

Study H-820

December 13, 2000

**Fourth Supplement to Memorandum 2000-78****Mechanic's Liens (More Comment Letters)**

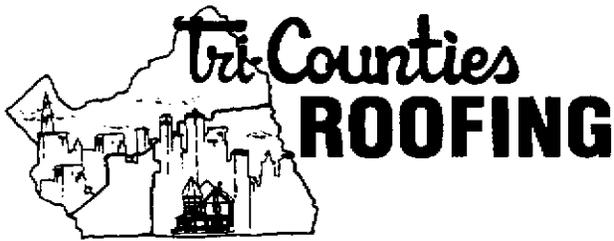
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Attached to this supplement are more letters on mechanic's lien law reform that we have received since the First Supplement was distributed. A letter from Sam Abdulaziz is also included. (Exhibit last page.)

We will discuss these letters at the meeting.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary



332 No. Bridge St., Visalia, CA 93291-5019  
(559) 732-8808 • Fax 732-0475 • Lic# 513914

December 4, 2000

Law Revision Commission  
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DEC 06 2000

File: H-820

Mr. Stan Ulrich  
California Law Review Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Dear Mr. Ulrich:

As a licensed contractor/owner of a 72-year-old company, I am extremely concerned about any change that reduces the influence of the mechanic's lien law.

Our cost of doing business totals 90% of our sales volume on a yearly average. If we make more than 10% on some projects, we make less than 10% on others. Our industry average according to the National Roofing Contractors Association in Chicago, Illinois, is less than 5% profit nationally. Without the leverage of the Mechanic's Lien Law, I would anticipate this collection percentage to drop dramatically and can envision many contractors going out of business as a result.

We file preliminary notices on all of our projects, as required by California State law. I feel this is our greatest protection against lack of payment by owners and general contractors. I urge you to consider this in your deliberations regarding changes to the law.

Sincerely,

**TRI-COUNTIES ROOFING CO., INC.**

A handwritten signature in black ink, appearing to read "Jim Reid", is written over the company name.

Jim Reid  
President

gs

December 4, 2000



Stan Ulrich  
California Law Review Commission  
4000 Middlefield Road  
Room D1  
Palo Alto, CA 94303-4739

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File: \_\_\_\_\_

The existing lien law has saved me about \$113,000.00 in the last 10 years. Please don't change it.

If we would loose \$10,000.00 on a job without the lien law, we would have to do about 1.9 million in volume. The profit margin is so small you would see a lot of contractors going out of business.

I'm just starting my 44-year with the Central Electric and I'm thankful for the current lien law.

Sincerely,

A handwritten signature in cursive script that reads 'Steve DuFour'.

Steve DuFour

430 Walker Street  
P.O. Box 1957  
Watsonville, CA 95077  
Phone 831/724-6321  
FAX 831/724-5108  
LIC. #246326



Since 1912

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539 G STREET, FRESNO, CALIFORNIA 93706

12/4/00

To: Stan Ulrich  
California Law Review Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

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DEC 07 2000

File: \_\_\_\_\_

Re: Mechanics' Liens

Dear Stan

It has been brought to our attention that these laws are or maybe under review. We would appreciate your consideration of our point of view in this matter.

Our industry operates on very small margins and any total loss is very difficult to overcome. If we have a loss of \$5,000.00 we have to sell \$125,000.00 to generate enough net profit to recapture the loss.

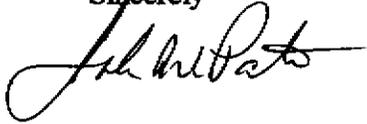
The industry currently uses several different methods of payment control. The methods that seem to insure equality for the Owner, General Contractor and a sub-contractor are a Voucher or Joint Check arrangement. These methodologies insure that all involved parties receive what they expect. Maybe there could be an establishment of some type of joint responsibility so the Owner gets what they contract for, the General gets his fair share and the sub-contractor gets paid for his materials and labor.

If there are going to be changes in the current laws, we would appreciate your consideration and not eliminate any avenue of recourse for the sub-contractors. In the building trades we operate on such close profit margins we must have some methodology to attain payment for work performed.

If the concern is the fact that the Owner may be responsible for a double-payment in the case where the general contractor does not pay a sub-contractor or supplier and they seek payment through a Lien maybe a formula that involves Vorchers or Joint Payment arrangement.

I'd like to Thank You for your time and the consideration of the point of view from one flooring sub-contractor.

Sincerely

A handwritten signature in cursive script, appearing to read "John W. Patrick".

John W. Patrick  
General Manager  
Kerr Rug Company



SHOLLENBARGER-BORELLO INC. dba

**GOLDEN STATE STEEL**

P.O. BOX 250  
FOWLER, CA 93625-0250  
(559) 834-6209  
FAX (559) 834-9219

December 5, 2000

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DEC 07 2000

File: \_\_\_\_\_

Stan Ulrich  
California Law Review Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, Ca 94303-4739

RE: Mechanics' Lien Law

Any recommendation the California Law Review Commission may give to the Legislature concerning the subcontractor's right to lien a project for non payment should be to strengthen the existing laws. The laws currently protect all parties involved through the process of lien releases. These are very effective tools used to insure that payments are received from the owner, to the contractor, and ultimately to the subcontractor, giving the owner and general contractor legal releases of liability for the payments made. Used properly, double-payments by the owners would not apply.

As a concerned subcontractor, we would plead that any recommendations made would not weaken the ability of the subcontractors to receive payment for work preformed. The current laws work to protect all parties concerned. We strongly recommend that no changes be made to the existing laws.

Sincerely,  
Shollenbarger-Borello, Inc., dba  
GOLDEN STATE STEEL

  
Douglas S. Shollenbarger  
Vice President



BETTER ROOFS  
SINCE 1928

## Fred B. Curtis, Inc.

ROOFING CONTRACTORS

7475 - 14th AVENUE  
SACRAMENTO, CA 95820-3537  
PHONE (916) 451-7286  
FAX (916) 451-1228  
LIC. NO. 159577

December 6, 2000

Stan Ulrich  
California Law Review Commission  
4000 Middlefield Rd., Room D-1  
Palo Alto, CA 94303-4739

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DEC 08 2000

File: 12-8-20

Dear Mr. Ulrich:

We are writing you concerning the study that the commission is currently performing on the mechanics' lien process.

Our company has been in business for over 72 years (since 1928), and a significant portion of our business is as a subcontractor to general contractors, wherein we perform various types of roofing work under contract with general contractors who contract direct with building owners. Our gross profit margin on these subcontracts is usually in the 10% to 15% range. On occasion, a general contractor fails to pay us in accordance with the terms and conditions of the subcontract, and the only way we have been able to collect under those circumstances is to file a mechanics' lien against the property (and property owner) on which we performed roofing work. If our lien rights were taken away or otherwise denied by some new law enactment, it would be a devastating blow to our company, it would result in significant losses to us, and it could cause us to go out of business. Of course we would still retain the right to bring legal action against the general contractor, but if this were to become necessary in most cases by that time the general contractor is already broke and there aren't sufficient attachable assets for a court judgment to enable us to recover the monies owed to us or the significant legal fees that would be required to file and prosecute legal action. If such a law were enacted, we would simply have to stop taking on jobs as a subcontractor, which would be a severe blow to our company being able to stay in business.

We urgently request that you do **NOT** enact any law that would deny our rights to file mechanics' liens direct against the property and the property owners. Thank you for your consideration in the matter.

Sincerely,

Calvin L. Holcomb  
Chief Financial Officer

December 7, 2000

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Stan Ulrich  
California Law Review Commission  
4000 Middlefield Road  
Room D1  
Palo Alto, CA 94303-4739

File: \_\_\_\_\_

Dear Mr. Ulrich,

The existing lien laws are crucial to all Subcontractors within the Construction Industry. On several past contracts, the 20 Day Preliminary notice is the only tool that helped to insure payment on the Contract and change orders to that contract. If we do not have a safety net to insure payment by General's then our risk level may surpass an unacceptable level. We as subcontractors carry too many risks as it is, including Indemnifying everyone and their mother, Construction Defect Suits (legalized extortion), and responsibility for poor engineering and incomplete plans just to name a few.

Our business has been in existence for over 88 years and the fourth generation of the family is now running it. In that time there have been many changes to the industry. I hope this will not be one of those changes.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Jurach'.

Sharon Jurach  
Owner  
Central Electric Company

President  
Monterey Bay Chapter, National Electrical Contractor's Association

430 Walker Street  
P.O. Box 1957  
Watsonville, CA 95077  
Phone 831/724-6321  
FAX 831/724-5108  
LIC. #246326

Marc Crawley - General Contractor  
3492 Robinson Drive  
Oakland, Ca. 94602  
Phone (510) 482-8614  
Cal. License 274321 A & B

Law Revision Commission  
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DEC 11 2000

File: \_\_\_\_\_

December 6, 2000

California Law Review  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Dear Commissioners:

I was overjoyed when I read in *The California Contractor* newsletter that you will be making a comprehensive study of the Mechanics' Lien laws because I have several suggestions about how to make these laws more equitable. First, I would like to state what problems my suggestions would solve.

I am a small contractor. Sometimes I work as a general contractor/ original (C.C. sec. 3095) contractor directly with the home owner. Sometimes I work as a subcontractor on residential work for the home owner or a developer/ general contractor. A major reoccurring problem for me and other small contractors is to get paid in full and on time for the good work done. Most of the time partial/ progress payments are paid late. Even though on public works jobs the prime contractor is required to pay within 15 days of the receipt of money (C.C. sec. 3262.5) the general contractor can generally get around this requirement for the first couple of progress payments. The public works general contractor merely pretends that the subcontractor has failed to submit the required insurance or tax documents. The general contractor waits until the payment is due and then informs the subcontractor that they won't pay until these documents are submitted. When the subcontractor submits them immediately, the general contractor says the subcontractor will need to wait until next month's pay day before the check can be issued. On private construction work, the owner/ general contractor often pay even slower.

The civil code section 3260.1 and related sections appear to offer some relief or protection to the small contractor in that they prescribe 2% interest penalties on late payments. However, the 3260.1 code is impracticable since it specifies that the interest penalty must be on a "progress payment" and the code does not define a progress payment. The code is uncertain whether a "progress payment" is any payment, any partial payment, a final payment, a payment for change order work or a lump sum payment for the entire job or payment for "time & material" work. The appellate courts have not interpreted these statutes to define what is a progress payment. Since the average small contractor who is paid slow will be owed a few hundred dollars and not likely more than a couple of thousand dollars he is not likely to pay a lawyer thousands of dollars to litigate the 2% interest issue. So in a practical sense, this code provision has been of little help. Unless the written contract specifies that each that each payment is a progress payment, a trial court is unlikely to apply the 2% interest penalty to just any late payment.

Another problem with this 3260.1 code section is that it allows the owner/ prime contractor withhold payment due when not "in bad faith." This "bad faith" provision is a

question of fact for the jury to decide. The owner/ prime contractor will always be able to offer some excuse why the payment was withheld in good faith. The owner/ prime contractor can always say that the subcontractor failed up supply his insurance certificate, tax identification number or the subcontractor's work was substandard. As such, the subcontractor will never have a prima facie case for the 2% interest penalty. The only way the subcontractor is likely to get the 2% interest penalty is by a verdict, if the judge will even allow the jury to consider the 2% interest penalty. On a day to day basis, the large prime contractor/ owner doesn't have to pay promptly because as long as there is not a lawsuit for some major construction dispute, it is not economical for the subcontractor to file suit solely for the interest and the interest will never be paid without a verdict.

The next problem major problem with the C.C. sec. 3260.1 provisions is the owner/ general contractor may withhold "150 percent of the estimated value of the dispute amount" in a good faith dispute. On the casual reading of this 3260.1 statute would seem to entitle the subcontractor to 2% per month interest on the amount due. But the 150% allowance can easily make the 2% insignificant.

For example, suppose an excavation contractor had a \$10,000 contract based on the engineer's estimate of 600 cubic yards of dirt to be removed, but the engineer's estimate was grossly inaccurate. The actual amount of dirt was actually 2,500 cubic yard. The extra dirt and other complications of the job generated extra work of \$25,000. The owner/ prime contractor signed a change order approval to excavate as necessary to prepare for the next phase, i.e. the concrete foundation. When the dirt work was done and the receipts tabulated, the calculations showed that the amount due was \$10,000 plus \$25,000 in extra work totaling \$40,000. The owner might then refuse to pay the \$40,000 invoice because it greatly exceeded the approximately \$10,000 that he expected to pay. The owner could pretend shock and ignorance and have his lawyer study the bill to determine the acceptable amount to pay. The lawyer, being generally ignorant of construction conditions and dirt quantities would recommend that the owner offer \$13,000 to settle the debt. Therefore \$27,000 (\$40,000 less \$13,000) would be the amount in dispute. The amount protected from the 2% penalty would be  $\$27,000 \times 150\% = \$40,500!!$  Even if the owner refused to pay the \$13,000 undisputed amount the 2% penalty could not be applied even to the \$13,000.

This C.C. 3260.1 section would truly offer some help to the small subcontractor if the 2% per month penalty applied to all funds improperly withheld. Then there would truly be an incentive to the owner/ prime contractor to confront the issues promptly and pay the bill promptly. Presently this statute means nothing or merely encourages the debtors to delay and use their economic superiority or all it is worth. The subcontractor is not likely to misuse a 2% penalty of all amounts due by stalling, because he needs to get paid and get on with the next job. He's not in the business of making money by procrastination.

I have attempted to solve the chronic slow payment situation by including a collections provision for slow payments in my standard contract. My standard contract includes a provision that I will be paid additional labor for all efforts to collect money due. "Payment in full will be due 3 days from the date of invoice after completion of the work. Additional time expended by this contractor to collect money due charged at \$80/ hr. (15 min. minimum). This extra time includes time to make phone calls, travel time to collect,

time to draft & record a Stop Notice, Claim of Mechanics' Lien or draft a complaint. Interest on money due will be charged at 10% per annum in addition to any statutory penalties. \_\_\_\_\_ Initialed."

This contract provision is a partial solution to the slow payment problem, but it creates a new logistical problem. Namely, when the owner/ prime contractor pays slow, and the subcontractor documents all the phone calls, letters and other efforts to get paid, the owner/ prime contractor can simply ignore the demand for additional payment due. Even if a subcontractor ensured his/ her Mechanics' Lien rights by sending the certified 20-Day pre lien notice, the collections money due for additional collection efforts might not be covered by the Claim of Mechanics' Lien.

Civil Code sec. 3110 entitles a subcontractor on a project to record a Claim of Mechanic's Lien. The contractual interest and labor to collect on the jobsite labor is not addressed by statute and has not been published by the appellate courts. To further complicate this collection efforts question, if the subcontractor has a "time & material" agreement rather than a fixed sum contract, perhaps the collection efforts is definitely part of the labor supplied to the general contractor. In a T & M contract the collection efforts should not be viewed as a new labor contract precipitated by a breach of contract to pay the money due and owning but merely additional time spent connected with the job.

On the other hand, if a fixed price contract contained a collection efforts by the subcontractor and the contract was breached, the "subcontractor's collection efforts" might be viewed as a new contract not on "the work of improvement."

This breach of contract (for collection efforts) probably does not cloud the title of the property. The collection efforts and interest might amount to \$1,500. From my experience the courts are not particularly sympathetic to a small contractors collection efforts if he eventually got paid for the jobsite work. Therefore a subcontractor would need to waive the claim for collection efforts or go for to a jury verdict. What happens most of the time, is that the subcontractor gets paid most of what is due after a wait and the unscrupulous owner/ prime contractor continues to pay all subcontractors slowly.

This slow payment game could be corrected by the following statutory changes:  
Civil Code sec. 3260.1

(b) Except ...between the parties. In the event of a dispute between the owner and the contractor or a dispute between the contractor and a subcontractor, the owner/ contractor must pay 2% per month interest on any amount that is wrongfully withheld.

(c) For the purposes of this code section, a progress payment is any payment due except a retention payment after the commencement of the work by the subcontractor.

Civil Code sec. 3112

(b) Any claimant who has a lien upon such a lot or tract of land for work done or materials furnished may include contractual or statutory interest and collection charges by the claimant in the lien amount. Attorney's fees may be included in a lien claim.

Sincerely,

*Marc Crawley*  
Marc Crawley

c.c The California Contractor

December 8, 2000

**INTERSTATE SALES**  
CONTRACTING & MUNICIPAL SPECIALTIES

California Law Review Commission  
Attn: Stan Ulrich  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Law Revision Commission  
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DEC 12 2000

Re: Mechanics' Lien Process Review

File: H-820

Dear Sir:

My firm has furnished traffic safety related items to the construction industry since 1969.

The mechanics' lien law has been the foundation of our credit policy relative to materials furnished for incorporation into a private sector, non-bonded project.

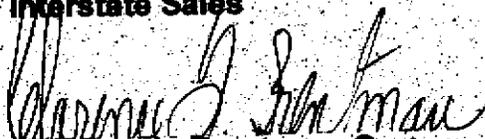
I feel that any removal of owner responsibility would require that the owner bond the contractor, thereby creating additional expense, or the supplier would require additional credit restrictions be placed on the contractor, thereby limiting the contractor's operating funds.

The construction supply industry, by its highly competitive nature, does not afford margins of profit, which are able to sustain losses due to contractor default.

In closing, I would encourage your commission to recommend that the Legislature leave the current owner responsibility intact.

Respectfully

Interstate Sales

  
Clarence L. Trentman, Owner

CLT:ses

**N**ielson  
**M**echanical

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File: \_\_\_\_\_

December 8, 2000

*Heating & Air Conditioning • State Lic. # 725457*

California Law Review Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Mechanic's Lien and Bond Protection

Dear Madam or Sirs,

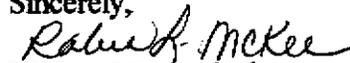
We are writing this letter to you in protest of the proposed changes to the California Mechanics' Lien Process. The Mechanics' Lien is a vital link to small businesses such as ours for many reasons, the most obvious being the protection it provides to our company's financial stability. Without the Mechanics' Lien, businesses would basically be left to battle for themselves in the already overcrowded court systems. From the point of filing suit, going to court several times, many phone calls, attorneys to hire, and the possibility of losing the case, a large portion of our profits would never be seen.

The retail industry is allowed a very sizeable markup without the competition of the bid process. They have the ability to incorporate their losses into their profits without it hurting their business and their doors can remain open using the collection process that has been in place for years. Therefore, the construction industry cannot come close to being compared to retail businesses!!!

*Nielson Mechanical* is a small company with approximately 10 – 15 employees. Our company is based in Solano County and we have successfully been in business for 4 ½ years and continue to grow larger each year and rely heavily on the protection of lien rights. If the Mechanics' Lien Process were to dissolve, our survival rate would decrease because we would not have a reliable or timely system to collect what we all work so hard for.

If the Mechanics' Lien Rights are in danger, then so are we. If we did not feel so strongly about this issue we would not take the time to respond. In turn, we would appreciate you taking the time to consider our view on this situation.

Sincerely,



Nielson Mechanical

1200-B Western Street  
Fairfield, CA 94533-2418

Bus. (707) 422-1961  
Fax (707) 422-0566

**MARINO CONSTRUCTION**

CL#482082, A, B, C-10, C-36  
5115 PATTERSON DRIVE  
DIAMOND SPRINGS, CA 95619  
530-622-4046  
530-622-0549:FX

December 12, 2000

California Law Review Commission  
4000 Middlefield Road  
Room D-1  
Palo Alto, CA 94303-4739

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File: \_\_\_\_\_

To Whom it May Concern,

I believe the Mechanics' lien laws need to be rewritten so the risk of unprofessional and unethical contractors is not born solely by the consumer.

I have been a General Contractor since 1985. I am a member of the Western Regional Master Builders Association and have enclosed an article which informs members that you are reviewing the mechanics' lien laws and the Builders Association encourages us to write including guidelines for our letter.

I do believe the law needs immediate revisal. This year my wife and I hired a General Contractor to frame our personal residence. She checked the contractor's license, his references, confirmed he was a union contractor and had adequate labor to draw from and then signed a contract for supply of labor only, we paid directly for all material. In 4 weeks of work, he requested his draws early to cover his payroll but neglected to pay his payroll. He bounced paychecks and the union pulled the laborers from the site. Almost 2 months later, after trying to coerce us into releasing him of all liability, he quit the project and we hired a new contractor to complete. We have/will pay over \$20,000.00 to repair incorrect work and complete the project to the contract stage of completion. We currently have a complaint filed against his contractor's bond and against his license at the Contractor's State License Board. After 15 years in business, we have finally been hit on a personal level by an unprofessional contractor.

The union filed mechanics' liens against our property on behalf of the union employees. We were unaware that they were able to file liens without prior preliminary notice.

We do not believe the union should be exempt from filing preliminary notices on jobs. The consumer should be aware of ALL potential financial obligations regarding their rights and property. The union may complain that this is a paperwork nightmare for them. Imagine having your dream home that you have saved for all your life dissolve into a nightmare with no pool of lawyers on staff to help you. We have received preliminary notices from other labor pools. If a labor pool has to file a preliminary notice, there is no reason the union can not do the same.

We would like to see all projects bonded for the full amount of the project with both payment and performance bonds. This is how State and Federal projects are run. Some might argue that this would be difficult for contractor's starting in business to expand. What this really does is limit a contractor to projects only within their physical and financial capabilities to complete. This protects the consumer and the contractor from taking on bigger projects than they can handle. At a very minimum, the Contractor's License Bond limit should be increased to \$15,000.00.

Sincerely,

*John Marino*

*Germaine*

John & Germaine Marino

# Contractors' lien rights in jeopardy

The California Law Review Commission is making a "comprehensive study" of the mechanics' lien process. The Commission will make a recommendation to the Legislature as to what they believe should be done with respect to the mechanics' lien process. The commissioners don't have a real feeling for the economics of the construction industry. Simplistically, they might determine that if someone should bear the risk of a loss, it should be the contractor or material supplier and not the homeowner. The simplistic answer is that if the homeowner has paid the prime contractor in full, then the homeowner should have no responsibility to pay any other people.

This simplistic analysis may be appropriate in the normal retail marketplace where people double their money when they sell their goods and services. It is not realistic in the construction industry where contractors work on a

much smaller margin.

Your help is urgently needed to write letters to the Law Review Commission using your own words, telling them how devastating it would be if there was any curtailment to your rights to record a mechanics lien. Tell them how many jobs you might have to sell in order to just break even for a loss of \$5,000, \$10,000, or even more on another project.

You can write to the Law Review Commission at:

California Law Review Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Put the letter in your own language and it will be much better received and have greater impact.



LAW OFFICES OF  
**ABDULAZIZ & GROSSBART**  
 A Partnership of Professional Corporations

*Mailing Address: P.O. Box 15458 / North Hollywood, CA 91615-5458 / (818) 760-2600 or (323) 877-5776 / Fax: (818) 760-3908*

SAM K. ABDULAZIZ  
*A Law Corporation*

KENNETH S. GROSSBART  
*A Law Corporation*

December 11, 2000

**SENT VIA FAX EMAIL & US MAIL**  
**sulrich@clrc.ca.gov**

Stan Ulrich,  
 Assistant Executive Secretary  
 CALIFORNIA LAW REVIEW COMMISSION  
 4000 Middlefield Road Room D-1  
 Palo Alto, CA 94303-4739

Law Revision Commission  
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DEC 13 2000

**RE: LAW REVIEW COMMISSION**

Dear Mr. Ulrich:

File: \_\_\_\_\_

I've just read your most recent report. It gives a good summary. However, I do believe that it is somewhat misleading. All of the discussions have dealt with home improvement, typically defined as owner-occupied single-family residences. I have heard nothing whatsoever dealing with stop notices (unless one defines the "Direct Pay Proposal" as a type of stop notice). Nor have I heard any problems dealing with mechanic's liens or stop notices in the commercial or public sector. I believe that study should take very little if any time at all.

Secondly, early on, we sent a rather substantial proposal which would pretty much leave the system as is but substitute better notices. I believe those better notices would benefit both the homeowners and the industry, without worrying about the constitutionality of the lien or changing the manner in which the construction industry would operate. I still believe this is a viable alternative.

Lastly, a representative of a major bonding company told the Commission that they would be willing to write the bond being discussed at a premium that would not be out of line. I would bet that if they wrote such a bond other companies would quickly follow so as not to lose market share.

Very truly yours,  
 ABDULAZIZ & GROSSBART

SAM K. ABDULAZIZ

SKA: tmw  
 cc: Client(s) (via email)

F:\WP51\LAUREV\ULRICH.009