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Christopher H. Little

Little, Bulman & Reardon, P.C.

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The Rhode Island Mechanics' Lien Law: A Plea (and Proposal) for Clarity and Fairness

Christopher H. Little*

The mechanics' lien law, which is of ancient origin in this state, has been the subject of substantial but uncoordinated amendments on several occasions . . . [T]here is and for many years has been great uncertainty, among the members of the legal profession in this state, as to the interpretation and application of the statute.¹

INTRODUCTION

Unfortunately, this observation is equally applicable today as it was more than sixty years ago. First enacted in 1847, Rhode Island's current mechanics' lien law² has experienced a long, frequently amended history.³ It is now time for the Rhode Island

* Christopher Little is a principal of Little, Bulman & Reardon, P.C., a Providence-based law firm which concentrates its practice in the field of construction law and construction litigation. He is the co-editor of the American Bar Association's national survey of private construction laws, *Construction and Design Law* (forthcoming Spring, 1998), and the author of the Rhode Island chapter. He was assisted in the preparation of this Article by Fredrika Quinn Little, who is also an attorney with Little, Bulman & Reardon, P.C.

1. *Art Metal Constr. Co. v. Knight*, 185 A. 136, 139 (R.I. 1936).

2. The 1847 Act was actually preceded by one passed in 1834, but the forerunner of today's Act superseded the earlier version.

3. In addition to general reenactments over time, the Rhode Island lien law, since first enacted in 1834, The Mechanics' Lien Act of 1834, was amended in 1847, 1847 R.I. Pub. Laws ch. 177 [hereinafter 1847 Act]; in 1888, 1888 R.I. Pub. Laws ch. 696, §§ 1-4; in 1893, 1893 R.I. Pub. Laws ch. 1224, ch. 1, §§ 98-100; in 1896, R.I. Gen. Laws ch. 206, §§ 1-23 (1896); in 1906, 1906 R.I. Pub. Laws ch. 1325, § 1; in 1909, R.I. Gen. Laws ch. 257, §§ 1-23 (1909); in 1923, 1923 R.I. Pub. Laws ch. 460 (amending R.I. Gen. Laws ch. 301); in 1946, 1946 R.I. Pub. Laws ch. 1702, § 1 (amending R.I. Gen. Laws ch. 445, § 5); in 1956, 1956 R.I. Pub. Laws ch. 3780, § 1

General Assembly to consider substantial revisions to this statute, rendering it more comprehensible to the practitioner and equitable to the consumer. Rhode Island has an avowed liberal remedy available to all who have contributed labor, material or equipment towards the increased value of property.⁴ The statutory result is an unduly burdensome scheme for an owner who can be required to pay twice for work or materials and a trap for the hapless bona-fide purchaser for value who acquires property that subsequently can be liened. As for the poor contractor and his or her attorney, one can only hope for the ability to read forward, backward and virtually inside out as one tries to secure payment.

If all history is prologue, then perhaps a historical examination of the origins and development of the current mechanics' lien law will help ascertain where Rhode Island should go, and possibly glean a more direct route.

HISTORICAL BACKGROUND

While the current mechanics' lien law rests on a statute passed in 1847, that statute superseded an earlier act having much simpler terms and concepts. The Mechanics' Lien Law of 1834⁵ granted, subject to proper notice and perfection, a lien "for everything which was used or went into the building, by whomsoever furnished or supplied. It provide[d] for material men, tradesmen, dealers in merchandise, who furnished no labor and contracted for

(amending R.I. Gen. Laws ch. 446, § 5); in 1959, 1959 R.I. Pub. Laws ch. 89, § 1 (amending R.I. Gen. Laws § 34-28-11); in 1965, 1965 R.I. Pub. Laws ch. 235, § 1 (amending R.I. Gen. Laws §§ 34-28-1 to -36); in 1966, 1966 R.I. Pub. Laws ch. 197, §§ 1-5 (amending R.I. Gen. Laws §§ 34-28-4, -6, -7, -17, -34); in 1981, 1981 R.I. Pub. Laws chs. 356, § 1 (amending R.I. Gen. Laws § 34-28-1), 364, § 1 (amending R.I. Gen. Laws § 34-28-4); in 1986, 1986 R.I. Pub. Laws ch. 331, § 5 (amending R.I. Gen. Laws § 34-28-5); in 1989, 1989 R.I. Pub. Laws chs. 189, 540; in 1990, 1990 R.I. Pub. Laws ch. 452, § 1 (amending R.I. Gen. Laws § 34-28-37); in 1991, 1991 R.I. Pub. Laws ch. 328, §§ 1-2 (amending R.I. Gen. Laws §§ 34-28-1 to -5, -7 to -11, -13 to -17, -19, -21, -25), § 3 (adding R.I. Gen. Laws §§ 34-28-32.2, -16.2); and in 1997, 1997 R.I. Pub. Laws ch. 361, § 1 (adding R.I. Gen. Laws § 34-28-3.1).

4. See *Roofing Concepts, Inc. v. Barry*, 559 A.2d 1059, 1061 (R.I. 1989) (citing *Field & Slocumb v. Consolidated Mineral Water Co.*, 55 A. 757, 758 (R.I. 1903)).

5. "An act securing to Mechanics and others payment for their labor and materials expended in erecting and repairing houses and other buildings, canals, rail roads and turnpikes with their appurtenances." The Mechanics' Lien Act of 1834.

none, as well as for the builder and laborer."⁶ Those other than the prime contractor had thirty days to provide notice of having been employed to provide material or labor.⁷ While there may have been virtue in simplicity, the General Assembly saw differently and crafted the forerunner of today's statute. As a result, Rhode Island courts, as well as the General Assembly, have spent considerable effort defining and redefining the law's terms, enlarging and restricting its scope. On various occasions, the General Assembly has also amended the procedural aspects of the law, adding to the confusion over its implementation.

In terms of the protections afforded laborers, the principal difference between the 1834 Act and the 1847 Act was the latter's exclusion of materialmen, since only those materials provided by persons furnishing labor were covered.⁸ Subsequently, the Rhode Island Supreme Court interpreted the statute to include only those materials provided by persons furnishing labor *under the prime contract*.⁹ The fact that only the original contractor could assert a lien for materials was a significant objection to the statute.¹⁰

This objection, however, was not the only difficulty that arose. The court was also called upon to determine exactly who was entitled to a lien for labor. In 1873, the Rhode Island Supreme Court held that a worker of the original contractor possessed a lien for labor in his own right,¹¹ provided that he had given notice to the land owner.¹² Subsequently, the court sustained a lien for a subcontractor as to both his and his employees' labor.¹³ Ultimately, however, the court drew the line and denied a lien to the worker of a subcontractor.¹⁴ A second objection to the 1847 Act, then, was that one who did work for, or furnished labor to, a subcontractor could not assert a lien in his own right.¹⁵

6. Sweet & Carpenter v. James, 2 R.I. 270, 288 (1852) (referring to The Mechanics' Lien Act of 1834).

7. See The Mechanics' Lien Act of 1834 § 1.

8. See Sweet & Carpenter, 2 R.I. at 288.

9. See Hatch v. Faucher, 8 A. 543 (R.I. 1887) (emphasis added).

10. See Art Metal Constr. Co. v. Knight, 185 A. 136, 141 (R.I. 1936).

11. The pronoun "he" or "his" is employed only for semantic ease and is not intended as gender specific.

12. See Kenyon v. Peckham, 10 R.I. 402 (1873).

13. See Hatch, 8 A. at 543-44.

14. See Morrison v. Whaley, 19 A. 330 (R.I. 1890) (basing its decision on statutory provisions prior to the 1888 Amendments).

15. See Art Metal Constr. Co., 185 A. at 141-42.

Other changes in the 1847 Act required prior written consent of an owner before his interest could be pledged where a lessee or an owner of less than a fee simple contracted for improvements.¹⁶ The General Assembly also expanded and complicated procedural provisions of the Act.¹⁷ Notably, the Act imposed different time requirements for contractors with written contracts¹⁸ and those without,¹⁹ as well as for subcontractors, regardless of the existence of a written agreement.²⁰ Further, the General Assembly expressly preserved the right of a person whose lien was lost for failure to satisfy the Act's procedural requirements as to his claim upon the party with whom the contract had been made or at whose request the labor was performed or materials furnished.²¹

It was not until 1888 that the General Assembly fashioned a remedy to address the first objection. The General Assembly struck all language from section one that had previously granted a lien for materials only to the original contractor, and replaced it with language regarding materials "furnished by any person."²² Sections two and three of the 1847 Act were similarly amended.²³

Thereafter, in 1893, the legislature attempted to clarify various procedural provisions,²⁴ primarily by splitting existing sections into more discreet topics. Thus, three new provisions replaced section nine of the 1847 Act. The first provision addressed the petition to enforce the lien, dictating the requisite contents as well as the time and place for filing.²⁵ The second provision required notice of a petition.²⁶ Finally, the third provision established the contents and service of a citation to show cause why the lien should not be allowed.²⁷

In 1896, the General Assembly again modified the Act. A new section thirteen²⁸ broke out the cost provision from section ten of

16. 1847 R.I. Pub. Laws ch. 177, §§ 2-3.

17. *Id.* §§ 4-12, 16.

18. *Id.* § 4.

19. *See id.* § 5.

20. *See id.* § 6.

21. *Id.* § 17.

22. 1888 R.I. Pub. Laws ch. 696, § 1.

23. *Id.* §§ 2, 3.

24. *See* 1893 R.I. Pub. Laws ch. 1224 ch. 1, §§ 98-100.

25. *Id.* § 98.

26. *Id.* § 99.

27. *Id.* § 100.

28. R.I. Gen. Laws ch. 206, § 13 (1896).

the 1847 Act, and section fourteen addressed filing provisions for suits against a corporation.²⁹ Furthermore, whereas the 1847 Act had provided for a jury trial, the legislature removed that right in the 1896 amendment.³⁰ New sections were created addressing issues of trial and proceedings on petition;³¹ decree of sale³² and application of sale proceeds;³³ and posting of bond by a master directing such sale and application.³⁴ The remaining provisions essentially renumbered earlier sections including only minor linguistic changes.³⁵ The section of the 1847 Act which provided for appeal³⁶ was deleted entirely.

Workers waited until 1906, however, for the General Assembly to address the second objection to the 1847 Act. In that session, the legislature granted a lien to those who performed work for or furnished labor to a subcontractor.³⁷ At last, the mechanics' lien provisions extended relief to the same parties and for the same labor and services protected under the 1834 Act.

While pursuing modifications concerning parties, labor and services, the General Assembly was also tinkering with various procedural requirements.³⁸ Because the law developed piecemeal, notice requirements and time constraints did not carry any consistency.³⁹ Additionally, the legislature sought here to decrease and there to increase the protections afforded.⁴⁰

The twists and turns in the development of Rhode Island's law are, of course, particular to this state. Rhode Island, however, is

29. *Id.* § 14.

30. Compare 1847 R.I. Pub. Laws ch. 177, § 11 (providing for a jury upon request by the parties) with R.I. Gen. Laws ch. 206, § 15 (deleting the provision which allowed for a jury).

31. R.I. Gen. Laws ch. 206, § 16.

32. *Id.*

33. *Id.* § 17.

34. *Id.* § 18.

35. *Id.* §§ 19-23.

36. 1847 R.I. Pub. Laws ch. 177, § 18.

37. See 1906 R.I. Pub. Laws ch. 1325, § 1 (amending R.I. Gen. Laws ch. 206, § 6 (1896)).

38. See *Art Metal Constr. Co. v. Knight*, 185 A. 136, 140-44 (R.I. 1936).

39. See 1991 R.I. Pub. Laws ch. 328, § 1.

40. In 1906, for example, a lien was granted to one who performed work or labor at the request of a contractor or subcontractor and covered such work or labor for a period of 60 days next preceding the giving of requisite notice. See 1906 R.I. Pub. Laws ch. 1325, § 1. In 1923, the period covered was only 40 days. See R.I. Gen. Laws ch. 301, § 6 (1923). Now, it is 120 days. See R.I. Gen. Laws § 34-28-9 (1956) (1995 Reenactment).

hardly unique in its reliance upon an arcane and often incoherent statutory framework for protecting the interests of those who have contributed labor, material or equipment towards the increased value of property.

Maryland adopted the first mechanics' lien statute in 1791 at the urging of the commission created to establish the City of Washington.⁴¹ By the beginning of the nineteenth century, Pennsylvania also had adopted a mechanics' lien law.⁴² Thereafter, by the start of the twentieth century, virtually all states had adopted such laws. Initially, the statutes protected only persons who dealt directly with an owner. However, over time, subcontractors and materialmen persuaded many state legislatures, including Rhode Island's, to provide coverage to suppliers and subcontractors who had not been paid by the general contractor.

In many states, the lien of a subcontractor and supplier remained limited to that amount due and payable to the general contractor or the other party immediately above it in the contracting chain. This approach, known as the New York System,⁴³ is applied today in approximately one half of the states.⁴⁴ The more expan-

41. For a discussion of the history of the mechanics' lien law, see *Moore-Mansfield Constr. Co. v. Indianapolis New Castle & Toledo Railway Co.*, 101 N.E. 296, 301-02 (Ind. 1913). See Marion W. Benfield, Jr., *The Uniform Construction Lien Act: What, Whither and Why*, 27 Wake Forest L. Rev. 527 (1992).

In a recent article, Richard Morneau quotes James Madison and Thomas Jefferson, members of the commission, who urged the enactment of a law securing to tradesmen a lien on the houses they erected and land occupied:

Your memorialists conceive it would encourage master builders to contract for erection and furnishing of houses for certain prices agreed upon, if a lien was created by law for their just claim on the house erected and the lot of land on which it stood.

Richard N. Morneau, *Mechanic's Liens: Traps for the Unwary*, 18 R.I. Laws. Wkly., at 10 (Aug. 25, 1997).

42. See *Moore-Mansfield Constr. Co.*, 101 N.E. at 301.

43. See Robert Kratovil & Raymond Werner, *Modern Mortgage Law and Practice* § 25.27, at 392 (2d ed. 1981).

44. The following states limit a subcontractor's and supplier's lien to the unpaid portion owed the general contractor: Alabama, Ala. Code § 35-11-210 (1975 & Supp. 1997); Connecticut, Conn. Gen. Stat. Ann. §§ 49-33(e), (f) (West 1994); Delaware, Del. Code Ann. tit. 25, § 2702(a) (1989); District of Columbia, D.C. Code Ann. §§ 38-103, -105 to -106 (1990 Replacement); Florida, Fla. Stat. Ann. § 713.06(1) (West 1988 & Supp. 1998); Georgia, Ga. Code Ann. §§ 44-14-361.1(e) (Supp. 1997); Illinois, 770 Ill. Comp. Stat. Ann. 60/21 (West 1993 & Supp. 1996); Iowa, Iowa Code Ann. § 572.14 (West 1992); Kansas, Kan. Civ. Proc. Code Ann. §§ 60-1103(d) (West 1994); Kentucky, Ky. Rev. Stat. Ann. § 376.010(1) (Michie 1972 & Supp. 1996); Maine, Me. Rev. Stat. Ann. tit. 10, § 3251 (West 1997); Massachusetts,

sive approach, following the initial lead of Pennsylvania,⁴⁵ provides a subcontractor with a direct lien against the owner, regardless of the extent of the payments by the owner to the general contractor. Rhode Island is among the states that apply the Pennsylvania rule.⁴⁶

There is surprisingly little uniformity among the states as to procedures and terms of mechanics' lien laws. As stated by one authority, "[e]ach law is a patchwork, a crazy quilt of amendments lobbied through the state capitol to pull the teeth of court decisions deemed unfavorable to some interest."⁴⁷ Moreover, various commentators have criticized the expansion of subcontractors' and suppliers' rights as a consequence of the trades' lobbying of disorganized state legislatures. These commentators bemoan the ab-

Mass. Gen. Laws ch. 254, § 4 (West 1988 & Supp. 1997); Michigan, Mich. Comp. Laws Ann. § 570.102 (West 1996); Mississippi, Miss. Code Ann. § 85-7-131 (1972) (1991 Revised); Nebraska, Neb. Rev. Stat. § 52-136 (1993); New York, N.Y. Lien Law § 4 (McKinney 1966 & Supp. 1997-1998); North Carolina, N.C. Gen. Stat. § 44A-18 (1991); North Dakota, N.D. Cent. Code § 35-27-02 (1987); Oklahoma, Okla. Stat. Ann. tit. 42, § 143 (West 1990); South Carolina, S.C. Code Ann. § 29-5-40 (Law Co-op. 1976) (1991 Revised); South Dakota, S.D. Codified Laws § 44-9-1 (Michie 1997); Texas, Tex. Prop. Code Ann. § 53.024 (West 1995) and Virginia, Va. Code Ann. § 43-7 (Michie 1950) (1994 Replacement).

45. See Kratovil & Werner, *supra* note 43 § 25.27, at 392 (referring to the Pennsylvania system).

46. In addition to Rhode Island, the following states apply the traditional Pennsylvania rule which gives subcontractors and suppliers a direct lien for the entire amount of the claim: Alaska, Alaska Stat. § 34.35.050 (Michie 1996); Arizona, Ariz. Rev. Stat. Ann. § 33-981(A) (West 1990 & Supp. 1997); Arkansas, Ark. Code Ann. § 18-44-101 (Michie 1987 & Supp. 1997); California, Cal. Civ. Code § 3110 (West 1993); Colorado, Colo. Rev. Stat. § 38-22-101(2) (1997); Hawaii, Haw. Rev. Stat. § 507-42 (1993); Idaho, Idaho Code § 45-501 (1997); Indiana, Ind. Code Ann. § 32-8-3-1 (West 1979 & Supp. 1997); Louisiana, La. Rev. Stat. Ann. § 9:4802(A), (D) (West 1991); Maryland, Md. Code Ann., Real Prop. § 9-104 (1996 & Supp. 1997); Minnesota, Minn. Stat. Ann. § 514.01 (West); Missouri, Mo. Ann. Stat. § 429.010 (West 1992 & Supp. 1998); Montana, Mont. Code Ann. §§ 71-3-524, -526 (1997); Nevada, Nev. Rev. Stat. Ann. § 108.222(1)(a) (Michie 1994 & Supp. 1997); New Hampshire, N.H. Rev. Stat. Ann. § 447:5 (1991); New Jersey, N.J. Stat. Ann. § 2A:44A-3 (West Supp. 1997); New Mexico, N.M. Stat. Ann. § 48-2-2 (Michie 1978) (1995 Replacement); Ohio, Ohio Rev. Code Ann. § 1311.02 (West 1994); Oregon, Or. Rev. Stat. § 87.010 (1988); Pennsylvania, Pa. Stat. Ann. tit. 49, § 1405 (West 1965); Tennessee, Tenn. Code Ann. § 66-11-102 (1993); Vermont, Vt. Stat. Ann. tit. 9, § 1921 (1993); Washington, Wash. Rev. Code Ann. § 60.04.021 (West Supp. 1998); West Virginia, W. Va. Code §§ 38-2-2, -21 (1997); Wisconsin, Wis. Stat. Ann. § 779.01(3) (West 1981) and Wyoming, Wyo. Stat. Ann. § 29-2-106(b) (Michie 1997).

47. Kratovil & Werner, *supra* note 43, § 25.27, at 392.

sence of an organized group of owners.⁴⁸ One response has been a suggestion to create a uniform act applicable throughout the country.

Beginning in the 1970s, the National Conference of Commissioners on Uniform State Laws (National Conference) proposed the Uniform Simplification of Land Transfers Act (USLTA), which included a section for mechanics' liens.⁴⁹ The USLTA was resoundingly unsuccessful, and only Nebraska adopted, with modifications, the construction lien article as a free-standing act.⁵⁰ In 1987, the National Conference developed the Uniform Construction Lien Act (UCLA)⁵¹ from the USLTA.⁵² The UCLA was likewise not well received, although different states have adopted pieces of the UCLA in recent years.⁵³

A principal objection to the UCLA is attributable directly to its statement of purposes. Section 101 of the UCLA asserts that the Act's underlying purpose is to further the security and certainty of land titles and to create uniformity with respect to mechanic's liens law.⁵⁴ Unlike most state laws, including that of Rhode Island, the UCLA contained no clear statement protecting those who furnish labor and materials to construction projects.⁵⁵

48. *See id.*; Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process* § 24.07, at 468 (2d ed. 1977).

49. *Unif. Simplification of Land Transfers Act*, prefatory note, 14 U.L.A. 249 (1990).

50. *See* Neb. Rev. Stat. §§ 52-125 to -159 (1993).

51. *Unif. Construction Lien Act*, 7 U.L.A. 381 (1987).

52. *See id.* at 381.

53. *See* Benfield, *supra* note 41, at 567 (referring to Nebraska, Michigan, Ohio and Texas adopting portions of the UCLA).

54. *See* Steven M. Siegfried & Stanley P. Sklar, *Overview of the Uniform Construction Lien Act*, 10 *Constr. Law* 13 (1990) (referring to the UCLA §§ 101(a)(3), (4), 7 U.L.A., at 394).

55. Section 101 of the UCLA reads as follows:

§ 101. Purposes; Rules of Construction; Scope.

(a) This [Act] shall be liberally construed and applied to promote its underlying purposes and policies, which are:

- (1) to simplify, clarify, and modernize the law governing construction liens;
- (2) to provide procedures for the protection of persons furnishing services and materials for real estate improvements;
- (3) to further the security and certainty of land titles; and
- (4) to make uniform the law with respect to the subject of this [Act] among states enacting it.

Although the National Conference drafted the UCLA with the expectation that it would accommodate the interests of all parties to the construction process and lead to uniformity of mechanics' lien laws across the country, such has not been the case. One prominent commentator has noted that the UCLA's intended goal of uniformity is not likely to be met due to "the variable political climate in the various states; particularly varying political strengths of parties in the construction process which have opposing interests."⁵⁶ In addition, the UCLA has met strong opposition from the construction community, particularly those involved as subcontractors and suppliers. Criticizing the assertion that the UCLA answers problems in a realistic manner, these opponents have argued:

We agree that they operate in a realistic manner, but we question in whose favor the realism flows. It is our opinion that the realism flows not to the contractor but to the lender and owner. One could debate *ad nauseum* who is more important, i.e., the lender without whose funds the project could not be completed or the contractor without whose skill the project could not be constructed. The fact is that both parties are necessary ingredients and that an accommodation should be reached between both of these parties in order to realize a fair act.⁵⁷

Even a cursory review of the lien laws of the various states reveals a remarkable degree of variety in terminology, time tables and procedures.⁵⁸ These inconsistencies among the states, while providing a logical justification for a uniform system, are a result of local practice, custom and individual legislative choices and have been difficult to overcome. The experience with the UCLA seems to establish that uniformity's potential benefits are outweighed by the political process which retains its responsiveness to such local pressures, customs and dynamics. Even some UCLA proponents now recognize the apparent futility in seeking major

(b) This [Act] creates, and provides for the attachment and enforceability of, a lien against real estate in favor of a person furnishing services or materials under a real estate improvement contract.

Unif. Construction Lien Act, 7 U.L.A., at 397.

56. Benfield, *supra* note 41, at 570.

57. Siegfried & Sklar, *supra* note 54, at 20.

58. For a general discussion of various state provisions, see 5 C. Allen Foster et al., *Construction and Design Law* § 37 (1991 and Supp. 1997).

substantive and procedural changes which would be the ineluctable consequence of achieving uniformity. The observation of Professor Marion Benfield, a reporter-drafter in the efforts of the National Conference, may accurately depict the future of the UCLA: "For the most part, the UCLA is likely to be viewed, at the least, as a parts warehouse from which parts which fit a particular state's existing statute and its political climate can be extracted."⁵⁹

THE MASSACHUSETTS MESSAGE

In looking for other spare parts to repair Rhode Island's tattered lien law, one should look beyond the UCLA to the experiences of other states. Massachusetts presents a particularly good place to start. In 1996, the Massachusetts legislature enacted the most substantial reforms to its mechanics' lien laws since 1915.⁶⁰ These amendments were the result of years of negotiations involving contractors, subcontractors, developers, owners, bankers, title insurers and organized labor. One commentator has written: "[T]he drafters intended to make the lien law fulfill its promise as a contractor's security for payment, to simplify the process of recording the lien and to enhance the fairness and certainty of the law for all affected constituencies."⁶¹ The Massachusetts legislature learned from the mistake of the UCLA, and "[n]othing in the new law changes the basic purpose of the mechanic's lien statute; rather the changes are intended to give meaning to its true purpose."⁶²

Of particular pertinence to Rhode Island are the provisions in the new Massachusetts law which provide procedure for "non-hostile" lien notices by general contractors and a statutory restriction on a lender's ability to refuse to fund over such notice, provided certain procedural requirements are met. The law establishes new procedures for owners and contractors to work with lenders so that liens can be released or subordinated in an orderly and non-confrontational manner to facilitate funding of projects.⁶³

59. Benfield, *supra* note 41, at 569.

60. See *A Practical Approach to Mechanics Liens*, MCLE (Massachusetts Continuing Legal Education, Boston, MA) 1996.

61. *Id.* at 3.

62. *Id.* at 6.

63. Mass. Gen. Laws Ann. ch. 254, § 32 (West Supp. 1997).

Massachusetts thus has joined a number of states that recognize the importance of providing an owner with actual or constructive knowledge of all potential claims. While lienors in privity with the owner are generally not subject to pre-lien notification requirements because the owner has obvious knowledge of their involvement in the project, such is often not the case with respect to subcontractors, or in particular, suppliers and remote subcontractors. The reasons for providing pre-lien notice are obvious. An owner not in privity with a potential lienor may be unaware of the work performed or the materials supplied, or just who is providing value to the real property. This lack of knowledge of potential lienors can work to the detriment of the lienor as well as the owner. Pre-lien notice serves to inform owners of the existence and status of a creditor's potential claims. Thus, states that require pre-lien notice generally ensure that such notice is provided much earlier than the time within which the notice of the lien is to be filed.⁶⁴ States may require the filing of the pre-lien notice prior to furnishing the labor and materials,⁶⁵ within a certain number of days after first furnishing labor and materials,⁶⁶ or not later than a certain number of days prior to filing of the lien.⁶⁷

The new Massachusetts provision recognizes commercial reality. In the general commercial setting, the owner, through the general contractor, may not need a pre-lien notice from all subcontractors inasmuch as the owner has measures through which it can receive actual or constructive notice of those subcontractors who are working on the project. The Massachusetts law previously authorized the filing of a notice of contract. That provision, however, was commonly considered to be a "notice of conflict"⁶⁸ because, upon the filing of a notice of contract, a lender would generally stop payment even if no actual conflict on the project existed. As a consequence, a notice of contract would usually

64. Foster et al., *supra* note 58, § 37.4A, at 41.

65. See Ala. Code § 35-11-210 (1975) (1991 Replacement); Okla. Stat. Ann. tit. 42, § 142.1 (West 1990).

66. See Ariz. Rev. Stat. Ann. §§ 33-992.01(a)-(c) (1990); Cal. Civ. Code §§ 3097(a)-(b),(d) and 3114 (West 1993 & Supp. 1997); Fla. Stat. Ann. § 713.06(2)(a) (West Supp. 1998); Ind. Code Ann. § 32-8-3-1 (West 1979 & Supp. 1997); Wash. Rev. Code Ann. § 60.04.031 (West Supp. 1998).

67. See Ark. Code Ann. § 18-44-114(a) (Michie 1987 & Supp. 1997); Colo. Rev. Stat. § 38-22-109(3) (1997); Mo. Ann. Stat. § 429.100 (West 1992); Wyo. Stat. Ann. § 29-2-107 (Michie 1997).

68. See *A Practical Approach to Mechanics Liens*, *supra* note 60, at 12.

not be filed unless a payment dispute was pending.⁶⁹ The Massachusetts legislature addressed the legitimate concerns of lenders about maintaining their priorities for advances made subsequent to the filing of a notice of contract. The legislature provided protection for the priority of a lender who had made a payment subject to receipt of a partial waiver and subordination form executed in accordance with statutory requirements.⁷⁰ Specifically, the new statute prevents a lender from withholding payment for the sole reason that a notice of contract has been filed.⁷¹

Under the new Massachusetts framework, the recording of a notice of contract is now considered a "non-hostile and expected event on every project."⁷² The Massachusetts law now specifically requires lower-tier subcontractors, suppliers and vendors to serve a notice of identification on the general contractor.⁷³ Under prior Massachusetts practice and the current practice in Rhode Island, a second-, third- or fourth-tier subcontractor or supplier could come out of the woodwork late in the process. Under the new Massachusetts law, however, a lower-tier subcontractor must provide formal notice to the general contractor in order to protect his lien rights.⁷⁴

Of significant importance to the Massachusetts practitioner has been the elimination of much of the disjointed provisions of the prior statute. In sum, the Massachusetts legislature has largely rewritten its construction lien law.⁷⁵

WHERE DO WE START WITH THE RHODE ISLAND LAW?

The statutory provisions suggested in this Article deserve the attention of all parties involved in Rhode Island's construction industry—owners,⁷⁶ contractors, subcontractors, insurance and bank representatives, attorneys, architects and engineers—as well as members of the General Assembly. The goal is twofold: to sim-

69. See *A Practical Approach to Mechanics Liens*, *supra* note 60, at 13.

70. See Mass. Gen. Laws Ann. ch. 254, § 32 (West 1988 & Supp. 1997).

71. See *id.* § 33.

72. See *A Practical Approach to Mechanics Liens*, *supra* note 60 at 12.

73. See Mass. Gen. Laws Ann. ch. 254, § 4.

74. See *id.*

75. Compare *id.* § 1 with R.I. Gen. Laws § 34-28-1 (1956) (1995 Reenactment) (maintaining the arcane language of Rhode Island law).

76. References to "owner" are intended to include "tenant or lessee" as well as "owner of less than freehold" as covered by §§ 34-28-1 to -3 of the Rhode Island General Laws.

plify and clarify the law in order to protect the interests of all and to maintain consistency with the basic thrust of Rhode Island law since 1847. Toward those ends, the procedures adopted should be readily comprehensible and conform with general civil litigation practices.

The first place to start is by considering the intended purpose of the mechanics' lien law, which is nothing other than to provide protection for those parties whose services increase the value of realty. In effect, the law provides these parties with an interest in the property akin to a mortgage. In both instances, the land is held responsible for the debt in the nature of an *in rem* proceeding,⁷⁷ which does not preclude an *in personam* claim.⁷⁸

The second consideration is to determine whose interests are at stake and a delineation of their concerns. Clearly, the interests of workers and suppliers, be they original or subcontractors, warrant paramount concern. Certainly, workers and suppliers desire and deserve full payment. The lender, however, must ensure that work is performed before loan proceeds may be disbursed and does not want to be caught in crossfire between adverse parties. The owner presumably wants the project completed lien free. Owners, particularly those of residential dwellings, understandably object to the idea of paying twice for the same work. A bona-fide purchaser for value has no interest in incurring liens for which there was no notice. Others with property interests expect their rights to be respected as well.

Any reform must address the arcane language which is perhaps at its worst typified in section 34-28-5 of the Rhode Island General Laws.⁷⁹ At the outset, let it be said: Woe to the grammarian who seeks to diagram the first sentence of that section. The linguistic difficulty in this section is only the beginning of the problem. A statute which has its origins in the nineteenth century and has been the subject to numerous amendments over the years cannot be expected to be coherent. The Rhode Island statute does not exceed even these minimal expectations.

77. See *Hunt v. Darling*, 59 A. 398 (R.I. 1904).

78. See *Tilcon Gammino, Inc. v. Commercial Assocs.*, 570 A.2d 1102 (R.I. 1990).

79. Section 34-28-5 concerns the notice requirements for a party intending to claim a lien.

FROM THE BEGINNING

For years, legal lore has held that Rhode Island's mechanics lien law grants a right to all contractors, subcontractors, suppliers, architects or engineers to file a lien against the property they improve. It is true that this lore is not literally consistent with the language of section 34-28-1(a) of the Rhode Island General Laws.⁸⁰ In *Myles P. Flaherty Associates v. Russo*,⁸¹ the Rhode Island Supreme Court rejected lore, in favor of law. The court held that a supplier of materials used to construct an improvement to property could not perfect a mechanic's lien. The court reasoned that there was no agreement made by the owner with anyone to construct any improvement since at all times the owner intended to construct the improvements himself. Myles Flaherty Associates had supplied materials to Steel Roof Systems, which had delivered the materials to the property through a North Carolina-based trucking firm. Under these circumstances, the court held that the owner of the property had not agreed with the supplier of the materials to furnish or deliver them for purposes of improving the property.

One could argue that the owner impliedly consented by virtue of his receipt and use of the steel that Myles Flaherty delivered to the Russo residence. The decision is difficult to reconcile with prior Rhode Island Supreme Court holdings. The court has generally recognized that, when placing the burden of expense on two individuals who are generally blameless, it will give first preference to the party providing the labor or material.⁸² The decision may also superficially conflict with the long-established concepts that the

80. Section 34-28-1(a) provides:

Whenever any building, canal, turnpike, railroad, or other improvement shall be constructed, erected, altered, or repaired by oral or written contract with or at the oral or written request of the owner, the owner being at the time the owner of the land on which the improvement is located, or by the husband of such owner with the consent of his wife, the building, canal, turnpike, railroad, or other improvement, together with the land, is hereby made liable and shall stand subject to liens for all the work done by any person in the construction, erection, alteration or reparation of such building, canal, turnpike, railroad, or other improvement, and for the materials used in the construction, erection, alteration, or reparation thereof, which have been furnished by any person.

R.I. Gen. Laws § 34-28-1(a).

81. 685 A.2d 663 (R.I. 1996).

82. See *Faraone v. Faraone*, 413 A.2d 90 (R.I. 1980).

statute is intended to afford a liberal remedy to all who have contributed labor or material adding to the value of real property.⁸³

Yet, consider the bases underlying a mechanic's lien. A prerequisite to the existence of a valid mechanic's lien is the implied or express consent of the owner to the furnishing of labor or materials or both. Express written contracts are not typically required. Generally, most state courts, like Rhode Island's, hold that implied or oral contracts are sufficient.⁸⁴ Most mechanics' lien laws, however, require something more than inactive or passive consent by the owner. Mere knowledge by the owner that labor and materials have been or are being furnished to improve the property is generally insufficient.⁸⁵ Even the states with the most expansive lien laws require knowledge on the part of the owner that a particular party is furnishing labor and/or materials to the project. Often, the issue of notice extends not simply to the fact that labor or materials are being provided, but extends to the identity of the person who is providing the labor or materials to the project.⁸⁶ In this light, the reasoning underlying the holding in *Myles Flaherty* becomes lucid. The Russos had an obvious inability even to know the identity of Myles Flaherty Associates and its potential involvement with their project. The Russos' plight is similar to that faced often in Rhode Island even by those prudent owners who unsuccessfully try to protect themselves from mechanics' liens asserted by lower-tier suppliers or subcontractors.

On a typical project, an owner may engage a general contractor who in turn enters into agreements with subcontractors. Many of those subcontractors may issue agreements to suppliers and/or their own subcontractors. While an owner can protect him or herself from a contractor's lien, and perhaps from the liens of prominent direct subcontractors and suppliers, other subcontractors and suppliers frequently do not appear on the construction-site radar. At times, it can be virtually impossible for the owner to be certain

83. See, e.g., *Roofing Concepts, Inc. v. Barry*, 559 A.2d 1059 (R.I. 1989).

84. See, e.g., *Turnkey Constructors, Inc. v. Dewey, Cheatum & Howe, Inc.*, 341 So. 2d 1339, 1340-41 (La. Ct. App. 1997); *Schaefer v. Lampert Lumber Co.*, 591 P.2d 1225, 1227 (Wyo. 1979).

85. See, e.g., *Wilbur Smith & Assocs. v. F & J, Inc.*, 382 A.2d 541, 543 (Conn. Super. Ct. 1977); *Miles Holmes v. Harrah Plumbing and Heating Serv. Co.*, 408 N.E.2d 597, 600 (Ind. Ct. App. 1980).

86. See generally *Foster et. al., supra* note 58, at § 37.3(d) (stating that identity of a lower-tier party is important because of the extension of lien rights).

that everyone has been paid. A supplier to a second-tier subcontractor may seek to assert a lien due to lack of payment—a condition over which the owner may have little redress, and likely little knowledge. If the company that supplies lumber to the lumber yard that sells lumber to the subcontractor who works for the general contractor is not paid, then how can the owner know? The Supreme Court's holding in *Myles Flaherty* is one response. Yet, the holding by itself has added much to the consternation and confusion of construction-law practitioners.

Several avenues exist through which difficulties created by *Myles Flaherty* can be addressed. One logical response is to mandate the recording of a notice of intention by any person who does not have a direct contract with the owner or a direct contract with a contractor to the owner. Rhode Island law envisions a notice of intention that may be recorded to provide notice that the party will be providing materials or labor to the project. Under current practice, however, lenders are unlikely to advance funds upon recording of a notice of intention for fear that doing so will cause subsequent payments to lose priority to the person filing notice. Rhode Island is now in the same position as Massachusetts prior to its recent amendments—there is no clear procedure to accommodate the interests of both lenders and mechanics' lienors short of dissolution of the mechanic's lien. As a consequence, a notice of intention is effectively a notice of conflict.⁸⁷ With modifications to

87. Massachusetts has provided comfort to lenders by stating:

Except with respect to any construction project containing or designed to contain at least one but not more than four dwelling units, the filing or recording of documents claiming a lien under section two, or the filing or recording of a statement pursuant to section eight in furtherance of a lien arising pursuant to section one, shall not itself be grounds for a mortgagee to withhold sums for the funding, financing or payment for the labor or labor and materials for which any such notice or statement is filed or recorded or to require dissolution of such notice or statement before providing further funding, financing or payments, and any covenant, promise, agreement or understanding relative to the improvement or alteration to real property to withhold such funding, financing or payment to require dissolution of such notice or statement before providing further funding, financing or payments solely on that ground is against public policy and void and unenforceable; provided, however, that nothing contained in this chapter shall obligate a mortgagee to disburse sums for the funding, financing or payment for the labor or labor and materials for which any such notice or statement is filed or recorded unless such mortgagee has received an accurately completed and valid partial waiver and subordination of lien in the form set forth in clause (3) of section thirty-two from the

person who filed or recorded such notice or statement; provided, further that nothing in this chapter shall, in any manner limit or restrict the right of any mortgagee to withhold any and all sums for the funding, financing, or payment for labor or labor and materials based upon: (a) the failure of the owner to comply with any other terms, conditions or requirements in any agreement providing for the funding of the loan, the repayment of the loan or any mortgage securing any such agreement or (b) the filing or recording of documents claiming a lien under section four if the right to withhold is contained in any agreement providing for the funding of the loan, the repayment of the loan, or any mortgage securing such agreement, except that such right to withhold shall not be effective to bar the filing of notice of contract or the taking of any steps to enforce a lien.

Mass. Gen. Laws Ann. ch. 254, § 33 (West Supp. 1997).

The form required under Section 33 is the form of Partial Waiver and Subordination of Lien:

Partial Waiver and Subordination of Lien

COMMONWEALTH OF MASSACHUSETTS: _____ Date: _____
 _____ COUNTY Application for Payment No: _____

OWNER: _____

CONTRACTOR: _____

LENDER/MORTGAGEE: _____

- | | | | |
|-----|--|----|-------|
| 1. | Original Contract Amount: | \$ | _____ |
| 2. | Approved Change Orders: | \$ | _____ |
| 3. | Adjusted Contract Amount
(line 1 plus 2) | \$ | _____ |
| 4. | Completed to Date: | \$ | _____ |
| 5. | Less Retainage: | \$ | _____ |
| 6. | Total Payable to Date:
(line 4 less line 5) | \$ | _____ |
| 7. | Less Previous Payment: | \$ | _____ |
| 8. | Current Amount Due:
(line 6 less line 7) | \$ | _____ |
| 9. | Pending Change Orders: | \$ | _____ |
| 10. | Disputed Claims: | \$ | _____ |

The undersigned who has a contract with _____
 for furnishing labor or materials or both labor and materials or rental equipment,
 appliances or tools for the erection, alteration, repair or removal of a building or
 structure or other improvement of real property known and identi-
 fied as _____
 located in _____ (city or town), _____ County, Common-
 wealth of Massachusetts and owned by _____, upon receipt of
 (\$ _____) in payment of an invoice/requisition/application for payment
 dated _____ does hereby:

- (a) waive any and all liens and right of lien on such real property for labor
 or materials, or both labor and materials, or rental equipment, appliances or
 tools, performed or furnished through the following date: _____

fit Rhode Island's statutory scheme, the Massachusetts response certainly could work in this state, particularly on commercial projects.

THE RESIDENTIAL CONTEXT

Many states address the *Myles Flaherty* conundrum with special requirements for residential construction. In Delaware, for example, if a contractor has received full or final payment made in good faith and has given the owner a verified written certification that everyone has been paid, then it is not possible thereafter for a party to obtain a mechanic's lien on the property.⁸⁸ The law of Michigan protects the owner or lessee of a residential structure from the requirement of paying twice for contracted improvements by virtue of the establishment of a homeowner's construction lien recovery fund.⁸⁹ That fund is established through contractors' licensure fees and provides recovery up to \$75,000 for each residential structure.⁹⁰ The Michigan Department of Licensing and Regulation is subrogated to the rights of each person to whom a fund payment is made.⁹¹ A simpler alternative, adopted by some other states, is to require residential subcontractors and/or those parties lower on the construction tier, in order to preserve lien rights, to issue the owner a notice that he is providing labor or materials.⁹² Any late notice may still be valid to protect the sub-

(payment period), except for retainage, unpaid agreed or pending change orders, and disputed claims as stated above; and

(b) subordinate any and all liens and right of lien to secure payment for such unpaid, agreed or pending change orders and disputed claims, and such further labor or materials, or both labor and materials, or rental equipment, appliances or tools, except for retainage, performed or furnished at any time through the twenty-fifth day after the end of the above payment period, to the extent of the amount actually advanced by the above lender/mortgagee through such twenty-fifth day.

Signed under the penalties of perjury this ____ day of _____, ____.

The giving of partial waiver and subordination of lien by any contractor under this section shall not affect the lien rights of any other person claiming a lien under any section of this chapter.

Id. at § 32.

88. See Del. Code Ann. tit. 25, § 2707 (1989).

89. See Mich. Comp. Laws Ann. § 570.1201 (1996).

90. See *id.* § 570.1204.

91. See *id.* § 570.1205(2).

92. See, e.g., Me. Rev. Stat. Ann. tit. 10, § 3255(3) (West 1997); S.C. Code Ann. § 29-5-40 (Law Co-op. 1991).

contractor, although to a limited extent,⁹³ e.g., if the owner has not yet paid the contractor.

In residential and commercial projects alike, the owner may all too frequently find himself paying more than once for the same work. Even the most prudent owner or lender cannot avoid this possibility. The General Assembly could readily advance construction interests by requiring that a party, whose specific involvement in the project is likely unknown to the owner, directly notify the owner of his involvement. If, in that event, the owner continues to avail himself of the benefit of the labor and materials provided, then the General Assembly should consider such to be in accordance with "an oral or written contract with or at the oral or written request of the owner."⁹⁴

HOW TO PROVE THE AMOUNT OF THE LIEN

Having been born a century before the adoption of the rules of civil procedure and lived as a distant and unfamiliar cousin since, the statutory framework for the proof of a lien is a hybrid mush of inconsistencies. The starting place for reform here lies in changing the pleading and process mandated by the statute.⁹⁵

The requirements of section 34-28-13 of the Rhode Island General Laws relative to the contents of the petition to enforce do not differ significantly from similar requirements that are required relative to the preparation of a complaint in a civil action. Yet, upon filing of the petition, all resemblance with customary pleading and process comes to an end. When the petition to enforce is filed, the mechanic's lien process reverts to the nineteenth century. Section 34-28-14 sets forth the duties of the clerk of the superior court upon the filing of a petition. The clerk shall advertise the petition,

93. See, e.g., Ariz. Rev. Stat. Ann. § 33-992.01(E) (West 1990).

94. R.I. Gen. Laws § 34-28-1 (1956) (1995 Reenactment).

95. After the pleading and process stage, the action should proceed in accordance with a normal civil action. Rule 81 of the Rhode Island Superior Court Rules of Civil Procedure provides in pertinent part:

Applicability of Rules. – (a) *To What Proceedings Applicable.*

(1) These rules do not apply during the process and pleading stages to the following proceedings: . . . [p]etitions for enforcement of mechanics' liens.

R.I. Super. Ct. R. Civ. P. 81.

Similarly, section 34-28-16.2 of the Rhode Island General Laws provides that, "after the filing with the court of all claims pursuant to § 34-28-16, the proceeding shall continue pursuant to the rules of civil procedure, in a nonjury proceeding." R.I. Gen. Laws § 34-28-16.2 (1956) (1995 Reenactment).

together with the "return date" set pursuant to section 34-28-15, once in a newspaper of general circulation. This advertisement notifies all persons with an interest in the property to appear on the return date and show cause why the mechanic's lien should not be enforced for the amount claimed.⁹⁶ Section 34-28-14 also requires the clerk to issue citations, to be served by the sheriff, on all interested parties listed on the petition informing them of the need to come forward and show cause. The sheriff must serve these citations on the parties at least ten days prior to the date set as the return date. Pursuant to section 34-28-16, all parties asserting a lien must file an account and demand, and parties with an encumbrance other than a lien must file a claim. Although the statute sets forth specific service requirements in section 34-28-15, the petition itself is not required to be served upon the parties in interest.

The consequence of this procedure is confusion. There is no show-cause hearing, and there is no return date for anyone to appear, contrary to the language of the statute. Moreover, the special process of requiring the clerk to issue a citation, instead of allowing the customary issuance of a summons, may result in undue complexity. In *Frank N. Gustafson & Sons, Inc. v. Walek*,⁹⁷ the Rhode Island Supreme Court reversed a superior court decision dismissing the lien where the court clerk had failed to issue a citation for the property owner and the contractor's counsel did not recognize the clerk's error.⁹⁸ The contractor did not serve the owner before the return date. Even though the owner obviously had actual notice of the proceeding as evidenced by his motion to dismiss filed just four days after the citation should have been served, the superior court granted the motion. The superior court believed that under the literal language of the statute, it had no discretion to do otherwise. In reversing, the supreme court recognized the cumbersome nature of the statute, reasoning that "to obligate every petitioner to ensure that the clerk's office satisfactorily performs its statutory duties would be unduly burdensome."⁹⁹

96. R.I. Gen. Laws § 34-28-14. The return date, contrary to the language of the statute, has little contemporary significance. There is no show-cause proceeding on that date.

97. 599 A.2d 730 (R.I. 1991).

98. *See id.*

99. *Id.* at 732.

The original purpose of the statutory framework in providing for a return date and show-cause process was to give a claimant a summary remedy without the delay of further pleadings.¹⁰⁰ Inasmuch as the rules of civil procedure now expressly apply to all mechanic's lien proceedings after the pleading and process stage,¹⁰¹ this goal can no longer be achieved and the existing notice and service process serves no readily identifiable purpose. The need for citations and advertising unduly increase the cost of the process without adding to notice or aiding the parties. The unusual process engenders confusion among all who have long become accustomed to the processes of the rules of civil procedure.

A second source of statutory confusion may arise pertaining to multiple lien claims. Section 34-28-18, which pertains to the consolidation of proceedings, is at best superfluous and at worst confusing, when construed in light of its counterparts under the rules of civil procedure.¹⁰²

The statute and the rules explicitly state that the rules of civil procedure govern all mechanic's lien actions following the pleading stage. As presently drafted, however, the statute continues to include the common-law provisions for proving a lien. Thus, these terms are inconsistent with the rules.¹⁰³ Massachusetts¹⁰⁴ and

100. See *Burlingame & Co. v. Emerson*, 5 R.I. 62 (1857).

101. See R.I. Super. Ct. R. Civ. P. 81.

102. Section 34-28-18 of the Rhode Island General Laws reads as follows: If more than one petition under §§ 34-28-10 and 34-28-13 are filed against the same or any part of the same property, like proceedings shall be had on each, and each petitioner shall give upon motion of any person interested in the petition made at any time, surety for costs, unless he or she is an inhabitant of the state; but all such petitions against the same or any part of the same property shall be consolidated after the returns of the citations and shall proceed as one.

R.I. Gen. Laws § 34-28-18. Cf. R.I. Super. Ct. R. Civ. P. 7(b)(3)(ii) (describing the procedure with respect to a motion to consolidate cases for trial); *id.* 12(b)(7) (failure to join an indispensable party); *id.* 19 (joinder of persons needed for just adjudication).

103. Section 34-28-21 of the Rhode Island General Laws, which pertains to a decree ordering sale, is particularly apt in this respect. It was obviously originally drafted to provide guidance to the superior court, prior to the rules of civil procedure, as to the scope of the court's authority in determining the validity of a lien and the validity and amount of a lien. It provides the following language, which, at best, is superfluous:

[T]he court shall, by itself or by a master to be appointed by it for that purpose, proceed to ascertain the exact nature and amount of each claim on the property or any part thereof, made by or belonging to any party to the proceedings, the amount of which to be allowed and paid shall be com-

Maine,¹⁰⁵ among other states, have recognized that an action to prove the amount of a mechanic's lien logically should not be treated any differently in the civil-litigation system than in any other in rem action.¹⁰⁶ So should Rhode Island.

A BONA-FIDE PURCHASER SHOULD NOT BE SUBJECT TO A LIEN.

Rhode Island has maintained a highly controversial and often unfairly applied provision in its mechanic's lien law by permitting the filings of mechanic's liens against the interests of a bona-fide purchaser for value. In addition to being unfair, the statute is ambiguous. Section 34-28-4 alludes to a forty-day rule within which mechanic's liens against a bona-fide purchaser for value must be filed. However, the statute does not provide direct confirmation for that conclusion. The forty-day rule appears only in the language of the existing notice of intention form; it does not appear in the text of the statute.

The issue of fairness merits more substantive concern. Making a bona-fide purchaser for value liable for claims is at odds with the concept of holding the party who consents to the improvement liable for its cost. The quandary faced by the court in *Myles Flaherty* is multiplied here. Not only is a bona-fide purchaser in no reasonable position to have notice of potential claims under our current statute, but the issue of consent, implied or expressed, which apparently was critical to the holding in *Myles Flaherty*, is largely irrelevant to liability. For these reasons, many states reject the proposition that a bona-fide purchaser can be held liable

puted on the basis of the value of the property prior to the construction, erection, alteration, or reparation which is the subject matter of the petition, and the order in which, in accordance with § 34-28-25 they should be paid, and, in the event no payment has been made into the registry of the court as provided in § 34-28-17, how much of the property, and especially how much if any, and what portions of land under and adjoining the same, subject to sale by the provisions of this chapter, should be sold to satisfy the claims; . . .

R.I. Gen. Laws § 34-28-21.

104. See Mass. Gen. Laws Ann. ch. 254, § 5 (West 1988 & Supp. 1997).

105. See Me. Rev. Stat. Ann. tit. 10, § 3255 (West 1997).

106. The recent amendments to Massachusetts law particularly provide a vehicle through which additional notice can be provided where it is deemed advisable by the court and the parties can appropriately litigate their differences in a manner consistent with all other similar cases before the superior court. See Mass. Gen. Laws Ann. ch. 254, § 2 (West Supp. 1997).

under a mechanic's lien for work provided prior to the date of purchase.¹⁰⁷ Such claims should fail by virtue of the absence of implied or expressed consent or the inability of the purported lienor to establish that the work has been performed at the instance of the owner.¹⁰⁸

In the residential context, it is virtually impossible for an owner to be certain that no potential mechanic's lien claims accruing prior to the date of purchase exist. While mechanics' lien affidavits and title insurance quell apprehension, the risk is not eliminated. If, for some reason, the seller is unable to satisfy a subsequent claim brought by virtue of the existence of a mechanic's lien asserted after the purchase of real estate, then the bona-fide purchaser may be ultimately liable to the lienor.

Although a party purchasing commercial property may possess a degree of sophistication and may have sufficient notice to be alert for potential claims that could lurk after the sale, such is rarely true for the residential purchaser. How, if at all, can a new purchaser of a home protect him or herself from a lien asserted for work which occurred two or three months before the closing date? Repairs incidental to the sale of the real estate might not be easily identified. Because of the obvious unfairness to a buyer of a residence, the General Assembly should cut off the lien rights against a residential dwelling upon the date of sale. This would be consistent with the manner in which the General Assembly has treated other parties for whose labor liens may attach.¹⁰⁹

Finally, the General Assembly must eliminate the arcane and politically incorrect language of the statute. Consider for example

107. Under the New York System, the limitation of the lien to the amount not paid by the owner obviously precludes the bona-fide purchaser from liability. Colorado and Indiana, which follow the Pennsylvania system, are examples of states expressly protecting the bona-fide purchaser for value. *See, e.g.*, Colo. Rev. Stat. § 38-22-125 (1997); Ind. Cod. Ann. § 32-8-3-1 (West 1979 and Supp. 1997).

108. *See, e.g.*, *C & W Elec., Inc. v. Casa Dorado Corp.*, 523 P.2d 137 (Colo. Ct. App. 1974).

109. Compare R.I. Gen. Laws §§ 34-28-1 to -37 (Mechanics' Liens) with *id.* §§ 34-30-1 to -3 (Jewelers', Watchmakers' and Silversmiths' Liens); *id.* §§ 34-33-1 to -2 (Innkeepers' Liens); *id.* § 34-24-1 (Federal Liens), and *id.* § 34-35-1 (Enforcement of Common Law and Contractual Liens). This comparison reveals that the General Assembly has not chosen to make a bona-fide purchaser liable for liens incurred by the prior owner in any setting other than involving a construction project.

the existing language of sections 34-28-1(a), 34-28-2 and 34-28-3, each of which provides:

Whenever any building, canal, turnpike, railroad, or other improvement shall be constructed, erected, altered, or repaired by oral or written contract with or at the oral or written request of the owner, the owner being at the time the owner of the land on which the improvement is located, *or by the husband of such owner with the consent of his wife*, the building, canal, turnpike, railroad, or other improvement, together with the land, is hereby made liable and shall stand subject to liens for all the work done by any person in the construction, erection

Why is this language still part of our law?

Let us also recognize that a "mechanics" lien is at best an inarticulate description of the "construction" lien that our law is intended to offer.¹¹⁰

CONCLUSION

In certain states, concerns over unfairness have reached a level at which the debate has turned to whether a lien should even be allowed. Michigan, for example, underwent a debate in the late 1970s about a potential repeal of the construction lien. The opponents of mechanics' liens questioned why the real-estate construction field should be accorded legal rights not available generally throughout commerce and industry.¹¹¹ In the end, Michigan elected to retain its construction-lien law although the legislature significantly changed the law to become more favorable to lenders and owners, and in particular, homeowners.

One of the major features of the UCLA, the notice of commencement, is similar to the notice of commencement utilized in Massachusetts and other states. Rhode Island could easily employ such a system with respect to remote subcontractors and suppliers in the commercial setting and all subcontractors for residential construction. With the owner and lender having a reasonable op-

110. Inasmuch as the protection of the statute has gone far beyond the interest of the particular mechanic and now includes those who contribute to the construction process, most states have deleted the word "mechanic" and now use the term "construction" when referring to the nature of the lien.

111. For discussion of the Michigan experience, see Benfield, *supra* note 41, at 532-35.

portunity to receive notice of a potential lien, the likelihood of double payment and the quandary faced by the court in *Myles Flaherty* are less likely to occur.

The Rhode Island Mechanics' Lien Law has generally served its purposes well since the General Assembly promulgated the current version in 1847. It is time to recognize, however, that in the 150 years that have ensued, the language and processes of the lien law have not followed the changes in our legal system. Although a strong case could be made for a total rewrite of the Act including major changes to many of its policies, the experience of the UCLA suggests that such a rewrite would likely be unsuccessful and, in the end, no significant changes would occur.

A statute which includes 340 words in one sentence, e.g., section 34-28-4, is rife for misinterpretation. Likewise, a statute which subjects a residential owner to payment for services provided by a vendor that could not reasonably have been discerned, no matter the degree of care, is unfair. The Rhode Island statutes cry out for revision. The Act should be simplified and clarified with protection for all interests involved. The procedures in the end should be readily comprehensible and uniform with general civil litigation practices.¹¹²

112. A proposed Rhode Island Construction Lien law follows.

A PROPOSAL FOR REFORM
TITLE 34. PROPERTY
CHAPTER 28. CONSTRUCTION LIENS

§ 34-28-1. Short Title.

This chapter may be cited as the "Rhode Island Construction Lien Law."

§ 34-28-2. Definitions

(a) "Construction, erection, alteration or reparation" and "constructed, erected, altered or repaired," as used in this chapter, means excavation and demolition preparatory to actual construction, erection, alteration, or reparation, except where used in the phrase "actual and visible commencement, by excavation or otherwise, of such construction, erection, alteration or reparation," in § 34-28-6, which phrase shall be construed to include the excavation or otherwise, but not demolition.

(b) "Mortgage" as used in this chapter means construction mortgages, so called, which are given to secure the payment of a sum certain which is to be advanced at stated times or intervals.

(c) "Person" as used in this chapter means corporations, partnerships, or other organizations or entities, except that the words "individual person" means only a natural person.

(d) "Materials" or "materials", when sued in this chapter, shall, in addition to any meaning given through judicial interpretations or context, also include the rental or lease of any equipment.

(e) "Contractor" means a person in direct privity with the owner or lessee, as the case may be.

(f) "Subcontractor" means a person in direct privity with a Contractor.

(g) "Residential Structure" means an individual residential condominium unit or a residential building that contains no more than three residential units and land on which it is or will be located, in which the owner or lessee contracting or requesting the improvement is residing or will reside when the improvement is completed.

§ 34-28-3. Improvements by consent of owner.

Whenever any improvement to real property shall be constructed, erected, altered, or repaired by oral or written contract with or at the oral or written request of the owner, the owner being at the time the owner of the real property on which the improvement is located, such improvement, together with the real property, is hereby made liable and shall stand subject to liens for all the work done by any person in the construction, erection, alteration, or reparation of such improvement, and for the materials used in the construction, erection, alteration, or reparation thereof, which have been furnished by any person.

§ 34-28-4. Improvements by consent of tenant or lessee.

Whenever any improvement to real property shall be constructed, erected, altered, or repaired by oral or written contract with or at the oral or written request of any lessee or tenant thereof, the interest and title of the lessee or tenant in such improvement, and in the real property on which the improvement is located, shall stand subject to liens for all the work done by any person in the construction, erection, alteration, or reparation of such improvement, and for the materials used in the construction, erection, alteration, or reparation thereof, which have been furnished by any person, but not the interest or title of the landlord of such lessee or tenant, unless the consent in writing of the landlord is first obtained, assenting to the construction, erection, alteration, or reparation of such improvement.

§ 34-28-5. Improvements by consent of owner of less than freehold.

Whenever any improvement to real property shall be constructed, erected, altered, or repaired by oral or written contract with or at the oral or written request of the owner, the owner being at the time less than sole owner of the fee simple (including, without restricting the foregoing, a life tenant, tenant in common, joint tenant, and tenant by entirety), such improvement, together with the title and interest of the owner in the real property on which the improvement is located, shall stand subject to liens for all the work done by any person in the construction, erection, alteration, or rep-

aration of such improvement, and for the materials used in the construction, erection, or reparation thereof, which have been furnished by any person, but not the interest or title of any owner of an estate in such real property, unless the consent in writing of the other owner is first obtained, assenting to the construction, erection, alteration, or reparation. In the case of a tenancy by entirety, no lien shall be had unless both husband and wife have contracted for or requested such improvement.

§ 34-28-6. Lien of architect or engineer.

The lien, under §§ 34-28-3, 34-28-4 or 34-28-5, of any architect or engineer for work done in connection with the construction, erection, alteration, or reparation, the result of which is used therein, shall be valid and enforceable under the provisions of this chapter if and only if a notice of lien provided for in § 34-28-10, is mailed and filed in accordance therewith by the architect or engineer, the mailing and filing in the land evidence records to be before the later of one hundred twenty (120) days of the performance of the work or ten (10) days after the actual and visible commencement, by excavation or otherwise, of the construction, erection, alteration or reparation.

§34-28-7. Notice to owner of residential structure.

If a person who is not a contractor claims a lien under §§ 34-28-3, 34-28-4, 34-28-5, or 34-28-6 in connection with work performed and materials furnished to a residential structure, the lien may only be enforced against the real property and improvements thereon to the extent of the balance due from the owner to the contractor or to the subcontractor in privity with the person claiming the lien unless that person asserting the lien has, within thirty (30) days of commencement of his performance of his work or furnishing of his materials provided a notice of intention meeting the requirements of § 34-28-9 to the owner, or lessee, as the case may be, either by certified mail, return receipt requested, or by filing in the office of land evidence records for the city or town within which the real property is located.

§ 34-28-8. Remote subcontractors and suppliers.

If the person claiming a lien under §§ 34-28-3, 34-28-4, and 34-28-5 and 34-28-6 is neither a contractor nor a subcontractor, the amount of the lien shall not exceed the amount due or to become due under the agreement between the contractor and the subcontractor whose work includes the work of the person claiming the lien as of the date such person files the notice of lien under § 34-28-10, unless the person claiming such lien has, within thirty days of commencement of performance of his or her work or furnishing of his materials, provided a notice of intention meeting the requirements of § 34-28-9, providing notice to the owner, either by certified mail, return receipt requested or by filing the notice of intention in the office of land evidence records for the city or town within which the real property is located.

§ 34-28-9. Notice of intention to perform work, to furnish, materials or both.

(a) A notice of intention to perform work, furnish materials or both, required by §§ 34-28-7 and 34-28-8 shall be executed under oath and contain the following information:

(1) The name of the owner of record of the land at the time of the mailing, or in the case of any lessee or tenant, the name of the lessee or tenant, and the mailing address of the owner or lessee, the name and address to be located at the upper left hand corner of the notice, in addition to the text of the notice;

(2) A general description of the land sufficient to identify it with reasonable certainty, including, for example only, street name and number, if available;

(3) A general description of the nature of the work done or to be done, or of the materials to be furnished, or both, and the approximate value, if known;

(4) The name and address of the person or persons for whom directly the work is to be done, or to whom directly the materials are to be furnished;

(5) The name and address of the person mailing the notice;

(b) The notice of intention may be in substantially the following form:

(Name of owner of record/Lessee)

(Address of owner/Lessee)

**NOTICE OF INTENTION TO DO WORK OR FURNISH
MATERIALS, OR BOTH**

All persons are hereby notified that the undersigned intends to do work or furnish materials or both, in the construction, erection, alteration, or preparation of an improvement on land described as follows: [here insert description] and that the land is owned by or leased to [here insert name of owner or lessee or tenant]. The nature of the work or materials furnished is as follows: [here insert general description of the nature of the work or materials, or both] and is being done for or furnished to [here insert name of person or persons for whom directly the work is being done or to whom directly the materials are being furnished], whose address is [here insert address].

The approximate value of said work or materials is, \$_____.

[Name and address of person
filing notice]

NOTARIZATION CLAUSE

Signed and sworn before me this _____ day of _____,

Notary Public
My Commission Expires:

§34-28-10. Notice of lien.

(a) Any and all liens claimed or that could be claimed under §§ 34-28-3, 34-28-4, 34-28-5, or 34-28-6 shall be void and wholly lost to any person claiming under those sections unless the person shall, before or within one hundred and twenty (120) days after the doing of such work or the furnishing of such materials, mail by prepaid registered or certified mail, in either case return receipt requested, a notice of lien, executed under oath and containing the following information:

(1) The name of the owner of record of the land at the time of the mailing, or in the case of a lien against the interest of any lessee or tenant, the name of the lessee or tenant, and the mailing address of the owner or lessee, the name and address to be located

at the upper left hand corner of the notice, in addition to the text of the notice, as described in subsection (b);

(2) A general description of the land sufficient to identify it with reasonable certainty, including, for example only, street name and number, if available;

(3) A general description of the nature of the work done, or of the materials furnished, or both, and the approximate value of the money claimed for such work done or materials furnished, or both, as of the date of the notice;

(4) The name and address of the person or persons for whom directly the work has been done or is to be done, or to whom directly the materials have been furnished or are to be furnished;

(5) The name and address of the person mailing the notice and the name of the individual person or persons whose signature will bind the person so mailing on all matters pertaining to the notice or any lien claimed thereunder, or release thereof;

(6) A statement that the person mailing the notice has not been paid for the work done or materials furnished or both; and

(7) A statement that the filing in the land evidence records of a copy of the notice of lien together with the notice to the owner will perfect a lien against the owner's real property.

(b) The notice may be in substantially the following form:

(Name of owner of record/Lessee)

(Address of owner/Lessee)

NOTICE OF LIEN

All persons are hereby notified that the undersigned has within the one hundred and twenty (120) days prior to the mailing hereof done work, furnished materials, or both, in the construction, erection, alteration, or preparation of an improvement on land described as follows: [here insert description] and that the land is owned by or leased to [here insert name of owner or lessee or tenant]. The nature of the work done or materials furnished is as follows: [here insert general description of the nature of the work or materials, or both] and was done for or furnished to [here insert name of person or persons for whom directly the work is being done or to whom directly the materials are being furnished], whose address is [here insert address].

The approximate value of said work or materials is, as of the date of the notice, \$ _____, and the undersigned has not been paid for the work or materials or both;

The undersigned authorizes [here insert name or names] to act or sign documents in behalf of the undersigned in all matters pertaining to this notice, or any lien claimed hereunder, or release thereof.

You are hereby informed that the filing in the records of land evidence of the city or town of [here insert name of city or town] of a copy of this notice of lien, together with this mailing, will perfect a lien against the land described herein, under the subject to the provisions of the Rhode Island Construction Lien Law.

[Name and address of person
filing notice]

NOTARIZATION CLAUSE

Signed and sworn before me this ____ day of _____, ____.

Notary Public
My Commission Expires:

(c) If the person claiming a lien is subject to filing and/or serving a notice of intention to do work and/or furnish materials, or both, as required by §§ 34-28-7 or 34-28-8, a copy of such notice indicating proof and date of filing and service shall be provided to the owner or lessee with the notice of lien.

(d) Within three (3) days of mailing a copy of the notice of lien to the owner, a person claiming a lien must file a copy of such notice in the records of land evidence in the city or town in which the land described in the notice of lien is located.

(e) The notice of lien shall be mailed to the owner of record of the land at the time of the mailing, or, in the case of a lien against the interest of any lessee or tenant, to the lessee or tenant, the mailing to be addressed to the last known residence or place of business of the owner or lessee or tenant, but if no residence or place of business is known or ascertainable by the person making the mailing, by inquiry of the person with whom the person making the mailing is directly dealing or otherwise, then the mailing under this section shall be to the address of the land.

(f) The mailing of the notice of lien and the filing of the copy in the land evidence records together with the mailing of another

copy thereof as hereinbelow provided shall perfect, subject to other sections of this chapter, the lien of the person so mailing and filing as to work done or materials furnished by the person during the one hundred and twenty (120) days prior to the mailing and thereafter, but not as to work done or materials furnished by the person before the one hundred and twenty (120) days prior to the mailing, any lien for which shall be void and wholly lost.

(g) In the event that the notice of lien, having been mailed, shall be returned to the person mailing the notice, not having been delivered for any reason, the lien of the person so mailing shall be void and wholly lost, notwithstanding any other provision of this section, unless such person shall, within thirty (30) days after the return of the notice of lien, and in no event more than one hundred twenty (120) days after the mailing of the notice, file the notice together with the envelope in which the notice was returned, in the place and manner and with the consequences hereinbefore provided for the filing of a copy of the notice of intention, and the filing shall be in lieu of any filing required at any other time under this section.

§ 34-28-11. Contracts barring notices of intention or notice of lien barred as against public policy—filing of notice of intention no grounds for mortgagee to withhold funding.

(a) A covenant, promise, agreement of understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to bar the filing of a notice of intention or notice of lien or the taking of any steps to enforce a lien as set forth in this chapter is against public policy and is void and unenforceable. This section shall not preclude a requirement for a written waiver of the right to file a construction lien executed and delivered by a contractor, subcontractor, material supplier, or laborer simultaneously with or after payment for the labor performed or the materials furnished has been made to such contractor, subcontractor, material supplier, or laborer.

(b) The filing or recording of a notice of intention as provided in § 34-28-9 shall not itself be grounds for a mortgagee to withhold

sums for the funding, financing or payment for performing work or furnishing materials or both for which any such notice or statement is filed or recorded or to require dissolution of such notice or statement before providing further funding, financing or payments, and any covenant, promise, agreement or understanding relative to the improvement or alteration to real property to withhold such funding, financing or payment or to require dissolution of such notice or statement before providing further funding, financing or payments solely on that ground is against public policy and void and unenforceable; provided, however, that nothing contained in this chapter shall obligate a mortgagee to disburse sums for the funding, financing or payment for the work or materials or both for which any such notice or statement is filed or recorded unless such mortgagee has received an accurately completed and valid partial waiver and subordination of lien in the form set forth substantially as follows from the person who filed or recorded such notice of intention:

PARTIAL WAIVER AND SUBORDINATION OF LIEN

STATE OF RHODE ISLAND

Date: _____

_____[CITY/TOWN]

OWNER: _____

CONTRACTOR: _____

LENDER/MORTGAGEE: _____

1. Original Contract Amount: \$ _____
2. Approved Change Orders: \$ _____
3. Adjusted Contract Amount: \$ _____
(line 1 plus 2)
4. Completed to Date: \$ _____
5. Less Retainage: \$ _____
6. Total Payable to Date: \$ _____
(line 4 less line 5)
7. Less Previous Payments: \$ _____
8. Current Amount Due: \$ _____
(line 6 less line 7)
9. Pending Change Orders: \$ _____
10. Disputed Claims: \$ _____

The undersigned who has a contract with _____
for performing work or furnishing materials or both for the
construction, erection, alteration or repair of an improvement of

real property known and identified as _____ located in _____ (city or town), Rhode Island and owned by _____, upon receipt of _____ (\$_____) in payment of an invoice/requisition/application for payment dated _____ does hereby:

(a) waive any and all liens and right of lien on such real property for labor or materials, or both labor and materials, or rental equipment, appliances or tools, performed or furnished through the following date: _____ (payment period), except for retainage, unpaid agreed or pending change orders, and disputed claims as stated above; and

(b) subordinate any and all liens and right of lien to secure payment for such unpaid, agreed or pending change orders and disputed claims, and such further work or materials, or both work and materials, for retainage, performed or furnished at any time through the date of the above payment period, to the extent of the amount actually advanced by the above lender/mortgagee through such date.

[Signature of person signing
waiver]

Signed and sworn before me this ____ day of _____, ____.

Notary Public
My Commission Expires:

§ 34-28-12. Recording notice of intention.

Every town clerk and every recorder of deeds, as the case may be, shall, on payment of a fee of eight dollars (\$8.00) for each notice of intention provided for in § 34-28-9, and notice of lien provided for in § 34-28-10, record the notice whether in the form therein provided or not, in a book to be kept by him or her for that purpose, with the time and date when the notices of intention and notices of lien are received and recorded by him or her; he or she shall also maintain an alphabetical index of the owners and lessees or tenants mentioned in all notices of intention and notices of lien, so recorded, provided, however, that the town clerk may refuse for recording any notice of intention or notice of lien which fails to reference the name of the owner of record, or lessee.

§ 34-28-13. Land subject to lien.

A notice of lien may be mailed and filed under § 34-28-10 against one or more contiguous parcels of land or parcels of land separated only by a public or private way, provided such parcels are owned, or occupied as lessee or tenant, by the same person or persons, and in such case the lien under the provisions of §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 shall be against all of the parcels of land and all of the improvements thereon in accordance with the tenor of those sections, or against the interest of the lessee or tenant therein, if the work is done or the materials are used on any of the parcels, or in any of the improvements.

§ 34-28-14. Effective period of notice of lien.

A notice of lien filed under § 34-28-10 shall cover all work done or materials furnished, or both, within its terms, and shall be effective only for one hundred twenty (120) days from the date of filing.

§ 34-28-15. Civil action to enforce lien—lis pendens notice.

(a) Any and all liens under the provisions of §§ 34-28-3, 34-28-4, 34-28-5, or 34-28-6 shall be void and wholly lost to any person claiming a lien under those sections, unless the person shall file a civil action to enforce the lien in the superior court for the county in which is situated the land upon which the improvement has been constructed, erected, altered, or repaired, and unless such person shall also file in the records of land evidence in the city or town in which such land is located a notice of lis pendens, described in § 34-28-16, the civil action to be filed on the same day as the notice of lis pendens, or within seven (7) days thereafter, and both the civil action and the notice of lis pendens to be filed within one hundred twenty (120) days of the date of the recording of the notice of lien provided in § 34-28-10. The lien of any person under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 who fails to file a civil action and notice of lis pendens under this section within the required one hundred twenty (120) day period, shall be void and wholly lost as to work done or materials furnished prior to the one hundred twenty (120) day period, regardless of the fact that the person may thereafter do other work or furnish other materials in the course of the same construction, erection, alteration, or reparation.

(b) The power of sale contained in a mortgage on any real property subject to a lien created by this chapter shall not be affected by the filing of a notice of lien as provided in § 34-28-10, provided, however, the power of sale shall be suspended by the filing of a civil action to enforce as provided in this section and the power of sale shall only be exercised thereafter in accordance with the provisions of § 34-28-18.

§ 34-28-16. Contents of lis pendens.

(a) The notice of lis pendens required to be filed under § 34-28-15 shall state that the person filing the notice of lis pendens that day has filed or will file within seven (7) days in the superior court a civil action to enforce a construction lien, and shall also contain:

(1) The name of the person against whom the civil action has been or will be filed and the relationship of the person to the real property which the improvement has been constructed, erected, altered or repaired;

(2) A description of the land by metes and bounds, or by reference to a recorded plat, by tax assessor's lot and plat, or by other legal description:

(3) The amount claimed in the civil action to be due;

(4) The dates of the mailing and of filing of any notice of intention under § 34-28-9 and notices of lien under § 34-28-10, and the name and address of the person to whom any mailing under § 34-28-10 was made:

(5) The name and address of the plaintiff and of his or her attorney, if any.

(b) The notice of lis pendens may be in substantially the following form:

NOTICE OF LIS PENDENS

All persons are hereby notified that the undersigned this day had filed or will file within seven (7) days hereafter, in the superior court for _____ County, a civil action to enforce a construction lien against [here insert name of the person against whom the civil action has been or will be filed and his or her relationship to the real property], concerning land described as follows: [here insert description of land]. The undersigned asserts that there is due to him or her the sum of [here insert the amount claimed] under a

construction lien, which is based upon a notice of lien under § 34-28-10- of the construction lien law, mailed to [here insert name and address of person to whom mailing was made] on [here insert date of mailing] and filed in the records of land evidence of the city or town of [here insert name of city or town] on [here insert date of filing of notice]. The attorney for the undersigned is [here insert name and address of attorney].

[Name and address of person filing notice of lis pendens]

§34-28-17. Form and prosecution of civil action to enforce lien.

(a) The plaintiff shall bring the civil action in his or her own behalf and shall name as defendants the owner and all persons, including any other person asserting a lien under this chapter, having any interest of record in the real property, or with respect to liens asserted pursuant to §§ 34-28-4 and 34-28-5, an interest in the leasehold or of a less than freehold interest of the owner, as the case may be. The complaint shall contain a brief description of the property sufficient to identify it, a statement of the amount due, and a brief explanation of the basis under which the claim is asserted.

(b) All parties having an interest in the real property may appear and have their rights determined in the civil action, and at any time before entry of final judgment, upon the suggestion of any party in interest that any other person is or may be interested in the action, or of its own motion, the court may summon such person to appear in such cause on or before a day certain or be forever barred from any rights thereunder. The court may in its discretion provide for notice to absent parties in interest. The term "party in interest" shall include mortgagees and attaching creditors.

(c) The commencement and prosecution of the civil action to enforce the construction lien shall be governed by the rules of civil procedure in a non-jury proceeding.

§ 34-28-18. Petition to foreclose mortgage.

At any time after the filing of a civil action under § 34-28-15, the holder of a mortgage having a priority over liens existing under

§§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 may petition the court to exercise the power of sale contained in the mortgage and the court shall grant the petition to foreclose, after notice to all interested parties and hearing thereon, upon a showing by the mortgagee that the mortgage is valid, entitled to priority and is in default, except for a default arising from the filing of a civil action to enforce pursuant to § 34-28-15.

§ 34-28-19. Dismissal of civil action, notice of lien, and release of lien upon deposit in court.

At any time after the recording of a notice of lien or after the filing of a civil action to enforce a lien under § 34-28-15, and upon providing notice to the person or persons claiming the lien and approval by the superior court, the owner or lessee or tenant of the land described in the notice or petition may pay into the registry of the court in the county in which the land is located cash equal to the total amount of the notice of lien and all claims of person asserting liens therein under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6, including costs of the lien holder, or may, in lieu of cash, deposit in the registry of the court the bond of a surety company licensed to do business in this state in the total amount running to all persons claiming liens under §§ 34-28-3, 34-28-4, 34-28-5 and 34-28-6, and on proper proof of payment or deposit the superior court shall enter an order discharging the notice of lien and *lis pendens* and dismissing the cause as to the owner or lessee or tenant and as to all persons having any title, claim, lease, mortgage, attachment or other lien or encumbrance (other than under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6), and on the entry of the order, the improvement is being or has been constructed, erected, altered, or repaired shall be released and discharged from the notices of lien, but the rights of all persons having any title, claim, lease, mortgage, attachment or other lien or encumbrance (other than under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6) shall be the same as if no notices of lien under § 34-28-10 had been mailed or filed and as if no petition under § 34-28-15 had been filed. In the event that a payment is made into the registry of court in accordance with this section, any person, having a contract directly with the person making the payment, may be permitted, after notice to all parties under the petition and after hearing in open court, to withdraw from the registry of court the sum of money due to him or her under the contract,

provided that the person making the withdrawal first furnish a bond, payable to the clerk of court, with good and sufficient corporate surety, for the repayment of the amount, or as much thereof as may be necessary to satisfy claims thereafter allowed by the court.

§ 34-28-20. Costs of proceedings.

The costs of the proceedings shall in every instance be within the discretion of the court as between any of the parties. Costs shall include legal interest, and all other reasonable expenses of proceeding with the civil action and the enforcement of the action. The court, in its discretion, may also allow for the award of attorneys' fees to the prevailing party.

§ 34-28-21. Decree ordering sale.

(a) When the amount of any lien under §§ 34-28-3, 34-28-4, 34-28-5 and 34-28-6 has been established, the court may enter an order authorizing the sale of the real property to satisfy the lien. In so ordering the court may issue such instructions, restrictions and conditions as, in its discretion, it deems appropriate. The court may appoint a master to conduct the sale of the real property.

(b) In every decree of sale the court shall prescribe the notice that shall be given of the sale and shall also give therein instructions and particular directions as each case may require, and upon application to the court, at any time, further instructions and directions may be given from time to time in relation thereto.

§ 34-28-22. Application of proceeds of sale.

The proceeds of the sale, after payment of costs and expenses of sale as shall be allowed by the court, shall be applied to the payment of the claims as marshaled and ascertained, and the balance, if any, which shall remain after payment thereof, shall be paid over to the owner or the lessee or tenant of the property, as the case may be.

§ 34-28-23. Master's bond.

The court may, in its discretion, require of a master bond or bonds with surety or sureties in such sum and to the person or persons as it may direct, securing the faithful application of the proceeds of sale, and may from time to time remove the master on account of any noncompliance with its order or decree, and appoint a new master in his or her stead.

§ 34-28-24. Priority of liens.

(a) The priority of liens under §§ 34-28-3, 34-28-4, 34-28-5 and 34-28-6 shall be as follows:

(1) Except as provided in subdivision (a)(3), as between persons having valid liens under this chapter, all of the lien holders shall share pro rata in the distribution of funds received by deposit under § 34-28-19 or of the proceeds of any sale under § 34-28-21, based on the court's determination of the amount of their liens and costs of proceeding.

(2) Except as provided in subdivision (1), the priority of persons mailing and filing notices of intention under § 34-28-10 shall date from the date of the filing; the lien of the persons shall be senior to any subsequently recorded title, claim, lease, mortgage, attachment, or other lien or encumbrance (other than under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6), and the lien of such persons shall be junior to any prior recorded title, claim, lease, mortgage, attachment, or other lien or encumbrance (other than under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6). Any person having an existing lien under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 subject to any prior recorded mortgage, attachment, or other lien or encumbrance may pay off the prior mortgage, attachment, or other lien or encumbrance and shall be subrogated to all of the rights of the holder of the prior mortgage, attachment, or other lien or encumbrance.

(3) In the event that there shall be recorded any title, claim, lease, mortgage, attachment, or other lien or encumbrance (other than under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6) junior to any liens under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 or in accordance with subdivision (2) and senior to other liens, then the liens under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 senior to the title, claim, lease, mortgage, attachment, or other lien or encumbrance shall be separated from the liens junior to the lien or encumbrance, and the

senior liens shall be senior to the title, claim, lease, mortgage, attachment, or other lien or encumbrance, and the junior liens shall be junior thereto.

(b) Priority between persons whose claims are not specifically provided for in this section shall be determined by the court or master in accordance with equity and good conscience.

§ 34-28-25. Subordination or release of lien.

Any subordination agreement or release, bearing the signature of any person with authority to sign the agreement or release, or of the person who is designated in a notice of intention under §§ 34-28-10 as the person whose signature will bind the person filing the notice, which purports to subordinate or release any lien under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 whether for work done or materials furnished prior to the agreement or release, or thereafter, or both, notwithstanding the fact that no consideration is given therefor, shall be enforceable according to its terms, by any other person who has changed his or her position in any way in reliance upon the subordination agreement or release, whether the other person is otherwise obligated to make the change of position or not.

§ 34-28-26. Direct payment on release of lien.

Any person entitled to any lien under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 who releases the lien before receiving payment for the work done or materials furnished forming the basis of the lien, shall be entitled to demand and receive direct payment therefor from the owner or lessee or tenant or other person as may be obligated or permitted to make the payment on behalf of the owner or lessee or tenant, provided that the person entitled to the lien first obtains the written consent of all persons in line of privity between him or her and the owner or other person; on presentation of a proper demand for the payment, the owner or lessee or tenant or other person shall, if satisfied as to the amount thereof, make payment, on proper receipt therefor, and credit shall be given therefor by all persons in line of privity between the owner or other person and the person releasing the lien.

§ 34-28-27. Damages on withholding direct payment of consent thereto.

No person in the line of privity referred to in § 34-28-26 shall unreasonably withhold his or her written consent to a direct payment, nor shall any owner or lessee or tenant or other person referred to in § 34-28-28 unreasonably withhold a direct payment, and, if the person or owner or lessee or tenant or other person shall unreasonably withhold consent therefor or payment thereof, he or she shall be liable for any damages as may accrue as the natural and probable consequences thereof.

§ 34-28-28. Form of demand for direct payment.

A demand for direct payment under § 34-28-26 shall be sufficient in substantially the following form:

DEMAND FOR DIRECT PAYMENT

To: [here insert name of owner or lessee or tenant, or of other person as may be obligated or permitted to make payments on behalf of the owner or lessee or tenant]. The undersigned hereby releases his or her lien against [here describe the improvement and the land on which it is situated, which description shall be sufficient to identify it generally with reasonable certainty] owned by or leased to [here insert name of owner or lessee] for work done or materials furnished by the undersigned, as follows:

[here insert a general description of the work done or materials furnished, with amounts and dates the work was performed].

The undersigned had taken the following steps to perfect the lien:

[here insert the steps take to perfect the lien under this chapter].

the persons in line of privity between you and the undersigned are as follows:

[here insert names of all persons in line of privity].

Each of the persons has endorsed his or her approval to this demand.

Wherefore, the undersigned demands payment from you of the sum of [here insert amount].

[here insert signature and address of person making demand]

Approved:

[here insert signatures of persons in line of privity]

Payment received

[for signature of person demanding payment, when he or she has received the same]

§34-28-29. Suit on bond to secure payment.

If any bond is given to secure payment for work done or materials furnished on account of the construction, erection, alteration or reparation of improvement or on account of any contract between the owner or lessee or tenant of the land on which the improvement is or shall be constructed, erected, altered, or repaired and any other person, the bond shall enure to the benefit of any person who does any work in the construction, erection, alteration, or reparation thereof, or who furnishes any materials used for that purpose, and the person doing the work or furnishing the materials may bring suit in his or her own name on the bond against any party thereto, notwithstanding the fact that no notice of lien under § 34-28-10 has been mailed or filed, and, further, notwithstanding the fact that he or she is not a party to the bond or to the contract between the owner or lessee or tenant and other person, and, further, notwithstanding, the fact that he or she did not know of or rely on the bond or give any notice to the surety on the bond, and further, notwithstanding the fact that he or she did work or furnished materials for use on any subcontract, mediate or immediate, to such contract between the owner or lessee or tenant and the other person.

§ 34-28-30. Application to governmental agencies.

No lien under §§ 34-28-3, 34-28-4, 34-28-5 or 34-28-6 shall attach to any improvement, if the improvement is being constructed, erected, altered, or repaired by or for the state, or any city or town,

or any subdivision or agency thereof, or to any land upon which the improvement exists, if the land is owned by the state or any city or town, or any subdivision or agency thereof, but the provisions of §§ 34-28-29 shall apply to improvements being so constructed, erected, altered, or repaired.

§ 34-28-31. Contractor excused from completing work upon filing of petition.

From and after the filing of any civil action under § 34-28-15, any person furnishing work or materials, or both who shall not have fully completed his or her contract in relation to the erection, construction, alteration, or reparation thereof, shall thereafter be excused from completing the contract, unless unreasonable conduct by such person has contributed materially to the facts giving rise to the nonpayment resulting in the commencement of the civil action.

§ 34-28-32. Construction.

This chapter is intended to afford a liberal remedy to all who have contributed labor, material, or equipment towards adding to the value of property to which the lien attaches and should be construed accordingly.

§ 34-28-33. Remedy of chapter not exclusive.

Except as otherwise specified, nothing in this chapter shall be construed to limit the right of any person, whether he or she have a valid lien hereunder or not, to remedies otherwise available to him or her under law; and the rights, if any, of any person against any other person (rather than against the property which is the subject matter of any petition under this chapter) shall not be impaired by the provisions of this chapter.

§ 34-28-34. Bona fide purchaser.

Any person who is a bona fide purchaser for value of an ownership or interest leasehold in a residential structure which would otherwise be subject to a lien under §§ 34-28-3, 34-28-4, 34-28-5, or 34-28-6, takes title to such interest free of any such lien unless, before the bona fide purchaser takes title to the real property or

leasehold interest, on which the lien would attach, the person performing work, or furnishing materials, or both, has filed a notice of intention to do work and/or furnish materials as provided by § 34-28-9, or has filed a notice of lien as provided by § 34-28-10.

§ 34-28-35. Severability.

If any part or parts of this chapter shall be held to be unconstitutional, that unconstitutionality shall not affect the validity of the remaining parts of this chapter. The general assembly hereby declares that it would have enacted the remaining parts of this chapter if it had known that the part or parts thereof would be declared unconstitutional.

§ 34-28-36. Form of real estate description.

Whenever any description of real estate is required under the provisions of this chapter, it shall be deemed sufficient to describe the real estate by metes and bounds description and street address, or by recitation of the taxing authority's assessor's plat and lot designation and street address, or by recitation of the book and page of mortgage and street address.