RECENT DEVELOPMENTS WITH LOUISIANA'S PRIVATE WORKS ACT
LBA CONFERENCE

G. TRIPPE HAWTHORNE, PARTNER

KEAN | MILLER LLP
ATTORNEYS AT LAW
People First

RECENT DEVELOPMENTS WITH LOUISIANA'S PRIVATE WORKS ACT

1. Legislative Amendments:

   A. Act 182 of 2014 – Amended La. R.S. 9:4835 to remove the reference to depositing a federally insured certificate of deposit to bond off a lien.

   B. Act 394 of 2013 – Amended La. R.S. 9:4823.A(2) to simplify the lien claimant's deadline for filing suit – amended from one year after the expiration of the lien filing deadline (which might not otherwise have been relevant or known) to one year after filing the statement of claim. Also changed references to "notice of lis pendens" to "notice of pendency of action".[1]

   C. Act 357 of 2013 – Amended La. R.S. 9:4802.G., which requires an equipment lessor to give preliminary notice of the lease of a movable to the owner. The amendment substituted a "notice of the lease" for delivery of a copy of the lease. Query whether an equipment lessor that continues to deliver a copy of the lease itself, instead of the new notice of lease might lose its lien rights.

   D. Act 277 of 2013 – Amended La. R.S. 9:4822.G(4) which requires that a statement of claim reasonably itemize the elements of the lien claimants' claim. The amendment clarifies jurisprudence by stating that a claimant does not have to file copies of unpaid invoices with the statement of claim unless the privilege specifically states that the invoices are attached. Query whether a statement of claim is valid if it reasonably itemizes the elements of the lien claimant's claim but does not attach copies of unpaid invoices, even though the statement of claim says they are attached.

   E. Act 425 of 2012 – Provides a 4 day safe harbor for filing a mortgage after the filing of a "No Work Affidavit."

2. Contents of Statement of Claim:

   A. *Tee It Up Golf, Inc. v. Bayou State Construction*, 09-855 (La. App. 3 Cir. 2/10/10), 30 So. 3d 1159.

      In *Tee It Up Golf*, the contractor, Bayou State, was hired by John Nobles and/or Tee it Up Golf to construct a strip mall and to do improvements on a

[1] *Specialty Const., LLC v. JimMeyers Const. Co., LLP*, 2010-1378 (La.App. 1 Cir. 2/11/11) 2011 WL 846119 (2011) would have had a different result after the amendment. In Specialty, the lien claimant fax filed its petition to enforce its lien within one year from filing its lien, but did not file the original petition for 9 days, meaning the fax filed version was considered not to have been filed. Since this was prior to the amendment, the one-year period expired not one year from the date the statement of claim was filed, but rather, one year from the date any person falling into that claimant's category could have filed a statement of claim and privilege under La. R.S. 9:4822. The record did not contain any evidence as to the deadline for filing a statement of claim.

private home. A dispute arose between the parties, and outstanding invoices were left unpaid. Subsequently, Bayou State filed materialman's liens on each of the properties. Noble sought to have the liens cancelled for numerous deficiencies, including the "failure to reasonably itemize the elements comprising the amounts and obligations asserted." *Id*. at 1160. Each of the liens stated the debt owed on "Materials Supplied" as a lump sum of $180,762.59. On that specific issue, the Third Circuit found that simply inserting "a lump sum amount cannot meet the statutory requirement to set forth the amount and nature of the claim giving rise to the privilege...." *Id*. at 1162. Further, the court surmised that it was unreasonable to conclude that each property had the exact same amount of outstanding debt on materials and there was no attempt to itemize the elements comprising the amount claimed, which is also a requirement of the statute. Ultimately, the court affirmed the trial court's ruling ordering that the liens be cancelled.

B. *Jefferson Door Co. v. Cragmar Construction, L.L.C.*, 11-1122 (La. App. 4 Cir. 1/25/12), 81 So. 3d 1001, *writ denied*, 12-0454 (La. 4/13/12), 85 So.3d 1250.

In *Jefferson Door*, the court declared invalid a lien that purported to itemize its elements by specific reference to the invoices of the claimant--when, in fact, those invoices were not attached to or recorded with the lien.

The Statement of Claim itemized the claim as follows:

> JEFFERSON DOOR COMPANY, INC., a Louisiana Corporation domiciled in the Parish of Jefferson, with mailing address of P.O. Box 220, Harvey, La. 70059 sold to CRAGMAR CONSTRUCTION, L.L.C., 3343 Metairie Rd., Suite 7, Metairie, LA 70001, certain materials consisting of but not limited to trim, millwork, etc., for the agreed remaining principal balance of $37,623.98 and accrued service charges of $879.36 from September 11, 2009 through December 7, 2009, for a total due of $38,503.34, plus service charges at the rate of 18% per annum ($18.55 per diem) from December 8, 2009, until paid in full, all expenses incurred in the collection of all monies due and reasonable attorneys' fees of not less than 25% of the entire sum due as will appear from the itemized statement of account attached hereto....

> That the said account represents materials sold and delivered to the aforesaid contractor and/or real property owners for use in and, which now forms a part of the construction of additions and renovations and/or improvements at the following described property….

The court found:

> After review of the record in light of Comments 1981 to La. R.S. 9:4822(G), we do not find that the Lien Affidavit fulfills the requirements of the statute, specifically to "reasonably itemize the elements comprising it including ... material supplied ...". Clearly, the reference in the Lien Affidavit to "certain materials consisting of but not limited to trim, millwork, etc." is not the requisite reasonable itemization of materials for purposes of the statutory requirements. (Emphasis added.) Moreover, although the attached Itemized Statement of Account states that the plaintiff provided "various materials" that would be "more particularly itemized on the attached invoices," the referenced invoices are not attached. In consequence, the Lien Affidavit did not meet the requisites listed in the statute.*Id*. at 1006.

C. Act 277 of 2013 – Amended La. R.S. 9:4822.G(4) followed *Jefferson Door*. The amendment clarifies that a claimant does not have to file copies of unpaid invoices with the statement of claim unless the privilege specifically states that the invoices are attached (see above).

D. *Bradley Electrical Services, Inc. v. 2601, L.L.C.*, 11-0627 (La. App. 4 Cir. 12/14/2011) 82 So. 3d 1242.

The lien's description of the basis for the obligation and the enumeration of the materials supplied were as follows:

> There is an unpaid balance of One Hundred ninety five thousand two hundred eighty and fourteen cents ($195,280.14) Dollars, together with contractual interest per annum until paid, any assessed late fees, attorney's fees of $150.00 plus all costs, for services rendered.

The owner, 2601, argued that the lien failed to set forth the nature of the obligation giving rise to the claim and contained no itemization of the materials supplied.

The court found that this description was similar to the insufficient description in *Tee it Up Golf* and affirmed the trial court's summary judgment against the subcontractor, Notoco. The court said, "[i]n Notoco's lien, not only do they not itemize, there is not even a general description of the nature of the debt. A lump sum with no supporting description is more than a technical defect." *Id*. at 1244.

The court also found that the owner's actual knowledge of the basis for the lien is irrelevant. The court noted that "the purpose of the lien is to give notice that the claim exists, not just to the owner but also to third parties. Thus, Notoco's position that 2601, L.L.C. had sufficient notice prior to the filing of the lien, does not lessen its burden to provide specific information regarding the debt." *Id*.

E. *Simms Hardin Company, LLC v. 3901 Ridgelake Drive, LLC*, 12-469 (La. App. 5 Cir. 5/16/13), 119 So. 3d 58.

Several subcontractors recorded liens for work on a condominium project. The issue before the court was whether the subcontractors' liens met the requirements of La. R.S. 9:4822.G, that the property be reasonably identified, and that the liens set forth the amount and nature of the obligation giving rise to the privilege and reasonably itemize the elements comprising it.

The various liens filed by various trade subcontractors did not identify the particular condominium units in which they worked. Instead, they described the entire property. The property description was: "Lots 7, 8, 9, 10, 11, 12 and 13, Square 53, Harlem Parkway Subdivision, Parish of *67

Jefferson, State of Louisiana otherwise known as Pontchartrain Caye Condominiums, 3901 Ridgelake Drive, Metairie, Louisiana." *Id*. at 66-67.

The owner argued that the property description referenced the wrong lot numbers (by using lot numbers prior to the re-subdivision of several lots into one lot for the project) and included property greater than that on which the condominiums were built, which included property owned by third persons.

The Fourth Circuit found that the work done by the subcontractors had been done throughout the development, prior to the sale of individual condominiums. The court also found that the property description met the requirements of La. R.S. 9:4822.G(3), which specifically allows for use of lot numbers. The court concluded that this description was sufficient to put owners and third parties on notice regarding the property that was subject to the privilege. *Id.* at 67.

The owner also argued that the lien affidavits did not properly identify which work was performed on which particular condominium unit. The court held that the affidavits adequately met the statute's requirements of specificity because the work performed by each subcontractor was performed throughout the entire condominium development prior to the sale of the individual units. The work did not involve separate and distinct parcels of immovable property. Though the condominiums were sold as individual units, the various subcontracts were for construction work to be performed on the condominium complex as a whole.

The owner further argued that the lien affidavits did not adequately describe the work performed or the materials supplied, and cited *Tee it up Golf* as support for its argument that lump sum amounts in a lien are insufficient.

The description of work in the liens was as follows:

i. Sharp Electric's lien affidavit claims the amount of $91,492.60 for "electrical and lighting work."

ii. Commercial Paint's lien affidavit asserts a claim for the amount of $58,563.10 for "wall preparation and general painting work."

iii. Simms Hardin's lien affidavit claims the amount of $106,248.00 for "framing, insulation, and drywall installation."

iv. Gallo's lien affidavit claims the amount of $78,382.20 for "plumbing installation work."

v. Crasto Glass's lien affidavit claims the amount of $45,346.80 for "aluminum framing and glass and glazing installation work."

vi. Year Round's Statement of Lien claim claims the amount of $119,028.70 for "air conditioning and ventilation work." *Id*. at 68.

The court found these descriptions to be sufficiently individualized and descriptive to meet the requirements of La. R.S. 9:4822.G(4). The court noted that the subcontracts were not specific to the individual units but were for work on the entire condominium complex. The court distinguished *Tee it up Golf* by finding that the work described in the liens had been performed in individual units of one complex, while, in *Tee it up Golf*, work performed on the strip mall was lumped in with work performed on the residence, a completely separate property. *Id*. at 68.

3. Cancellation and Refiling of A Statement of Claim:

A. *In re Tuscany Reserve, LLC*, No. 09-11027, 2011 WL 831596, at *5 (Bankr. M.D. La. Mar. 3, 2011).

The general contractor filed a lien during the course of the project. As an accommodation to the owner, and so that the lender would continue funding the project, the general contractor cancelled the lien. The owner defaulted again and ended up in bankruptcy. The general contractor timely filed and prosecuted a lien claim that included the amounts included in the original lien. In the Bankruptcy proceeding, the lender argued that the general contractor had abandoned its claim for the privilege it cancelled.

The court essentially found that a lien claimant is free to cancel a lien without prejudice, so long as it refiles in compliance with the requirements of the PWA.

4. Obligation of Owner that Did Not Contract with Contractor:

A. *Gasaway-Gasaway-Bankston v. CP Land, LLC*, 14-1749 (La. App. 1 Cir. 6/5/15) 2015 WL 3548099, *writ denied*, 2015-1304 (La. 10/2/15), --- So.3d ---.

In April 2006, CP Land, LLC sold immovable property to Dana and Tatjana Feneck for $288,000. The property was part of a development known as Carter Plantation in Springfield, Louisiana, and Mr. Feneck was managing director of Carter Plantation from April 2005 through July 2009. According to Mr. Feneck, the purpose of the sale was to generate cash to pay property taxes on Carter Plantation, and the parties agreed in writing

that CP Land would later repurchase the property from the Fenecks for $350,000. The repurchase transaction never occurred.

On January 30, 2007, after the property had been sold to the Fenecks, CP Land entered into a $400,000 contract with Gasaway–Gasaway–Bankston (GGB), a professional architectural corporation, to provide architectural services for the construction of a marina and hotel site, front office, and supporting facility center (the conference center) at Carter Plantation, part of which was to be constructed on the Fenecks' property. Although GGB provided all services pursuant to the contract, CP Land did not pay an outstanding balance of $182,500 allegedly owed to GGB.

On April 9, 2009, GGB recorded a privilege against certain immovable property located in Carter Plantation, including the immovable property owned by the Fenecks, pursuant to the Louisiana Private Works Act, LSA–R.S. 9:4801, *et seq*.

The First Circuit noted that the privilege granted by La. R.S. 9:4802 affects only the interest in or on the immovable enjoyed by the owner whose obligation is secured by the privilege [La. R.S. 9:4806(C)], and that under La. R.S. 9:4806(B) and (C), the claim against an owner granted by LSA–R.S. 9:4802 is "limited to the [owner(s)] who have contracted with the contractor" and "affects only the interest in or on the immovable enjoyed by the owner whose obligation is secured by the privilege." *Id.* at *2. If the owner did not personally contract with a contractor, there is no liability, either personally or for that owner's interest in the property.

B. *Cajun Constructors, Inc. v. EcoProduct Solutions*, 15-0049 (La. App. 1 Cir. 9/18/15) --- So.3d ---, 2015 WL 5474883, writ den. 2015-C-1908 (La. 11/20/15).

Syngenta and EcoProducts entered into an agreement for EcoProducts to construct and own a plant to convert a by-product of one of Syngenta's plants into a marketable product. Syngenta would lease the land for that plant to EcoProducts, and EcoProducts would own the plant.

EcoProducts contracted with Cajun for construction of the plant. EcoProduct ended up in bankruptcy, allegedly still owing Cajun an estimated 1.5 million dollars.

Cajun filed a lien and took the position that Syngenta was personally liability to Cajun under La. R.S. 9:4802, characterizing Syngenta as the owner.

Pursuant to the public records doctrine, Cajun also argued that the lease could not impact Cajun's rights because the lease was not filed in the public records. Cajun also argued that Syngenta was conclusively presumed to be the owner under Civil Code article 491 because there was no separate writing filed in the public records indicating the separate ownership of the plant..

The trial court granted Syngenta's motion for summary judgment, finding that for purposes of the Private Works Act, Cajun was the general contractor, EcoProducts was the owner who contracted with the general contractor, and Syngenta had no liability under La. R.S. 9:4806.B. The First Circuit affirmed.

With respect to the argument that the public records doctrine protects Cajun, the First Circuit stated:

> We further hold that the fact that the September 24, 2009 agreement was not recorded in this instance does not override the provisions of the LPWA, in determining whether Cajun thus has a privilege against Syngenta. The public records doctrine does not alter the application of the statutory definitions of "owner" and "contractor" found in the LPWA. The fact that the agreement between Syngenta and EcoProduct was not filed in the public records does not make Syngenta liable to Cajun under the LPWA in this instance. *Id*. at 19.

The First Circuit further found:

> To hold Syngenta liable for EcoProduct's failure to perform its obligations under the agreement and its failure to pay its contractors would undermine the statutory provisions of the LPWA. *Id*. at 20.

This case reaffirms that the Private Works Act is sui generis and strictly construed. Articles on property classification, accession, and the public records doctrine should not be used to extend liability beyond that provided for on the face of the PWA.

5. General Contractor's Lien Rights if Notice of Contract Not Timely Filed:

   A. *Tee It Up Golf, Inc. v. Bayou State Construction*, 09-855 (La. App. 3 Cir. 2/10/10), 30 So. 3d 1159.

The general contractor did not timely file a notice of contract, but filed a general contractor's lien. In the suit to enforce the lien, the general contractor argued that the court should apply *Burdette v. Drushell*, 01-2494 (La. App. 1 Cir. 12/20/02), 837 So. 2d 54, 69 (2002), *writ denied*, 2003-0682 (La. 5/16/03), 843 So. 2d 1132, where the First Circuit found that a general contractor could still file a lien for work it self-performed, even though the notice of contract was not timely filed. In dicta, the Third Circuit said, "[w]e do not disagree," referring to the *Burdette* framework. This was dicta because, as discussed above in section 2.A, the lien was cancelled for being fatally flawed.

6. Preliminary Notice:

A. Act 357 of 2013 – Amended La. R.S. 9:4802.G., which requires an equipment lessor to give preliminary notice of the lease of a movable to the owner (see above).

B. *Reed Constructors, Inc. v. Roofing Supply Group, LLC* (La. App. 1 Cir. 11/1/13), *writ denied*, 2014-1031 (La. 9/12/14), 148 So. 3d 931.

This is a Public Works case. It is relevant to the Private Works Act, though, because the section of the Public Works Act under which it was decided, La. R.S. 38:2242.F, [2] has a nearly identical counterpart in the Private Works Act at La. R.S. 9:4802.G(3).[3] In fact those two sections were added to the Public Works Act and the Private Works Act, respectively, by means of the same Act, Act 1134 of 1999.

Roofing Supply was a material supplier to a subcontractor on a public project. La. R.S. 38:2242.F requires a material supplier to a subcontractor to give notice of nonpayment to the owner and general contractor within 75 days. Roofing Supply sent a notice of nonpayment within 75 days from its last delivery to the project, but not within 75 days of prior deliveries for which it had not been paid.

[2] La. R.S. 38:2242.F. says: "[i]n addition to the other provisions of this Section, if the materialman has not been paid by the subcontractor and has not sent notice of nonpayment to the general contractor and the owner, then the materialman shall lose his right to file a privilege or lien on the immovable property. The return receipt indicating that certified mail was properly addressed to the last known address of the general contractor and the owner and deposited in the U.S. mail on or before seventy-five days from the last day of the month in which the material was delivered, regardless of whether the certified mail was actually delivered, refused, or unclaimed satisfies the notice provision hereof or no later than the statutory lien period, whichever comes first. The provisions of this Subsection shall apply only to disputes arising out of recorded contracts."

[3] La. R.S. 9:4802.G(3) says: "[i]n addition to the other provisions of this Section, if the seller of movables has not been paid by the subcontractor and has not sent notice of nonpayment to the general contractor and the owner, then the seller shall lose his right to file a privilege or lien on the immovable property. The return receipt indicating that certified mail was properly addressed to the last known address of the general contractor and the owner and deposited in the U.S. mail on or before seventy-five days from the last day of the month in which the material was delivered, regardless of whether the certified mail was actually delivered, refused, or unclaimed satisfies the notice provision hereof or no later than the statutory lien period, whichever comes first. The provisions of this Paragraph shall apply only to disputes arising out of recorded contracts."

The court found that a material supplier may only file a Statement of Claim for invoices for which it timely sent a notice of nonpayment.

> We find La. R.S. 38:2242(F) is clear and unambiguous. To preserve his right to file a privilege or lien on the immovable property, the materialman SHALL deposit in the U.S. mail, via certified mail, notice of nonpayment before seventy-five days from the last day of the month in which material was delivered or no later than the statutory lien period, whichever comes first. Regardless of the month of delivery or the number of deliveries, the seventy-five-day period commences on the last day of that month. *Id.* at 756.

The pertinent language of the statute is, "…or before seventy-five days from *the* last day of the month in which the material was delivered…" (emphasis added). The court read this as meaning, "each month in which the material was delivered…."

C. *Hawk Field Servs., L.L.C. v. Mid Am. Underground, L.L.C.*, 47,078 (La. App. 2 Cir. 5/16/12), 94 So. 3d 136, 143, *writ denied*, 2012-1660 (La. 10/26/12), 99 So. 3d 652.

An equipment lessor failed to provide a copy of the lease to the owner within 10 days [as required by La. R.S. 9:4802(G)(1)][4] but timely filef its statement of claim.

The Second Circuit found that while non-compliance with La. R.S. 9:4802(G)(1) cost the equipment lessor its privilege on the property, it did not preclude the direct right of action against the contractor and owner.

> While we agree that both U Brothers' claim and lien would be extinguished had it failed to file a statement of claim and lien within the time period required by La. R.S. 9:4822, here, it is undisputed that U Brothers filed its statement of claim and lien within the window set forth by La. R.S. 9:4822. Therefore, we find that the trial court erred in finding that U Brothers' claim against Hawk Field was extinguished. *Id*. at 143.

[4] La. R.S. 9:4802.G. (1) at the applicable time provided: "[f]or the privilege under this Section to arise, the lessor of the movables shall deliver a copy of the lease to the owner and to the contractor not more than ten days after the movables are first placed at the site of the immovable for use in a work."

7. Right to Cancellation of an Improperly Filed Lien:

A. *Smith Plumbing, Inc. v. Manuel*, 11-1277 (La. App. 3 Cir. 3/28/12), 88 So. 3d 1209, 1217.

Smith Plumbing is a residential case in which liens were filed more than 60 days after the Notice of Termination was filed. The lien claimants argued that the Notice of Termination was not filed in good faith because work was performed after the filing of the Notice, but the court found that the plaintiffs had occupied the house at the time the Notice was filed and that the additional work was minor or inconsequential.

The plaintiffs made the written demand for cancellation specified in La. R.S. 9:4833, and the lien claimants did not cancel the liens. The court awarded the plaintiffs $2,000 each in general damages for the anxiety caused by the liens and $3,500 for attorney's fees.

B. *Urban's Ceramic Tile, Inc. v. McLain*, 47,955 (La. App. 2 Cir. 4/10/13), 113 So. 3d 477.

Urban's Ceramic Tile involved a residential construction project on which the general contractor went out of business after the home was substantially complete. The flooring subcontractor was owed an estimated $15,000 by the general contractor.

After a trial on the merits, the district court found that the subcontractor had missed its lien filing deadline by about 8 days, ordered the lien cancelled, and awarded attorney's fees to the homeowners under La. R.S. 9:4833 because of the subcontractor's unreasonable failure to cancel the lien.

The lien claimant argued to the appellate court that the attorney's fee award was improper, as the facts regarding whether or not the lien was timely filed were disputed. The appellate court agreed that, in certain disputed cases, an award of attorney's fees may be improper. It went on to find, however, that the subcontractor's factual support for its position was not strong enough and affirmed the district court's award of attorney's fees, deferring to the district court's vast discretion. *Id*. at 483.

8. Lien Release Bonds:

A. Act 182 of 2014 – Amended La. R.S. 9:4835 to remove the reference to depositing a federally insured certificate of deposit to bond off a lien (see above).

B. *Elder Offshore Leasing v. Safe Haven Enterprises, Inc.*, No. 2:02-1274, 2011 WL 1898300, at *4-5 (W.D. La. May 17, 2011).

The Bolivarian Republic of Venezuela entered into a contract with Consorcio Groupo Total Mar ("Total Mar") to construct and install living-quarter modules on concrete platforms at a naval base located at Isla de Aves. For construction of the modules, Total Mar subcontracted with Elder Offshore Leasing, Inc. ("Elder"), who the subcontracted withSafe Haven for the design and construction of the modules. A dispute arose between Elder and Safe Haven near the project's completion, resulting in Elder filing suit against Safe Haven for breach of contract in August 2002.

Safe Haven filed a Private Works Act lien, and then filed suit to enforce the lien. The Court attached the modules. Venezuela took possession of the modules after substituting a $3.5MM bond for them.

Safe Haven's lien was for $322,000. That amount was paid to Safe Haven out of the registry of the court. Safe Haven filed a motion to amend its claims to increase them to $638,489.33.

Venezuela argued that because Safe Haven did not file any other Statement of Claim against the modules under the Louisiana Private Works Act, and the claims secured by the Statement of Claim filed in August 2002 has been satisfied with proceeds from the Safe Haven Cash Bond, Safe Haven had no valid lien rights remaining. Safe Haven argued that filing a Statement of Claim is not a necessary requirement after Venezuela posted the lien release bond and after Safe Haven filed suit against Venzuela to enforce the original lien. Essentially, the argument was that the amended pleading itself was a new Statement of Claim.

The court agreed with Venezuela.

> In order for Safe Haven to properly preserve its lien rights in the modules, it must have complied with Louisiana Revised Statute 9:4822 for the increased amount of damages it is seeking. The summary judgment evidence submitted established only one lien was preserved in August 2002 for $322,049.38 as to the modules at issue with regard to this motion for summary judgment. The evidence clearly established that there was only one Statement of Claims filed against Elder and/or Total Mar.

> Accordingly, we find that Safe Haven did not satisfy the requirements set forth in § 9:4822 with respect to the Reserved Claims because filing a Statement of Claims is a necessary requirement that must be met in order to preserve lien rights in accordance with the LPWA.
>
> Safe Haven maintains that Venezuela's filing of the cash bond extinguished all liens or privileges granted by the LPWA without affecting other rights the claimant or privilege holder may have against the owner, the contractor, or the surety. Therefore, according to Safe Haven, once the bond was posted, the liens and/or privileges extinguished, along with the necessity for the formalities of the LPWA. Moreover, Venezuela lost the right to challenge the validity of Safe Haven's claims of lien under the LPWA once the bonds were posted. We disagree.
>
> The Safe Haven Cash Bond specifically put conditions on payment for the Reserved Claims which are that Safe Haven obtain a final, non-appealable judgment that establishes (1) that Venezuela is not the owner of the modules, (2) the validity of the Reserved Claims; and (3) the validity of the Claims of Lien made with respect to the Reserved Claims. The Safe Haven Cash Bond expressly preserved Venezuela's right to challenge whether Safe Haven properly preserved its lien in the modules. To argue that furnishing the Bond extinguished that right is completely contradictory to the express language in the Bond and inherently illogical. *Id.* at *5.

9. Lien Waivers:

   A. *Indus. & Mech. Contractors, Inc. v. Polk Const. Corp.*, No. CIV.A. 14-513, 2014 WL 2719462, at *2 (E.D. La. June 16, 2014).

   > Subcontractor filed a Private Works Act lien and sued for breach of contract. The subcontractor's subcontract included a prospective blanket lien waiver. The owner and surety filed a motion for summary judgment, which the court denied. The court recognized that prospective lien waivers are enforceable in Louisiana, but that, as was held in *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 544–45 (5th Cir.2004), a lien waiver

provision does not waive the separate and independent right to dissolution of the contract, including the lien waiver provisions.

The court denied the motion, finding that disputed issues of material fact precluding summary judgment based on the record before it.

10. Open Account:

A. *R. L. Drywall, Inc. v. B & C Elec., Inc.*, 2013-1592 (La. App. 1 Cir. 5/2/14) 2014 WL 3559390.

A sheetrock contractor filed a Private Works Act lien and suit to enforce it against the owner. In the suit to enforce the lien, the contractor also claimed attorney's fees under the Open Account statute (La. R.S. 9:2781). The First Circuit noted that *Frey Plumbing Company, Inc. v. Foster*, 2007–1091 (La. 2/26/08), 996 So. 2d 969 (*per curiam*) removed many of the prior limitations on utilizing the Open Account statute in a construction dispute, and affirmed the trial court's award of attorney's fees.

B. *E. Smith Plumbing, Inc. v. Manuel*, 11-1277 (La. App. 3 Cir. 3/28/12), 88 So. 3d 1209, 1213-14.

Two subcontractors and the general contractor were in a payment dispute with the owner. The subcontractors sued the owner, but not the general contractor. The subcontractors claimed to be entitled to attorney's fees from the owner under the Open Account statute (La. R.S. 9:2781).

The court found that the amounts owed to the subcontractors included attorney's fees under the Open Account statute, but also found that the trial court erred as a matter of law in finding that it was the owner that owed them. The subcontractors established their open account with the general contractor, not the owner.

C. *Roofing Products & Bldg. Supply Co., LLC v. Mechwart*, 2013-1506 (La. App. 1 Cir. 5/2/14) 2014 WL 2711793, *reh'g denied* (June 3, 2014).

On a residential project, the homeowner bought shingles and roofing supplies directly from a material supplier, and had his contractor install them. The homeowner paid for the supplies with a credit card, but after the dispute arose, reversed the charge and refused to pay for the materials. The material supplier properly preserved and asserted its rights under the Private Works Act, and claimed attorney's fees against the owner under the Open Account statute. The trial court awarded judgment against the owner under the Private Works Act and the Open Account statute.

The First Circuit reversed the award under the Open Account statute, finding that this was not an open account because no credit was extended -- the owner paid for the materials at the time of sale (even though he later reversed the charges on his credit card).

11. Unjust Enrichment, Third Party Beneficiary, LUTPA, and Agency:

A. *JP Mack Indus. LLC v. Mosaic Fertilizer*, LLC, 970 F.Supp. 2d 516 (E.D. La. Sep. 4, 2013).

A subcontractor that did not timely file a statement of claim sued the owner and general contractor. The subcontractor asserted unjust enrichment and third party beneficiary (to the contract and change orders between the owner and general contractor) claims against the owner. The owner filed a Rule 12(b)(6) motion to dismiss, arguing that the subcontractor's exclusive remedy against the owner was under the Private Works Act and, alternatively, that the subcontractor had not and could not allege a cause of action against the owner for unjust enrichment or as a third party beneficiary. The court granted the owner's motion. The court declined, however, to hold that the subcontractor's exclusive remedy against the owner was under the Private Works Act, instead finding that the subcontractor could not allege a cause of action against the owner for unjust enrichment or as a third party beneficiary under the contract and change orders.

B. *E. Smith Plumbing, Inc. v. Manuel*, 11-1277 (La. App. 3 Cir. 3/28/12), 88 So. 3d 1209, 1213-14.

Two subcontractors and the general contractor were in a payment dispute with the owner. The subcontractors sued the owner, but not the general contractor. The subcontractors claimed to be entitled to judgment against the owners under the theory of unjust enrichment.

The court reviewed the elements of an unjust enrichment claim under Louisiana law, including the "absence of a remedy at law." *Minyard v. Curtis Products, Inc.*, 251 La. 624, 205 So. 2d 422 (La. 1967) and *G. Woodward Jackson Co., Inc. v. Crispens*, 414 So. 2d 855 (La. App. 4 Cir. 1982). The court found that the subcontractors here had additional legal remedies available to them, including collecting on an open account against the general contractor or pursuing their rights under the Private Works Act. Having failed to do so, "[t]hey are therefore prohibited from resorting to the extraordinary remedy of unjust enrichment." *Id*. at 1215-16.

C. *Shelter Products, Inc. v. Am. Const. Hotel Corp.*, No. 12-CV-2533, 2014 WL 2949444, at *7 (W.D. La. June 26, 2014).

Shelter Products involved a payment dispute arising out of sale of lumber by a material supplier to a subcontractor for use in the construction of a hotel and a joint check agreement between the general contractor, subcontractor, and material supplier. Ganga was the Owner, ACHC was the general contractor, Cratus was the subcontractor, and Shelter was the material supplier of lumber.

Before Shelter would sell to Cratus, it wanted a joint check agreement with ACHC. ACHC agreed to the joint check agreement but wrote in a "not to exceed" amount. Shelter apparently did not realize that the joint check agreement had been modified to include the NTE amount and sold lumber to the subcontractor in excess of the NTE amount.

Shelter sent notice of nonpayment to Ganga and requested notice of filing of termination under La. R.S. 9:4822.K. Ganga filed a notice of termination but did not notify Shelter. Shelter then filed its Private Works Act lien and filed suit to enforce the lien. Shelter's claim against ACHC included a count under Louisiana Unfair Trade Practices Act (“LUTPA”) for adding the NTE amount to the joint check agreement and for refusing to honor the joint check agreement. Shelter's claim against Ganga included a claim under LUTPA for failing to give the notice required by La. R.S. 9:4822.K.

The opinion we have is a Memorandum Ruling by a United States Magistrate Judge on cross motions for summary judgment on the LUTPA claims.

With regard to the LUTPA claim against ACHC, the court granted summary judgment in favor of ACHC, finding that the act of adding a NTE amount to the joint check agreement was not a violation of LUTPA.

More interestingly, with regard to the LUTPA claim against Ganga, the court found that the LUTPA claim against Ganga could survive this motion and would have to be decided based on a more robust record.

D. *Ted Hebert, LLC v. Infiniedge Software, Inc.*, 13-2052 (La. App. 1 Cir. 9/19/14) 2014 WL 4669188.

Hebert was a subcontractor to Arkel on a project owned by Infiniedge. During the project, the project engineer directed Hebert to install a larger piece of equipment than had been specified in the plans. No change order

was prepared or executed. Hebert sent Arkel a bill for the increased cost of the equipment, and Arkel denied the request because of the lack of a change order.

Hebert failed to preserve its rights under the Private Works Act.

Hebert sued Infiniedge, originally under an unjust enrichment theory. Infiniedge argued that Hebert had no right of action against it because it had failed to preserve its rights under the Private Works Act. On a writ application, the First Circuit agreed with Infiniedge and sustained its exceptions.

Hebert amended its petition to assert a claim against Infiniedge based on breach of contract and agency. Hebert alleged that Infiniedge was liable to Hebert for the increased cost of the equipment because Infiniedge had authorized the engineer act as Infiniedge's agent to direct Hebert to install the larger equipment. Under this agency and breach of contract theory, the court found that Hebert had stated a cause and right of action against Infiniedge and remanded the matter to the district court.

12. Unlicensed Contractors:

A. *In re S. Louisiana Ethanol, LLC*, No. 12-0854, 2014 WL 803704, at *2 (E.D. La. Feb. 19, 2014).

Under Louisiana law, it is "unlawful for any person to engage or to continue in this state in the business of contracting, or to act as a contractor ... unless he holds an active license...." La.R.S. 37:2160. A contract that is entered into with an unlicensed contractor is null and void. *Tradewinds Environmental Restoration, Inc., v. St. Tammany Park, LLC*, 578 F.3d 255, 259 (5th Cir. 2009). *Id*. at *2.

IPT entered into contracts with J & C on January 8, 2007. IPT became a licensed contractor in Louisiana on January 25, 2007. IPT, therefore, was not licensed when it entered into the contracts with J & C, and any contracts entered into by IPT with J & C prior to January 25, 2007 were null and void. *Id*.

Even after IPT obtained its contractor's license on January 25, 2007, any work IPT performed was done pursuant to the invalid, null and void contracts entered into on January 8, 2007. *Id.* at *4.

B. *LaCote, LLC v. Glob. Golf Const., Inc.*, No. CIV. A. 09-6384, 2009 WL 3763912, at *4 (E.D. La. Nov. 9, 2009)

The dispute in *LaCote* arose because the general contractor, whom the subcontractor contracted with, was an unlicensed contractor. The owner of the property was seeking to recover money paid to the subcontractor after the subcontractor threatened to file a lien against the owner. The owner argued that because the general contractor was unlicensed, the subcontractor's contract with the general contractor was invalid, and, therefore, the subcontractor could not recover under the Private Works Act. The court disagreed and reasoned that the contract was not void due to the lack of the general contractor's license because the court was not willing to hold the lawfully licensed subcontractor responsible for the unlicensed general contractor's act. Therefore, the court found that because the subcontractor's contract was not a nullity, the subcontractor had a validly enforceable Private Works Act lien. *Id*. at *4.

13. Procedure:

A. *Cornell Malone Corp. v. Sisters of the Holy Family, St. Mary's Acad. of the Holy Family*, 922 F.Supp. 2d 550 (E.D. La. 2013)

Cornell Malone involved multiple proceedings (some including Private Works Act claims) in multiple courts, all arising out of a single construction project. The United States District Court for the Eastern District of Louisiana applied the *Colorado River* abstention doctrine and stayed the federal court action in lieu of the pending parallel state court proceeding.

B. *Mid-S. Plumbing, LLC v. Dev. Consortium-Shelly Arms, LLC*, 12-1731 (La. App. 4 Cir. 10/23/13), 126 So. 3d 732.

After the contractor that claimed a lien against mortgaged property obtained a writ of *fieri facias*, the mortgagee filed a petition seeking to enjoin the sheriff's sale of the property, alleging that the contractor's lien was invalid. The trial court granted the mortgagee a preliminary injunction enjoining the sale, and the Fourth Circuit affirmed the granting of the preliminary injunction, finding that the mortgagee had standing to seek to enjoin the sheriff's sale, and that the mortgagee demonstrated a *prima facie* case of entitlement to relief, as necessary to support the preliminary injunction.