

## Memorandum 2001-52

### **Mechanic's Liens: Double Payment Issue**

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Attached to this memorandum is a staff draft of a tentative recommendation on *The Double Payment Problem in Home Improvement Contracts*.

At the last meeting, the Commission directed the staff to prepare a draft tentative recommendation with a view toward distributing it for comment after the June meeting. As discussed toward the end of this memorandum, the staff has some concern about distributing the draft without further refinement of the proposal and the explanatory text, but the Commission may prefer to make an early distribution and provide more time for analysis and comment by interested persons, than more staff and Commission work on "perfecting" the draft, resulting in substantially less time for public review. The approval and scheduling issue should be kept in mind as the Commission reviews the substantive issues in the draft tentative recommendation.

#### **Summary of Proposal**

The draft tentative recommendation includes the following elements, some of which are discussed further in this memorandum or in staff notes appended to the relevant sections:

- (1) The new statute would apply to home improvement contracts.
- (2) An owner who pays the prime contractor in good faith would not be subject to further liability.
- (3) Mechanic's liens would apply only to the extent that the owner had not paid the prime contractor in good faith.
- (4) A surety bond in the amount of 50% of the contract price would be required in all home improvement contracts over \$5,000.
- (5) The bond would be obtained by the prime contractor, and would be recorded with the county recorder, along with a filed copy of the contract between the owner and prime contractor.
- (6) Claims of subcontractors and suppliers would be made against the bond or other liable parties, but could not be made against the owner to the extent the owner has paid the prime contractor in good faith.

- (7) Stop notice rights of all claimants would continue. A stop notice served on the owner who has not paid the prime contractor would prevent payment in good faith.
- (8) The preliminary 20-day notice would not be required and the restrictions on the rights of subcontractors and suppliers in the existing preliminary notice scheme would not apply.
- (9) Subcontractors and suppliers would be responsible for determining whether the bond had been recorded.
- (10) For home improvement contracts under \$5,000, the owner would still be protected by the good faith payment rule, the claimants would not need to give the preliminary notice, and stop payment and mechanic's lien rights would continue to apply.
- (11) Any party would be able to contract for additional notices or greater protections, such as with additional bonds or the use of joint control, and the owner could use joint checks directed to the prime contractor and other claimants.
- (12) The new statute would be subject to a one-year deferred operative date to enable implementation of regulations and procedures, and education of the affected parties.

The staff believes that there is general agreement of interested parties — or at least the ones who have been attending Commission meetings — on the basic concept of mandating the 50% bond, and that this approach is the best hope for any type of consensus bill in the 2002 legislative session. That said, the devil may be in the details.

### **Drafting Approach**

The 50% payment bond approach to addressing the double payment issue is grounded in an existing remedy. Civil Code Section 3235, whose core provisions date back to 1911, permits the owner to limit liability to the amount of the contract by filing the contract and recording a surety bond for 50% of the contract amount before work commences. Regardless of what other procedures might apply — and they differ greatly under existing law from what existed in 1911 — the owner should not be liable to subcontractors and suppliers if the contract price has been properly paid to the prime contractor.

The simplest reform would be to provide that the 50% bond under Section 3235 and related provisions is mandatory in home improvement contracts (or whatever other class of cases it should cover). This one sentence added to Section 3235 or made into a separate section would address the double payment issue,

and would have the collateral effect of helping to improve the collective financial soundness of the home improvement industry.

Regrettably, it is not this simple. The Section 3235 procedure does not appear to have been used often enough to develop much case law or statutory refinements, so many questions remain unanswered. Handbooks and references do not devote much space to Section 3235. There are unanswered issues in the existing statute, such as the full import of the recovery limitation “where it would be equitable so to do.” The elaborate and convoluted provisions governing the preliminary notice under Section 3097 and related provisions do not adequately take account of the procedure and limitations in Section 3235.

The one-sentence reform approach would also pass up an opportunity to make additional improvements, clarify the bonding procedure, and reduce or eliminate some paper shuffling required by existing law. The staff is intrigued by the possibility of eliminating the 20-day preliminary notice under Section 3097, which is designed to give the owner and lender notice of potential mechanic’s lien claimants, as to contracts where the bond would be required. The existing notice would have no real purpose if there is no mechanic’s lien right for those not in privity with the owner, or if the right to recover, however it is characterized and implemented, is recast to focus on the surety bond and any amount that may still be due from the owner on the contract with the prime contractor.

Accordingly, the staff has included a number of related revisions in the attached draft. Some alternatives and issues are discussed in this memorandum and in the staff notes following the sections in the draft. Various proposals have been previewed by some of the experts in the field who have been attending Commission meetings, so there has been a significant amount of preliminary discussion, though not necessarily consensus on many of these points.

### **Scope of Proposal**

Earlier in this project, the Commission considered the question of the scope of various remedies addressing the double payment problem. In connection with staff drafts of a full payment defense and a direct pay proposal, the Commission decided that the scope of the special rules should be limited to single-family, owner-occupied dwellings. (See, e.g., Memorandum 2000-37.) As stated in the Minutes of the July 2000 meeting:

After discussing a number of options in some detail, and hearing the views of interested persons, the Commission directed the staff to prepare drafts of the full-pay defense proposal and the direct pay proposal.... These special rules would be limited to situations involving home improvement contracts affecting single-family, owner-occupied dwellings. Commissioners stressed the need to simplify the existing statute and to avoid making any new notices and statutory rules as complicated as existing law.

The decision to limit coverage to single-family, owner-occupied dwellings was consistent with the approach of Assembly Member Honda's bills in the 1999-2000 session to provide for a recovery fund. See ACA 5, AB 742, AB 2113.

The staff has broadened the scope in the draft tentative recommendation in order to tie into the definition of home improvement contracts, which are subject to special rules and regulations under the Contractors' State License Law. See, e.g., Bus. & Prof. Code §§ 7150-7168. This approach avoids technicalities of determining whether the premises is in fact a single-family, owner-occupied dwelling and avoids after-the-fact disputes about when or whether particular duties should have applied, depending on the status of the property subject to the work of improvement. In an extensive remodeling job, the owner may not occupy the premises for some time. There may also be doubt about whether the term would include condominiums. See, e.g., Rev. & Tax. Code § 218 (property tax exemptions).

Definitions of "single-family, owner-occupied dwelling" in other statutes, such as those applicable to mortgages are not particularly helpful in the mechanic's lien context. Consider, e.g., Civil Code Section 2954 relating to mortgage impound accounts:

(c) As used in this section, "single-family, owner-occupied dwelling" means a dwelling which will be owned and occupied by a signatory to the mortgage or deed of trust secured by such dwelling within 90 days of the execution of such mortgage or deed of trust.

On the other hand, there is precedent for use single-family, owner-occupied dwelling limitations in a context akin to mechanic's liens. Civil Code Section 3081.10 provides the following exception to the design professional's lien:

3081.10. The design professionals' lien provided in this chapter shall not apply to a work of improvement relating to a single-family owner occupied residence where the construction costs are less than one hundred thousand dollars (\$100,000) in value.

Balancing the factors, however, the staff thinks that using the home improvement contract definition should be easier to apply.

### **Contract Amount**

The draft tentative recommendation proposes a floor of \$5,000, meaning that home improvement contracts under that amount would not be subject to the mandatory bond requirement. The law would permit “small contracts” to use the scheme. Whether or not the contract is bonded should be made clear in the record and in paperwork available to subcontractors and suppliers, however remote from the prime contract.

The \$5,000 amount is set at the same level as small claims court jurisdiction, as suggested by one of our knowledgeable commentators. See Code Civ. Proc. § 116.220. The staff is not proposing to incorporate the jurisdictional limit by reference. It is probably best to have it clearly stated in the mechanic’s lien statutes. While there are probably similarities in the policy reasons for setting the small claims court jurisdiction and a minimum prime contract amount here, they do not strike us as close enough to justify incorporation.

A proposal made by a State Bar committee about 40 years ago set the floor amount for a mandatory bond at \$1,000. See discussion in Comment, *The “Forgotten Man” of Mechanics’ Lien Laws — The Homeowner*, 16 *Hastings L.J.* 198 (1964). That amount would be over \$5,700 today.

Perhaps the \$5,000 amount is too low. Although different policies are at play, it is interesting to note that public works are not required to be bonded in California below \$25,000. See Civ. Code § 3247.

### **Small Contract Scheme**

If the mandatory bond applies only to contracts of \$5,000 or more, then what remedies should apply to small contracts? It would be anomalous to continue the complicated, confusing, and burdensome preliminary notice scheme only for small contracts. We are reliably informed that it is extremely unlikely that anyone would sue to enforce a mechanic’s lien for amounts this small, particularly since attorney’s fees are not available — and we do not propose legislating liability for attorney’s fees in mechanic’s lien foreclosures.

In addition to the paper-shuffling and the confusing preliminary notice, keeping the existing scheme for small contracts would also preserve the double-payment problem. Even though mechanic’s lien foreclosure actions are not

brought on small amounts, most homeowners are probably unaware of the practical realities and will settle claims of subcontractors and suppliers to avoid liens (which would disappear in a few months on their own if the owner just waits the claimants out). Many owners probably feel a moral obligation to pay their debts to unpaid subcontractors and suppliers. This may be particularly true of senior citizens. In this respect, from the perspective of subcontractors and suppliers, the mechanic's lien system would be working relatively efficiently, without the need for court proceedings and attorney's fees.

If the floor were set at \$1,000, the staff might recommend eliminating the mechanic's lien below that amount for those not in privity. *De minimis non curat lex*. But can this be done at the \$5,000 level? Another alternative would be to require joint checks and make clear that signing the joint check is a complete release of all claims. Or a "mini-direct payment" statute could be implemented to help protect subcontractors and suppliers who lack faith in the prime contractor. Whatever alternative is selected, the statute should not preserve the existing preliminary 20-day notice only for small home improvement contracts.

In the interest of consistency and to protect owners from double payment liability at the small, but significant levels under \$5,000, the staff draft tentative recommendation would apply the payment limitations of the general scheme to all home improvement contracts, regardless of whether a bond is required. Claimants would continue to have all of their rights, subject to the important limitation that owner would not be liable for more than the contract price. The risk of loss is substantially lower on a small job, of course, but a subcontractor or supplier who has many contracts under a prime contractor who goes bankrupt could still suffer a substantial cumulative loss.

This may present a challenge in certain projects where the work is done quickly and the claimants won't know whether the prime is paying out until the owner has paid all or substantially all of the contract price. There may be another remedy appropriate in these cases, such as a general blanket payment bond required of all home improvement contractors to cover the smaller jobs, but the staff draft does not implement such a scheme.

### **Effect of Mandatory Surety Bond**

The best security is a bond issued by an admitted surety insurer. The staff draft adopts this as the standard. The drawback is that surety companies underwrite bonds based on the soundness of the bond principal. The argument is

always made against mandatory bonding that it will drive many contractors out of business. On the other hand, bonding is required in public works and the industry has survived. It has also been suggested that smaller bonds will be readily available for entry-level general contractors, and that the difficulties will only develop if the contractor is trying to take on too many projects or too complicated projects in relation to the contractor's abilities and experience.

Gordon Hunt has put the arguments, pro and con, in the following terms:

Mandatory bonding on private works is not a new concept and has been suggested many times. The major arguments against mandatory bonding are:

....

3. Too many contractors in the construction industry could not obtain bonds, thereby forcing them out of business. In the alternative, said contractors would reach their bonding capacity so quickly that it would seriously affect their ability to expand and take in additional work.
4. It would prevent young men without substantial assets from entering the contracting field.
5. The resultant drop in the number of bondable contractors would result in an overall reduction in private construction thereby creating further economic problems for the already troubled construction industry in California.

....

The arguments favoring mandatory bonding are as follows:

....

3. Unbondable contractors would be unable to do business, thereby stabilizing the industry by eliminating marginal elements.
4. It would compel the sureties to change their attitudes and standards in order to enable more contractors to obtain bonds.

Hunt, *California Mechanics' Lien Law: Need for Improvement*, 9 Santa Clara Law. 101, 107-09 (1968) [footnotes omitted].

The staff is not in a position to make meaningful predictions on the effect of a mandatory 50% bond on the construction industry. One critical factor would be the ability of the surety industry to respond to the demand for bonds and the manner in which they would shape their policies in the current state of the construction industry. We have heard optimistic assurances from some commentators, but the Commission and the Legislature would probably want

greater certainty before a mandatory bond is implemented. Commentary on the effect of mandatory bonds has always recognized that some honest, competent, and reliable contractors would not be able to qualify for surety bonds if the surety companies apply strict underwriting standards.

### **Alternatives to Surety Bond**

If the Commission judges the mandatory surety bond requirement to be too restrictive for honest, competent, and reliable, but financially marginal, contractors, there will need to be some amelioration. Any exceptions to the bonding rules would have to be carefully crafted to they don't undermine the basic protection of the surety bond. One or more of the following options should be considered, and there may be others that we haven't thought of.

#### *Personal Sureties*

The general rule under the Bond and Undertaking Law is that deposits and personal sureties are acceptable alternatives to corporate surety bonds. See Code Civ. Proc. §§ 995.310, 995.710. These options obviously involve complications and uncertainties, and reduce the reliability of the security. Bond beneficiaries prefer corporate sureties. Deposits and personal sureties could be permitted if there were appropriate protections, such as prior approval by CSLB.

#### *Public Bond Fund*

The Commission has not been in favor of establishing new funds or bureaucracies to administer them, but one possible way to deal with reluctance of surety companies to underwrite deserving contractors would be through a public (or private?) bond fund.

#### *Joint Control Alternative*

The usual optional remedies and approaches would be available, including joint control. The statute could provide for joint control, established by the prime contractor, where the contractor was unable to get a bond. The owner would not pay the prime directly, but would make payments to the joint control company which would disburse to subcontractors and suppliers at appropriate times.

#### *Direct Pay Alternative*

The statute could also implement a direct pay scheme limited to situations where the prime contractor could not get a bond. This would permit marginal

contractors to get the contract, with payments flowing directly from the owner to the subcontractors and suppliers pursuant to the contractor's direction when progress payments are due.

#### *Owner Bonding*

In order to justify the protection proposed in the mandatory 50% bonding proposal, the owner could obtain the bond where the prime contractor is unable to do so. In effect, the owner would be creating the equivalent of mechanic's liens in the amount of half of the contract price.

#### **Filing and Recording Alternatives**

The staff draft adopts the existing scheme of requiring filing of the contract and recording of the payment bond. This is done for two reasons: (1) it is presumably more familiar and acceptable, and (2) some other provisions depend on the recording of a payment bond, such as Section 3159(a) relating to stop notices.

More efficient and streamlined procedures are possible. The statute could require that the prime contractor obtain the surety bond and provide a copy to any subcontractor or supplier with which the prime deals, and on down the line. This could be a duty with consequences for failure to perform under the licensing statute. This would save the expense of recording and the trouble and expense of getting records from the recorder (or paying a service) to verify the information. We have not implemented any duty to provide paperwork on top of the duty to record under the draft statute.

#### **Transition**

The staff draft provides a one-year deferred operative date on the mandatory bonding proposal (January 1, 2004, if a bill is passed in 2002), although CSLB would be given authority to make the regulations implementing the proposal a year earlier (January 1, 2003, the regular operative date of 2002 legislation). There will be a need for major educational efforts by CSLB, industry groups, and others so that the new rules can be understood and applied. The surety industry would also need sufficient time to respond to the bonding demands. It is hoped that the tentative recommendation will elicit comments from sureties and other stakeholders on the transitional issues.

A one-year deferred operative date may not provide enough time to accomplish all that is necessary to implement an across-the-board mandatory

bonding scheme for home improvement contracts. We can't predict how sureties would respond to the demand for certification by tens of thousands of general contractors. (There are over 130,000 general contractor licensees, and as of February 1, 2001, CSLB has issued 137,959 Home Improvement Certifications.)

It would be possible to accomplish a smoother transition by one of the following means:

- (1) *Dollar amount of contracts in base year.* The law would apply in its first year only to prime contractors who had executed contracts totaling \$ \_\_\_\_\_ [insert appropriate amount].
- (2) *Dollar amount of contracts in first year of new law.* The law would trigger only to contracts that exceed a total amount of \$ \_\_\_\_\_ [insert appropriate amount].
- (3) *Number of contracts in first year of new law.* The new bonding requirement would not apply until, say, the 10th contract executed during the first year.
- (4) *Stepped threshold amount.* If the bonding requirement applies only to contracts over \$5,000, during the transitional year the new law could be mandatory only for contracts over \$25,000 or some other amount.

The transitional period could be made longer than one year, if needed. The staff would make any of these transitional rules safe harbors, not requirements, so that contracts could be under the new statute even though not required to be.

### **Schedule**

Irrespective of any revisions that will need to be made as the Commission reviews the draft tentative recommendation, the explanatory text needs to be expanded and polished before it is distributed. The Commission should consider whether distribution of the tentative recommendation should wait until after the September 20-21 meeting. This would still give interested persons sufficient time to analyze the Commission's tentative proposals before the November 30 meeting. The Commission would be able to hold off approving a final recommendation until the January 17-18, 2002, meeting and still have time to meet legislative schedules.

The Commission should also recall that various CSLB reports are due to be submitted to the Legislature by October 1. Business and Professions Code Section 7021 provides, in relevant part:

(a) The board shall conduct a comprehensive study of the issues surrounding home improvement contracts that involve home equity lending fraud and scams, and provide recommendations to deal with this problem.

....

(c) The board shall conduct a comprehensive study and review of recovery fund programs in California and other states which provide compensation to consumers for financial injury caused by a licensed professional. It should evaluate the effectiveness of these programs and whether such a recovery fund could benefit consumers who are harmed as a result of contractor fraud, poor workmanship, malfeasance, abandonment, failure to perform, or other illegal acts.

(d) The board shall conduct a comprehensive study in consultation with the Department of Insurance, on the use of surety bonds to compensate homeowners for financial injury sustained as a result of a contractor's fraud, poor workmanship, malfeasance, abandonment, failure to perform, or other illegal acts. This study shall include consideration of the payout criteria of bonds, increasing the bond amount, a "step-bonding" approach based on the amount of the prime contract, and the requirement of performance or payment bonds. This study shall additionally consider whether to require contractors to carry general liability insurance and whether to establish a guarantee program in order to provide the appropriate insurance and bond coverage in connection with a homeowner's employment of a contractor.

The staff will look for these reports and propose ways to coordinate the Commission's work with the CSLB recommendations, as appropriate.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

## THE DOUBLE PAYMENT PROBLEM IN HOME IMPROVEMENT CONTRACTS<sup>1</sup>

1 This tentative recommendation addresses the potential double payment risk  
2 faced by homeowners and consumers under home improvement contracts. The  
3 double payment problem arises because, even though the owner has paid the prime  
4 contractor in good faith under the contract, subcontractors and material suppliers  
5 are entitled to enforce mechanic's lien rights against the owner's property if they  
6 are not paid by the prime contractor.<sup>2</sup>

7 The potential "double-payment" problem does not affect only homeowners. The  
8 other side of the coin is the problem faced by subcontractors and material suppliers  
9 who have not been paid by the prime contractor or a subcontractor.  
10 Fundamentally, the problem involves who will bear the risk of nonpayment by the  
11 prime contractor or by a subcontractor higher in the payment chain, where the  
12 owner has made full payment, and which parties are in the best position to be  
13 knowledgeable about the risks and remedies and take appropriate steps.

14 A special statute applicable to home improvement contracts, with the following  
15 features, is proposed to address this problem:

- 16 (1) The proposed law would apply to all home improvement contracts, as  
17 defined under the Contractor's State License Law.
- 18 (2) An owner who pays the prime contractor in good faith would not be  
19 subject to further liability.
- 20 (3) Mechanic's liens and stop notices would apply only to the extent that the  
21 owner had not paid the prime contractor in good faith.
- 22 (4) A surety bond in the amount of 50% of the contract price would be  
23 required in all home improvement contracts over \$5,000.
- 24 (5) The bond would be obtained by the prime contractor, and would be  
25 recorded with the county recorder, along with a filed copy of the contract  
26 between the owner and prime contractor.
- 27 (6) Claims of subcontractors and suppliers would be made against the bond  
28 or other liable parties, but could not be made against the owner to the  
29 extent the owner has paid the prime contractor in good faith.
- 30 (7) Stop notice rights of all claimants would continue. A stop notice served  
31 on the owner who has not paid the prime contractor would prevent  
32 payment in good faith.
- 33 (8) The preliminary 20-day notice would not be required and the restrictions  
34 on the rights of subcontractors and suppliers in the existing preliminary  
35 notice scheme would not apply.
- 36 (9) Subcontractors and suppliers would be responsible for determining  
37 whether the bond had been recorded.

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1. Staff Note: The final form of this discussion depends on Commission decisions concerning the issues raised in Memorandum 2001-52 and staff notes following sections in this draft.

2. See Civ. Code § 3123.

- 1 (10) For home improvement contracts under \$5,000, the owner would still be  
2 protected by the good faith payment rule, the claimants would not need to  
3 give the preliminary notice, and stop payment and mechanic's lien rights  
4 would continue to apply.
- 5 (11) Any party would be able to contract for additional notices or greater  
6 protections, such as with additional bonds or the use of joint control, and  
7 the owner could use joint checks to direct payment to subcontractors and  
8 suppliers.
- 9 (12) The proposed law would be subject to a one-year deferred operative date  
10 to enable implementation of regulations and procedures, and education of  
11 the affected parties.

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30  **Note.** The proposed payment bond in home improvement contracts is an application of the  
31 existing rules in Chapter 6 (commencing with Section 3235) of Title 15 of Part 4 of Division 3 of  
32 the Civil Code, the mechanic’s lien statute. For informational purposes, the text of Chapter 6 is  
33 set out below even though some of its provisions are not proposed to be amended.

34 CHAPTER 6. PAYMENT BOND FOR PRIVATE WORKS

35 Article 1. Provision for and Effect of Filing Contract and Payment Bond

36 **Civ. Code § 3235 [unchanged]. Fifty percent payment bond**

37 3235. In case the original contract for a private work of improvement is filed in  
38 the office of the county recorder of the county where the property is situated

1 before the work is commenced, and the payment bond of the original contractor in  
2 an amount not less than 50 percent of the contract price named in such contract is  
3 recorded in such office, then the court must, where it would be equitable so to do,  
4 restrict the recovery under lien claims to an aggregate amount equal to the amount  
5 found to be due from the owner to the original contractor and render judgment  
6 against the original contractor and his sureties on such bond for any deficiency or  
7 difference there may remain between such amount so found to be due to the  
8 original contractor and the whole amount found to be due to claimants.

9 ☞ **Staff Note.** The language “where it would be equitable so to do” is troublesome, if it is not  
10 read narrowly. It dates back to 1911 (see Code Civ. Proc. § 1183, as amended, 1911 Cal. Stat. ch.  
11 681, § 1) and has been mentioned in a handful of cases. See, e.g., Merner Lumber Co. v. Brown,  
12 218 Cal. 136, 21 P.2d 590, 592-93 (1933); S.R. Frazee Co., v. Arnold, 46 Cal. App. 74, 77, 188 P.  
13 822 (1920) (not equitable to limit recovery where sureties on bond required by owner were not  
14 sufficient).

15 In the scheme under Article 3, where the prime contractor supplies a corporate surety bond, it  
16 should be sufficient that the owner has paid in good faith, and not in the face of demands from  
17 unpaid subcontractors and suppliers by way of stop notices. The court should not be invited to  
18 reexamine the equities in applying the statutory rule that is intended to address the double  
19 payment problem, nor should parties be encouraged to litigate the matter in the hope that a court  
20 might invade the intended statutory protection. Accordingly, this language does not appear in the  
21 proposed Article 3 (commencing with Section 3244) applicable to home improvement contracts.

22 • **Reminder:** Staff Notes will be omitted from this material before any tentative  
23 recommendation approved by the Commission is circulated for comment.

24 **Civ. Code § 3236 [unchanged]. Purpose, limitation on owner’s liability**

25 3236. It is the intent and purpose of Section 3235 to limit the owner’s liability, in  
26 all cases, to the measure of the contract price where he shall have filed or caused  
27 to be filed in good faith his original contract and recorded a payment bond as  
28 therein provided. It shall be lawful for the owner to protect himself against any  
29 failure of the original contractor to perform his contract and make full payment for  
30 all work done and materials furnished thereunder by exacting such bond or other  
31 security as he may deem necessary.

32 ☞ **Staff Note.** This section should be revised in connection with a general revision. There should  
33 not be a good faith issue at the time of filing the contract and recording the bond, but only later (if  
34 at all), when payments are made. The language of this section dates back to the struggles of the  
35 late 1800s and early 1900s concerning contract rights and the extent to which bonds could be  
36 required.

37 **Civ. Code § 3237 [unchanged]. Lender’s objection**

38 3237. When a lending institution requires that a payment bond be furnished as a  
39 condition of lending money to finance a private work of improvement, and accepts  
40 in writing as sufficient a payment bond posted in fulfillment of this requirement, it  
41 may thereafter object to the borrower as to the validity of that payment bond or  
42 refuse to make the loan based upon any objection to the payment bond only if the  
43 bond underwriter was licensed by the Department of Insurance.

1 As used in this section, “lending institution” includes commercial banks, savings  
2 and loan institutions, credit unions, and any other organizations or persons that are  
3 engaged in the business of financing loans.

4 ☞ **Staff Note.** At a minimum, this section should be revised to eliminate the second paragraph  
5 and to use the term “construction lender” defined in Section 3087. The rules concerning  
6 objections to sureties should be generalized or perhaps supplanted by the general rules in the  
7 Bond and Undertaking Law (Code Civ. Proc. § 995.010 *et seq.*).

## 8 Article 2. Conditions to Action on Payment Bond

### 9 **Civ. Code § 3239 (amended). Invalidity of provisions limiting actions**

10 SEC. \_\_\_\_\_. Section 3239 of the Civil Code is amended to read:

11 3239. (a) ~~No~~ A provision in any a payment bond given pursuant to ~~any of the~~  
12 ~~provisions of this chapter~~ Article 1 (commencing with Section 3235) attempting  
13 ~~by contract~~ to shorten the period prescribed in Section 337 of the Code of Civil  
14 Procedure for the commencement of an action ~~thereon shall be~~ on the bond is not  
15 ~~valid if such provision~~ it attempts to limit the time for commencement of an action  
16 ~~thereon on the bond~~ to a shorter period than six months from the completion of  
17 ~~any the~~ work of improvement, ~~nor shall any.~~

18 (b) ~~A~~ provision in ~~any of such bonds~~ a payment bond given pursuant to Article 1  
19 (commencing with Section 3235) attempting to limit the period for the  
20 commencement of ~~actions thereon be~~ an action on the bond is not valid insofar as  
21 ~~actions an action~~ brought by ~~claimants are~~ a claimant is concerned, unless such ~~the~~  
22 bond is recorded, before the work of improvement is commenced, with the county  
23 recorder of the county in which the property referred to ~~therein in the bond~~ is  
24 situated.

25 **Comment.** Section 3239 is amended to make clear that the general rules on limiting actions to  
26 recover on payment bonds do not apply to home improvement payment bonds under Article 3  
27 (commencing with Section 3244). A six-month rule applies to home improvement payment  
28 bonds, as provided in Section 3240. The other revisions are technical, nonsubstantive changes  
29 intended to improve clarity and modernize language.

30 See also Sections 3096 (“payment bond” defined), 3106 (“work of improvement” defined).

31 ☞ **Staff Note.** In amendments to Sections 3239 and 3240, the staff proposes to apply a standard  
32 six-month limitations period for actions on bonds. This would not be subject to contractual  
33 control and would not depend on whether the bond is recorded before work commences.

### 34 **Civ. Code § 3240 (amended). Time to bring action after bond recorded**

35 SEC. \_\_\_\_\_. Section 3240 of the Civil Code is amended to read:

36 3240. Notwithstanding Section 3239, if a surety on ~~any a~~ payment bond given  
37 pursuant to ~~this chapter~~ Article 1 (commencing with Section 3235), or an original  
38 contractor as principal on a home improvement payment bond given pursuant to  
39 Article 3 (commencing with Section 3244), records the payment bond in the office  
40 of the county recorder of the county in which the property is situated before the  
41 work of improvement is completed, then any action ~~against the surety or sureties~~

1 on the bond shall be commenced not later than six months after the completion of  
2 the work of improvement.

3 **Comment.** Section 3240 is amended to apply the six-month limitation period to actions on  
4 home improvement payment bonds under Article 3. The other revisions are technical,  
5 nonsubstantive changes intended to improve clarity and modernize language.

6 See also Sections 3095 (“original contractor” defined), 3096 (“payment bond” defined), 3106  
7 (“work of improvement” defined).

8 **Civ. Code § 3242 (amended). Claim against payment bond**

9 SEC. \_\_\_\_\_. Section 3242 of the Civil Code is amended to read:

10 3242. (a) With regard to a contract entered into on or after January 1, 1995, in  
11 order to enforce a claim upon ~~any~~ on a payment bond given in connection with a  
12 private work of improvement, a claimant shall give the preliminary 20-day private  
13 work preliminary notice (private work) provided in Section 3097.

14 (b) If the preliminary 20-day private work preliminary notice (private work) was  
15 not given as provided in Section 3097, a claimant may enforce a claim by giving  
16 written notice to the surety and the bond principal as provided in Section 3227  
17 within 15 days after recordation of a notice of completion. If no notice of  
18 completion has been recorded, the time for giving written notice to the surety and  
19 the bond principal is extended to 75 days after completion of the work of  
20 improvement.

21 (c) This section does not apply to home improvement payment bonds given  
22 under Article 3 (commencing with Section 3244).

23 **Comment.** Subdivision (c) is added to Section 3242 to make clear that the preliminary notice is  
24 not required under the mandatory home improvement payment bond provisions in Article 3.  
25 Since payment bonds under Article 3 are required to be recorded and no preliminary 20-day  
26 notice is required, the limitations in Section 3240 apply. The other revisions are technical,  
27 nonsubstantive changes intended to improve clarity and modernize language.

28 See also Sections 3085 (“claimant” defined), 3096 (“payment bond” defined), 3097  
29 (“preliminary 20-day notice (private work)” defined), 3093 (“notice of completion” defined).

30 ☞ **Staff Note.** Another option would be to exclude home improvement contracts from operation  
31 of this section and provide special rules for claims against the Article 3 payment bond.

32 **Civ. Code §§ 3244-3244.60 (added). Home improvement payment bonds**

33 SEC. \_\_\_\_\_. Article 3 (commencing with Section 3244) is added to Chapter 6 of  
34 Title 15 of Part 4 of Division 3 of the Civil Code, to read:

35 Article 3. Home Improvement Payment Bonds

36 **§ 3244. Scope of article**

37 3244. Notwithstanding any other provision in this title, this article governs the  
38 rights of claimants and the liabilities of owners under home improvement  
39 contracts, as defined in Section 7151.2 of the Business and Professions Code.

40 **Comment.** Section 3244 makes clear that this article governs enforcement of claims by way of  
41 mechanic’s liens, bond claims, and stop notices, and any other means, in the case of home

1 improvement contracts. Specific limitations have been amended into a number of other provisions  
2 in this title, but the introductory clause is intended to make clear that this article governs home  
3 improvement contracts in the case of a conflict with another provision. See, e.g., Sections  
4 3097(q), 3123(a), 3159(a)(1)-(2), 3161(a), 3162(a)(1)-(2).

5 See also Section 3085 (“claimant” defined).

6 ☞ **Staff Note.** It is generally not good drafting practice to provide “notwithstanding any other  
7 provision” and the Commission usually avoids this crutch, but in this case, given the nature of  
8 Title 15, it may be advisable.

#### 9 § 3244.10. Fifty percent payment bond

10 3244.10. (a) Before work commences under a home improvement contract in the  
11 amount of five thousand dollars (\$5,000) or more, the original contractor shall file  
12 the home improvement contract and shall obtain and record a payment bond in an  
13 amount not less than 50 percent of the contract price.

14 (b) An increased or supplemental payment bond shall be recorded as provided in  
15 subdivision (a) if changes have the effect of increasing the price stated in the  
16 contract by 10 percent or more, in which case the total bond amount shall be  
17 increased to not less than 50 percent of the increased contract price.

18 (c) If the original contractor has not filed the home improvement contract and  
19 recorded a bond under subdivision (a) because the contract is in an amount under  
20 five thousand dollars (\$5,000), the original contractor shall comply with  
21 subdivision (a) where changes have the effect of increasing the total contract price  
22 to five thousand dollars (\$5,000) or more.

23 **Comment.** Subdivision (a) of Section 3244.10 provides for a mandatory payment bond to be  
24 obtained by the prime contractor and recorded, along with a filed copy of the home improvement  
25 contract. This provision is drawn from Section 3235.

26 The requirement for increasing the bond in subdivision (b) is consistent with the rule under  
27 Section 3123(c) requiring the owner to notify the prime contractor and construction lender where  
28 changes increase the contract price by 5 percent or more. The 10 percent amount is employed in  
29 this section because the bond is given for 50% of the increase, equivalent to the 5 percent  
30 standard in Section 3123(c).

31 Subdivision (c) makes clear that a contract may become subject to the bonding requirement in  
32 subdivision (a) as a result of changes increasing the contract price over the threshold amount.

33 See also Sections 3095 (“original contractor” defined), 3096 (“payment bond” defined), 3244  
34 (incorporation of “home improvement contract” definition).

35 ☞ **Staff Note.** The Commission has decided to use the term “prime contractor” as a general  
36 revision matter, but it does not seem appropriate to do so here until the term is revised for the  
37 entire title. Until then, “original contractor” is the defined term, dating back nearly 150 years in  
38 California law.

39 The trigger amount for requiring an additional bond could be set at a different level.

#### 40 § 3244.20. Corporate surety required

41 3244.20. A payment bond under this article shall be executed by an admitted  
42 surety insurer. A deposit in lieu of bond is not sufficient under this article.

43 **Comment.** Section 3244.20 makes clear that only a bond of a corporate surety is sufficient  
44 under this article See Code Civ. Proc. § 995.120 (“admitted surety insurer” defined); see  
45 generally Code Civ. Proc. § 995.010 *et seq.* (Bond and Undertaking Law). The second sentence is

1 necessary to negate the effect of Code of Civil Procedure Section 995.710 (deposit in lieu of bond  
2 permissible unless specific statute precludes deposit).

3 For general terms of payment bonds, see Section 3096.

4 **§ 3244.30. Limitation on owner’s liability**

5 3244.30. (a) Whether or not the home improvement contract is filed and a  
6 payment bond is recorded as provided in Section 3244.10, the liability of owner  
7 under a home improvement contract is limited to the contract price. Payments  
8 made to the original contractor in good faith discharge the owner’s liability to all  
9 claimants to the extent of the payments.

10 (b) A payment is not made in good faith by the owner to the original contractor  
11 if the owner has received notice of a claim from a claimant other than the original  
12 contractor, by way of a claim of lien or a stop notice. However, the owner may  
13 make payments in good faith if the amount remaining unpaid is sufficient to pay  
14 the claims of claimants other than the original contractor of which the owner has  
15 received notice.

16 **Comment.** Subdivision (a) of Section 3244.30 protects owners who, in good faith, pay the  
17 prime contractor under the contract. This section is intended to shield owners from liability for  
18 double payment in cases where subcontractors and suppliers do not receive payments that have  
19 been made by the owner.

20 Subdivision (b) makes clear that the owner cannot make a good faith payment that would  
21 reduce the unpaid contract amount below the amount needed to pay claimant’s who have given  
22 proper notice.

23 See also Sections 3084 (“claim of lien” defined), 3085 (“claimant” defined), 3088 (“contract”  
24 defined), 3095 (“original contractor” defined), 3096 (“payment bond” defined), 3103 (“stop  
25 notice” defined).

26 **§ 3244.40. Enforcement of claims**

27 3244.40. The lien and stop notice rights of claimants are not limited by this  
28 article, except as provided in Section 3244.30, and claimants may enforce payment  
29 by any appropriate remedy provided in this title, without the necessity of giving  
30 the preliminary 20-day notice (private work) provided by Section 3097.

31 **Comment.** Section 3244.40 makes clear that the only limitation on the rights of claimants is the  
32 rule protecting good faith owners from being subject to double liability for payments made under  
33 the contract. Thus, for example, subcontractors and suppliers may seek satisfaction from the  
34 owner as to amounts not yet paid to the prime contractor or from the construction lender by way  
35 of a stop notice. In addition, compensation may be sought from the payment bond. The final  
36 clause of this section emphasizes that the preliminary 20-day notice should not be used with  
37 regard to home improvement contracts. The notice is not necessary and serves to purpose in this  
38 context, and would be confusing to recipients. Sureties, lenders, and others may contract for  
39 notice as desired.

40 See also Sections 3084 (“claim of lien” defined), 3085 (“claimant” defined), 3103 (“stop  
41 notice” defined).

1    **§ 3244.50. Penalty for noncompliance with bonding requirement**

2       3244.50. The failure of an original contractor to comply with the requirements of  
3 this article is grounds for disciplinary action by the Contractors’ State License  
4 Board.

5       **Comment.** Section 3244.50 provides for discipline to enforce the bonding requirement in  
6 Section 3244.10.

7       See also Section 3095 (“original contractor” defined); Bus. & Prof. Code § 7000 *et seq.*  
8 (Contractors’ State License Law).

9       ☞ **Staff Note.** This section may need to be more specific as to the form of penalty.

10    **§ 3244.60. Bond terms subject to regulation**

11       3244.60. The Contractors’ State License Board may, by regulation, provide  
12 standard terms for payment bonds required by this article.

13       **Comment.** Section 3244.60 grants regulatory authority to the Contractors’ State License  
14 Board, to assist in carrying out the purpose of this article. This authority is consistent with the  
15 CSLB’s special responsibility concerning home improvement contracts. See, e.g., Bus. & Prof.  
16 Code § 7150.2 (certification program, information pamphlets).

17    **Uncodified (added). Operative date**

18       SEC. \_\_\_\_\_. This act becomes operative on January 1, 2004, except that the  
19 authority granted the Contractors’ State License Board to make regulations  
20 governing forms and notices, and any related implementing regulations, becomes  
21 operative on January 1, 2003.

22       **Comment.** This uncodified provision provides a one-year deferred operative date for the  
23 provisions in this act, other than the regulatory authority granted CSLB.

24       ☞ **Staff Note.** For a discussion of transitional issues, see Memorandum 2001-52.



1 and performance bond as well as a copy of the construction contract should be  
2 filed with the county recorder for your further protection. The payment and  
3 performance bond will usually cost from 1 to 5 percent of the contract amount  
4 depending on the contractor's bonding ability. If a contractor cannot obtain such  
5 bonding, it may indicate his or her financial incapacity.

6 (2) Require that payments be made directly to subcontractors and material  
7 suppliers through a joint control. Funding services may be available, for a fee, in  
8 your area which will establish voucher or other means of payment to your  
9 contractor. These services may also provide you with lien waivers and other forms  
10 of protection. Any joint control agreement should include the addendum approved  
11 by the registrar.

12 (3) Issue joint checks for payment, made out to both your contractor and  
13 subcontractors or material suppliers involved in the project. The joint checks  
14 should be made payable to the persons or entities which send preliminary notices  
15 to you. Those persons or entities have indicated that they may have lien rights on  
16 your property, therefore you need to protect yourself. This will help to insure that  
17 all persons due payment are actually paid.

18 (4) Upon making payment on any completed phase of the project, and before  
19 making any further payments, require your contractor to provide you with  
20 unconditional "Waiver and Release" forms signed by each material supplier,  
21 subcontractor, and laborer involved in that portion of the work for which payment  
22 was made. The statutory lien releases are set forth in exact language in Section  
23 3262 of the Civil Code. Most stationery stores will sell the "Waiver and Release"  
24 forms if your contractor does not have them. The material suppliers,  
25 subcontractors, and laborers that you obtain releases from are those persons or  
26 entities who have filed preliminary notices with you. If you are not certain of the  
27 material suppliers, subcontractors, and laborers working on your project, you may  
28 obtain a list from your contractor. On projects involving improvements to a single-  
29 family residence or a duplex owned by individuals, the persons signing these  
30 releases lose the right to file a mechanics' lien claim against your property. In  
31 other types of construction, this protection may still be important, but may not be  
32 as complete.

33 To protect yourself under this option, you must be certain that all material  
34 suppliers, subcontractors, and laborers have signed the "Waiver and Release"  
35 form. If a mechanics' lien has been filed against your property, it can only be  
36 voluntarily released by a recorded "Release of Mechanics' Lien" signed by the  
37 person or entity that filed the mechanics' lien against your property unless the  
38 lawsuit to enforce the lien was not timely filed. You should not make any final  
39 payments until any and all such liens are removed. You should consult an attorney  
40 if a lien is filed against your property."

41 (b) Each contractor licensed under this chapter, prior to entering into a contract  
42 with an owner for work specified as home improvement or swimming pool

1 construction pursuant to Section 7159, shall give a copy of this the “Notice to  
2 Owner (Home Improvement)” to the owner, the owner’s agent, or the payer. The  
3 failure to provide this notice as required shall ~~constitute~~ constitutes grounds for  
4 disciplinary action.

5 **Comment.** Section 7018.5 is amended to replace the explicit language of the Notice to Owner  
6 with authority for the Contractors State License Board to provide by regulation for appropriate  
7 notice language. The other revisions are technical, nonsubstantive changes intended to improve  
8 clarity and modernize language.

9 ☞ **Staff Note.** Additional items and some explicit language may be added to this section, as  
10 desired, without undermining the purpose of making the form more capable of responding to  
11 changing conditions.

12 **Bus. & Prof. Code § 7159 (amended). Home improvement contract requirements**

13 SEC. \_\_\_\_\_. Section 7159 of the Business and Professions Code Section is  
14 amended to read:

15 ☞ **Staff Note.** Amendments to this section have not yet been drafted. Section 7159 competes  
16 with Civil Code Section 3097 for top honors on at least one staff member’s list of statutes most in  
17 need of reorganization and revision.

18 7159. This section applies only to home improvement contracts, as defined in  
19 Section 7151.2, between a contractor, whether a general contractor or a specialty  
20 contractor, who is licensed or subject to be licensed pursuant to this chapter with  
21 regard to the transaction and who contracts with an owner or tenant for work upon  
22 a residential building or structure, or upon land adjacent thereto, for proposed  
23 repairing, remodeling, altering, converting, modernizing, or adding to the  
24 residential building or structure or land adjacent thereto, and where the aggregate  
25 contract price specified in one or more improvement contracts, including all labor,  
26 services, and materials to be furnished by the contractor, exceeds five hundred  
27 dollars (\$500).

28 Every home improvement contract and every contract, the primary purpose of  
29 which is the construction of a swimming pool, is subject to this section. Every  
30 contract and any changes in the contract subject to this section shall be evidenced  
31 by a writing and shall be signed by all the parties to the contract. The writing shall  
32 contain all of the following:

33 (a) The name, address, and license number of the contractor, and the name and  
34 registration number of any salesperson who solicited or negotiated the contract.

35 (b) The approximate dates when the work will begin and on which all  
36 construction is to be completed.

37 (c) A plan and scale drawing showing the shape, size, dimensions, and  
38 construction and equipment specifications for a swimming pool and for other  
39 home improvements, a description of the work to be done and description of the  
40 materials to be used and the equipment to be used or installed, and the agreed  
41 consideration for the work.

1 (d) If the payment schedule contained in the contract provides for a  
2 downpayment to be paid to the contractor by the owner or the tenant before the  
3 commencement of work, the downpayment may not exceed two hundred dollars  
4 (\$200) or 2 percent of the contract price for swimming pools, or one thousand  
5 dollars (\$1,000) or 10 percent of the contract price for other home improvements,  
6 excluding finance charges, whichever is less.

7 (e) A schedule of payments showing the amount of each payment as a sum in  
8 dollars and cents. In no event may the payment schedule provide for the contractor  
9 to receive, nor may the contractor actually receive, payments in excess of 100  
10 percent of the value of the work performed on the project at any time, excluding  
11 finance charges, except that the contractor may receive an initial downpayment  
12 authorized by subdivision (d). With respect to a swimming pool contract, the final  
13 payment may be made at the completion of the final plastering phase of  
14 construction, provided that any installation or construction of equipment, decking,  
15 or fencing required by the contract is also completed. A failure by the contractor  
16 without lawful excuse to substantially commence work within 20 days of the  
17 approximate date specified in the contract when work will begin shall postpone the  
18 next succeeding payment to the contractor for that period of time equivalent to the  
19 time between when substantial commencement was to have occurred and when it  
20 did occur. The schedule of payments shall be stated in dollars and cents, and shall  
21 be specifically referenced to the amount of work or services to be performed and  
22 to any materials and equipment to be supplied. With respect to a contract that  
23 provides for a schedule of monthly payments to be made by the owner or tenant  
24 and for a schedule of payments to be disbursed to the contractor by a person or  
25 entity to whom the contractor intends to assign the right to receive the owner's or  
26 tenant's monthly payments, the payments referred to in this subdivision mean the  
27 payments to be disbursed by the assignee and not those payments to be made by  
28 the owner or tenant.

29 (f) A statement that, upon satisfactory payment being made for any portion of  
30 the work performed, the contractor shall, prior to any further payment being made,  
31 furnish to the person contracting for the home improvement or swimming pool a  
32 full and unconditional release from any claim or mechanic's lien pursuant to  
33 Section 3114 of the Civil Code for that portion of the work for which payment has  
34 been made.

35 (g) The requirements set forth in subdivisions (d), (e), and (f) do not apply when  
36 the contract provides for the contractor to furnish a performance and payment  
37 bond, lien and completion bond, bond equivalent, or joint control approved by the  
38 registrar covering full performance and completion of the contract and the bonds  
39 or joint control is or are furnished by the contractor, or when the parties agree for  
40 full payment to be made upon or for a schedule of payments to commence after  
41 satisfactory completion of the project. The contract shall contain, in close  
42 proximity to the signatures of the owner and contractor, a notice in at least 10-

1 point type stating that the owner or tenant has the right to require the contractor to  
2 have a performance and payment bond.

3 (h) No extra or change-order work may be required to be performed without  
4 prior written authorization of the person contracting for the construction of the  
5 home improvement or swimming pool. No change-order is enforceable against the  
6 person contracting for home improvement work or swimming pool construction  
7 unless it clearly sets forth the scope of work encompassed by the change-order and  
8 the price to be charged for the changes. Any change-order forms for changes or  
9 extra work shall be incorporated in, and become a part of, the contract. Failure to  
10 comply with the requirements of this subdivision does not preclude the recovery of  
11 compensation for work performed based upon quasi-contract, quantum meruit,  
12 restitution, or other similar legal or equitable remedies designed to prevent unjust  
13 enrichment.

14 (i) If the contract provides for a payment of a salesperson's commission out of  
15 the contract price, that payment shall be made on a pro rata basis in proportion to  
16 the schedule of payments made to the contractor by the disbursing party in  
17 accordance with subdivision (e).

18 (j) The language of the notice required pursuant to Section 7018.5.

19 (k) What constitutes substantial commencement of work pursuant to the  
20 contract.

21 (l) A notice that failure by the contractor without lawful excuse to substantially  
22 commence work within 20 days from the approximate date specified in the  
23 contract when work will begin is a violation of the Contractors' State License  
24 Law.

25 (m) If the contract provides for a contractor to furnish joint control, the  
26 contractor shall not have any financial or other interest in the joint control.

27 A failure by the contractor without lawful excuse to substantially commence  
28 work within 20 days from the approximate date specified in the contract when  
29 work will begin is a violation of this section.

30 This section does not prohibit the parties to a home improvement contract from  
31 agreeing to a contract or account subject to Chapter 1 (commencing with Section  
32 1801) of Title 2 of Part 4 of Division 3 of the Civil Code.

33 The writing may also contain other matters agreed to by the parties to the  
34 contract.

35 The writing shall be legible and shall be in a form that clearly describes any  
36 other document that is to be incorporated into the contract. Before any work is  
37 done, the owner shall be furnished a copy of the written agreement, signed by the  
38 contractor.

39 For purposes of this section, the board shall, by regulation, determine what  
40 constitutes "without lawful excuse."

41 The provisions of this section are not exclusive and do not relieve the contractor  
42 or any contract subject to it from compliance with all other applicable provisions  
43 of law.

1 A violation of this section by a licensee, or a person subject to be licensed, under  
2 this chapter, or by his or her agent or salesperson, is a misdemeanor punishable by  
3 a fine of not less than one hundred dollars (\$100) nor more than five thousand  
4 dollars (\$5,000), or by imprisonment in the county jail not exceeding one year, or  
5 by both that fine and imprisonment.

6 (n) Any person who violates this section as part of a plan or scheme to defraud  
7 an owner of a residential or nonresidential structure, including a mobilehome or  
8 manufactured home, in connection with the offer or performance of repairs to the  
9 structure for damage caused by a natural disaster, shall be ordered by the court to  
10 make full restitution to the victim based on the person's ability to pay, as defined  
11 in subdivision (e) of Section 1203.1b of the Penal Code. In addition to full  
12 restitution, and imprisonment authorized by this section, the court may impose a  
13 fine of not less than five hundred dollars (\$500) nor more than twenty-five  
14 thousand dollars (\$25,000), based upon the defendant's ability to pay. This  
15 subdivision applies to natural disasters for which a state of emergency is  
16 proclaimed by the Governor pursuant to Section 8625 of the Government Code or  
17 for which an emergency or major disaster is declared by the President of the  
18 United States.

19 (o)(1) An indictment or information against a person who is not licensed, but  
20 who is required to be licensed under this chapter, shall be brought, or a criminal  
21 complaint filed, for a violation of this section within four years from the date the  
22 buyer signs the contract.

23 (2) An indictment or information against a person who is licensed under this  
24 chapter shall be brought, or a criminal complaint filed, for a violation of this  
25 section within one year from the date the buyer signs the contract.

26 (3) The limitations on actions in this subdivision shall not apply to any  
27 administrative action filed against a licensed contractor.

28 **Comment.** [To be supplied.]

29 ☞ **Staff Note.** There may be other provisions in the Contractors' State License Law (Bus. &  
30 Prof. Code §§ 7000-7191) that will need to be conformed.

31 **Civ. Code § 3097 (amended). Preliminary 20-day notice (private work)**

32 SEC. \_\_\_\_\_. Section 3097 of the Civil Code is amended to read:

33 3097. "Preliminary 20-day notice (private work)" means a written notice from a  
34 claimant that is given prior to the recording of a mechanic's lien, prior to the filing  
35 of a stop notice, and prior to asserting a claim against a payment bond, and is  
36 required to be given under the following circumstances:

37 (a) Except one under direct contract with the owner or one performing actual  
38 labor for wages as described in subdivision (a) of Section 3089, or a person or  
39 entity to whom a portion of a laborer's compensation is paid as described in  
40 subdivision (b) of Section 3089, or as provided in subdivision (q), every person  
41 who furnishes labor, service, equipment, or material for which a lien or payment  
42 bond otherwise can be claimed under this title, or for which a notice to withhold

1 can otherwise be given under this title, shall, as a necessary prerequisite to the  
2 validity of any claim of lien, payment bond, and of a notice to withhold, cause to  
3 be given to the owner or reputed owner, to the original contractor, or reputed  
4 contractor, and to the construction lender, if any, or to the reputed construction  
5 lender, if any, a written preliminary notice as prescribed by this section.

6 (b) Except the contractor, or one performing actual labor for wages as described  
7 in subdivision (a) of Section 3089, or a person or entity to whom a portion of a  
8 laborer's compensation is paid as described in subdivision (b) of Section 3089, or  
9 as provided in subdivision (q), all persons who have a direct contract with the  
10 owner and who furnish labor, service, equipment, or material for which a lien or  
11 payment bond otherwise can be claimed under this title, or for which a notice to  
12 withhold can otherwise be given under this title, shall, as a necessary prerequisite  
13 to the validity of any claim of lien, claim on a payment bond, and of a notice to  
14 withhold, cause to be given to the construction lender, if any, or to the reputed  
15 construction lender, if any, a written preliminary notice as prescribed by this  
16 section.

17 (c) The preliminary notice referred to in subdivisions (a) and (b) shall contain  
18 the following information:

19 (1) A general description of the labor, service, equipment, or materials furnished,  
20 or to be furnished, and an estimate of the total price thereof.

21 (2) The name and address of the person furnishing that labor, service,  
22 equipment, or materials.

23 (3) The name of the person who contracted for purchase of that labor, service,  
24 equipment, or materials.

25 (4) A description of the jobsite sufficient for identification.

26 (5) The following statement in boldface type:

27 **NOTICE TO PROPERTY OWNER**

28 If bills are not paid in full for the labor, services, equipment, or materials  
29 furnished or to be furnished, a mechanic's lien leading to the loss, through court  
30 foreclosure proceedings, of all or part of your property being so improved may be  
31 placed against the property even though you have paid your contractor in full. You  
32 may wish to protect yourself against this consequence by (1) requiring your  
33 contractor to furnish a signed release by the person or firm giving you this notice  
34 before making payment to your contractor, or (2) any other method or device that  
35 is appropriate under the circumstances.

36 (6) If the notice is given by a subcontractor who has failed to pay all  
37 compensation due to his or her laborers on the job, the notice shall also contain the  
38 identity and address of any laborer and any express trust fund to whom employer  
39 payments are due.

40 If an invoice for materials or certified payroll contains the information required  
41 by this section, a copy of the invoice, transmitted in the manner prescribed by this  
42 section shall be sufficient notice.

1 A certificated architect, registered engineer, or licensed land surveyor who has  
2 furnished services for the design of the work of improvement and who gives a  
3 preliminary notice as provided in this section not later than 20 days after the work  
4 of improvement has commenced shall be deemed to have complied with  
5 subdivisions (a) and (b) with respect to architectural, engineering, or surveying  
6 services furnished, or to be furnished.

7 (d) The preliminary notice referred to in subdivisions (a) and (b) shall be given  
8 not later than 20 days after the claimant has first furnished labor, service,  
9 equipment, or materials to the jobsite. If labor, service, equipment, or materials  
10 have been furnished to a jobsite by a claimant who did not give a preliminary  
11 notice, that claimant shall not be precluded from giving a preliminary notice at any  
12 time thereafter. The claimant shall, however, be entitled to record a lien, file a stop  
13 notice, and assert a claim against a payment bond only for labor, service,  
14 equipment, or material furnished within 20 days prior to the service of the  
15 preliminary notice, and at any time thereafter.

16 (e) Any agreement made or entered into by an owner, whereby the owner agrees  
17 to waive the rights or privileges conferred upon the owner by this section shall be  
18 void and of no effect.

19 (f) The notice required under this section may be served as follows:

20 (1) If the person to be notified resides in this state, by delivering the notice  
21 personally, or by leaving it at his or her address of residence or place of business  
22 with some person in charge, or by first-class registered or certified mail, postage  
23 prepaid, addressed to the person to whom notice is to be given at his or her  
24 residence or place of business address or at the address shown by the building  
25 permit on file with the authority issuing a building permit for the work, or at an  
26 address recorded pursuant to subdivision (j).

27 (2) If the person to be notified does not reside in this state, by any method  
28 enumerated in paragraph (1) of this subdivision. If the person cannot be served by  
29 any of these methods, then notice may be given by first-class certified or registered  
30 mail, addressed to the construction lender or to the original contractor.

31 (3) When service is made by first-class certified or registered mail, service is  
32 complete at the time of the deposit of that registered or certified mail.

33 (g) A person required by this section to give notice to the owner, to an original  
34 contractor, and to a person to whom a notice to withhold may be given, need give  
35 only one notice to the owner, to the original contractor, and to the person to whom  
36 a notice to withhold may be given with respect to all materials, service, labor, or  
37 equipment he or she furnishes for a work of improvement, that means the entire  
38 structure or scheme of improvements as a whole, unless the same is furnished  
39 under contracts with more than one subcontractor, in which event, the notice  
40 requirements shall be met with respect to materials, services, labor, or equipment  
41 furnished to each contractor.

42 If a notice contains a general description required by subdivision (a) or (b) of the  
43 materials, services, labor, or equipment furnished to the date of notice, it is not

1 defective because, after that date, the person giving notice furnishes materials,  
2 services, labor, or equipment not within the scope of this general description.

3 (h) If the contract price to be paid to any subcontractor on a particular work of  
4 improvement exceeds four hundred dollars (\$400), the failure of that contractor,  
5 licensed under Chapter 9 (commencing with Section 7000) of Division 3 of the  
6 Business and Professions Code, to give the notice provided for in this section,  
7 constitutes grounds for disciplinary action by the Registrar of Contractors.

8 If the notice is required to contain the information set forth in paragraph (6) of  
9 subdivision (c), a failure to give the notice, including that information, that results  
10 in the filing of a lien, claim on a payment bond, or the delivery of a stop notice by  
11 the express trust fund to which the obligation is owing constitutes grounds for  
12 disciplinary action by the Registrar of Contractors against the subcontractor if the  
13 amount due the trust fund is not paid.

14 (i) Every city, county, city and county, or other governmental authority issuing  
15 building permits shall, in its application form for a building permit, provide space  
16 and a designation for the applicant to enter the name, branch, designation, if any,  
17 and address of the construction lender and shall keep the information on file open  
18 for public inspection during the regular business hours of the authority.

19 If there is no known construction lender, that fact shall be noted in the  
20 designated space. Any failure to indicate the name and address of the construction  
21 lender on the application, however, shall not relieve any person from the  
22 obligation to give to the construction lender the notice required by this section.

23 (j) A mortgage, deed of trust, or other instrument securing a loan, any of the  
24 proceeds of which may be used for the purpose of constructing improvements on  
25 real property, shall bear the designation “Construction Trust Deed” prominently on  
26 its face and shall state all of the following: (1) the name and address of the lender,  
27 and the name and address of the owner of the real property described in the  
28 instrument, and (2) a legal description of the real property which secures the loan  
29 and, if known, the street address of the property. The failure to be so designated or  
30 to state any of the information required by this subdivision shall not affect the  
31 validity of the mortgage, deed of trust, or other instrument.

32 Failure to provide this information on this instrument when recorded shall not  
33 relieve persons required to give preliminary notice under this section from that  
34 duty.

35 The county recorder of the county in which the instrument is recorded shall  
36 indicate in the general index of the official records of the county that the  
37 instrument secures a construction loan.

38 (k) Every contractor and subcontractor employing laborers as described in  
39 subdivision (a) of Section 3089 who has failed to pay those laborers their full  
40 compensation when it became due, including any employer payments described in  
41 Section 1773.1 of the Labor Code and regulations adopted thereunder shall,  
42 without regard to whether the work was performed on a public or private work,  
43 cause to be given to those laborers, their bargaining representatives, if any, and to

1 the construction lender, if any, or to the reputed construction lender, if any, not  
2 later than the date the compensation became delinquent, a written notice  
3 containing all of the following:

4 (1) The name of the owner and the contractor.

5 (2) A description of the jobsite sufficient for identification.

6 (3) The identity and address of any express trust fund described in Section 3111  
7 to which employer payments are due.

8 (4) The total number of straight time and overtime hours on each job.

9 (5) The amount then past due and owing.

10 Failure to give this notice shall constitute grounds for disciplinary action by the  
11 Registrar of Contractors.

12 (l) Every written contract entered into between a property owner and an original  
13 contractor shall provide space for the owner to enter his or her name and address  
14 of residence; and place of business if any. The original contractor shall make  
15 available the name and address of residence of the owner to any person seeking to  
16 serve the notice specified in subdivision (c).

17 (m) Every written contract entered into between a property owner and an  
18 original contractor, except home improvement contracts and swimming pool  
19 contracts subject to Article 10 (commencing with Section 7150) of Chapter 9 of  
20 Division 3 of the Business and Professions Code, shall provide space for the  
21 owner to enter the name and address of the construction lender or lenders. The  
22 original contractor shall make available the name and address of the construction  
23 lender or lenders to any person seeking to serve the notice specified in subdivision  
24 (c). Every contract entered into between an original contractor and subcontractor,  
25 and between subcontractors, shall provide a space for the name and address of the  
26 owner, original contractor, and any construction lender.

27 (n) Where one or more construction loans are obtained after commencement of  
28 construction, the property owner shall provide the name and address of the  
29 construction lender or lenders to each person who has given the property owner  
30 the notice specified in subdivision (c).

31 (o)(1) Each person who has served a preliminary 20-day notice pursuant to  
32 subdivision (f) may file the preliminary 20-day notice with the county recorder in  
33 the county in which any portion of the property is located. A preliminary 20-day  
34 notice filed pursuant to this section shall contain all of the following:

35 (A) The name and address of the person furnishing the labor, service, equipment,  
36 or materials.

37 (B) The name of the person who contracted for purchase of the labor, service,  
38 equipment, or materials.

39 (C) The common street address of the jobsite.

40 (2) Upon the acceptance for recording of a notice of completion or notice of  
41 cessation the county recorder shall mail to those persons who have filed a  
42 preliminary 20-day notice, notification that a notice of completion or notice of

1 cessation has been recorded on the property, and shall affix the date that the notice  
2 of completion or notice of cessation was recorded with the county recorder.

3 (3) The failure of the county recorder to mail the notification to the person who  
4 filed a preliminary 20-day notice, or the failure of those persons to receive the  
5 notification or to receive complete notification, shall not affect the period within  
6 which a claim of lien is required to be recorded. However, the county recorder  
7 shall make a good faith effort to mail notification to those persons who have filed  
8 the preliminary 20-day notice under this section and to do so within five days after  
9 the recording of a notice of completion or notice of cessation.

10 (4) This new function of the county recorder shall not become operative until  
11 July 1, 1988. The county recorder may cause to be destroyed all documents filed  
12 pursuant to this section, two years after the date of filing.

13 (5) The preliminary 20-day notice which a person may file pursuant to this  
14 subdivision is for the limited purpose of facilitating the mailing of notice by the  
15 county recorder of recorded notices of completion and notices of cessation. The  
16 notice which is filed is not a recordable document and shall not be entered into  
17 those official records of the county which by law impart constructive notice.  
18 Notwithstanding any other provision of law, the index maintained by the recorder  
19 of filed preliminary 20-day notices shall be separate and distinct from those  
20 indexes maintained by the county recorder of those official records of the county  
21 which by law impart constructive notice. The filing of a preliminary 20-day notice  
22 with the county recorder does not give rise to any actual or constructive notice  
23 with respect to any party of the existence or contents of a filed preliminary 20-day  
24 notice nor to any duty of inquiry on the part of any party as to the existence or  
25 contents of that notice.

26 (p)(1) The change made to the statement described in subdivision (c) by Chapter  
27 974 of the Statutes of 1994 shall have no effect upon the validity of any notice that  
28 otherwise meets the requirements of this section. The failure to provide, pursuant  
29 to Chapter 974 of the Statutes of 1994, a written preliminary notice to a  
30 subcontractor with whom the claimant has contracted shall not affect the validity  
31 of any preliminary notice provided pursuant to this section.

32 (2)(A) The inclusion of the language added to paragraph (5) of subdivision (c)  
33 by Chapter 795 of the Statutes of 1999, shall not affect the validity of any  
34 preliminary notice given on or after January 1, 2000, and prior to the operative  
35 date of the amendments to this section enacted at the 2000 portion of the 1999-  
36 2000 Regular Session, that otherwise meets the requirements of that subdivision.

37 (B) A preliminary notice given on or after January 1, 2000, and prior to the  
38 operative date of the amendments to this section enacted at the 2000 portion of the  
39 1999-2000 Regular Session, shall not be invalid because of the failure to include  
40 the language added to paragraph (5) of subdivision (c) by Chapter 795 of the  
41 Statutes of 1999, if the notice otherwise complies with that subdivision.

1 (C) The failure to provide an affidavit form or notice of rights, or both, pursuant  
2 to the requirements of Chapter 795 of the Statutes of 1999, shall not affect the  
3 validity of any preliminary notice pursuant to this section.

4 (q) This section does not apply to home improvement contracts as provided in  
5 Chapter 6 (commencing with Section 3235).

6 **Comment.** Section 3097 is amended, and subdivision (a) is added to the section, to recognize  
7 the exception to the general preliminary notice requirement provided in Section 3244.40 (home  
8 improvement contracts).

9 See also Sections 3083 (“bonded stop notice” defined), 3085 (“claimant” defined), 3084  
10 (“claim of lien” defined), 3089 (“laborer” defined), 3087 (“construction lender” defined), 3090  
11 (“materialman” defined), 3095 (“original contractor” defined), 3096 (“payment bond” defined),  
12 3103 (“stop notice” defined), 3104 (“subcontractor” defined), 3106 (“work of improvement”  
13 defined).

14 ☞ **Staff Note.** Like Business and Professions Code Section 7159, Civil Code Section 3097 needs  
15 to be broken up into many shorter sections and reorganized in the course of a general revision.  
16 The staff has not made any technical language improvements in this section at this point because  
17 it is nearly pointless to try to improve Section 3097 in its current form.

18 **Civ. Code § 3114 (amended). Preliminary notice required**

19 SEC. \_\_\_\_\_. Section 3114 of the Civil Code is amended to read:

20 3114. A Except as provided in Section 3244.40, a claimant shall be is entitled to  
21 enforce a lien only if ~~he has given~~ where the preliminary 20-day notice (private  
22 work) has been given in accordance with ~~the provisions of~~ Section 3097, if  
23 required by that section, and has made proof of service in accordance with ~~the~~  
24 ~~provisions of~~ Section 3097.1.

25 **Comment.** Section 3114 is amended to recognize the exception to the lien enforcement right  
26 provided in Section 3244.40 (home improvement contracts). The other revisions are technical,  
27 nonsubstantive changes intended to improve clarity and modernize language.

28 See also Sections 3085 (“claimant” defined), 3097 (“preliminary 20-day notice (private work)”  
29 defined).

30 **Civ. Code § 3123 (amended). Direct lien, amount of lien**

31 SEC. \_\_\_\_\_. Section 3123 of the Civil Code is amended to read:

32 3123. (a) The liens provided for in this chapter ~~shall be~~ are direct liens, and shall  
33 be for the reasonable value of the labor, services, equipment, or materials  
34 furnished or for the price agreed upon by the claimant and the person with whom  
35 ~~he or she~~ the claimant contracted, whichever is less. The lien shall is not be limited  
36 ~~in amount~~ by the price stated in the contract, ~~as defined in Section 3088 between~~  
37 the owner and the original contractor, except as provided in ~~Sections 3235 and~~  
38 ~~3236 and in~~ [subdivision (c) of this section and in] Chapter 6 (commencing with  
39 Section 3235).

40 (b) This section does not preclude the claimant from including in the lien any  
41 amount due for labor, services, equipment, or materials furnished based on a  
42 written modification of the contract or as a result of the rescission, abandonment,  
43 or breach of the contract. However, in the event of rescission, abandonment, or

1 breach of the contract, the amount of the lien may not exceed the reasonable value  
2 of the labor, services, equipment, and materials furnished by the claimant.

3 (c) The owner shall notify the prime contractor and construction lenders of any  
4 changes in the contract if the change has the effect of increasing the price stated in  
5 the contract by 5 percent or more.

6 **Comment.** Subdivision (a) of Section 3123 is amended to recognize the limitations applicable  
7 to home improvement contracts under Article 3 (commencing with Section 3244) of Chapter 6.  
8 The other revisions are technical, nonsubstantive changes intended to improve clarity and  
9 modernize language.

10 See also Section 3085 (“claimant” defined), 3087 (“construction lender” defined).

11 ☞ **Staff Note.** The *Roystone* majority was puzzled by the “direct lien” language, noting  
12 parenthetically “whatever that may mean.” *Roystone Co. v. Darling*. 171 Cal. 526, 537 (1915).  
13 The language probably serves no purpose now, but was arguably important to signal the change  
14 in the law brought about by the 1911 amendments.

15 Note the use of “prime contractor” in subdivision (c). As a general matter, the Commission has  
16 tentatively decided to replace “original contractor” with “prime contractor” throughout the statute  
17 in the course of a general revision. But if that revision does not take place, it might be best to  
18 replace “prime” with “original” in this section.

19 Note also the 5% figure in subdivision (c). The staff is proposing that an increased bond in the  
20 home improvement contract area be required if the price is increased by 10%. See draft Section  
21 3244.10(b)-(c) *supra*.

22 It is not readily apparent to the staff why subdivision (c) is considered to be an exception to the  
23 direct lien rule in subdivision (a). Subdivision (c) on its face simply provides a notice right when  
24 change orders increase the contract price. This provision should be given further study to make its  
25 meaning clear. Subdivision (c) is misplaced and by its terms has little or nothing to do with the  
26 rest of the section.

27 **Civ. Code § 3159 (amended). Duties of construction lender with regard to stop notice**

28 SEC. \_\_\_\_\_. Section 3159 of the Civil Code is amended to read:

29 3159. (a) ~~Any of the persons named~~ A claimant described in Sections ~~Section~~  
30 ~~3110, 3111, and or 3112~~ 3110, 3111, and or 3112 may, prior to the expiration of the period within which  
31 ~~his or her~~ the claim of lien ~~must~~ is required to be recorded under Chapter 2  
32 (commencing with Section 3109), give to a construction lender a stop notice or a  
33 bonded stop notice. The construction lender ~~shall be~~ is subject to the following  
34 duties:

35 (1) The construction lender shall withhold funds pursuant to a bonded stop  
36 notice filed by an original contractor, regardless of whether a payment bond has  
37 previously been recorded ~~in the office of the county recorder where the site is~~  
38 ~~located in accordance with Section 3235~~ pursuant to Chapter 6 (commencing with  
39 Section 3235).

40 (2) The construction lender shall withhold funds pursuant to a bonded stop  
41 notice filed by ~~any other person named in Sections~~ a claimant described in Section  
42 ~~3110, 3111, and or 3112, other than an original contractor,~~ 3110, 3111, and or 3112, unless a payment bond  
43 has previously been recorded ~~in the office of the county recorder where the site is~~  
44 ~~located in accordance with Section 3235~~ pursuant to Chapter 6 (commencing with  
45 Section 3235). If a payment bond has previously been recorded, the construction

1 lender may, at its option, withhold funds pursuant to the ~~bonded~~ stop notice or  
2 bonded stop notice, or may elect not to withhold pursuant to the ~~bonded~~ stop  
3 notice or bonded stop notice given by anyone other than an original contractor.

4 (3) If, when giving the construction lender the stop notice or bonded stop notice,  
5 the claimant makes a written request for notice of the election, accompanied by a  
6 preaddressed, stamped envelope, the construction lender shall furnish the claimant  
7 a copy of the bond within 30 days after making the election. A lender ~~shall~~ is not  
8 be liable for a failure to furnish a copy of the bond if the failure was not intentional  
9 and resulted from a ~~bona fide~~ good faith error, if the lender maintains reasonable  
10 procedures to avoid such ~~an~~ this type of error, and if the error was corrected not  
11 later than 20 days from the date on which the violation was discovered. The  
12 payment bond may be recorded at any time prior to the serving of the first stop  
13 notice. The notice may only be given for materials, equipment, or services  
14 furnished, or labor performed.

15 (b) In the case of a stop notice or bonded stop notice filed by the original  
16 contractor or by a subcontractor, the original contractor or subcontractor shall only  
17 be entitled to recover on his or her stop notice or bonded stop notice the net  
18 amount due the original contractor or subcontractor after deducting the stop notice  
19 claims of all subcontractors or material suppliers who have filed bonded stop  
20 notices on account of work done on behalf of the original contractor or the  
21 subcontractor.

22 (c) In no event shall is the construction lender ~~be~~ required to withhold, pursuant  
23 to a bonded stop notice, more than the net amount identified in subdivision (b).  
24 Notwithstanding any other provision, ~~no~~ a construction lender ~~shall have any~~  
25 liability is not liable for the failure to withhold more than this net amount upon  
26 receipt of a bonded stop notice.

27 **Comment.** Section 3159 is amended to recognize the bonding requirement applicable to home  
28 improvement contracts under Section 3244.10. The other revisions are technical, nonsubstantive  
29 changes intended to improve clarity and modernize language.

30 See also Sections 3083 (“bonded stop notice” defined), 3085 (“claimant” defined), 3087  
31 (“construction lender” defined), 3090 (“materialman” defined), 3095 (“original contractor”  
32 defined), 3096 (“payment bond” defined), 3103 (“stop notice” defined), 3104 (“subcontractor”  
33 defined).

34 ☞ **Staff Note.** The statute uses “stop notice” to mean (1) both bonded and unbonded stop  
35 notices, as in this section, and (2) only unbonded stop notices, as in Section 3159. This is  
36 troublesome in a number of sections, such as Section 3162(b) below. As a general revision, the  
37 staff proposes to replace the phrase “stop notice or bonded stop notice” with “top notice” and use  
38 the term “unbonded stop notice” when the statute intends to draw a distinction.

39 This section is *identical* to Section 3162, except for the different wording of the first sentence  
40 of subdivision (a) and the last sentence of subdivision (a)(3), which does not appear in Section  
41 3162. This confusing and pointless repetition should be fixed by way of a general revision of the  
42 mechanic’s lien statute.

43 The preferred term is “good faith” instead of “bona fide.” In existing law, “good faith” is used  
44 in seven sections (§§ 3097(o)(3), 3137, 3145, 3236, 3260.1(b), 3262.5(a), 3263) and “bona fide”  
45 is used in five sections (§§ 3159(a)(3), 3162(a)(3), 3260(e), 3261, 3262).

1 **Civ. Code § 3160 (amended). Effective service of stop notice**

2 SEC. \_\_\_\_\_. Section 3160 of the Civil Code is amended to read:

3 3160. Service of a stop notice or a bonded stop notice ~~shall be~~ is effective only if  
4 the claimant satisfied both of the following requirements:

5 (a) Gave the preliminary 20-day notice (private work) in accordance with the  
6 ~~provisions of Section 3097, if required by that section; and~~ or any other provision  
7 in this title.

8 (b) Served his the stop notice ~~as defined in Section 3103 or his or~~ bonded stop  
9 notice ~~as defined in Section 3083~~ prior to the expiration of the period within which  
10 his a claim of lien ~~must~~ is required to be recorded under Section 3115, 3116, or  
11 3117.

12 **Comment.** Subdivision (a) of Section 3160 is amended to recognize that other provisions may  
13 excuse the duty to file a preliminary 20-day notice, specifically Section 3244.40, relating to home  
14 improvement contracts. The other revisions are technical, nonsubstantive changes intended to  
15 improve clarity and modernize language.

16 See also Sections 3083 (“bonded stop notice” defined), 3085 (“claimant” defined), 3097  
17 (“preliminary 20-day notice (private work)” defined), 3103 (“stop notice” defined), 3104  
18 (“subcontractor” defined).

19 ☞ **Staff Note.** As to the cross reference in subdivision (b), note that Section 3159(a) refers to  
20 “recorded under Chapter 2 (commencing with Section 3109)” rather than “recorded under Section  
21 3115, 3116, or 3117.” It does not appear that any special distinction or limitation is intended by  
22 the language in subdivision (b). The broader reference is probably preferable, to avoid technical  
23 problems if a relevant section were to be added and a cross-reference is not added to subdivision  
24 (b).

25 **Civ. Code § 3161 (amended). Withholding by owner in response to stop notice**

26 SEC. \_\_\_\_\_. Section 3161 of the Civil Code is amended to read:

27 3161. ~~It shall be the duty of the owner upon~~ (a) Upon receipt of a stop notice  
28 pursuant to Section 3158 ~~to, the owner shall~~ withhold from the original contractor  
29 or from any person acting under his or her authority and to whom labor or  
30 materials, or both, have been furnished, or agreed to be furnished, sufficient  
31 money due or to become due to such the original contractor to answer [such claim  
32 and any claim of lien that may be recorded therefor], unless a payment bond has  
33 been recorded pursuant ~~to the provisions of Section 3235~~ Chapter 6 (commencing  
34 with Section 3235), in which case the owner may, but is not obligated to, withhold  
35 such the money.

36 (b) If the owner elects not to withhold pursuant to a stop notice by reason of a  
37 payment bond having been previously recorded, then the owner shall, within 30  
38 days after receipt of the stop notice, give a written notice to the claimant at the  
39 address shown in the stop notice that the bond has been recorded and furnish to the  
40 claimant a copy of that bond.

41 **Comment.** Section 3161 is amended to recognize the bonding requirement applicable to home  
42 improvement contracts under Section 3244.10. The other revisions are technical, nonsubstantive  
43 changes intended to improve clarity and modernize language.

44 See also Sections 3085 (“claimant” defined), 3095 (“original contractor” defined), 3097  
45 (“preliminary 20-day notice (private work)” defined), 3103 (“stop notice” defined),

1 ☞ **Staff Note.** In the first paragraph, the antecedent to “any person acting under his or her  
2 authority” is not clear. Note also that only labor and materials are mentioned — what about  
3 equipment and services? Compare Sections 3159(b) (“materials, equipment, or services furnished,  
4 or labor performed”), 3168 (“labor, services, equipment, or materials”).

5 **Civ. Code § 3162 (amended). Withholding by lenders**

6 SEC. \_\_\_\_\_. Section 3162 of the Civil Code is amended to read:

7 3162. (a) ~~Upon~~ Except as otherwise provided in this section, upon receipt of a an  
8 unbonded stop notice pursuant to Section 3159, the construction lender may, and  
9 upon receipt of a bonded stop notice the construction lender shall, ~~except as~~  
10 ~~provided in this section,~~ withhold from the borrower or other person to whom ~~it~~  
11 the construction lender or the owner may be obligated to make payments or  
12 advancement out of the construction fund, sufficient money to answer the claim  
13 [and any claim of lien that may be recorded therefor]. The construction lender  
14 ~~shall be is~~ subject to the following duties:

15 (1) The construction lender shall withhold funds pursuant to a bonded stop  
16 notice filed by an original contractor, regardless of whether a payment bond has  
17 previously been recorded ~~in the office of the county recorder where the site is~~  
18 ~~located in accordance with Section 3235 pursuant to Chapter 6 (commencing with~~  
19 Section 3235).

20 (2) The construction lender shall withhold funds pursuant to a bonded stop  
21 notice filed by ~~any other person named in Sections~~ a claimant described in Section  
22 3110, 3111, and or 3112, other than an original contractor, unless a payment bond  
23 has previously been recorded ~~in the office of the county recorder where the site is~~  
24 ~~located in accordance with Section 3235 pursuant to Chapter 6 (commencing with~~  
25 Section 3235). If a payment bond has previously been recorded, the construction  
26 lender may, at its option, withhold funds pursuant to the ~~bonded~~ stop notice or  
27 bonded stop notice, or may elect not to withhold pursuant to the ~~bonded~~ stop  
28 notice or bonded stop notice given by anyone other than an original contractor.

29 (3) If, when giving the construction lender the stop notice or bonded stop notice,  
30 the claimant makes a written request for notice of the election, accompanied by a  
31 preaddressed, stamped envelope, the construction lender shall furnish the claimant  
32 a copy of the bond within 30 days after making the election. A lender ~~shall is~~ not  
33 be liable for a failure to furnish a copy of the bond if the failure was not intentional  
34 and resulted from a ~~bona fide~~ good faith error, if the lender maintains reasonable  
35 procedures to avoid such an this type of error, and if the error was corrected not  
36 later than 20 days from the date on which the violation was discovered. The  
37 payment bond may be recorded at any time prior to the serving of the first stop  
38 notice.

39 (b) In the case of a stop notice or bonded stop notice filed by the original  
40 contractor or by a subcontractor, the original contractor or subcontractor shall only  
41 be entitled to recover on his or her stop notice or bonded stop notice the net  
42 amount due the original contractor or subcontractor after deducting the stop notice  
43 claims of all subcontractors or material suppliers who have filed bonded stop

1 notices on account of work done on behalf of the original contractor or the  
2 subcontractor.

3 (c) In no event shall is the construction lender ~~be~~ required to withhold, pursuant  
4 to a bonded stop notice, more than the net amount identified in subdivision (b).  
5 Notwithstanding any other provision, ~~no~~ a construction lender ~~shall have any~~  
6 liability is not liable for the failure to withhold more than this net amount upon  
7 receipt of a bonded stop notice.

8 **Comment.** Section 3162 is amended to recognize the bonding requirement applicable to home  
9 improvement contracts under Section 3244.10. The other revisions are technical, nonsubstantive  
10 changes intended to improve clarity and modernize language.

11 See also Sections 3083 (“bonded stop notice” defined), 3085 (“claimant” defined), 3087  
12 (“construction lender” defined), 3090 (“materialman” defined), 3095 (“original contractor”  
13 defined), 3096 (“payment bond” defined), 3103 (“stop notice” defined), 3104 (“subcontractor”  
14 defined).

15 ☞ **Staff Note.** This section is *identical* to Section 3159, except for the different wording of the  
16 first sentence of subdivision (a) and the last sentence of Section 3159(a)(3), which does not  
17 appear in this section. This confusing and pointless repetition should be fixed by way of a general  
18 revision of the mechanic’s lien statute.

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