

Introduction and section on the Louisiana Private Works Act

Introduction

I. Privileges In General

A. Nature of Privileges

- The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exists among the creditors some lawful causes of preference. La. CC 3183
- Lawful causes of preference are privilege and mortgages. La. CC 3184
- *Stricti juris*- privilege can be claimed only for those debts to which it is expressly granted in this Code. LA CC 3185
- Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even over those who have mortgages. La. CC 3186

B. Why You Should Care

Privileges can attach to movables, immovables (like mineral leases!), even ships! That mineral lease you acquired, the ship or platform you bought, the pipeline you were assigned- some stranger who provided services to it in the past may have a right to it that is superior to yours. If he claims one, this will lead to legal costs at the least. Bonding costs to use the thing while you duke it out in court are not unlikely. And you may wind up having to pay even more to clear all the clouds off the title of the thing you already spent a ton of money on.

This lecture is intended to:

1. Refresh your familiarity with the mechanics of three types of lien and privilege: Louisiana Oil Well Lien Act ("LOWLA") privileges, Louisiana Private Works Act Privileges ("PWA"), and federal maritime liens;
2. Highlight which privileges apply to what, and the advantages/disadvantages of each;

3. Identify the borders and overlap between the most common privileges the E & P industry encounters, and point out unfamiliar and unexpected subjects of lien rights.

II. The Outer Continental Shelf Lands Act (“OCSLA”)

43 U.S.C. §1301 *et seq*

A. OCSLA Extends Louisiana Privilege Law Beyond State Waters to the Continental Shelf

Within 3 miles of the Louisiana coast, Louisiana law applies. If there is a pipeline, platform, or well within that distance, LOWLA and the PWA will apply. Beyond 3 miles, OCSLA will apply the law of the adjacent state (in certain circumstances).

B. When Does OCSLA Apply?

The Fifth Circuit, in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, established a 3 part test for determining whether OCLA mandated applying the law of the adjacent state. 895 F.2D 1043, 1047 (5th Cir. 1990)

1. The controversy must arise on a situs covered by OCSLA (more than 3 miles offshore, and on the subsoil, seabed, or artificial structures permanently or temporarily attached thereto)
2. Federal maritime law must not apply of its own force
3. The state law applied must not be inconsistent with Federal law

III. Types of Privileges Relevant to E&P Companies, and the Advantages of Each

A. LOWLA

-This is a right against the lease, things on the lease, and most importantly, production from the lease. Oil and gas are very liquid (drumroll) assets, much more so than buildings or other immovables, or even lease interests.

-It is limited to work connected with OPERATIONS. This means it must be closely connected with a WELL. Production facilities are sufficiently connected, but they are as distant as you can get and still have a LOWLA Lien.

Transmission pipelines, for example, are not subject to a LOWLA lien. (Gathering lines probably would be.)

B. Maritime

-These ONLY apply to VESSELS. However, they are the only liens that apply to vessels. If your client's work or materials were applied to a vessel, this is your only option. LOWLA and PWA will be preempted.

-Vessels are very valuable. They can also be difficult to seize at times. Some attempts to enforce a lien against a vessel have resembled the hunt for the Bismark.

C. PWA

-It is preempted by LOWLA. This is fine, because you'd rather have a LOWLA lien anyway. The privilege does **NOT** attach as a result of work covered by LOWLA. La. R.S. 9:4808(D)(1).

-The liens it provides are only against THINGS, for seizure and sale. You cannot grab production, as you can under LOWLA.

-If LOWLA doesn't apply, and you're not dealing with a vessel, it is often the only game in town.

-Pipelines, platforms too removed from well operations to be covered by LOWLA, various and sundry- this will be the catchall when LOWLA fails you. (How about compressors used to force gas or oil into a transmission line?)

Louisiana Private Works Act

(LA R.S. § 9:4801 *et seq*)

I. Who Is Protected

Those protected can be generally described as those who "work" on the improvement or construction, those who supply building materials or consumables used at the work site, and those who rent equipment used at the work site. This will include:

1. Contractors
2. Sub-contractors (and subs of subs)
3. Workers
4. Materialmen
5. Lessors
6. Professionals such as architects and surveyors

To be protected, all these categories must have some direct connection to the site of the construction.

II. What Work Is Covered

The work must be connected to the site. Offsite labor or supply done to support the construction will not qualify.

III. The Two Rights

The first two provisions of the PWA can be confusing. They seem to overlap. They do not.

A. 9:4801- The obligations of the owner are protected by a privilege on the thing.

4801 provides a privilege to those **in privity with the owner**. Only. Third parties get **NO** privilege under this.

“The following persons have a privilege on an immovable to secure the... obligations of the owner... Contractors... Laborers or employees of the owner... Sellers, for the price of movables sold to the owner... Lessors, for the rent of movables... leased to the owner... [professionals (such as architects and surveyors)] employed by the owner.

B. 9:4802- Superior Third Parties Are Responsible for the debts of their subordinates. A privilege on the thing secures the owners obligations under this provision.

9:4802 provides that persons not in privity can still sue the owner, contractors, and subcontractors with whom they are not in privity, and their right against the owner is secured by a lien on the thing worked on.

The owner’s liability is not limited to the value of thing worked on. (Although, of course, the privilege is.) However:

Owner can escape personal liability through notification and bonding

The owner can escape personal liability by following procedures set out in 9:4811-13. 9:4802(C). To do so, he must:

1. Require the contractor to post a bond for the work to be done, pursuant to the provisions and in the amount set by 4812.
2. File in the mortgage records of the parish where the work is to be performed (9:4831) written notice of his contract with the general contractor, in the form prescribed by 9:4811.

IV. How the Privilege Is Created and Preserved

There are multiple rules for the preservation, ranking, and expiration of PWA privileges. A detailed examination of these would extend beyond the very limited scope of this presentation. Consider La. R.S. § 9:4820-41.

V. How Is It Enforced

To enforce the privilege under the PWA, suit must be filed against the owner seeking the principal, interest, and the costs of filing the privilege.

Once the suit is won, the property may be seized and sold via regular fieri facias procedure. La. CCP 2291-2381.

VI. What Things Are Covered by Privilege

Immovables. That is **ALL**. The immovable worked on, or into which a materialman's supplies were incorporated. (And remember, if owner complied with the formalities of 4802(C), and 4811-13, he has **NO** obligation, and therefore no privilege attaches to his property.

The privilege can attach to a lease interest. (A lessee can be an "owner" for purposes of 9:4806(A).) It cannot attach to a greater interest than the "owner" has. 9:4806(C). For a privilege to affect the interest of a lessor, the lessor would have to be privy to the construction contract, or specifically agree in writing to the contract and to be liable for claims under 9:4802.

A. What Is an Immovable?

1. Definition

The Code defines immovables as tracts of land and their component parts. La. CC 462. However, buildings which belong to someone other than the owner of the land are separate immovables. La. CC 464. "Other constructions" (constructions other than buildings) which belong to someone other than the owner of the land are considered movables. La. CC 464.

Result- when the owner of the land orders improvements, the PWA privileges attaches to construction and the underlying land (the construction being part of the immovable.) If the "owner" under the PWA is **NOT** the owner of the land, only buildings are considered immovables, and therefore no privilege can attach to "other constructions."

So what's the difference between a "building" and an "other construction"?

There's the rub- there's no bright line. As will be seen below, modules for an offshore platform are immovables, even while they sit on shore waiting for transport. Offshore platforms are immovables. Pipelines are immovables. What about tankage or compressors, or separators? Unknown.

B. The privilege does NOT attach as a result of work covered by LOWLA. La. R.S. 9:4808(D)(1).

This means that many constructions, which would otherwise have been covered by the PWA, will be excluded. This is fine, as LOWLA gives a better privilege anyway. But it can surprise the unwary.

For example, LOWLA gives liens for work occurring "on the well site." La. R.S. 9:4861(d). The well site is larger than the immediate vicinity of the well- it is the operating interest of unit. So activity on the lease will often be covered by LOWLA, not PWA. For example, **work for the following purposes are explicitly NOT covered by LOWLA:**

transporting, handling, processing, treating, or otherwise dealing with:

1. Liquid hydrocarbons produced or separated at the well site after being removed from a leasehold tank and delivered into a truck, barge, pipeline, or other facility for transportation away from the well site.
2. Hydrocarbons produced in gaseous form, or produced in association with those produced in gaseous form and not separated at the well site, after being delivered into a pipeline for transportation away from the well site or delivered to a plant at the well site for processing or manufacturing.
3. Salt water or another waste substance produced in association with hydrocarbons, after it is placed in a truck, rail-car, pipeline, or other means of transportation for disposal away from the well site. La. R.S. 9:4861(4)(b).

Note that all these deal with transport **AWAY** from the lease.

B. Particular Immovables under the PWA

1. Platforms

As LOWLA and PWA have been amended over the years, older jurisprudence has become less of a reliable guide. Two things are certain- rigs and platforms permanently attached to the ocean floor are “buildings”, hence are separate immovables, hence are at least potentially covered by PWA. Second, large rig modules, prior to installation, are “buildings” and subject to the PWA.

a. Rigs and platforms are buildings

-*St. Mary Iron Works Inc. v. McMoran Exploration Co.*, 809 F.2d 1130 (5th Cir. 1987).

-*Shell Offshore, Inc. v. Kirby Exploration of Texas*, 909 F.2d 811, 815 (5th Cir. 1990)

and in a non-privilege context

-*Olsen v. Shell Oil Co.*, 365 So.2d 1285, 1290 (La. 1979).

-*Steele v. Helmerich & Payne International Drilling Co.*, 738 F.2d 703, 705 (5th Cir. 1984).

-*Bruyninckx v. Bratten*, 554 So.2d 247 (La. App. 3 Cir. 1989)

But-

A *movable* drilling rigs is **not** a building. (Non-privilege context.) *Boggs v. Atlantic Richfield Co.*, 720 F.Supp. 72 (E.D.La. 1989).

An *incomplete* platform is not a building. *Ainsworth v. Shell Oil Co.*, 649 F.Supp. 1223 (W.D.La. 1986).

b. Rig modules, prior to installation, are subject to PWA.

P.H.A.C. Services, Inc. v. Seaways International, Inc. 403 So.2d 1199 (La. 1981.)

c. POST-installation, it depends on the purpose of the platform into which they are installed

Once they are installed, they become component parts of the platform, and as such the manufacturer’s privilege would attach to the platform itself. La. R.S. 9:4801-2, 9:4808. *See St. Mary Iron Works Inc. v. McMoran Exploration Co.*, 809 F.2d 1130 (5th Cir. 1987). There, a living quarters unit was installed on a platform offshore. The court assumed the work done and materials supplied by subcontractors to build a living quarters module for a drilling platform was “in connection with drilling

a well.” *Id.* at 1134. Therefore, LOWLA applied and PWA could not. Were the situation to repeat today, and the court to conclude that the platform **NOT** involved in “operations”, the result might be a PWA lien, rather than a LOWLA one. Examples of platforms not involved in operations would be any used exclusively for the same purpose “non-operational” machinery on land are used for- post separation work such as transport to a refinery.

2. Pipelines

The proper vehicle for asserting a privilege on a pipeline depends on the purpose of the pipeline. A pipeline on a lease, intended to transport from well to separator, or from tank to well (for salt water disposal or gas lift) would be tied up with “operations”, and therefore subject to a LOWLA. (a “gathering line”) On the other hand, construction of a pipeline **off** the lease, for example to transport product to market or refinery, would not give rise to a LOWLA privilege. (a “transmission line”)

Continental Casualty Co v. Associated Pipe and Supply Co, 447 F.2d 1041 (5th Cir. 1971). Concluded that both PWA and LOWLA privileges applied to gathering lines laid offshore to transport product from platforms to an onshore terminal.

Since the PWA has since been modified to exclude work covered by LOWLA, PWA liens would no longer apply to gathering lines. (*see* La. Acts 1981, No. 724, § 1, eff. Jan. 1, 1982, amending La. R.S. 9:4808(D)).

On the other hand, *McGee v. Missouri Valley Dredging*, the court concluded that work on a transmission line did not qualify for a LOWLA lien. 182 So.2d 764 (La. 1 Cir. 1966). Work on such transmission pipelines would be covered by PAW privileges. *See* Chicoine, *Lien on LOWLA; It’s a Privilege: Recent Revisions to the Louisiana Oil Well Lien Act*, 57 La. Law Rev. 1133, 1138 (Summer 1997).