

Study H-820

November 13, 2001

First Supplement to Memorandum 2001-92**Mechanic's Liens: General Revision (Abdulaziz Comments)**

Attached to this memorandum is part of a letter from Sam K. Abdulaziz commenting on general revision issues, in particular, the points reviewed at the last meeting in connection with Memorandum 2001-71.

We will discuss Mr. Abdulaziz's comments at we reach relevant sections in reviewing the staff draft statute attached to Memorandum 2001-92.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

☞ **Staff Note.** The following material concerning general revision of the mechanic's lien statute is extracted from Mr. Abdulaziz's letter of November 7, which also comments on home improvement contracts issues to be discussed at the following meeting. Omissions are indicated by elipsis marks.

November 7, 2001

SENT VIA E-MAIL ONLY

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

RE: CALIFORNIA LAW REVISION COMMISSION STUDY / MECHANIC'S LIENS ...

Dear Commissioners:

* * * * *

III. PROPOSED LEGISLATION

Below are our comments as to all of the proposed amendments to the statutes, including ... those General Revisions discussed in Staff Memorandum 2001-71

A. General Revision

The following pertain to the Staff Recommendations in Memorandum 2001-71:

1. Prime Contractor

We agree with the proposal to use the word "prime contractor" throughout the statutes as opposed to various different names such as "original contractor," "general contractor," etc. The terms "original contractor" or "original contract" appear in your tentative draft in numerous places. The statutes should be changed to refer to the "prime contract" or "prime contractor" throughout.

2. Preliminary Notice

The requirement of a preliminary notice should remain within the statutes, though we agree that subsection (b) of Section 3097 should be omitted. We agree with the Staff Memorandum, that subdivision (a) of section 3097 works well in the industry and should not be changed. The omission of subdivision (b) should be carried forward into the Recommendations to the Legislature.

3. Lien For Labors Benefits

We would leave this issue to representatives of labor. However we believe that anyone who contributes to a work of improvement should be protected.

4. Time To File Stop Notices

We agree that the time to file stop notices should be consistent with the time to record mechanic's liens. However, we believe that anyone who contributes to a work of improvement and is not paid should be entitled to enforce his or her constitutional rights at the moment that payments are past due and not have to wait until he or she finishes the job or ceases performance.

The present statutes provide remedies to owners or contractors who feel that mechanic's liens or stop notices have been served improperly. Release bonds are available for both mechanic's liens and stop notices. There is an affidavit process that the prime contractor can invoke on public works projects.

5. Attorneys Fees In Actions On Stop Notices

We support the ability to collect attorneys fees in both bonded and unbonded stop notice actions. The current state of the law (Civil Code section 3176) allows for the recovery of attorneys fees in bonded stop notice actions only. We support an amendment to section 3176, however, we suggest that a further amendment be made to section 3176. We have been involved in hundreds of stop notice actions, both bonded and unbonded. There have been numerous instances where those that are required to pay under the stop notice, would refuse to pay attorneys fees in instances where a settlement had been reached prior to the filing of a law suit, despite the fact that a stop notice claimant has incurred attorneys fees. In other words, those responsible to pay the stop notice funds have refused to pay attorneys fees based upon the theory that without a lawsuit being filed, there is no "action," and therefore no legal requirement to pay attorneys fees. We see no rational basis for the distinction and therefore we suggest that section 3176 should be amended further to eliminate the word "action" and replace it with the word "claim." The statute would then read, "in any claim against an owner..."

6. Claims Includable In Stop Notices

We agree with the comments set forth in the Staff Recommendations, approving the substance of the proposal to amend Civil Code section 3123(b) to allow a stop notice to include the same claims as available under a mechanic's lien.

7. Presumption Concerning Use Of Materials

The statements set forth in the Staff Memorandum are a true to life problem for all material suppliers. Material suppliers can overcome this problem by relying upon the person they sold the materials to, to testify on their behalf as to the consumption of the materials purchased by that contractor and subsequent incorporation into the work of improvement. Absent the assistance of the contractor, material suppliers generally have a problem proving that their materials were in fact incorporated. For this reason, we support the creation of a rebuttable presumption that once the materials are on site, they were incorporated into the work of improvement.

Perhaps a better proposal would be for the state statutes to adopt the Federal rule. Federal statutes do not require any proof whatsoever that the materials were in fact incorporated into the work of improvement. The delivery of the materials to the jobsite is sufficient to allow a material supplier to recover on a federal project. We would support this form of amendment to the statute, thus eliminating the back and forth arguments and litigation over whether or not the material was actually consumed into the work of improvement.

8. Attorneys Fees In Mechanic's Liens Foreclosure Actions

We disagree with the staff position stated in Memorandum 2001-71, and believe that Mr. Hunt's suggestion to impose attorney's fee liability in mechanic's lien actions should be adopted. Considering the lien will now only apply on residential projects where an owner has not paid his contractor, there is no valid reason not to adopt this proposal.

9. Coverage Of Releases

We agree that the language in the statutory notice creates an ambiguity, which may preserve contract rights, even though the document itself waives any rights to a mechanic's lien, stop notice, or payment bond claim for the same amount. One must remember, however, that the purpose of the statutory lien release is to protect persons not in privity with releasor. As an example, subcontractors and material suppliers provide the conditional and unconditional release forms to their customer, and ultimately, those get passed on to the owner. Subcontractors and material suppliers have no contract rights against an owner. There is no ambiguity in the mind of the courts who strictly construe a statutory release against the releasor's lien rights. As between the prime contractor and the owner, that is the situation where the language may need to be cleaned up. However, that may be best left for another time.

10. Completion

We agree with the proposed revision to Civil Code Section 3086 as it relates to public works projects. We agree that it is a trap for the unwary. The reduction in the time to record a mechanic's lien or file a stop notice should be similar in nature, and there should be no exception because the project is a public works project.

11. Discipline For Contractors' Failure To Provide Information

We agree that there is a problem with the failure to provide accurate and complete information, as outlined in the Staff Memorandum. Prime contractors are sometimes uncooperative and refuse to provide information, to the detriment of subcontractors and material suppliers. The proposal for disciplining prime contractors who refuse to provide the information may be a good suggestion, but it is not a remedy. Subcontractors and material suppliers need the information as to the owner, lender, etc. This information is critical to the processing of the preliminary notice, which is critical to preserving the mechanic's lien and stop notice rights of subcontractors and material suppliers. Under your proposal, the Preliminary Notice will remain necessary on non-residential projects. Thus, merely disciplining the prime contractor for the failure to provide the needed information will not rectify the real problem, which is essentially putting subcontractors and material suppliers in a position not being able to protect their mechanic's lien and stop notice rights.

In our years of representing contractors in disciplinary matters, we have never seen a situation where a contractor was disciplined for failing to provide information to subcontractors and material suppliers, as required by law. However, we would not take the teeth out of the statute. We might suggest that the Commission go one step forward and provide that the prime contractor will be liable to any material supplier or subcontractor to the harm cause to them by their knowing or willful failure to provide accurate information as to the owner, lender, etc. By doing so, if the subcontractor or material supplier loses the right to recover, they may have the ability to seek further redress from the prime contractor. However, even this suggestion may have no "teeth," as if the contractor is not paying those persons (or has himself or herself filed bankruptcy), there may be nothing to collect in such a suit. Another suggestion could be a civil penalty of an amount sufficient to send a message (i.e., \$2,000.00). Civil penalties are a part of the existing Business & Professions Code for other violations. See, e.g., Civil Code section 7160.

12. Requirement For Sending Copies Of Payment Bond

We agree with the first paragraph of the Staff Memorandum. Often times, it is a problem obtaining a copy of the payment bond. For some reason, contractors and owners alike are often reluctant to provide copies of the payment bond to the subcontractors and/or material suppliers.

We would suggest that some formal amendment be made to the statute that requires the owner to provide a copy of the payment bond, or at a minimum, the name, address, telephone number, and

bond number of the payment bond surety so that the mechanic's lien and/or stop notice claimant can obtain a copy of the bond.

13. Time To Sue On Stop Notice Release Bond

We agree with the Staff Memorandum set forth in this section. That is to say that the statute of limitations should not begin to run until service of the bond on the claimant.

14. Notice Of Preliminary Notice Mistakes

We also agree that the Preliminary Notice statutes should be amended to pattern themselves after the Arizona law in the event of a mistake. We do not feel that the responsibilities placed upon the owner create a burden or hardship. If the comments are correct that owners will use the inaccuracies placed in the Preliminary Notices as a defense, then it is clear that early on those owners have found and recognized those mistakes -- those owners should not be able to profit from those mistakes by their own inaction.

James Stypin states that as a practical matter, minor non-substantive errors are ignored by the courts. This may be true, but the problem is, what is a substantive error? It is subject to interpretation by courts. Is placing the wrong address in your Preliminary Notice a substantive error? Is naming the wrong prime contractor a substantive error? Why not take care of this problem without resorting to the courts?

Mr. Stypin also suggests that the proposed language "imposes a sweeping burden on the recipient of the Preliminary Notice to perform a clinical analysis of that notice." We do not agree with this statement. As stated above, if the owner is going to raise a mistake contained in the preliminary notice as a defense to a mechanic's lien or stop notice action, that mistake was obviously found by the owner without any type of "sweeping burden" or "clinical analysis."

If there are obvious mistakes contained within the preliminary notice that the owner fails to bring to the attention of the claimant, the owner should be estopped from being able to assert those defenses.

15. "Other Completion Issues" -- Notice of Recording Notice of Completion

We also agree with the American Subcontractors Association that there is a the need for legislation that would require the owner to give notice to all people that sent Preliminary Notices that a Notice of Completion has been recorded. We would suggest that legislation apply to both public and private works of improvement.

* * * * *

Very truly yours,
ABDULAZIZ & GROSSBART

SAM K. ABDULAZIZ
KENNETH S. GROSSBART

SKA: tmw