

PRESENTED AT

Mortgage Lending and Servicing Institute

September 12-13, 2019

Austin, Texas

Challenges In Building And Construction

Dale E. Butler

Author Contact Information:

Dale E. Butler

Butler Law Firm, PC

Flower Mound, Texas

dbutler@butlerlegal.com

972.355.6600

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. MODULAR CONSTRUCTION.....	1
A. Benefits of Modular Construction.....	1
B. Good or Services?	2
C. Article 9 Security Interests.....	4
III. ENFORCEMENT OF AGREEMENTS.....	5
A. Assignment.....	6
B. Third-Party Beneficiary	7
IV. TRUST FUNDS.....	8
V. RETAINAGE	10
VI. MECHANIC’S LIENS	11
A. Lien Rights.....	11
B. Lien Perfection	12
C. Inception of a Lien	13
D. Relation Back Doctrine.....	14
E. Removables.....	15
F. Modular Components as Removables and Specially Fabricated Materials.....	16
G. Sham Contracts.....	17
H. Statutory Lien Waivers	17
VII. CONCLUSION	18

TEXAS STATUTORY LIEN WAIVER FORMS - End of Document

CHALLENGES IN BUILDING AND CONSTRUCTION

I. INTRODUCTION

Everyone involved in a construction project wants the project to go smoothly, which usually means they want the project to be on time and within budget. This applies to lenders as much as any other party. Unfortunately, this doesn't always happen. This paper will take a brief look at some of the issues in building and construction that may present challenges for a lender on a project.

II. MODULAR CONSTRUCTION

A. Benefits of Modular Construction

In modular construction, a majority (if not all) of a building is constructed offsite in a warehouse or controlled environment, and the building components are later delivered to the construction site for incorporation into the structure. Modular construction for both residential and non-residential construction has been utilized for several years in the construction industry, although its use has grown over the last several years.

Modular construction still requires design services. The owner can hire its own design team and provide the plans and specifications to the modular contractor, or hire the modular contractor to handle both the design and construction of the components.

Modular construction is used on a variety of projects, including multifamily, commercial, and hotels. There are several potential benefits to utilizing modular construction such as shorter construction schedules, cost savings, lower labor costs, fewer weather delays, and improved quality control and safety. While these benefits lower certain risks for lenders, there are other risks that lenders must navigate when funding a project that will utilize modular construction.

If the modular components will be constructed in a different state than where the project is located, there may be issues related to multiple states' laws applying to portions of the work. For instance, differences in limitations periods or statutes of repose could become issues. In addition, the modular components may have to comply with applicable statutes and building codes in multiple jurisdictions.

Insurance is important on every project, but on a modular construction project insurance is particularly important because the majority of the building's components will likely be offsite until that are ready to be shipped and installed. If liability insurance for the overall project is being provided under a controlled insurance program ("CIP"), offsite work or materials are usually not covered. This means the party sponsoring the CIP will need to address offsite work with the CIP administrator to see if the "Project Site" can be defined to include the offsite work or if the coverage can be extended to "incidental areas," which should also be specifically defined.

In addition, builder's risk insurance, which covers the project site during construction, may not provide coverage for the location of where the modular components are being constructed. So if there is a catastrophic event at the modular contractor's warehouse then a significant portion of the "building" will essentially be destroyed. In light of the extensive risks in a modular construction project, all parties should focus on getting the insurance right.¹

B. Good or Services?

Article 2 of the UCC only applies to transactions involving goods,² which are defined as "all things (including specially manufactured goods) which are movable at the time of

¹ If the modular components are being constructed in another state then some requirements may differ between the states. The contract with the modular contractor needs to try and address any potential issues where there could be a conflict between the states' laws. For example, the worker's compensation limits will need to meet the requirements of the state where the workers will be located.

² TEX. BUS. & COM. CODE §2.102

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Challenges in Building and Construction

Also available as part of the eCourse

[2019 William W. Gibson, Jr. Mortgage Lending and Servicing eConference](#)

First appeared as part of the conference materials for the
53rd Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"Challenges in Building and Construction"