

1985

Worthington and Kimball Construction Company,  
a Utah general partnership, Gary Worthington and  
Edwin N. Kimball, general partners v. C and A  
Development Company, an Arizona corporation,  
C and A Enterprises, an Arizona partnership, First  
Interstate Bank of Arizona, N.A., Stewart Title  
Company of Salt Lake City : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Robert F. Bentley; Bentley and Armstrong; LaVar E. Stark; Attorneys for Appellees.

Robert F. Babcock; Walstad and Babcock; Attorney for Appellant Worthington and Kimball Construction.

---

### Recommended Citation

Brief of Respondent, *Worthington and Kimball v. C and A*, No. 198520674.00 (Utah Supreme Court, 1985).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/562](https://digitalcommons.law.byu.edu/byu_sc1/562)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

20674

IN THE SUPREME COURT  
OF THE STATE OF UTAH

WORTHINGTON & KIMBALL CONSTRUCTION :  
COMPANY, a Utah General Partnership, :  
GARY WORTHINGTON and EDWIN N. :  
KIMBALL, general partners, :

Plaintiffs/Appellants, :

No. 20674

vs. :

C & A DEVELOPMENT COMPANY, an :  
Arizona corporation, C & A ENTER- :  
PRISES, an Arizona partnership, :  
FIRST INTERSTATE BANK OF ARIZONA, :  
N.A., STEWART TITLE COMPANY OF SALT :  
LAKE CITY, :

Defendants/Respondents, :

RESPONDENT'S BRIEF

Appeal from the Judgment of the Second  
District Court for Weber County  
The Honorable Ronald O. Hyde

LaVar E. Stark  
2485 Grant Avenue, Suite 200  
Ogden, Utah 84401  
Attorney for Defendants/  
Respondents First Interstate  
Bank of Arizona, N.A., and  
Stewart Title Company of  
Salt Lake City

Robert F. Bentley  
BENTLEY & ARMSTRONG  
7525 East Camelback Road  
Scottsdale, Arizona 85251  
Attorney for Defendants/Appellees  
C & A Development Company and  
C & A Enterprises

Robert F. Babcock  
WALSTAD & BABCOCK  
185 South State Suite 1000  
Salt Lake City, Utah 84111  
Attorney for Plaintiff/Appellant  
Worthington & Kimball Construction

FILED

DEC 18 1985

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	i
CONSTITUTION	ii
STATUTES	ii
OTHER	ii
STATEMENT OF ISSUE ON APPEAL	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENTS	3
ARGUMENT	4
POINT I	4
THE NOTICE OF LIEN IS NOT VERIFIED AND HENCE IS FATALLY DEFECTIVE	
POINT II	12
THE AMENDMENT OF UCA, 1953 SECTION 38-1-7, DISPENSING WITH THE VERIFICATION REQUIREMENT IS NOT RETROSPECTIVE IN ITS APPLICATION	
POINT III	15
THE AMENDMENT TO UCA, 1953 SECTION 38-1-7 IS A VIOLATION OF ARTICLE I, SECTION 7 OF THE CONSTITUTION OF UTAH	
POINT IV	17
THE ARBITRATION AWARD OF INTEREST WAS PUNITIVE AND HENCE INAPPROPRIATE	
CONCLUSION	18
ADDENDUM	Addendum

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Anchorage Sand and Gravel Company, Inc., v. Woolridge</u> , 619 P2d 1014 (Alaska 1980)	8, 10
<u>Archer v. Utah State Land Board</u> , 15 Utah 2d 392 (1964), P2d 622	12
<u>Aviles v. Eshelman Electric Corporation</u> , 379 A.2d 1227 (Maryland App. 1977)	14
<u>Boucofski v. Jacobsen</u> , 36 Utah 165, 104 P. 117 (1909)	13
<u>Coleman v. Schwendiman</u> , 680 P2d 29 (Utah 1984)	10
<u>Cook Associates, Inc., v. Warnick</u> , 664 P2d 1161 (Utah 1983)	17
<u>Disconnection of Certain Territory from Highland City</u> , 668 P2d 544 (Utah 1983)	13
<u>Ewell v. Morrow</u> , 28 Utah 278, 78 P. 605 (1904)	13
<u>Firecrest Supply, Inc., v. Plummer</u> , 634 P2d 891 (Wash. App. 1981)	8
<u>First Security Mortgage Co. v. Hansen</u> , 631 P2d 919 (Utah 1981)	4
<u>Graff v. Boise Cascade Corp.</u> , 660 P2d 721 (Utah 1983)	7
<u>Highland Construction Company v. Union Pacific Railroad Company</u> , 683 P2d 1042 (Utah 1984)	17
<u>Ingraham's Estate, Petersen v. State Tax Commission</u> , 148 P2d 340, 106 Utah 337 (1944)	12

	<u>PAGE</u>
<u>McCarrey v. Utah State Teachers' Retirement Board, 177 P2d 725, 111 Utah 251 (1947)</u>	12
<u>Stephenson v. Ketchikan Spruce Mills, Inc. 412 P2d 496 (Alaska 1966)</u>	8
<u>Thompson v. Ford Motor Company, 384 P2d 109 14 Utah 2d 334 (1963)</u>	15
<u>Union Pacific Railroad Company v. Trustees, Inc., 329 P2d 398, 8 Utah 2d 101 (1958)</u>	12
<u>Utah Department of Transportation v. Fuller, 603 P2d 814 (Utah 1979)</u>	15
<u>Yost v. State of Utah, 640 P2d 1044, (Utah 1981)</u>	15

## CONSTITUTION

CONSTITUTION OF THE STATE OF UTAH ARTICLE I, SECTION 7	15 and Addendum
---	--------------------

## STATUTES

UCA, 1953 Section 38-1-7	1 and Addendum
UCA, 1953 Section 57-2-7	6 and Addendum
UCA, 1953 Section 68-3-3	3 and Addendum

## OTHER

92CJS at Page 996	5
-------------------	---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

WORTHINGTON & KIMBALL CONSTRUCTION	:	
COMPANY, a Utah General Partnership,	:	
GARY WORTHINGTON and EDWIN N.	:	
KIMBALL, general partners,	:	
	:	
Plaintiffs/Appellants,	:	Case No. 20674
	:	
vs.	:	
	:	
C & A DEVELOPMENT COMPANY, an	:	
Arizona corporation, C & A ENTER-	:	
PRISES, an Arizona partnership,	:	
FIRST INTERSTATE BANK OF ARIZONA,	:	
N.A., STEWART TITLE COMPANY OF SALT	:	
LAKE CITY,	:	
	:	
Defendants/Respondents,	:	

RESPONDENTS' BRIEF

---

STATEMENT OF ISSUES ON APPEAL

1. Whether the Notice of Lien was properly verified as required by UCA, 1953 Section 38-1-7.
2. Whether the amendment which eliminated the verification requirement has retrospective effect.
3. Whether the amendment is unconstitutional.
4. Whether the interest award in the arbitration proceeding was a penalty and hence, inappropriate.

STATEMENT OF FACTS

Plaintiffs/Appellants Worthington and Kimball Construction Company, a Utah General Partnership, Gary Worthington and Edwin N. Kimball, general partners, hereinafter Worthington & Kimball, sought to foreclose its Notice of Lien claiming priority over the Deed of Trust of Defendants/Respondents First Interstate Bank of Arizona, N.A., and Stewart Title Company of Salt Lake City, hereinafter First Interstate. Worthington & Kimball also requested confirmation of an award of arbitration.

The claim of lien is signed and acknowledged as follows:

"STATE OF UTAH )  
COUNTY OF SALT LAKE )

On this 13th day of January, 1982, personally appeared before me Edwin N. Kimball, who duly acknowledged to me that he has executed this notice and that he has read the contents thereof, and the same is true of his own knowledge.

/s/ Arnold Allred  
Notary Public  
Residing at: 6586 W. 3500 S.

My Commission Expires:  
18 Sept. 1985 "

The trial court held that the Notice of Lien was not properly verified and hence null and void (R 1130, 1132).

After the signing and entry of the Order, Judgment and Decree, UCA, 1953 Section 38-1-7 was changed to eliminate the verification requirement.

The Court affirmed the arbitration results except the interest at the rate of 15% was found to be a penalty and was reduced to the rate of 10%.

The arbitration award at paragraph 7 (addendum 3 of Worthington & Kimball's brief) provides:

"The contractor is entitled to interest at the rate of 15% per annum on the sum of \$377,131.00 from December 1, 1981 until paid by owner. We select that rate in part as a measure of damages to Worthington and Kimball for the unreasonable withholding of the balance of the contract price."

#### SUMMARY OF ARGUMENTS

The Notice of Lien was not verified as required by statute. With due regard to Worthington & Kimball's claims of (a) broad construction; (b) protection to furnishers of labor and materials and (c) substantial compliance, nevertheless, the requirement of verification is explicit, clear and mandatory under Utah case law.

The change in the statute dispensing with the verification requirement is a change of substance, not procedure. UCA, 1953 Section 68-3-3 and the weight of



authority indicate its application is prospective and not retrospective.

First Interstate objects to the inclusion in Worthington & Kimball's brief of the legislative history for the 1985 amendment to mechanic's lien law (addendum 8) as being beyond the scope of the matters presented at the trial.

The amendment is unconstitutional as being deprivation of property without due process of law.

The interest award of 15% is on the face of it a penalty, and as such, inappropriate.

### ARGUMENT

#### POINT I

#### THE NOTICE OF LIEN IS NOT VERIFIED AND HENCE IS FATALY DEFECTIVE

UCA, 1953 Section 38-1-7, sets forth the requirements of the Notice of Claim and states:

"xxxwhich claim must be verified by the  
oath of himself or by some other person.xxx"

The case of First Security Mortgage Co., v. C. Scott Hansen, 631 P2d 919 (Utah 1981), the Utah Supreme Court held the lien invalid because of lack of verification. In

this case, a statutory corporate acknowledgement was used in lieu of a sworn statement that the contents of the lien notice were true. The Court stated that the corporate acknowledgement was insufficient as an oath as to the truthfulness of the facts giving rise to the claim of lien.

In strictly construing the statutory requirements, the Court used the following language:

"Verification is not a hypertechnicality that we can discount. Without verification, no lien is created. Our statute leaves no room for doubt as to the requirement of a verified notice of claim, and this Court in *Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 P. 713 (1906), stated that since a mechanic's lien is statutory and not contractual, a lien cannot be acquired unless the claimant complies with the statutory provisions xxx 87 P at 716

The notice of lien claim in the instant case clearly lacked verification, the corporate acknowledgement being insufficient as an oath as to the truthfulness of the facts giving rise to the claim of lien. Defendant therefore failed to create a valid mechanic's lien, and the trial court was correct in dismissing its claim. In view of this holding, defendant's argument that it was nevertheless in substantial compliance with the lien statute is unavailing."

"Verification" is defined in 92CJS AT PAGE 996 as follows:

"Certifying that the statement as made is true; confirmation or substantiation of something already done; the certificate that the writing is true; more specifically, a confirmation of the correctness, truth or authenticity of a pleading, account or other paper by affidavit, oath or deposition.

"Verification" includes both the actual swearing to the truth of the statements by the subscriber and also the certification thereto by the notary or other officer authorized by law to administer oaths. It is a personal ceremony.

xxx"

And in the pocket parts:

"(1) a "Verification" is an affidavit attached to a statement, as to the truth of the matters therein set forth.

(2) "Verification" requires formal declaration and verification under oath bespeaks some further formal act or presence calculated to bring to bear upon declarant's conscience the full meaning of what he does.

xxx"

The acknowledgements in Worthington & Kimball's Notice of Lien follow closely the statutory form UCA, 1953 Section 57-2-7 as follows:

"State of Utah )

County of \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, personally appeared before me \_\_\_\_\_ who duly acknowledged to me that he has executed this Notice and that he has read the contents thereof, that the same is true of his own knowledge.

\_\_\_\_\_  
NOTARY PUBLIC

Residing at: \_\_\_\_\_

My Commission Expires:

\_\_\_\_\_ "

The acknowledgement in Worthington & Kimball's claim of lien is as follows:

"STATE OF UTAH            )  
                                  :ss.  
COUNTY OF SALT LAKE )

On this 13th day of January, 1982, personally appeared before me Edwin N. Kimball (sic), who duly acknowledged to me that he has executed this notice and that he has read the contents thereof, that the same is true of his own knowledge.

/s/ Arnold Allred  
Notary Public  
Residing at: 6586 W. 3500 S.  
(seal)

My Commission Expires:  
18 Sept. 85"

Verification should be in the following form:

"State of Utah            )  
                                  :ss.  
County of \_\_\_\_\_ )

\_\_\_\_\_, being first duly sworn, says that he is \_\_\_\_\_ claimant in the foregoing Notice of Lien; that he has read said Notice and knows the contents thereof and that the same is true of his own knowledge.

(signature)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC"

The case of Graff v. Boise Cascade, 660 P2d 721, (Utah 1983), is also pertinent.

In this case, the lien form was signed, but the verification block was neither filled in as to the name of the person making the verification, nor was it signed. The Court held that the notice of claim of lien clearly lacked verification and that the statutory requirements have not been substantially complied with.

Worthington & Kimball argues that the lien form substantially complies with the Utah Code and cite as authority the following cases:

Firecrest Supply, Inc., v. Plummer, 634 P2d 891  
(Washington 1981)

Stephenson v. Ketchikan Spruce Mills, Inc., 412 P2d  
496 (Alaska 1966)

Anchorage Sand and Gravel v. Woolridge, 619 P2d 1014  
(Alaska 1980)

These cases are distinguishable from the case at bar.

In Firecrest,

"... registered agent signed claim, his name was typed in on verification identifying him as the claimant who was sworn, and there was nothing to suggest that the registered agent was without authority."

The verification was as follows:

"State of Washington     )  
                                      :ss.  
County of Pierce         )

David Perkins, registered agent, being sworn,  
says: I am the claimant xxxxx above named;  
I have heard the foregoing claim read and know

the contents thereof and believe the same to be just.

/s/ Beverly C. Wilson

Subscribed and sworn to before me this 13th day of July, 1978.

residing in Tacoma, Wa  
(seal)"

The jurat stated that the signer was sworn. There is no such statement in the case at bar.

In Stephenson, the lien form was executed as follows:

"KETCHIKAN SPRUCE MILLS, INC.

By: /s/ Lyle E. Anderson  
LYLE E. ANDERSON, Manager

Immediately below Anderson's signature was the following:

UNITED STATES     )  
  OF AMERICA       :ss.  
STATE OF ALASKA    )

LYLE E. ANDERSON, being first duly sworn, upon oath, deposes and says:

That he is the Manager of KETCHIKAN SPRUCE MILLS, INC., and makes this verification for and on behalf of said corporation; that KETCHIKAN SPRUCE MILLS, INC., is the claimant named in the foregoing claim of lien; that he has read the same and knows the contents thereof and that the same is true of his own knowledge.

---

SUBSCRIBED AND SWORN to before me this 5th day of March, 1962.

/s/ Veryl B. Lekander  
Notary Public in and for  
Alaska  
 My Commission expires:  
 9/28/64"

Here, the jurat says that the signer "being first duly sworn, upon oath deposes and says: xxx." There is no statement of swearing in the case at bar.

In Anchorage Sand and Gravel the court found that the language "hereby verifies that said facts are true and correct" amounts to a verification. The Alaska court stated that to "verify" means to "confirm by oath". The Court held that when a lien claimant, in the presence of a notary, affixes his signature to a written statement incorporating the necessary elements of a claim of lien, and the notary certifies this act, claimant has substantially complied with the requirements of an "oath."

In Worthington & Kimball's lien form there is no statement that the signer made a verified statement, or was under oath. There is simply an acknowledgement that he signed it and that the contents are true.

In discussing the requirements for an oath, the Supreme Court in Coleman v. Schwendiman, 680 P2d 29, (Utah 1984), quoted with approval two earlier cases as follows:

"Some courts have held that signing an affidavit in the presence of a notary is sufficient to constitute the taking of an oath. However, this court has not followed that view. In Spangler v. District Court of Salt Lake County, we said that to constitute the taking of an oath:

There must be definite evidence that affiant was conscious that he was taking an oath; that is, there must be not only the consciousness of affiant that he was taking an oath, but there must be some outward act from which that consciousness can be definitely inferred. That cannot be done from the mere signature to a printed form of an oath.

In McKnight v. State Land Board, the Court cited Spangler with approval and further set the essentials of an oath:

1. A solemn declaration.
2. Manifestation of an intent to be bound by the statement.
3. Signature of declarer.
5. Acknowledgement by an authorized person that oath was taken."

First Security Mortgage Co. v. C. Scott Hansen,  
supra, is controlling.

The lien being fatally defective as to verification fails.



## POINT II

THE AMENDMENT OF UCA, 1953 SECTION 38-1-7,  
DISPENSING WITH THE VERIFICATION REQUIREMENT IS.  
NOT RETROSPECTIVE IN ITS APPLICATION

Throughout these proceedings, including the signing and filing of the Order, Judgment and Decree, the mechanic's lien statute required the Notice of Claim to be verified. The amendatory statute which eliminated this requirement made no provision for retroactive application.

UCA, 1953 Section 68-3-3, as amended provides:

"Revised statutes not retroactive. No part of these revised statutes is retroactive, unless expressly so declared."

The general rule that legislative enactments operate prospectively rather than retrospectively is expressed in several Utah cases including Archer v. Utah State Land Board, 392 P2d 622, 15 Utah 2d 321 (1964); McCarrey v. Utah State Teachers Retirement Board, et al., 177 P2d 725, 111 Utah 251 (1947).

The following cases hold that there must be an express declaration in the legislative enactment for it to have retroactive effect. In re: Ingraham's Estate, Petersen v. State Tax Commission, 148 P2d 340, 106 Utah 337 (1944). Union Pacific Railroad Company v. Trustees, Inc., 329 P2d 398, Utah (1958).

If the amendment constitutes a fundamental change in the adjective law as distinguished from matters of practice or procedure, its application is prospective and not retrospective. Boucofski v. Jacobsen. 36 Utah 165, 104, P.117 (1909). In the matter of the Disconnection of certain territory from Highland City, 668 P2d 544, (Utah 1983).

In the Highland City case (P2d 548, 549) the changed legislation placed the burden of proof on petitioner by a preponderance of the evidence and added as further matters for the District Court to consider the effects of the disconnection on the city or community as a whole and adjoining property owners.

The Court held:

"There being no provision to the contrary in this circumstance and the amendment being substantive rather than procedural, the general rule governs and the 1983 amendments do not apply to this case".

A mechanic's lien is statutory and not contractual. It only arises upon compliance with the statutory provisions. Prior to the amendment without verification no lien was created. Elwell v. Morrow, 78 P 605, 28 278 Utah (1904). First Security Mortgage Co. v. Hansen, supra.

The Court, in First Security, supra in discussing the

need for a verification held that the filing of a lien creates serious consequences to persons having an interest in real property which justifies the "statutory imposition of a requirement that one who makes the claim must furnish a sworn statement to the truthfulness of the facts giving rise to it. xxx Verification is not a hypertechnicality that we can discount. Without verification, no lien is created."

The right to a lien is a matter of substance. Without verification there is no lien. The elimination of the requirement of verification is the elimination of a matter of substance.

Worthington & Kimball rely on Aviles v. Eshelman Electric Corporation, 379 A.2d 1227 (Maryland App. 1977). In affirming that "in Maryland mechanic's lien statutes create no vested rights, but are only an in rem remedy which can be changed or completely withdrawn at the whim of the legislature so as to control foreclosure actions, be they accrued, pending or future". The Court readily acknowledged that "there is a contrary view expressed by the courts of some of our sister states." The Maryland court apparently felt that the mechanic's lien law gave no substantive rights. First Interstate disagrees with this

position and submits that this case does not apply in Utah.

First Interstate objects to the inclusion by Worthington & Kimball in its brief of references to the bearing of the Business, Labor Committee regarding the amendment. Obviously this matter was not considered at the trial and it cannot be presented on appeal. Utah Department of Transportation v. Glen E. Fuller, et al., 603 P2d 814, (Utah 1979). Yost v. State of Utah, 640 P2d 1044, (Utah 1981). Thompson v. Ford Motor Co., 384 P2d 109, 14 Utah 2d 334 (1963).

### POINT III

#### THE AMENDMENT TO UCA, 1953 SECTION 38-1-7 IS A VIOLATION OF ARTICLE I, SECTION 7 OF THE CONSTITUTION OF UTAH

The amendment to UCA, 1953 Section 38-1-7 abolishing the verification requirement is an unconstitutional deprivation of property within the meaning of Article I Section 7 of the Utah Constitution. That section provides:

"[n]o person shall be deprived of life,  
liberty or property, without due process  
of law."

The principles of due process of law and basic fairness go to the heart of the policy requiring verification of the notice to hold and claim a lien. Those

are the same principles which proscribe other prejudgment actions which deprive persons of, or impair their interests in property. The policy upon which the verification requirement has its foundation is stated in First Security Mortgage Co. v. Hansen, supra, as follows:

"The policy underlying these decisions is sound. A lien creates an encumbrance on property that deprives the owner of his ability to convey clear title and impairs his credit. The filing of a lien for an excessive amount could be used to force a settlement unfairly weighted in favor of the claimant. Such abuse is made a misdemeanor by Section 38-1-25. These serious consequences justify the statutory imposition of a requirement that one who makes the claim must furnish a sworn statement to the truthfulness of the facts giving rise to it. Frivolous, unfounded and inflated claims can thereby be minimized, and the prejudgment property rights of the individuals receive their due protection."

A person with an interest in real property is entitled to the protection afforded by the requirement of verification before a lien claimant can impose a lien on real property. As this Court stated in First Security Mortgage Co., v. Hansen, supra, the prejudgment property rights of persons with interests in real property are more fully protected by requiring the verification of the lien claimant.

The elimination of verification deprives such person with this protection and hence deprives him of property rights without due process of law. It is submitted that the mechanic's lien statute, as amended, is an unconstitutional deprivation of property without due process of law.

#### POINT IV

##### THE ARBITRATION AWARD OF INTEREST WAS PUNITIVE AND HENCE INAPPROPRIATE

The arbitration award at paragraph 7 (addendum 3 of Worthington & Kimball's brief) provides:

"The contractor is entitled to interest at the rate of 15% per annum on the sum of \$377,131.00 from December 1, 1981 until paid by owner. We select that rate in part as a measure of damages to Worthington & Kimball for the unreasonable withholding of the balance of the contract price."

It appears therefore that such an award on its face is punitive. The following cases indicate an award of punitive damages in a contract case is inappropriate unless an independent tort is committed. Cook v. Warnick, 664, P2d, 1161, (Utah 1983); Highland Construction v. UPRR Co., 683 P2d 1042, (Utah 1984). There is nothing in the award justifying the imposition of punitive damages.

CONCLUSION

The Notice of Lien not being verified as required by statute and case law; the amendment dispensing with the verification requirement being prospective and not retrospective; the amendment being unconstitutional and the interest award being a penalty, it is respectfully submitted that the Order, Judgment and Decree of the trial court as to these matters ought to be affirmed.

RESPECTFULLY SUBMITTED this 18th day of December,  
1985.

---

LaVar E. Stark  
Attorney for Defendants/  
Respondents First Interstate Bank  
of Arizona, N.A., and Stewart  
Title Company of Salt Lake City  
2485 Grant Avenue, Suite 200  
Ogden, Utah 84401

ADDENDUM

CONSTITUTION OF UTAH  
ARTICLE I, SECTION 7

"No person shall be deprived of life, liberty or property without due process of law."

UCA 1953 Section 38-1-7 (prior to April 29, 1985)

NOTICE OF CLAIM - CONTENTS - RECORDING

"Every original contractor within eighty days after the completion of his contract, and except as hereafter provided, every person other than the original contractor claiming the benefit of this chapter within sixty days after furnishing the last material or performing the last labor for or on any land, building, improvement or structure, or for any alteration, addition to or repair thereof, or performance of any labor in, or furnishing any materials for, any mine or mining claim, must file for record with the county recorder of the county in which the property, or some part thereof, is situated a claim in writing, containing a notice of intention to hold and claim a lien, and a statement of his demand after deducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last material was furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

When a subcontractor or any person furnishes labor or material as stated above at the instance and request of an original contractor, then such subcontractor's or person's lien rights, as set forth herein, are extended so as to make the final date for the filing of a notice of intention to hold and claim a lien sixty days



after completion of the original contract of the original contractor."

UCA 1953 Section 38-1-7 (after April 29, 1985)

NOTICE OF CLAIM - CONTENTS - RECORDING - SERVICE  
ON OWNER OF PROPERTY

"(1) Every original contractor within 100 days after the completion of his contract, and except as provided in this section, every person other than the original contractor who claims the benefit of this chapter within 80 days after furnishing the last material or performing the last labor for or on any land, building, improvement, or structure, or for any alteration, addition to, repair of, performance of any labor in, or furnishing any materials for, any mine or mining claim, shall file for record with the county recorder of the county in which the property, or some part of the property is situated, a written notice to hold and claim a lien.

(2) This notice shall contain a statement setting forth the following information:

(a) the name of the reputed owner if known, or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the material;

(c) the time when the first and last labor was performed, or the first and last material was furnished;

(d) a description of the property sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent, and the date signed.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or

record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorney's fees against the reputed owner or record owner in an action to enforce the lien.

(4) When a subcontractor or any person furnishes labor or material as stated in Subsections (1) through (3) at the request of an original contractor, then the final date for the filing of a notice of intention to hold and claim a lien for a subcontractor or a person furnishing labor or materials at the request of an original contractor is 80 days after completion of the original contract of the original contractor."

UCA, 1953, Section 57-2-7

#### FORM OF CERTIFICATE OF ACKNOWLEDGEMENT

"A certificate of acknowledgment to any instrument in writing affecting the title to any real property in this state may be substantially in the following form:

State of Utah, County of \_\_\_\_\_

On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, personally appeared before me \_\_\_\_\_, the signer of the above instrument, who duly acknowledged to me that he executed the same."

UCA, 1953, Section 68-3-3

#### REVISED STATUTES NOT RETROACTIVE.

"No part of these revised statutes is retoractive, unless expressly so declared.

## FINDINGS OF FACT

"15. That a Deed of Trust to secure an indebtedness on the subject building and property was given by First Interstate according to the following terms, conditions, amounts and time:

Dated:	November 1, 1981
Trustor:	C & A Enterprises
Amount:	\$2,300,000.00
Trustee:	Stewart Title Company of Salt Lake City
Beneficiary:	First Interstate Bank of Arizona, N.A.
Recorded:	November 30, 1981 as Entry No. 848026 in Book 1393, at page 1305 of official records."

"16. A mechanic's lien was filed in Weber County by Gary J. Worthington and Edwin N. Kimball, dba Worthington and Kimball in the amount of \$430,586.15, plus interest for labor and materials recorded January 14, 1982, as Entry No. 850356 in Book 1396 at page 258 of official records, first work day being 7/15/80 and last work day being 11/12/81, hereinafter designed as Worthington & Kimball's first mechanic's lien."

"33. That the amount due and owing to Worthington and Kimball by C & A Enterprises, is the sum of \$377,131 00, together with interest at the rate of 10% per annum. The court further finds that of this amount, \$2,355.00 was personal property and was not properly lienable, leaving a balance due and owing, subject to the Utah Mechanic's Lien Statute of \$374,776.00, together with interest at the rate of 10% per annum. It appears to the court that the 15% interest awarded in the Arbitration Award is a penalty and, therefore, the court is only awarding Worthington & Kimball 10% interest on the amounts as provided herein."

ORDER, JUDGMENT AND DECREE OF FORECLOSURE

"2. The mechanic's lien filed in Weber County by Gary J. Worthington and Edwin N. Kimball, dba Worthington & Kimball Construction Company, to secure the above amounts recorded on the official records, as more particularly described in Weber County, State of Utah, as:

Lot 9, Plat "A" of the Weber County  
Industrial Park

is null and void and was not properly perfected because of the defective verification of the lien pursuant to Utah Code Annotated, 1953, Section 38-1-7 as amended."