercontinental Group, Inc., 374 So. 2d 21, 22 (Fla. Dist. Ct. App. 1979) (per curiam) (compliance with notice requirement or appropriate excuse necessary to enforce mechanics' lien); Lowe's of Savannah, Inc. v. Jarrell, 257 S.E.2d 341, 342 (Ga. Ct. App. 1979) (inaccuracy in stating due date of claim caused mechanics' lien to fail).

9. *See* TEX. REV. CIV. STAT. ANN. arts. 5452-5472e (Vernon 1958 & Supp. 1980). In addition to the statutory lien incorporated in articles 5452-5472e, article sixteen, section thirty-seven of the Texas Constitution created a mechanics' lien for the benefit of contractors in privity with the owner. Known as a constitutional lien, it is self-executing without reliance on statutory provisions. *See* Hayek v. Western Steel Co., 478 S.W.2d 786, 790 (Tex. 1972). Since a constitutional lien cannot be enforced against a bona fide purchaser for value without notice, a prime contractor must comply with statutory lien provisions in order to secure maximum protection. *See* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 688 (1972). Discussion in this comment is limited to the statutory lien. *See* TEX. REV. CIV. STAT. ANN. arts. 5452-5472e (Vernon 1958 & Supp. 1980).

10. *See* 1839 Tex. Gen. Laws, An Act for the Relief of Master Builders and Mechanics of Texas § 1, at 66, 2 H. GAMMEL, LAWS OF TEXAS 66 (1898).

11. *See* 1844 Tex. Gen. Laws, An Act for the Better Security of Mechanics and Others

same,[12] "the procedures prescribed by the current statutes, particularly procedures for perfecting the subcontractor's lien, have become vastly more complex and unwieldly."[13] Even the Hardeman Act,[14] the most recent and thorough revision of the Texas mechanics' and materialmen's lien laws,[15] failed to simplify the inadequate amendments accumulated during the prior century.[16]

II. A UNIFORM ACT

Enactment of a uniform act updating and simplifying mechanics' lien statutes would be a meritorious endeavor. Attempting to accomplish this, work on the Uniform Simplification of Land Transfers Act (USLTA) was initiated with a view towards unifying and modernizing the laws of priority and recording in real estate transactions.[17] The Act is intended to sim-

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§ 1, at 96, 2 H. GAMMEL, LAWS OF TEXAS 1008-09 (1898).

12. *Compare* TEX. REV. CIV. STAT. ANN. arts. 5452-5472e (Vernon 1958 & Supp. 1980) *with* 1839 Tex. Gen. Laws, An Act for the Relief of Master Builders and Mechanics of Texas § 1, at 66, 2 H. GAMMEL, LAWS OF TEXAS 66 (1898) *and* 1844 Tex. Gen. Laws, An Act for the Better Security of Mechanics and Others § 1, at 96, 2 H. GAMMEL, LAWS OF TEXAS 1008 (1898). *See generally* Hayek v. Western Steel Co., 478 S.W.2d 786, 790 (Tex. 1972) (history and purpose of mechanics' liens used to interpret current legislation); McPherson, *The Constitutional Mechanics' Lien in Texas*, 11 S. TEX. L.J. 101, 103 (1969) (present scheme is similar to enactment of 1839); 52 TEXAS L. REV. 773, 773-75 (1974) (nineteenth century lien laws not substantially changed until 1961).

13. Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 666 (1972). Arguably, current Texas mechaincs' lien laws are "counterproductive to the interests of those for whom the original statutes were enacted." *Id.* at 666. *But cf.* Helm, *Establishment and Priority of Liens for the Development and Improvement of Real Estate*, 20 BAYLOR L. REV. 387, 387 (1968) (perfecting lien mainly involves tracking statute and compliance with its provisions).

14. *See* TEX. REV. CIV. STAT. ANN. arts. 5452-5472e (Vernon 1958 & Supp. 1980). The Texas Legislature revised lien laws pertaining to private construction in 1961. Although the revision was extensive, the basic scheme and a great deal of the language of the prior law were retained. The most significant changes addressed the procedure for perfecting a mechanics' lien. *See* Alvis & Carssow, *Supplementary Commentary - Mechanic's Liens in Texas*, 16 TEX. REV. CIV. STAT. ANN. 1-3 (Vernon Supp. 1980).

15. *See* Hayek v. Western Steel Co., 478 S.W.2d 786, 791-95 (Tex. 1972) (legislative purpose for enacting Hardeman Act was to prevent "loss of liens through technicalities"); 1961 Tex. Gen. Laws, ch. 382, § 14, at 872 (emergency clause of statute).

16. *See* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 669-70 (1972). *See generally* 22 SW. L.J. 500, 503-04 (1968) (discusses specific changes made by legislature in 1961).

17. *See* UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT, Prefatory Note, at 3 (1977) (USLTA). USLTA was initiated by the National Conference of Commissioners on Uniform State Laws as part of a large project of modernization and unification of land legislation. After USLTA's promulgation in 1976, the Act, with several amendments, was approved in 1977 by the National Conference. *Id.* at 4-5. The American Bar Association approved USLTA in February 1978. Pedowitz, *Uniform Simplification of Land Transfers Act—A*

plify laws relating to land transfers, increase security of land titles, promote interstate real estate financing transactions, and protect consumer buyers and borrowers.[18] This comment focuses on article 5 "Construction Liens"[19] and analyzes the potential effect of the adoption of USLTA upon a subcontractor in Texas.

Article 5 has been opposed by various subcontractors and materialmen groups[20] primarily because the same conflicting interests that created imperfect state statutes had to be considered when promulgating USLTA.[21] The drafters of the Act attempted to address this opposition by balancing the conflicting interests of owners, lenders, general contractors, and subcontractors.[22] Negotiations with representative groups, however, failed to produce a consensus on the most equitable treatment of construction liens.[23] Consequently, article 5 is likely to meet strong opposition when

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Commentary, 13 REAL PROP., PROB. & TR. J. 696, 696 n.1 (1978). Offered to the states as a separate act, USLTA complements the Uniform Land Transactions Act (ULTA). *Id.* at 696. *See generally* Trevaskis, *Summary of the Uniform Land Transactions Act*, 13 REAL PROP., PROB. & TR. J. 672 (1978). The following is an overview of USLTA: article 1 introduces the Act and sets out definitions and general provisions; article 2 addresses conveyancing and recording; article 3 concerns priorities, marketable record titles, and extinguishment of claims; article 4 provides for recording of statutory liens pending judicial proceedings; article 5 sets out a treatment of construction (mechanics' and materialmen's) liens; article 6 offers a system of public land records; and article 7 contains the mechanics for enacting and repealing the Act. USLTA, Prefatory Note, at 3 (1977). Promulgation of a uniform mechanics' lien act was first attempted in 1925 and resulted in the Uniform Mechanics' Lien Law. *See* Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 413 n.27 (1977). Florida, the only state to adopt the Uniform Act, repealed it in 1963, but preserved its approach. *Id.* at 413-14. Article 5 of USLTA was based upon Florida's Mechanics' Lien Statute, FLA. STAT. ANN. §§ 713.01-.37 (West 1969 & Supp. 1979). *See* USLTA art. 5, Introductory Comment, at 62 (1977). *See generally* Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. PA. L. REV. 1083 (1932).

18. USLTA § 1-102 (1977).

19. *See id.* art. 5. Article 5 "Construction Liens" acquired its name from a Wisconsin statute, WIS. STAT. ANN. § 289.01 (West Supp. 1980). Liens covered by this article are referred to as construction liens and are synonymous with liens commonly known as mechanics' and materialmen's liens. The drafters of USLTA adopted this term because laborers are no longer primarily benefited by mechanics' lien laws. *See* USLTA art. 5, Introductory Comment, at 62 (1977). *But cf.* Comment, *Future Advances Under the ULTA and USLTA: The Construction Lender Receives a New Status*, 34 WASH. & LEE L. REV. 1027, 1035 n.62 (1977) (term "mechanics' lien" due to its common usage should continue to be used to avoid confusion, especially with liens acquired by construction lenders).

20. *See* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 717 (1978).

21. *Id.* at 715-16. The conflicting interests may be categorized as owner-developer, construction lender, general contractor, and subcontractors and materialmen. *Id.* at 715-16.

22. *See* USLTA, Prefatory Note, at 4 (1977).

23. *See* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 717 (1978). *But cf.* Comment, *Uniform Simplification of*

state legislatures consider enactment of USLTA.[24]

III. Parallel Provisions of the Texas Hardeman Act and Article 5 of USLTA

A. *Qualifying for a Lien*

According to article 5 of USLTA, a subcontractor acquires a right to a construction lien when he furnishes services or materials pursuant to a contract calling for the physical improvement of real estate.[25] As long as the improvement can be traced to an agreement with the owner, there is no limitation on the subcontractor's level in the contracting chain.[26] The improvement contracted for may encompass a variety of activities, provided they are not primarily for purposes of cultivation or disposing of or removing objects from the real estate.[27] Additionally, materials must be supplied with the intent to improve the real estate subject to lien liability,[28] and services rendered may not include financing activities.[29]

The subcontractor's right to a mechanics' lien in Texas is substantially the same as provided for in USLTA.[30] A significant feature of both Acts

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Land Transfers Act: Areas of Departure from State Law, 73 Nw. L. Rev. 359, 391 (1978) (Article 5's added protection and uniformity of interstate law should encourage "free participation by all parties in construction-related real estate transactions.").

24. *See* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 Real Prop., Prob. & Tr. J. 696, 715 (1978) (article 5 most controversial section of Act); *cf.* Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 Geo. L.J. 1245, 1246 (1976) (peculiar local character of land causes diversity of treatment among states and hinders adoption of uniform legislation); Comment, *Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 Nw. L. Rev. 359, 390 (1978) (article 5 will provide significant interstate uniformity in area of law exhibiting wide diversity).

25. *See* USLTA §§ 5-101,-107 (1977). Article 5 provides "a lien against real estate in favor of a person furnishing services or materials under a real estate improvement contract." Id. § 5-101. A " 'real estate improvement contract' means 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 . . . ." *Id.* § 5-107.

26. *See id.* § 5-201(a). Article 5 does not restrict "a lien to contractors in the first two, three, or four tiers below the owner. . . . However, a lien arises only against an owner who has entered into a contract to have the work done." *Id.* § 5-102, Comment 1, at 73. *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 Real Prop., Prob. & Tr. J. 696, 719 (1978); Comment, *Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 Nw. L. Rev. 359, 384-86 (1978).

27. *See* USLTA § 5-107(b) (1977).

28. *See id.* § 5-204(a)(1). A supplier selling materials without knowing the specific real estate being improved has no lien even when he is able to prove the materials were actually used on specific real estate. *Id.* § 5-204, Comment, at 80.

29. *See id.* § 5-102(9).

30. *Compare* Tex. Rev. Civ. Stat. Ann. art. 5452 (Vernon Supp. 1980) *with* USLTA

concerns the type of activity warranting a lien. The Hardeman Act's requirement that labor furnished be "used in direct prosecution of work"[31] parallels the Uniform Act's requirement that services, including labor, be for the purpose of producing a physical change in the real estate.[32] Consequently, adoption of USLTA in Texas would not limit the subcontractor's opportunity to qualify for a lien.

B. *Perfecting the Lien*

A subcontractor entitled to a construction lien must understand the procedure for perfecting his lien.[33] Recordation is an important step in this process.[34] Prior to recording a lien, the USLTA lien form must be signed by the claimant and contain a description of the real estate, the name of the owner, the claimant's name and address, the name and address of the person with whom the claimant contracted, a general description of the services or materials contracted for, the amount unpaid, and the time of completion.[35] The information in the form must afford third parties sufficient notice of the existence and extent of lien liability.[36] The

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§§ 5-101, -107 (1977). In Texas, "[a]ny person or firm, lumber dealer or corporation, artisan, laborer, mechanic or sub-contractor who may labor, specially fabricate material, or furnish labor or material: (a) for the construction or repair of any house, building or improvement whatever . . . upon complying with the provisions of this Chapter shall have a lien . . . ." TEX. REV. CIV. STAT. ANN. art. 5452, § 1 (Vernon Supp. 1980).

31. *Id.* § 2a. Work means "any construction or repair, or any part thereof, which is performed pursuant to an original contract . . . ." *Id.* § 2d. A liberal construction of this provision extends lien protection to off-site labor such as the preparation of plans and specifications for the improvement of real estate. *See* Lodal & Bain Eng'rs., Inc. v. Bayfield Pub. Util. Dist., 583 S.W.2d 653, 656 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ granted); Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 671-72 (1972).

32. *See* USLTA § 5-107 (1977). Included in the many activities meriting lien protection under USLTA is preparation of plans for the development of real estate. *See id.* § 5-107(a).

33. USLTA sets out the basic operative provision of article 5 in subsection 5-201(a). *See id.* § 5-201(a). This provision permits security of the contract price if the lien claimant complies with the provisions of the article. *See id.* § 5-201(a). To apprise contractors of what constitutes the contract price, the drafters defined the term as the amount agreed upon adjusted by changes in requirements or by breach of contract. *See id.* § 5-102(2). An aid to finding other appropriate sections of article 5 was drafted in subsections (b) through (f) of section 5-201. *See id.* § 5-201(b)-(f). These subsections do not have independent significance but serve primarily as an introduction to the mechanics of perfecting a construction lien. *See id.* § 5-201, Comment 2, at 73-74.

34. *See* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 719 (1978) (lien arises upon recording).

35. *See* USLTA § 5-303(a) (1977).

36. *See id.* § 5-303, Comments 2, 3, at 115-16. "The claimant may use any description . . . [of the real estate] so long as it is of the 'contracting owner's real estate being improved or directly benefited.' " *Id.* Comment 2, at 115. To be effective against third parties, a record search under the owner's name must reveal the recorded lien. *Id.* Comment 3, at 116.

effectiveness of the lien may be destroyed if the information is inaccurate.[37] Amount stated is particularly important because a subcontractor is limited to the stated amount when seeking to enforce his claim against others who have subsequently taken an interest in the real estate relying upon any excess value in determining the extent of their security.[38] To be enforceable the subcontractor's lien must be filed within the time limits prescribed by section 5-207.[39] This section requires an enforceable lien to be recorded after contracting for the real estate improvement but within ninety days of completing performance.[40]

The simplicity of executing liens under the Uniform Act becomes apparent when compared to the Hardeman Act.[41] In addition to recordation mandates, the Texas Act requires filing of a sworn statement.[42] Liens filed in Texas without a sworn statement are unenforceable because they are not in substantial compliance with the statute.[43] Adoption of USLTA

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37. *See id.* Comments 2, 3, at 115-16; Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 727 (1978). Information required is so simple that a lawyer should not be necessary; however, it is better for a lawyer to prepare any form that may later require litigation. Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 727 (1978); *cf.* Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. PA. L. REV. 1083, 1087 (1932) (when laymen prepares own form, he "has a fool for a client").

38. *See* USLTA § 5-303, Comment 4, at 116 (1977).

39. *See id.* § 5-207(a).

40. *See id.* § 5-207(a). Despite notice to owner, claimant will lose his lien if he does not record within the ninety day time limit. *See id.* § 5-207, Comment 1, at 93. *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 727 (1978) (time limit coupled with requirement of specifying date of final services or materials).

41. *Compare* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980) *and id.* art. 5455 *with* USLTA §§ 5-207, -303 (1977).

42. *See* TEX. REV. CIV. STAT. ANN. art. 5455 (Vernon Supp. 1980). The Hardeman Act requires a lien form be signed by the claimant or someone on his behalf that contains the following information:

> a. A sworn statement of his claim, including the amount thereof. A copy of the written agreement or contract, if any, may be attached at the option of the claimant.
> b. The name of the owner or reputed owner, if known.
> c. A general statement of the kind of work done or materials furnished by him, or both. It shall not be necessary to set forth the individual items of work done or material furnished or specifically fabricated. Any abbreviations or symbols customary in the trade may be used.
> d. The name of the person by whom claimant was employed, or to whom he furnished the materials or labor, and the name of the original contractor.
> e. A description of the property sought to be charged with the lien legally sufficient for identification.

Id.

43. *See* Perkins Constr. Co. v. Ten-Fifteen Corp., 545 S.W.2d 494, 498 (Tex. Civ. App.—San Antonio 1976, no writ) (claims not sworn to are fatally defective and of no ef-

would increase the enforceability of subcontractors' liens by eliminating the sworn statement requisite for substantial compliance.[44]

The time limits imposed by the Hardeman Act complicate execution of the lien by distinguishing between an original contractor and subcontractor.[45] An original contractor must file a lien affidavit within 120 days after indebtedness accrues, while a subcontractor only has ninety days.[46] The date indebtedness accrues is determined by "the kind of work a laborer is performing or the type of material which the materialman is contributing . . . . [I]n by far the majority of cases, accrual of indebtedness is deemed to be on the tenth of the month next following the month in which a specified event occurs."[47] Although the statute specifically states which provision applies to the original contractor,[48] the subcontractor must determine the category under which he has contracted in order to determine the appropriate provision to be applied in calculating the number of days allowed for filing his lien.[49] Compared to the original contractor, the subcontractor has stricter time limitations and more difficult procedural requirements for compliance.[50] Adoption of USLTA would eliminate this differential treatment and benefit the subcontractor.[51]

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fect); *cf.* Perkins v. Crittenden, 462 S.W.2d 565, 567 (Tex. 1970) (acknowledgment does not certify truth and does not constitute affidavit). *See generally* Heath & Bentley, *Real Property, Annual Survey of Texas Law,* 32 Sw. L.J. 27, 81 (1977); Stalcup & Williams, *Property, Annual Survey of Texas Law,* 24 Sw. L.J. 30, 36-37 (1970).

44. *Compare* Tex. Rev. Civ. Stat. Ann. art. 5455 (Vernon Supp. 1980) *with* USLTA § 5-303 (1977).

45. *See* Tex. Rev. Civ. Stat. Ann. art. 5453 (Vernon Supp. 1980); *cf.* Youngblood, *Mechanics' and Materialmen's Liens in Texas,* 26 Sw. L.J. 665, 676-77 (1972) (Hardeman Act complicated article 5453). *But see* Helm, *Establishment and Priority of Liens for the Development and Improvement of Real Estate,* 20 Baylor L. Rev. 387, 387 (1968) (statute relatively clear). Perfecting a lien mainly involves tracking the statute, complying with all notice requirements, and timely filing a lien affidavit. *See* Helm, *Establishment and Priority of Liens for the Development and Improvement of Real Estate,* 20 Baylor L. Rev. 387, 387 (1968).

46. *See* Tex. Rev. Civ. Stat. Ann. art. 5453, § 1 (Vernon Supp. 1980).

47. Youngblood, *Mechanics' and Materialmen's Liens in Texas, 26* Sw. L.J. 665, 678 (1972); *see* Tex. Rev. Civ. Stat. Ann. art. 5467 (Vernon Supp. 1980).

48. *See* Tex. Rev. Civ. Stat. Ann. art. 5467, § 1(a) (Vernon Supp. 1980). *See generally* Helm, *Establishment and Priority of Liens for the Development and Improvement of Real Estate,* 20 Baylor L. Rev. 387, 388 (1968).

49. *See* Tex. Rev. Civ. Stat. Ann. art. 5467, § 1(b)-(d) (Vernon Supp. 1980). *See also* Helm, *Establishment and Priority of Liens for the Development and Improvement of Real Estate,* 20 Baylor L. Rev. 387, 388-89 (1968); Comment, *Procedures for Claiming and Priority of Mechanics' and Materialmen's Liens in Texas,* 21 Baylor L. Rev. 21, 22-25 (1969).

50. *Compare* Tex. Rev. Civ. Stat. Ann. art. 5453, § 1 (Vernon Supp. 1980) *and id.* art. 5467, § 1(a) *with id.* art. 5453, §§ 1, 2 *and id.* art. 5467 § 1(b)-(d). *See generally* Youngblood, *Mechanics' and Materialmen's Liens in Texas,* 26 Sw. L.J. 665, 678 n.125 (1972).

51. *Compare* Tex. Rev. Civ. Stat. Ann. art. 5453 (Vernon Supp. 1980) *and id.* art. 5467

C. *Property Affected by the Lien*

Section 5-203 of USLTA specifies the manner of determining real estate upon which a construction lien attaches.[52] To understand this section a subcontractor should be familiar with the "notice of commencement" concept.[53] Although notice of commencement primarily determines priority among potential lien claimants and third party interests,[54] it also designates the real estate subject to a lien.[55] The contracting owner has the first opportunity to file a notice of commencement specifying the real estate involved in the improvement contract.[56] Subsequent liens will attach to this real estate.[57] If a notice of commencement is not filed, construction liens will attach to the owner's real estate improved or directly benefited.[58] When an owner contracts for improvement on real estate not owned by him, the lien may be enforced against the contracting owner's real estate benefited by such improvements, as if the improvements were actually placed thereon.[59]

The subcontractor may determine the real estate subject to a lien by filing a notice of commencement if the owner fails to do so.[60] When filing

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with USLTA § 5-207(c)(1) (1977).

52. *See* USLTA § 5-203 (1977). *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 720 (1978).

53. *See* USLTA § 5-301 (1977). USLTA's notice of commencement concept is based upon Florida legislation. *See* FLA. STAT. ANN. § 713.13 (West 1969 & Supp. 1979); USLTA art. 5, Introductory Comment, at 62 (1977). Under this system the owner may record a notice of commencement designating the effective time period for attachment of construction liens. *See* Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 386 (1978).

54. *See* USLTA § 5-301(a)(3) (1977) (lien has priority from time notice of commencement is recorded); Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 422 (1977) (recordation of notice of commencement sets date of attachment and lien priority).

55. *See* USLTA § 5-301(a)(1) (1977). The notice of commencement states "the real estate being or intended to be improved or directly benefited, with a description thereof sufficient for identification." *Id.* § 5-301(a)(1). Once recorded "the lien is on the real estate described in the notice." *Id.* § 5-301, Comment 2, at 109.

56. *See id.* § 5-301(a)(1) (signed by contracting owner, notice contains description of real estate); *id.* § 5-301(e) (claimant may file notice of commencement only if owner fails to do so). *See generally* Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. L. REV. 359, 386 (1978).

57. *See* USLTA § 5-203(a) (1977); *id.* § 5-301, Comment 2, at 109.

58. *See id.* § 5-203(b).

59. *See id.* § 5-203(d). "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 by the improvements." *Id.* § 5-203, Comment 5, at 77.

60. *See id.* § 5-301(e). "If no notice of commencement applies to an improvement, any claimant who is entitled to record a lien may record a notice of commencement denominated 'notice of commencement, claimant recording' . . . ." *Id.* § 5-301(e).

this notice the subcontractor risks overstating the amount of real estate being improved.[61] A deliberate overstatement may cause the subcontractor to lose his lien and may subject him to additional liability for any damages caused by this bad faith overstatement.[62] When bad faith is not involved, the entire amount of real estate designated by the subcontractor in the notice of commencement is subject to lien liability.[63] The subcontractor also has the right to assign his lien to any lot or portion of lots covered by a notice of commencement.[64] Should a subcontractor fail to so apportion, the owner may make the apportionment subject to the requirement of good faith.[65]

In Texas, upon compliance with the provisions of the Hardeman Act, a subcontractor may enforce a lien upon the improvements and "the lot or lots of land necessarily connected therewith."[66] If improvements extend to public property, the lien is limited to the owner's property.[67] Enforceability of mechanics' liens in Texas is enhanced by priority rules distinguishing between real estate upon which the improvement is made and the improvement itself.[68] A mechanics' lien perfected after another encumbrance upon the land has been secured may attach to the added improvements if such improvements can be removed without affecting the prior encumbrance.[69] Extending lien priority to removable improvements,

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61. *See id.* § 5-203, Comment 3, at 76-77.

62. *See id.* § 5-403(b). "If in bad faith a claimant records a lien, overstates the amount for which he is entitled to a lien, or refuses to execute a release of a lien, the court may: (1) declare his lien void; and (2) award damages to the owner or any other person injured thereby." *Id.* § 5-403(b).

63. *See id.* § 5-203(c) (lien attaches to property described in notice of commencement filed by claimant). *See generally id.* § 5-203, Comment 3, at 77.

64. *See id.* § 5-203(e).

65. *See id.* § 5-203(f).

66. TEX. REV. CIV. STAT. ANN. art. 5452, § 1 (Vernon Supp. 1980); *see id.* art. 5458 (Vernon 1958) (lien in municipal area attaches to lot or lots upon which improvement is placed; lien in rural area extends to fifty acres upon which improvement is placed).

67. *See id.* art. 5452, § 1 (Vernon Supp. 1980); *cf.* USLTA § 5-202 (1977) (paralleling Texas statute in not allowing lien upon government property).

68. *See* TEX. REV. CIV. STAT. ANN. art. 5459, § 1 (Vernon Supp. 1980); *cf.* Stalcup & Williams, *Property, Annual Survey of Texas Law*, 23 SW. L.J. 29, 34 (1969) (mechanics' lien has priority as against prior encumbrance if permanently attached and removable without injury to property).

69. *See* First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 269 (Tex. 1974); TEX. REV. CIV. STAT. ANN. art. 5459, § 1 (Vernon Supp. 1980). A mechanics' lien upon improvement is superior to a prior encumbrance where the improvements "can be removed without material injury to the land and pre-existing improvements, or to the improvements removed." First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 269 (Tex. 1974); Heath & Bentley, *Real Property, Annual Survey of Texas Law*, 32 SW. L.J. 27, 28, 84-85 (1978) ("Whirlpool Doctrine" sets out standard for determining lien priority of removable improvements).

however, does not negate the subcontractor's right to enforce his lien on the improved real estate as against subsequent competing interests.[70]

The Hardemen Act's description of real estate subject to a lien securing payment for the contract price is more favorable to the subcontractor than USLTA's provisions.[71] The Uniform Act's description of real estate is centered upon giving notice to third parties.[72] When filing a notice of commencement, the owner only has to depict the real estate upon which improvements are placed.[73] As a result the owner, by constricting the description of real estate being improved, may control the real estate subject to lien liability.[74] Moreover, if an owner fails to file, a subcontractor filing a notice of commencement determines the real estate subject to lien liability.[75] This determination, which affects all lien claimants, places the subcontractor in an awkward position.[76] If he conservatively estimates the real estate being improved, he diminishes the security upon which all claimants must rely;[77] if he liberally estimates, he jeopardizes his lien because of a possible finding of bad faith.[78] When there is no notice of commencement recorded under USLTA, the lien attaches to the owner's real estate being improved or benefited.[79] This parallels the Texas provision which allows a lien to attach to the land connected to the improvement.[80]

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70. *See, e.g.*, Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 583, 33 S.W. 652, 662 (1895) (liens attaching at inception determined by beginning of performance); Yeager Elec. & Plumbing Co. v. Gaines Bldg., Inc., 492 S.W.2d 921, 923 (Tex. Civ. App.—Corpus Christi 1972, no writ) (mechanics' lien has priority over all competing encumbrances except those existing at time of inception); Lubbock Nat'l Bank v. Hinkle, 397 S.W.2d 285, 286 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.) (when mechanics' lien and contractual interest attached on same day proceeds from sale of property shared on pro rata basis). *See generally* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 689 (1972); Comment, *Procedures for Claiming and Priority of Mechanics' and Materialmen's Liens in Texas*, 21 BAYLOR L. REV. 1, 27-31 (1969).

71. *Compare* TEX. REV. CIV. STAT. ANN. art. 5458 (Vernon 1958) (defines real estate connected to improvement) *and id.* art. 5452, § 1 (Vernon Supp. 1980) (lien will attach to both improvement and connected real estate) *and id.* art. 5450, § 1 (lien may attach to improvement and be enforced against prior encumbrance not affected by its removal) *with* USLTA § 5-203(a) (1977) (lien attaches to real estate described in notice of commencement) *and id.* § 5-301 (owner has first opportunity to file notice of commencement).

72. *See* USLTA § 5-301(a)(1) (1977) (real estate described sufficient for identification).

73. *See id.* § 5-301, Comment 2, at 109.

74. *See id.* § 5-301, Comment 2, at 109.

75. *See id.* § 5-301(j); *id.* § 5-203, Comment 3, at 76.

76. *See id.* § 5-203(a) (if notice of commencement is recorded, subsequent construction liens attach to property described therein).

77. *See id.* § 5-203, Comment 3, at 77 (recording of notice of commencement by claimant is for benefit of all claimants).

78. *See id.* § 5-403(b); *id.* § 5-203, Comment 3, at 77.

79. *See id.* § 5-203(b).

80. *See* TEX. REV. CIV. STAT. ANN. art. 5459, § 1 (Vernon Supp. 1980).

The Hardeman Act, however, extends an additional protection to mechanics' lien claimants. In cases of multiple claims on the real estate, if the improvement can be removed without affecting a prior interest, then, to the extent of the value of the improvement, the lienor's interest is secured.[81]

Under the Uniform Act only materials supplied for a particular real estate improvement contract qualify for lien security.[82] To enforce a lien securing payment for these materials, the subcontractor must demonstrate the materials were actually used on the project, consumed by the project, or were so specifically fabricated they serve no other marketable purpose.[83] The subcontractor's burden of proof as to intent and use "is eased by a presumption that materials delivered to a site were used in connection with the improvement at that site."[84] The Hardeman Act affords security to all materials secured by USLTA,[85] and is more liberal in extending lien security to materials delivered for the purpose of consump-

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81. *Id.* art. 5459, § 1; *see* Richard H. Sikes, Inc. v. L & N Consultants, Inc., 586 S.W.2d 950, 954 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); Justice Mortgage Investors v. C. B. Thompson Constr. Co., 533 S.W.2d 939, 944 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.); Parkdale State Bank v. McCord, 428 S.W.2d 121, 125 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). *See generally* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 695-97 (1972) (claimant benefited in cases when lien would otherwise fail because not first in time).

82. *See* USLTA § 5-204(a)(1) (1977).

> A lien for furnishing material arises only if they are supplied with the intent, shown by the contract of sale, the delivery order, delivery to the site by the claimant or at his direction, or by other evidence, that they be used in the course of construction of, or incorporated into, the improvement in connection with which the lien arises, ...

Id. See generally Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 720 (1978).

83. *See* USLTA § 5-204(a)(2) (1977). "[E]ven though the seller expects that the materials are to be used on a particular job . . . he has no lien unless his materials were in fact used in that improvement." *Id.* § 5-204, Comment, at 80.

84. *Id.* § 5-204, Comment, at 80.

85. *Compare* TEX. REV. CIV. STAT. ANN. art. 5452 (Vernon Supp. 1980) *with* USLTA § 5-204 (1977). A lien in Texas may arise for materials furnished and for materials specifically fabricated less their salvage value. *See* TEX. REV. CIV. STAT. ANN. art. 5452, § 1 (Vernon Supp. 1980). Materials furnished are:

> (1) Material, machinery, fixtures or tools incorporated in the work, or consumed in the direct prosecution of the work, or ordered and delivered for such incorporation or such consumption.
>
> (2) Rent at a reasonable rate and actual running repairs at a reasonable cost for construction equipment, used in the direct prosecution of the work at the site of the construction or repair, or reasonably required and delivered for such use.
>
> (3) Power, water, fuel and lubricants, when such items have been consumed or ordered and delivered for consumption in the direct prosecution of the work.

Id. art. 5452, § 2b.

tion or incorporation.[86]

D. *Value of the Lien*

A subcontractor seeking to enforce a lien on real estate is attempting to secure his contract price.[87] His success under USLTA is determined by the alternatives in section 5-206, one of which must be adopted by the enacting state.[88] Alternative A allows the subcontractor to recover the amount unpaid under the contract to the extent of the owner's lien liability.[89] This liability is the amount of the prime contract less payments properly made.[90] Payments are properly made when paid in good faith before receiving notice of lien liability by unpaid claimants,[91] or when sufficient funds are retained to pay the claims of those who have given notice.[92]

Recognizing that a number of states impose greater liability on owners, the drafters of USLTA prepared a second alternative to section 5-206 for

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86. *Compare id.* art. 5452, § 2 (ordered and delivered for incorporation or consumption) *with* USLTA § 5-204(b) (1977) (delivery is presumption of incorporation or use). In Texas, however, mere delivery of chattels has been found insufficient to qualify for mechaincs' lien security unless permanent attachment to the reality is established. *See, e.g.*, First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 266-67 (Tex. 1974) (chattels attached to realty sufficiently annexed to qualify for mechanics' lien); Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc., 517 S.W.2d 593, 595 (Tex. Civ. App.—Waco 1974, no writ) (fixture incorporated into structure of building qualified for mechanics' lien); McConnell v. Frost, 45 S.W.2d 777, 780 (Tex. Civ. App.—Waco 1931, writ ref'd n.r.e.) (to qualify for lien fixture must have been either made, repaired, or so constructed into building as to become permanent fixture).

87. *See, e.g.*, First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 269 (Tex. 1974) (mechanics' lien enforceable to secure debt due from debtor); Wortham v. Trane Co., 432 S.W.2d 520, 520 (Tex. 1968) (per curiam) (claimant may perfect lien after assignment of debt); Doyle v. Second Master-Bilt Homes, Inc., 453 S.W.2d 226, 228 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) (one who improves real estate under contract with owner entitled to lien to secure payment).

88. *Compare* USLTA § 5-206, Alternative A (1977) *with id.* § 5-206, Alternative B. *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 721-22 (1978). Although the drafters of USLTA disfavored imposing double liability on the contracting owner, an alternative allowing for double payment was offered to meet the demands of claimant groups. Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 721-22 (1978).

89. *See* USLTA § 5-206(a)(2), Alternative A (1977). The "claimant other than a prime contractor" may recover "the lesser of: (i) the amount unpaid under the claimant's contract, or (ii) the amount unpaid under the prime contract through which the claimant claims at the time the contracting owner receives the claimant's notice of lien liability . . . ." *Id.*

90. *See id.* § 5-206(d), Alternative A. *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 721 (1978).

91. *See* USLTA § 5-206(d)(1), Alternative A (1977).

92. *See id.* § 5-206(d)(2), Alternative A.

consideration by the states.[93] Alternative B allows a subcontractor to recover his entire contract price from an owner, other than a protected party, regardless of the amount due under the prime contract, provided he notifies the owner within twenty days after first furnishing goods or services.[94] Under both alternatives lien liability is limited to the owner's real estate; therefore, personal liability is not imposed unless the owner "wrongfully prevents a lien from attaching."[95]

The critical event imposing lien liability upon the owner is receipt of notice from the claimant specifying the amount of the unpaid contract price.[96] This notice may be given anytime after entering into a real estate improvement contract.[97] The notice must be in writing, state the right to assert a lien against the owner's real estate, contain specific factual infor-

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93. *See id.* § 5-206, Alternative B; *id.* § 5-206, Introductory Comment, at 87 (1977). *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 721 (1978). "Except under mechanic's lien laws as they exist in some states, no law specifically sanctions a requirement that a purchaser or user pay twice for the same work or merchandise." Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 721 (1978).

94. USLTA § 5-206(b), Alternative B (1977). Protected party is defined as:

> (1) an individual who contracts to give a real estate security interest in, or to buy or to have improved, residential real estate all or a part of which he occupies or intends to occupy as a residence;
>
> (2) a person obligated primarily or secondarily on a contract to buy or have improved residential real estate or on an obligation secured by residential real estate if, at the time he becomes obligated, he is related to an individual who occupies or intends to occupy all or a part of the real estate as a residence; or
>
> (3) with respect to a security agreement, a person who acquires residential real estate and assumes or takes subject to the obligation of a prior protected party under the real estate security agreement.

Id. § 5-105(a). Residential real estate is broadly defined as "containing not more than [3] acres, not more than 4 dwelling units, and no non-residential uses for which the protected party is a lessor." *Id.* § 5-105(b). A condominium unit is not excluded by this definition notwithstanding the size of the complex. *See id.* § 5-105(b). The purpose of this concept is "to provide special protection for home owners or home buyers in construction lien situations." *Id.* § 5-105, Comment 1, at 69-70; *cf.* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 718 (1978) (extensive provisions applicable to protected party status are objected to by claimant groups). Under Alternative B the protected party is afforded the same treatment as provided for in Alternative A for all owners. *Compare* USLTA § 5-206(c), Alternative B (1977) *with id.* § 5-206(a)(2), Alternative A.

95. *See id.* § 5-206, Alternative B, Introductory Comment, at 87.

96. *See id.* § 5-205(a); *id.* § 5-205, Comment 2, at 82; *cf.* Throwbridge, Inc. v. Hathaway, 233 So. 2d 129, 130 (Fla. 1970) (per curiam) (when no undisbursed funds available lien claimant not entitled to recover because failed to give statutory notice); FLA. STAT. ANN. § 713.06(2)(a) (West Supp. 1979) (lienor must serve notice on owner as prerequisite for perfecting lien). *See generally* Note, *Lien Rights and Construction Lending: Responsibilities and Liabilities in Florida*, 29 U. FLA. L. REV. 411, 418 (1977).

97. *See* USLTA § 5-205(a) (1977).

mation, and warn the owner of possible double liability resulting from future payments made in connection with the particular real estate contract.[98] The Act does not designate appropriate methods of delivery[99] but does require the claimant to look to article 1 for what constitutes receipt.[100] USLTA facilitates compliance with this provision by allowing anyone held out as the owner by the legitimate owner to receive effective notice.[101]

The Texas provisions for determining effective notice by claimants and ensuing owner's lien liability are considerably more complicated than those of USLTA.[102] Article 5453 requires the subcontractor to give several notices to both the owner and the original contractor.[103] Various time limits imposed are determined by the type of services and materials agreed

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98. *See id.* § 5-205(a). The factual information set out in the notice of lien liability must include the name and address of the claimant and the person with whom he contracted, the name of the contracting owner, a general description of the materials or services provided and the real estate affected by the lien, a statement concerning the possibility of lien recordation, and the amount unpaid, whether or not due to claimant. *See id.* § 5-205(a)(1)-(7). The warning of possible double liability places the owner on notice that he must retain a sufficient amount of the prime contract price to pay the amount owed to the claimant giving notice. *See id.* §§ 5-205(a)(8), 5-206(a)(2), Alternative A, 5-206(b), Alternative B. *See generally* Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Laws*, 73 NW. L. REV. 359, 388-89 (1978).

99. *See* USLTA § 5-205, Comment 2, at 82 (1977) (act does not specify delivery because receipt is critical event). *But cf.* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 721 (1978) (notice given by certified mail with return receipt requested should be used).

100. *See* USLTA § 5-205, Comment 2, at 82 (1977).

> A person "receives" a notice at the time it:
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> (1) comes to his attention; or
>
> (2) is delivered at the place of business through which the person conducted the transaction with respect to which the notice is given or at any other place held out by him as the place for receipt of the communication.

Id. § 1-202(d).

101. *See id.* § 5-205(c), (d).

> Sometimes corporate groups may use fairly indiscriminately the names of the various corporate entities. A case in which a claimant has been misled as to the particular corporate entity which is the contracting owner is one of the cases covered by subsection (c). Similarly, a corporation may contract under a name which is not its registered name, or an individual may contract as a corporation. These situations are among those covered by subsection (d).

Id. § 5-205, Comment 5, at 83.

102. *Compare* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980) (several provisions establishing what is effective notice) *with* USLTA § 5-205(a) (1977) (one time limitation is defined for all claimants giving notice of lien liability).

103. *See* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980); Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 678-80 (1972).

upon.[104] Once the owner receives the appropriate notices from claimants, he is required to retain sufficient funds to satisfy these claims.[105] An owner in compliance with the provisions is not liabile for any amount paid prior to receiving notice,[106] except an amount required to be retained by article 5469.[107]

Excluding article 5469, both the Hardeman and Uniform Acts' basic mechanisms for securing a claimant's contract price are identical.[108] The claimant is required to give notice to the owner of the contract for which he is seeking payment;[109] the owner is authorized to retain appropriate funds from the original contractor.[110] The detail and variation within the Texas statute, however, make compliance with its provisions more difficult than under the Uniform Act.[111] Simplifying these provisions would facilitiate compliance and enhance the enforceability of mechanics' liens.[112] To this extent adoption of the Uniform Act would benefit

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104. *See* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980).

105. *See* Hunt Developers, Inc. v. Western Steel Co., 409 S.W.2d 443, 447 (Tex. Civ. App.—Corpus Christi 1966, no writ). Proper notice by derivative claimants are comparable to writs of garnishment. If the owner fails to retain sufficient funds after receipt of notice, he will be liable for the amount authorized to be retained. *See id.* at 447; TEX. REV. CIV. STAT. ANN. art. 5463, § 1 (Vernon Supp. 1980).

106. *See, e.g.*, Crockett v. Brady, 455 S.W.2d 807, 810 (Tex. Civ. App.—Austin 1970, no writ) (failure to give notice negated lien liability of owner); Trinity Universal Ins. Co. v. Palmer, 412 S.W.2d 691, 695 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (giving notice condition precedent to withholding funds and creation of lien); Texas & N. Ry. v. Logwood, 401 S.W.2d 886, 890 (Tex. Civ. App.—Texarkana 1966, no writ) (insufficient notice resulted in no lien liability).

107. *See* TEX. REV. CIV. STAT. ANN. art. 5469 (Vernon Supp. 1980) (owner required to retain ten percent of the prime contract price during the progress of work and for thirty days after completion). *See generally* W & W Floor Covering Co. v. Project Acceptance Co., 412 S.W.2d 379, 382 (Tex Civ. App.—Austin 1967, no writ); Hunt Developers, Inc. v. Western Steel Co., 409 S.W.2d 443, 447, 449 (Tex. Civ. App.— Corpus Christi 1966, no writ).

108. *Compare* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980) *and id.* art. 5463 *with* USLTA § 5-205(a) (1977) *and id.* § 5-206, Alternative A *and id.* § 5-206, Alternative B.

109. *See* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980); USLTA § 5-205 (1977).

110. *See* TEX. REV. CIV. STAT. ANN. art. 5463 (Vernon Supp. 1980); USLTA §§ 5-206, Alternative A, 5-206, Alternative B (1977).

111. *Cf.* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 667 (1972) (notice requirements imposed upon subcontractor have resulted in a "labyrinth of technicalities"). *Compare* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980) *and id.* art. 5463 *with* USLTA § 5-205 (1977) *and id.* § 5-206, Alternative A *and id.* § 5-206, Alternative B. *But cf.* Helm, *Establishment and Priority of Liens for the Development and Improvement of Real Estate*, 20 BAYLOR L. REV. 387, 387 (1968) (perfecting lien involves tracking statute, complying with applicable notice requirements, and timely filing affidavit claiming lien).

112. *See* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665,

subcontractors.

Benefits received by adopting USLTA, however, would be outweighed by the inadequate security provided subcontractors in the Uniform Act. The Texas Act offers greater protection to subcontractors seeking payment for materials and services furnished for the improvement of real estate. Article 5469 creates a statutory retainage fund for the benefit of individuals improving the owner's real estate.[113] This provision requires the owner to retain ten percent of the prime contract price until thirty days after work is completed.[114] Consequently, at least to the value of this fund, the owner is liable regardless of payments made before receiving appropriate notice of lien liability.[115] In addition, a provision of the Hardeman Act designates a trust fund for the benefit of subcontractors.[116] Individuals within the contracting chain receiving funds for the express purpose of fulfilling a real estate improvement contract are designated trustees of such funds for the benefit of those who perform under them in the contracting chain.[117] Anyone intentionally misapplying these funds, without first paying all obligations incurred during the construction project, is subject to criminal penalty.[118] These provisions, benefiting subcon-

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706-07 (1972).

113. *See* TEX. REV. CIV. STAT. ANN. art. 5469 (Vernon Supp. 1980). One reason for the enactment of this provision is to protect persons who perform near the end of the real estate improvement project. In the absence of article 5469, notice of lien liability upon completion of the project would be too late to impound funds once the owner has properly paid the amount owed under the prime contract. Although originally enacted for the benefit of artisans and mechanics, the amendment in 1961 extended this benefit to other claimants once the demands of artisians and mechanics were met. *See* Woodward, *The Hardeman Act—Some Unanswered Questions*, 6 ST. MARY'S L.J. 1, 12-13 (1974).

114. *See* TEX. REV. CIV. STAT. ANN. art. 5469 (Vernon Supp. 1980).

115. *See, e.g.*, Hayek v. Western Steel Co., 478 S.W.2d 786, 794 (Tex. 1972) (ten percent of entire improvement project should be retained); General Air Conditioning Co. v. Third Ward Church of Christ, 426 S.W.2d 541, 544 (Tex. 1968) (secured lien authorizes recovery at least to extent of ten percent of contract price); Texas & N. Ry. v. Logwood, 401 S.W.2d 886, 890 (Tex. Civ. App.—Texarkana 1966, no writ) (filing lien thirty days after completion of project negates liability based upon statutory retainage).

116. *See* TEX. REV. CIV. STAT. ANN. art. 5472e, § 1 (Vernon Supp. 1980).

117. *See, e.g.*, Berger Eng'r Co. v. Village Casuals, Inc., 576 S.W.2d 649, 651-52 (Tex. Civ. App.—Beaumont 1978, no writ) (to qualify for additional security of article 5472e, claimant must prove funds were either paid to contractor or borrowed by securing a lien on specific property); American Amicable Life Ins. Co. v. Jay's Air Conditioning & Heating, Inc., 535 S.W.2d 23, 26 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (purpose of fund to protect materialmen, laborers, contractors, and subcontractors, not construction lenders); Panhandle Bank & Trust Co. v. Graybar Elec. Co., 492 S.W.2d 76, 82 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.) (subcontractor entitled to trust fund proceeds even when statute filing requirements not followed).

118. *See* TEX. REV. CIV. STAT. ANN. art. 5472e, §§ 2, 3 (Vernon Supp. 1980); Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 687 (1972). "The

tractors, would be negated by the adoption of USLTA.

E. *Priority of the Lien*

After the subcontractor perfects a lien, his chances of securing the contract price are dependent upon the priority of his lien.[119] USLTA's priority treatment of construction liens conforms with most state mechanics' and materialmen's lien laws.[120] The first in time rule applies to liens attaching at different times, and construction liens attaching simultaneously have equal priority and share the amount available on a pro rata basis.[121] USLTA's notice of commencement requirement, however, adds a unique dimension to these general rules.[122] A claimant who records a lien and then records a notice of commencement merely has equal priority with claimants who file a lien after him but while the notice of commencement is effective.[123] This provision does not guarantee equal priority among lien claimants. If, after one claimant records, another claimant or the owner files a notice of commencement, the first filing claimant has priority over subsequent claimants filing while the notice of commencement is effective.[124]

Regarding third party interests, the status of a construction lien claimant is established by USLTA as "a purchaser for value without knowledge

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statute makes a misapplication of these trust funds 'with intent to defraud,' punishable by fine or imprisonment. The Act does not apply to any lender, title company, or closing agent, and the Texas Trust Act is made inapplicable." Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 687 (1972).

119. *See* USLTA § 5-208, Comment 1, at 96 (1977). "In determining the amount to which a claimant is entitled in a foreclosure proceeding, it is first necessary to determine the amount of lien under Section 5-206 and then his priority for that amount as against all other lien claimants in the foreclosure."*Id.*

120. *Compare* USLTA § 5-208(a) (1977) *with* FLA. STAT. ANN. § 713.07(3) (West 1969) *and* HAWAII REV. STAT. § 507-46 (1976) *and* WASH. REV. CODE ANN. § 60.04.050 (Supp. 1978). *See generally* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 723 (1978).

121. *See* USLTA § 5-208(a), (b) (1977); Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 723 (1978). *See generally* Comment, *Uniform Simplification of Land Transfers Act: Areas of Departure from State Laws*, 73 NW. L. REV. 359, 386-88 (1978).

122. *See* USLTA §§ 5-208(c), -301(e) (1977).

123. *See id.* § 5-208(c); *id.* § 5-208, Comment 2, at 97. "Subsection (c) prevents a claimant from gaining priority over other claimants in cases where no notice of commencement has been recorded by recording his lien and then recording a notice of commencement." *Id.* § 5-208, Comment 2, at 97.

124. *See id.* § 5-208(c) (provision applies when same claimant records lien and then records notice of commencement); *id.* § 5-208, Comment 2, at 97 (first filing claimant has priority over subsequent claimants recording after notice of commencement is recorded).

who had recorded . . . at the time his lien attached."[125] The various exceptions set out in subsequent subsections limit this position.[126] The drafters justify these exceptions by assuming that security of the construction lender will indirectly benefit those involved in the construction project[127] and reduce the high cost of residential closings by treating home buyers more favorably.[128] Subcontractors seeking payment for services and materials furnished are unlikely to be comforted by such rationales.[129]

The Hardeman Act treats mechanics' liens equally without reference to date of recordation.[130] When funds are insufficient to pay all claimants, claims are paid on a pro rata basis.[131] Article 5469 provides an exception to this distribution, requiring the statutory retainage fund to be used initially to pay the claims of artisans and mechanics.[132] Priority of mechan-

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125. *Id.* § 5-209(a); *see id.* § 3-202. This status is afforded the construction lienor whether or not he had knowledge of prior interests before he recorded. *Id.* § 5-209, Comment 1, at 98.

126. *See id.* § 5-209(c)-(e). A significant feature of USLTA is its special treatment of future advances pursuant to a construction security agreement. The construction lender's advances have priority over construction liens when made to protect their security interest in the property even when advances exceed the amount stated in the security agreement. *See* Comment, *Future Advances Under the ULTA and the USLTA: The Construction Lender Receives a New Status,* 34 WASH. & LEE L. REV. 1027, 1036 n.67, 1037 (1977). Another exception allows the residential buyer to take an unencumbered interest in real estate even though a notice of commencement has been recorded and visible commencement of real estate improvements establishes notice of possible construction lien liability. *See* USLTA § 5-209, Comment 3, at 100 (1977).

127. *See id.* § 5-209, Comment 2, at 99. Special treatment of the construction lender is "intended to accommodate the economic pressures faced by construction lenders in an effort to encourage lenders to advance funds in every case where to do so would enable completion of a construction project." Comment, *Future Advances Under the ULTA and the USLTA: The Construction Lender Receives a New Status,* 34 WASH. & LEE L. REV. 1027, 1036-37 (1977).

128. *See* USLTA § 5-209, Comment 3, at 100 (1977). In recent years, substantial attention has focused on the high cost of residential real estate closings. A major purpose of this Act is to create a legal environment conducive to reduction of those costs." *Id.*

129. *Cf.* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary,* 13 REAL PROP., PROB. & TR. J. 696, 724 (1977) (provisions are highly favorable to construction lender; main thrust of criticism directed to favorable treatment of residential home buyer). *But cf.* Comment, *Future Advances Under the ULTA and the USLTA: The Construction Lender Receives a New Status,* 34 WASH. & LEE L. REV. 1027, 1040 (1977) (USLTA balances interests of construction lender and mechanics' lienor).

130. *See* TEX. REV. CIV. STAT. ANN. art. 5468 (Vernon Supp. 1980).

131. *See id.*

132. *Id.* art. 5469; *see* Marek v. Goyen, 346 S.W.2d 926, 928 (Tex. Civ. App.—Houston 1961, no writ). "The purpose of this article creating a special fund for the benefit of mechanics and artisans was to grant them a preference over materialmen and subcontractors." Marek v. Goyen, 346 S.W.2d 926, 928 (Tex. Civ. App.—Houston 1961, no writ).

ics' liens against third party interests are determined by attachment at the time of inception of the lien.[133] When this rule of law was first enacted there were no criteria specifying time of inception.[134] Continuous litigation attempting to clarify "time of inception" and thereby determine priority of competing interests[135] led to amendment of article 5459 in 1971.[136] This amendment did not alter the priority afforded competing claims but did provide statutory criteria for determining time of inception.[137] Today, as a result, the attachment of a mechanic's lien at inception is based upon actual visible commencement of construction or delivery of materials to the site, the recording of the written contract for improvements, or the recording of an affidavit stating information pertaining to an oral contract for improvements, whichever occurs first.[138]

A subcontractor in Texas may have difficulty perfecting his lien against the owner's real estate,[139] but once perfected, the status is not jeopardized by unfavorable priority rules.[140] This would not be true if USLTA was adopted. The Uniform Act's overwhelming concern for protecting third party interests[141] has created numerous loopholes thereby diminishing the status of a perfected construction lien.[142] Simplicity of perfection is of no benefit to subcontractors if the probability of enforcement is not favorable.

F. *Foreclosure of the Lien*

USLTA defers to appropriate state foreclosure proceedings, with an additional requirement that all persons recording a lien or acquiring an in-

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133. TEX. REV. CIV. STAT. ANN. art. 5459, § 1 (Vernon Supp. 1980); *see* Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 583, 33 S.W. 652, 661 (1895).

134. *See* Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 583, 33 S.W. 652, 661 (1895).

135. *See, e.g.*, University Sav. & Loan Ass'n Security Lumber Co., 423 S.W.2d 287, 292-96 (Tex. 1967); Finger Furniture Co. v. Chase Manhattan Bank, 413 S.W.2d 131, 136-37 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); Newman v. Coker, 310 S.W.2d 354, 362-63 (Tex. Civ. App.—Amarillo 1958, no writ). *See generally* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 690-91 (1972).

136. *See* 1971 Tex. Gen. Laws, ch. 231, § 2, at 1082.

137. *See* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665, 694-95 (1972).

138. *See* TEX. REV. CIV. STAT. ANN. art. 5459, § 2 (Vernon Supp. 1980). *See generally* Johnson & Barbee, *Property, Annual Survey of Texas Law, 26* SW. L.J. 24, 25 (1972).

139. *See* TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980); *id.* art. 5467, §§ 1 (b)-(d), 2, 3.

140. *See id.* arts. 5459, § 2, 5468 & 5469.

141. *See* USLTA § 1-102(4) (1977). One purpose of USLTA is "to protect consumer buyers and borrowers against practices that may cause unreasonable risk and loss to them." *Id.*

142. *See id.* § 5-209(c)-(e).

terest in contested real estate be made parties to the suit.[143] A lien claimant must institute a judicial foreclosure proceeding within thirty days of a demand by any party having an interest in the real estate.[144] Otherwise, a claimant has one year after recordation to enforce his lien.[145] Amendment and continuation provisions are provided for extending the enforcement period when necessary.[146]

Judicial foreclosure is the only means to enforce a mechanic's lien in Texas.[147] The applicable limitations depend upon the type of contract the claimant is seeking to secure. An oral contract is subject to a two year statute of limitations,[148] while a written contract is subject to a four year statute of limitations.[149] Again, a subcontractor in Texas would not benefit by the adoption of USLTA.

IV. Proposed Amendments to Article 5

When USLTA is considered for adoption by state legislatures, it will be opposed by organized subcontractor groups.[150] Successful lobbying efforts will either defeat the Act or cause legislative revision. Enactment of modified versions of USLTA will negate the primary purpose of achieving interstate uniformity.[151] Article 5 of USLTA should be amended to avoid opposition and possible variation among states. Based on Texas law and laws of other states, the following provisions are offered to enhance adoption of USLTA.[152]

A. *Date of Inception*

1. *Recommendation.* Before construction begins the contracting owner must file a notice of commencement.[153] In addition to information cur-

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143. *See id.* § 5-401.

144. *See id.* § 5-210(b).

145. *See id.* § 5-210(a).

146. *See id.* §§ 5-210(a), -304.

147. *See* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 698 (1972).

148. *See* Tex. Rev. Civ. Stat. Ann. art. 5526, § 4 (Vernon 1958).

149. *See id.* art. 5527, § 1.

150. *Cf.* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 Real Prop., Prob. & Tr. J. 696, 717 (1978) (organized subcontractor groups have continually expressed discontent with USLTA).

151. *See* USLTA § 1-102(5) (1977).

152. In order for a statute to endure it must be fair to all parties. *See* Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. Pa. L. Rev. 1083, 1104 (1932). Addressing the shortcomings of USLTA identified in this comment, the provisions suggested are intended to afford more favorable treatment to subcontractors.

153. *See* Fla. Stat. Ann. § 713.13(1) (West 1969 & Supp. 1979). "An owner or his authorized agent before actually commencing to improve any real property . . . shall record a

rently required by the Uniform Act,[154] the notice should contain the name and address of the construction lender.[155] A contracting owner who does not file a timely notice of commencement is subject to a lien liability in excess of the prime contract price.[156]

2. *Explanation.* The filing of a notice of commencement establishes the date of inception of construction liens in order to determine priority among competing claims.[157] As drafted, the Uniform Act merely affords the contracting owner the first opportunity to file a notice of commencement.[158] When the owner fails to file, date of inception is determined by the claimant's filing a notice of commencement,[159] by the visible commencement of the improvement, or by the date of lien recordation, whichever occurs first.[160] Mandatory, routine recordation of a notice of commencement by the contracting owner will insure adequate notice to third party interests of potential lien liability[161] and will minimize the

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notice of commencement . . . ." *Id.*

154. *See* USLTA § 5-301(a) (1977). This section provides:

> [A] notice of commencement must be signed by the contracting owner, be denominated "notice of commencement," and state:
>
> (1) the real estate being or intended to be improved or directly benefited, with a description thereof sufficient for identification;
>
> (2) the name and address of the contracting owner, his interest in the real estate, and the name and address of the fee simple title holder, if other than the contracting owner; and
>
> (3) that if, after the notice of commencement is recorded, a lien is recorded as to an improvement covered by the notice of commencement, the lien has priority from the time the notice of commencement is recorded.

Id.

155. *See* FLA. STAT. ANN. § 713.13(f) (West Supp. 1979).

156. *See id.* § 713.06(3)(a), (h). Payment under a real estate improvement contract prior to recording a notice of commencement is improperly paid. *Id.* § 713.06(3)(a). The real estate of an owner who makes improper payment is subject to lien liability to the extent of the amount of improper payment. *Id.* § 713.06(3)(h). *See generally* Adams v. McDonald, 356 So. 2d 864, 866-67 (Fla. Dist. Ct. App. 1978) (owner pays contractor at his peril when he fails to file notice of commencement); Torres v. MacIntyre, 334 So. 2d 59, 60 (Fla Dist. Ct. App. 1978) (per curiam) (filing notice of commencement must be taken into consideration when determining proper payment under real estate improvement contract).

157. *Compare* USLTA § 5-207(b) (1977) (lien attaches at the time notice of commencement is recorded) *with* FLA. STAT. ANN. § 713.07(2) (West 1969) (liens attach and take priority upon recordation of notice of commencement). *See generally* United of Fla., Inc. v. Illini Fed. Sav. & Loan Ass'n, 341 So. 2d 793, 795 (Fla. Dist. Ct. App. 1977) (per curiam) (mechanics' lien statute grants lienor priority over competing claim).

158. *See* USLTA § 5-301 (1977).

159. *See id.* §§ 5-207(b), -208(c), -301(e).

160. *See id.* § 5-207(c).

161. *See id.* § 5-301, Comment 1, at 108. "The certainty and ease with which relative priorities can be established if a notice of commencement covering the improvement has been recorded make it highly desirable, from the point of view of third parties who deal

risks subcontractors face when filing notices of commencement.[162] Additionally, information contained in the notice, including the name and address of the construction lender, will aid subcontractors in attempting to enforce lien liability against the contracting owner.[163]

B. *Notice of Lien Liability*

1. *Recommendation.* Immediately upon date of debt accrual, a claimant should give notice of lien liability to the construction lender and the owner.[164] Upon receipt of notice, the party in control of construction funds shall withhold a sufficient amount to pay the unpaid claims.[165] Consequently, the owner's lien liability will be the amount unpaid under the prime contract.[166] The effect on the construction lender is that failure to comply will subordinate subsequent advances to construction lienors upon enforcement of competing liens.[167]

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with the real estate, that the notice be recorded." *Id.* § 5-301, Comment 1, at 108.

162. *See id.* § 5-403(b). A claimant who files a notice of commencement designates the real estate subject to lien liability. *See id.* §§ 5-203(a), -301(e), (j). A judgment stating that a claimant overstated the real estate being improved or benefited may cause the claimant to lose his lien and incur liability for any damages caused by his bad faith overstatement. *See id.* § 5-403(b); *id.* § 5-203, Comment 3, at 76-77. In Florida if the owner fails to file a notice of commencement, a lien attaches upon recordation. *See* FLA. STAT. ANN. § 713.07(2) (West 1969). The proposed amendment to USLTA does not alter the criteria for establishing lien attachment when a notice of commencement is not recorded. *See* USLTA § 5-207(c) (1977). The mandatory filing requirement placed upon the owner, however, minimizes the application of this section.

163. *Compare* USLTA § 5-301 (1977) *with id.* § 5-205 *and id.* § 5-303.

164. *Cf.* CAL. CIV. CODE §§ 3158, 3159 (Deering 1972) (lien claimant may give stop notice to owner and construction lender); COLO. REV. STAT. § 38-22-102(4) (1973) (lien claimant at any time may give notice of lien liability to owner, reputed owner, superintendent of construction, financing institution, or other entity disbursing construction funds); WASH. REV. CODE ANN. §§ 60.04.020, 60.04.210 (Supp. 1978) (lien claimant must give notice to owner that lien may be claimed and may give notice of unpaid claim to lending institution within twenty days after date amount is due). Date of debt accural may be the date of payment required by the contract, *see* WASH. REV. CODE ANN. § 60.04.210(2) (Supp. 1978), or if no date is specified, shall be designated as the tenth of the month next following completion of performance. *See* TEX. REV. CIV. STAT. ANN. art. 5467, § 1(c) (Vernon Supp. 1980). Once indebtedness accrues no time limit is placed upon giving notice because the entity in control of construction funds is liable only for the amount remaining after receipt of notice. *Compare* USLTA § 5-206(a)(2), Alternative A (1977) *with* CAL. CIV. CODE §§ 3161, 3162 (Deering 1972) *and* COLO. REV. STAT. § 38-22-102(6) (1973) *and* TEX. REV. CIV. STAT. ANN. art. 5463, § 1 (Vernon Supp. 1980).

165. *Compare* USLTA § 5-205 (1977) *and id.* § 5-206, Alternative A *with* CAL. CIV. CODE §§ 3161, 3162 (Deering 1972) *and* COLO. REV. STAT. § 38-22-102(6) (1973) *and* TEX. REV. CIV. STAT. ANN. art. 5463, § 1 (Vernon Supp. 1980).

166. *Compare* USLTA § 5-206(a)(2)(ii), Alternative A (1977) *with* N.C. GEN. STAT. § 44A-20 (1976).

167. *See* WASH. REV. CODE ANN. § 60.04.210(6) (Supp. 1978). *See generally Symposium,*

2. *Explanation.* Under the Uniform Act the construction lienor has priority over third party interests arising after the date of lien inception.[168] An exception to this provision is the protection afforded the construction lender.[169] A subsequent advance under a prior construction security agreement has priority over the construction lien, notwithstanding knowledge of the lien, the absence of a commitment to make an advance, or expenditures greater than the amount stated in the recorded security agreement.[170] Requiring the construction lender to take an active role in disbursement of construction funds will diminish preferential treatment of construction lenders[171] and will secure the payment of funds to appropriate parties involved in the real estate improvement project.[172]

C. *Lien Recordation*

1. *Recommendation.* A claimant's lien does not attach and cannot be enforced unless the lien is recorded within ninety days from date of debt accrual.[173]

2. *Explanation.* One of the features of USLTA jeopardizing a subcontractor's security interest is the time limit imposed upon the claimant for lien recordation. Section 5-207(a) states a lien must be recorded after entering into the real estate improvement contract and within ninety days of completing performance.[174] Realistically, the subcontractor should not become concerned with lien security until the date indebtedness ac-

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Recent Washington Legislation—Mechanics' Liens: The "Stop Notice" Comes to Washington, 49 WASH. L. REV. 685, 696 (1974).

168. *See* USLTA § 5-209(a) (1977).

169. *Id.* 5-209(c); *accord*, WASH. REV. CODE ANN. § 60.04.220 (Supp. 1978).

170. USLTA § 5-209(c) (1977); *accord*, WASH. REV. CODE ANN. § 60.04.220 (Supp. 1978). *See generally Symposium, Recent Washington Legislation—Mechanics' Liens: The "Stop Notice" Comes to Washington*, 49 WASH. L. REV. 685, 698 (1974).

171. *Cf.* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP., PROB. & TR. J. 696, 724 (1978) (USLTA provisions are highly favorable to construction lender); *Symposium, Recent Washington Legislation—Mechanics' Liens: The "Stop Notice" Comes to Washington*, 49 WASH. L. REV. 685, 685 (1974) (construction lenders made vocal objection to provision allowing lien claimants to assert priority over construction funds).

172. *See generally Symposium, Recent Washington Legislation—Mechanics' Liens: The "Stop Notice" Comes to Washington*, 49 WASH. L. REV. 685, 685 (1974). The priority extended to a lien claimant by giving notice to the construction lender "opens a new line of communication between lender and subcontractors, with the hope of 'red flagging' nonpayment of subcontractors and exposing potential mechanics' liens early in the project." *Id.* at 695.

173. *See* CAL. CIV. CODE § 3116(a) (Deering 1972); NEV. REV. STAT. § 108.226(1) (1973); TEX. REV. CIV. STAT. ANN. art. 5453, § 1 (Vernon Supp. 1980).

174. *See* USLTA § 5-207(a) (1977).

crues.[175] A lien, therefore, is unlikely to be filed immediately upon entering into an agreement to furnish materials and services.[176] The extension of credit by the subcontractor indicates he does not contemplate resorting to legal remedies in order to collect his contract price.[177] More importantly, the premature filing of a lien will hinder the contracting relationship. Liens filed before payment is due result in premature lien liability.[178] The proposed amendment, based upon the date indebtedness accrues,[179] extends the time limits for lien recordation and prevents the filing of frivolous liens.[180]

D. *Statutory Retainage*

1. *Recommendation.* The construction lender or, if none, the owner, must retain ten percent of the contract price until thirty days after completion of the real estate improvement project.[181] The fund is to be distributed on a pro rata basis to lien holders giving notice of lien liability within the thirty day period.[182]

2. *Explanation.* USLTA's single provision for trapping funds after the owner receives notice of lien liability provides minimum security for subcontractors.[183] Amending the Uniform Act to include a statutory

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175. *See* Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. PA. L. REV. 1083, 1088 n.14 (1932).

176. *See id.* at 1088 n.14. "[A]s a practical matter, a claimant rarely, if ever, files a lien prior to the completion of his contract or the suspension of his work, since the average businessman would prefer to exhaust all other means of settlement before resorting to the expense, delay and inconvenience of litigation." *Id.* at 1088 n.14.

177. *See id.* at 1104.

178. *See id.* at 1088. "It is unreasonable to expect the contractor to pay subcontractors in full before he has received payment from the owner." *Id.* at 1088.

179. Date indebtedness accrues has been established to be the date of payment required by the contract, *see* WASH. REV. CODE ANN. § 60.04.210(2) (Supp. 1978), or if no date is specified, shall be designated as the tenth of the month next following completion of performance. *See* TEX. REV. CIV. STAT. ANN. art. 5467, § 1(c) (Vernon Supp. 1980).

180. *Compare* USLTA § 5-207(a) (1977) *with* CAL. CIV. CODE § 3116(a) (Deering 1972) *and* NEV. REV. STAT. § 108.226(1) (1973) *and* TEX. REV. CIV. STAT. ANN. art. 5453, § 1 (Vernon Supp. 1980).

181. *Cf.* COLO. REV. STAT. § 38-22-102(1) (1973) (specified percentage of contract price shall not be paid until thirty-five days after completion of contract); TEX. REV. CIV. STAT. ANN. art. 5459 (Vernon Supp. 1980) (ten percent of contract price must be retained until thirty days after work is completed).

182. *Compare* USLTA § 5-206(c)(2), Alternative A (1977) (claimants whose liens attach at same time share on a pro rata basis amount of owner's lien liability) *with* CAL. CIV. CODE § 3167(b) (Deering 1972) (insufficient funds are shared on pro rata basis) *and* TEX. REV. CIV. STAT. ANN. art. 5469 (Vernon Supp. 1980) (with preference to artisans and mechanics insufficient funds are ratably shared among claimants).

183. *See* USLTA §§ 5-206, Alternative A, 5-206, Alternative B (1977).

retainage fund will afford more adequate protection to subcontractors.[184] Since ten percent of the contract price will be withheld throughout the contracting period, subcontractors will not be penalized by the prior suggestion of giving notice of lien liability upon date of debt accrual.[185]

V. Conclusion

USLTA was drafted for enactment in its entirety by all fifty states to achieve interstate uniformity in real estate transactions.[186] To accomplish this purpose, interested parties must be convinced that nationwide legislation, in an area of law traditionally provincial, will be beneficial.[187] In an age of national lenders, suppliers, and builders, substantial support may be generated for a uniform mechanics' lien law.[188] The drafters of USLTA, however, failed to produce a viable alternative to existing state variations of mechanics' lien statutes. The Uniform Act does not provide adequate security to individuals intended to be protected by mechanics' lien legislation.[189] Until article 5 is revised to afford more favorable treatment to subcontractors, the probability of USLTA's adoption is minimal.

The development of an ideal mechanics' lien law is an unrealistic undertaking. While the need for mechanics' lien legislation is generally recognized, opposition to any statutory scheme attempting to balance the numerous conflicting interests is inevitable.[190] In Texas the predominant concern should be simplification of current mechanics' lien statutes.[191] The shortcomings of the Hardeman Act are due to its endless, selective amendment process.[192] Article 5 of USLTA provides an opportunity to

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184. *Compare id.* § 5-206, Alternative A *and id.* § 5-206, Alternative B *with* Tex. Rev. Civ. Stat. Ann. art. 5463 (Vernon Supp. 1980) *and id.* art. 5469 *and id.* art. 5472e. Claimant groups have criticized USLTA's single provision for trapping funds upon receipt of notice of lien liability. *See* Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 Real Prop., Prob. & Tr. J. 696, 721-22 (1978).

185. Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 683 (1972) (extending right to statutory retainage to all subcontractors outweighs significance of single fund-trapping statute).

186. *See* USLTA § 1-102 (1977).

187. *See also* Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 Geo. L.J. 1245, 1246 (1976).

188. *See* USLTA art. 5, Introductory Comment, at 62 (1977).

189. *See* First Nat'l Bank v. Whirlpool Corp., 517 S.W.2d 262, 265 (Tex. 1974) (mechanics' liens are intended for purpose of protecting laborers and materialmen).

190. Brown, *Mechanics' Liens: An Interpretation of Section 356 as Amended*, 37 Miss. L.J. 203, 203 (1966); Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 703 (1972).

191. *See* Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 707 (1972).

192. *See id.* at 667-70.

remedy this situation. Establishing a comprehensive treatment of mechanics' liens, an amended article 5 should be a catalyst for legislative study and reform.