

First Supplement to Memorandum 2007-57

**Mechanics Lien Law: Deferred Issues
(Analysis of Comments on Tentative Recommendation)**

This supplement continues a discussion of all significant outstanding issues relating to the Commission’s tentative recommendation on *Mechanics Lien Law* (June 2006).

Most comments analyzed in this memorandum were attached as an exhibit to previous CLRC memoranda. The relevant portions of those comments are summarized and discussed in this memorandum, but the comments have not been republished.

The following new comments are attached to this memorandum:

Exhibit p.

- California State Council of Laborers Legislative Department and Construction Laborers Trust Funds for Southern California, Los Angeles (12/10/07)1

Issues in this memorandum that clearly require discussion have been marked with the following symbol: ☞.

All other issues in this memorandum are presumed to be noncontroversial “consent” issues. The staff does not intend to discuss any consent issue, unless a Commission member or member of the public expresses a question or concern about the issue.

Sections of the proposed law reprinted in this memorandum are the latest draft versions of the section, incorporating any revisions approved by the Commission at previous meetings and any non-substantive technical corrections made by the staff.

OPERATIVE DATE AND TRANSITIONAL PROVISION

The proposed law presently contains the following operative date and transitional provision:

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

SEC. _____. (a) This act is operative January 1, 2009.

(b) Except as otherwise provided in this section, this act applies to a contract for a work of improvement executed before, on, or after the operative date.

(c) The effectiveness of a notice given, or other action taken, before the operative date is governed by the applicable law in effect before the operative date and not by this act.

Operative Date

The proposed law would have a one year deferred operative date. CLRC Memorandum 2006-20, pp. 9-10; Meeting Minutes (June 2006), p. 5. Given the passage of time since that decision, **the date needs to be revised from January 1, 2009, to January 1, 2010.**

Codification

The current provision is uncodified. In addition to a deferred operative date, the uncodified provision also includes transitional rules providing for retroactive effect of the proposed law, except with respect to a notice or act completed prior to the operative date.

The transitional rules should probably be codified, to make it easier for readers to find them. **The staff recommends doing so by adding the following sections to the private and public work parts of the proposed law:**

§ 8051. Application of former law

8051. (a) This part is operative January 1, 2010.

(b) Except as otherwise provided in this section, this part applies to a contract for a work of improvement executed before, on, or after the operative date.

(c) The effectiveness of a notice given or other action taken on a work of improvement before the operative date is governed by the applicable law in effect before the operative date and not by this part.

Comment. Section 8051 is new. Although this part applies generally to all contracts for a work of improvement, it does not govern notices given or actions taken on a work of improvement prior to January 1, 2010, which are governed by former law.

See also Sections 8008 (“contract”), 8050 (“work of improvement”).

§ 42005. Application of former law

42005. (a) This part is operative January 1, 2010.

(b) Except as otherwise provided in this section, this part applies to a public works contract executed before, on, or after the operative date.

(c) The effectiveness of a notice given or other action taken on a public works contract before the operative date is governed by the applicable law in effect before the operative date and not by this part.

Comment. Section 42005 is new. Although this part applies generally to all public works contracts, it does not govern notices given or actions taken on a public works contract prior to January 1, 2010, which are governed by former law.

See also Section 8008 (“public works contract”).

LIEN RELEASE ORDER

Proposed Civil Code Section 8496, a new section added by the Commission after circulation of the tentative recommendation, addresses the effect of a lien release order under the proposed law’s expedited lien release procedure:

8496. An order releasing a lien under this article does not bar the subsequent recording of a claim of lien by the claimant, if that recording is otherwise allowed by law.

The section was intended to codify the holding in *Solit v. Tokai Bank, Ltd. New York Branch*, 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243 (1999). See CLRC Memorandum 2006-48, pp. 99. After further analysis however, it appears the language in Section 8496 goes beyond the holding of the court in *Solit*.

Existing Law

Under existing law, a lien may be summarily released on only one ground: failure to file an action in court enforcing a recorded lien claim within 90 days of recordation of the claim. Civ. Code § 3154. The *Solit* case held that, if a lien is released on that ground, the lien claimant may record a new lien claim for the same work, if the time for recording a lien claim had not yet expired.

In so holding, the *Solit* court highlighted the distinction between a claimant’s inchoate and constitutionally based lien *right*, and a claimant’s statutory recorded lien *claim* based on that inchoate lien right. Per the *Solit* court, the existing lien release procedure is intended only to test the validity of a specific recorded claim, not to adjudicate the merit of the underlying lien right.

Possible Overbreadth of Proposed Section 8496

Proposed Section 8496 states broadly that release of a lien claim (on *any* ground) does not bar the recordation of a new lien claim for the same work, except as “otherwise provided by law.”

As applied to the proposed law, that rule may be broader than the holding in *Solit*. The *Solit* opinion effectively permits recordation of an identical lien claim only when a lien release is based on a correctable procedural defect, having nothing to do with the merit of the underlying lien right. But the proposed law would add a number of new grounds for the release of a lien claim that are *not* correctable, and *are* based on the underlying merit of the claim. The *Solit* rule may not apply to a release on those grounds.

Proposed Civil Code Section 8480(a) would provide the following grounds for releasing a lien claim:

- (1) The claimant has not commenced an action to enforce the lien within the time provided in Section 8460.
- (2) The claimant’s demand stated in the claim of lien has been paid to the claimant in full.
- (3) None of the work stated in the claim of lien has been provided.
- (4) The claimant was not licensed to provide the work stated in the claim of lien for which a license was required by statute.
- (5) There is a final judgment in another proceeding that the petitioner is not indebted to the claimant for the demand on which the claim of lien is based.

The holding in *Solit* is consistent with the *first* of these grounds. However, the second through fifth grounds present facts that were not at issue in *Solit*. Those grounds involve the *substance* of the lien claim, rather than a procedural defect. If a court finds that a lien claim has been paid, or the work was never provided, or the claimant is violating a licensing requirement, it is not clear that the claimant should be able to record a new lien claim for the same work.

The expanded lien release procedure in the proposed law would be a new and untested statutory creation. Until the practical aspects of its operation can be observed, it may be unwise to extend *Solit* to grounds for release that were not considered in that case. Even if proposed Section 8496 were narrowed to codify only the precise holding of *Solit*, the section might still create an inference as to the preclusive effect of a lien release based on any of the new grounds in proposed Section 8480.

The staff therefore recommends that proposed Section 8496 be deleted, and that this issue instead be addressed by adding the following language to the Comment to proposed Section 8480:

In *Solit v. Tokai Bank, Ltd. New York Branch*, 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243 (1999), the court held that an order releasing a lien because it had not been timely enforced may not bar the recording of a new claim for the same work, if the time for recording a new claim of lien had not yet expired.

That language would make clear the proposed law did not abrogate the holding in *Solit*, but would leave to case law development the question of whether a release based on any of the new grounds in the proposed law precludes a subsequent lien claim for the same work.

DESIGN PROFESSIONALS LIENS

Existing law provides a design professional with a special statutory lien right available only for design work performed *prior* to commencement of a work of improvement. Civ. Code §§ 3081.1-3081.10. Under existing law, the only provisions of the mechanics lien law applicable to this special lien are the mechanics lien enforcement provisions, including provisions relating to a lien release bond and the lien release procedure. Civ. Code § 3081.5.

Over the course of this study, the Commission has considered the extent to which other provisions in the proposed law should be made applicable to a design professionals lien. The Commission's last decision on the issue was to take a conservative approach to incorporation, preserving existing law, but not incorporating any additional provisions. See CLRC Memorandum 2006-43, pp. 8-9; CLRC Meeting Minutes (October 2006), pp. 5-6; CLRC Memorandum 2006-48, pp. 45-46; CLRC Meeting Minutes (December 2006), p. 3.

Based on a recommendation from the staff, the Commission implemented this conservative approach by revising the definition of the term "claimant" in the proposed law, so as to exclude a design professional exercising a design professionals lien right. CLRC Memorandum 2006-43, pp. 8-9; CLRC Meeting Minutes (October 2006), pp. 5-6.

After further consideration, the staff suggests that relying solely on a narrowed definition to specify which provisions of the proposed law are intended to apply to a design professionals lien may be too oblique. The staff instead suggests that a provision in the proposed law be revised to expressly

state which provisions of the proposed law are applicable (and inapplicable) to a design professionals lien. Each of the mechanics lien enforcement provisions in the proposed law (including provisions relating to a lien release bond and the lien release procedure) would be expressly declared applicable, and the staff suggests also making the definitional provisions in the proposed law applicable. All other provisions of the proposed law would be expressly stated to be inapplicable.

The staff therefore recommends **restoring the previous definition of “claimant” in the proposed law, and revising a design professionals lien provision as follows:**

§ 8308. Application of part

~~8308. A lien created under this chapter is enforceable under Article 7 (commencing with Section 7460) of Chapter 4.~~

(a) Except as provided in subdivision (b), no provision of this part applies to a lien created under this chapter.

(b) The following provisions of this part apply to a lien created under this chapter:

(1) This chapter.

(2) Article 1 (commencing with Section 8000) of Chapter 1.

(3) Section 8428.

(4) Article 7 (commencing with Section 8480) of Chapter 4.

(5) Article 8 (commencing with Section 8490) of Chapter 4.

Comment. Section 8308 ~~restates~~ continues the substance of former Section 3081.5, and provides for the application of the definitional provisions of this part.

See also Section 8024 (“lien” defined).

SUBCONTRACTOR BOND ON A PUBLIC WORK

Proposed Public Contract Code Section 45030, relating to a payment bond on a public work, may inadvertently broaden existing law relating to a subcontractor’s obligations.

Section 45030 generally continues existing law relating to a public work payment bond:

§ 45030. Bond requirements

45030. (a) A payment bond shall be in an amount not less than one hundred percent of the total amount payable pursuant to the public works contract. The bond shall be in the form of a bond and not a deposit in lieu of bond.

(b) The payment bond shall provide that if the direct contractor or a subcontractor fails to pay any of the following, the surety will pay the obligation and, if an action is brought to enforce the liability on the bond, a reasonable attorney's fee, to be fixed by the court:

(1) A person authorized under Section 42030 to assert a claim against a payment bond.

(2) Amounts due under the Unemployment Insurance Code with respect to work or labor performed pursuant to the public works contract.

(3) Amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the contractor and subcontractors under Section 13020 of the Unemployment Insurance Code with respect to the work and labor.

(c) The payment bond shall by its terms inure to the benefit of any person authorized under Section 42030 to assert a claim against a payment bond so as to give a right of action to that person or that person's assigns in an action to enforce the liability on the bond.

(d) The direct contractor may require that a subcontractor give a bond to indemnify the direct contractor for any loss sustained by the direct contractor because of any default of the subcontractor.

Subdivision (b) of the section provides that the bond shall be conditioned on various payment obligations on the part of both the direct contractor and any subcontractor on the project. Subdivision (d) then provides that the direct contractor may require any subcontractor to provide an additional bond, to indemnify the direct contractor for loss sustained by the direct contractor.

The staff is concerned that subdivision (d) as drafted may expand a subcontractor's obligation under this provision beyond that specified under existing law. The corresponding provision in existing law reads as follows:

The original contractor may require of the subcontractors a bond to indemnify the original contractor for any loss sustained by the original contractor because of any default by the subcontractors *under this section*.

Civ. Code § 3248 (emphasis added).

In Section 3248, the "default" of a subcontractor for which the subcontractor could have to indemnify the direct contractor must be a default "*under this section*" (i.e., the subcontractor's obligation to make the various payments specified in the section). But in proposed Section 45030, the words "under this section" have been omitted. Without these words, the default referenced might

be interpreted to include a default in *performance* by the subcontractor, i.e., a failure to provide agreed upon *work* to the direct contractor.

The staff is not sure whether this extension of existing law could cause any significant unintended consequences. However, rather than risk that possibility, the staff recommends that **existing law be continued, by adding the italicized language to subdivision (d):**

(d) The direct contractor may require that a subcontractor give a bond to indemnify the direct contractor for any loss sustained by the direct contractor because of any default of the subcontractor under this section.



WORK PERFORMED AFTER “COMPLETION” OF A WORK OF IMPROVEMENT

In CLRC Memorandum 2006-57, the staff discussed providing an extension of time for pursuing statutory remedies to claimants that contribute to a work of improvement after “completion” of the improvement. As one alternative, the staff suggested an extension for such claimants of 30 days from the date the claimant stops providing work.

That approach is generally supported by the California State Council of Laborers Legislative Department and the Construction Laborers Trust Funds for Southern California (collectively, “Laborers Group”). Exhibit p. 2. However, the group proposes that the extension be for 45 days.

The group indicates that employee benefit contributions are generally not due based on work provided until the month following the month in which work is done. Therefore, Laborers Group argues, the 30 day extension after a claimant stops providing work could expire before the claimant would be able to tell whether the contributions had been made. In an abundance of caution, laborers in that situation would need to record a precautionary lien to protect against the possibility that the contributions for the last month of work might not be made.

This rationale makes sense to the staff. It is true that every day after completion for which the right to pursue a claim is extended leaves owners, direct contractors, and sureties waiting another day before obtaining the assurance that no further claims will be made. However, if the Commission is inclined to grant any extension at all, an extra 15 days would not appear to add significantly to that burden.

As part of the Commission’s consideration of this issue as discussed in CLRC Memorandum 2007-57, **the Commission should consider whether a 45 day**

extension of time should be incorporated in any revision, for the reason offered by Laborers Group.

NOTICE REQUIRED PRIOR TO PAYMENT BOND CLAIM

Proposed Civil Code Section 8612 addresses the notice a claimant must give as a prerequisite to asserting a claim against a payment bond. The section provides that prior to enforcement of a payment bond claim, a claimant must either give preliminary notice as provided by law, or a later notice of a claim to the principal and surety on the bond.

In CLRC Memorandum 2007-57, the staff recommended that Section 8612 be revised (along with corresponding Public Contract Code Section 45060), to clarify that a claimant that gives a preliminary notice at any time may assert a claim against the payment bond for *all* work provided.

Laborers Group does not object to that clarification, but argues that the revision of the sections recommended by the staff creates a new notice requirement for laborers that is not part of existing law. Exhibit pp. 2-5. Laborers Group argues that, under existing law, as a laborer is not required to give preliminary notice, a laborer is required to give no notice prior to enforcing a payment bond claim.

It was not the staff's intention that proposed Civil Code Section 8612 or proposed Public Contract Code Section 45060 be revised in a manner that creates any new notice obligation on the part of laborers. The staff is of the opinion that, due to ambiguity in existing law, the obligation of a laborer to give notice prior to a payment bond claim is an open question. However, rather than attempt to resolve that ambiguity on such an important question at this late date, the staff believes the best alternative would be to simply continue this ambiguity in existing law. This continuation can be accomplished while still achieving the clarification the staff recommends, through a slightly altered revision.

The staff therefore recommends **a new revision to proposed Civil Code Section 8612 (and a corresponding new revision to proposed Public Contract Code Section 45060), intended to supersede the recommended revision in CLRC Memorandum 2007-57, as follows:**

§ 8612. Notice prerequisite to enforcement

8612. (a) In order to enforce a claim against a payment bond under this part, a claimant shall ~~give~~ , no later than 15 days after recordation of a notice of completion, or if no notice of completion

has been recorded, no later than 75 days after completion of the work of improvement:

(a) Give the preliminary notice provided in Chapter 2 (commencing with Section 7200).

(b) If preliminary notice was not given as provided in Chapter 2 (commencing with Section 7200), ~~a claimant may enforce a claim by giving written~~ give written notice of the claim to the surety and the bond principal ~~within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.~~

NOTICE PROVISIONS APPLICABLE TO SUMMARY ADJUDICATION OF STOP WORK NOTICE (PUBLIC WORK)

Under existing law, and as continued by the proposed law, a summary procedure exists by which a direct contractor on a public work may contest the validity of a stop payment notice given by a claimant. Civ. Code §§ 3198-3205, proposed Pub. Cont. Code §§ 44210-44280.

The procedure involves the service of several notices. Affidavits are exchanged relating to the merit of the stop payment notice, and a court proceeding (requiring more notices) is available, if the matter is not resolved.

The Commission has previously added an article to the public work part of the proposed law containing generalized notice provisions (proposed Pub. Cont. Code §§ 42110-42190), and revised several individual notice provisions in the proposed law to incorporate these generalized notice provisions. CLRC Memorandum 2007- 25, pp. 15-23, CLRC Meeting Minutes (June 2007), p. 3. See e.g., proposed Pub. Cont. Code §§ 42230 (notice of completion), 44130 (giving of stop payment notice).

The proposed summary adjudication provisions were not revised in that way. That could create an ambiguity as to whether or not the general notice provisions are intended to apply.

The staff recommends that **the summary adjudication provisions be revised to make clear that the general notice provisions apply:**

§ 44220. Contractor's affidavit and demand for release

44220. The direct contractor shall serve on the public entity an affidavit, together with a copy of the affidavit, in compliance with the requirements of Article 2 (commencing with Section 42110), that includes all of the following information:

(a) An allegation of the grounds for release of the funds and a statement of the facts supporting the allegation.

(b) A demand for the release of all or the portion of the funds that are alleged to be withheld improperly or in an excessive amount.

(c) A statement of the address of the contractor within the state for the purpose of permitting service by mail on the contractor of any notice or document.

§ 44230. Notice to claimant

44230. The public entity shall serve on the claimant a copy of the direct contractor's affidavit, together with a notice stating that the public entity will release the funds withheld, or the portion of the funds demanded, unless the claimant serves on the public entity a counteraffidavit on or before the time stated in the notice. The time stated in the notice shall be not less than 10 nor more than 20 days after service on the claimant of the copy of the affidavit. The notice shall comply with the requirements of Article 2 (commencing with Section 42110).

§ 44240. Claimant's counteraffidavit

44240. (a) A claimant that contests the direct contractor's affidavit shall serve on the public entity a counteraffidavit alleging the details of the claim and describing the specific basis on which the claimant contests or rebuts the allegations of the contractor's affidavit. The counteraffidavit shall be served within the time stated in the public entity's notice, together with proof of service of a copy of the counteraffidavit on the direct contractor. The service of the counteraffidavit on the public entity and the copy of the affidavit on the direct contractor shall comply with the requirements of Article 2 (commencing with Section 42110).

(b) If no counteraffidavit with proof of service is served on the public entity within the time stated in the public entity's notice, the public entity shall immediately release the funds, or the portion of the funds demanded by the affidavit, without further notice to the claimant, and the public entity is not liable in any manner for their release.

(c) The public entity is not responsible for the validity of an affidavit or counteraffidavit under this article.

§ 44250. Commencement of action

44250. (a) If a counteraffidavit, together with proof of service, is served under Section 44240, either the direct contractor or the claimant may commence an action for a declaration of the rights of the parties.

(b) After commencement of the action, either the direct contractor or the claimant may move the court for a determination of rights under the affidavit and counteraffidavit. The party making

the motion shall give not less than five days' notice of the hearing to the public entity and to the other party.

(c) The notice of hearing shall comply with the requirements of Article 2 (commencing with Section 42110). The court shall hear the motion within 15 days after the date of the motion, unless the court continues the hearing for good cause.

§ 44270. Court determination

44270. (a) No findings are required in a summary proceeding under this article.

(b) If at the hearing no evidence other than the affidavit and counteraffidavit is offered, the court may, if satisfied that sufficient facts are shown, make a determination on the basis of the affidavit and counteraffidavit. If the court is not satisfied that sufficient facts are shown, the court shall order the hearing continued for production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits.

(c) At the conclusion of the hearing, the court shall make an order determining whether the demand for release is allowed. The court's order is determinative of the right of the claimant to have funds further withheld by the public entity.

(d) The direct contractor shall serve a copy of the court's order on the public entity in compliance with the requirements of Article 2 (commencing with Section 42110).

When Notice Complete

Under the generalized notice requirements, notice given by mail is complete when deposited in the mail. However, one of the provisions relating to the stop payment summary adjudication procedure, relating to giving notice of an initial court hearing, requires only five (calendar) days' notice. If this notice is deemed complete at the time of mailing, it is possible that the notice of hearing could arrive after the hearing has already occurred.

On a private work, there is a similar provision relating to notice of a hearing on a petition to release a recorded lien claim. Existing law provides that when service of *that* notice of hearing is made by mail, the service is complete on the fifth day following the day of the deposit of the mail. Civ. Code § 3154(e).

Existing law does not apply the same special rule to the stop payment notice summary adjudication procedure. The staff recommends that **it be added:**

§ 44250. Commencement of action

44250. (a) If a counteraffidavit, together with proof of service, is served under Section 44240, either the direct contractor or the claimant may commence an action for a declaration of the rights of the parties.

(b) After commencement of the action, either the direct contractor or the claimant may move the court for a determination of rights under the affidavit and counteraffidavit. The party making the motion shall give not less than five days' notice of the hearing to the public entity and to the other party. Notwithstanding Section 42180, when notice of the hearing is made by mail, the notice is complete on the fifth day following deposit of the notice in the mail.

(c) The court shall hear the motion within 15 days after the date of the motion, unless the court continues the hearing for good cause.

Respectfully submitted,

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December 10, 2007

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**Comments from California State Council of Laborers Legislative Dept. and
Construction Laborers Trust Funds for Southern California
on Public Works - Memorandum 2007- 57**

Dear Members of the Commission:

On behalf of the California State Council of Laborers Legislative Department (Laborers), and the Construction Laborers Trust Funds for Southern California (Laborers Funds), we present the following comments to Memorandum 2007-57, for your consideration with the items on your Agenda for December 12 and 13, 2007. We have not yet received Memorandum 2007-58 , and so cannot comment on it.

I am available for questions, discussion or further input, at the address, phone and e-mail listed here. The best way to contact me is at this e-mail address: jds@racclaw.com

Thank you for your consideration.

Sincerely,

J. David Sackman, of
Reich, Adell & Cvitan

following: Comments (attached as separate files with e-mail).

cc: Mike Quevedo, Southern California District Council of Laborers
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1. Claims for Work Performed After "Completion" (Memo pp. 14-17)

Laborers support the proposal of Staff to extend the time to record a lien (and pursue other remedies) for work performed *after* completion. As we previously pointed out, "completion" can occur, not only upon "actual" completion, or a Notice of Occupancy, but upon "substantial completion." See *Hammond Lumber Co. v. Yeager*, 185 Cal.355, 197 P. 111 (1921); *Mott v. Wright*, 43 Cal.App.21, 184 P. 517 (1919); see also *In Re Showplace Square Loft Co.*, 289 B.R. 403, 409-410 (B.C. N.D. Cal. 2003) (material issue of fact when completion occurred, and whether lien for work on "punch list" was timely). This often occurs with work which may be performed after occupancy, such as landscaping. Landscaping is expressly included as part of a "work of improvement." Civil Code § 3106, Proposed § 7046. Yet the laborers performing landscaping work after occupancy or "substantial completion" may see the time limit to file a lien pass before they even finish their work.

This issue has also been addressed by a commentator, who has suggested a cure similar to that proposed here. See Craig Penner Bronstein, TRIVIAL (?) IMPERFECTIONS: THE CALIFORNIA MECHANICS' LIEN RECORDING STATUTES, 27 Loy. L.A. L. Rev. 735 (Jan. 1994).

We concur with the language proposed by Staff, with one change. We would propose 45 days after the last work, rather than 30, as the outside limit to file a lien. This is because benefit contributions typically do not become due until the month following that in which the work is done. With a 30 day limit, the time limit can pass before the contributions even become delinquent. While owners and general contractors may not agree with the extra time, the alternative is for benefit funds to file a lien before the end of every job, just to make sure they do not miss the time limit. An extra 15 days to see if there is a delinquency would be preferable alternative.

2. Notice for Payment Bond Claims (Proposed Civil Code § 7612, Memo pp. 37-40)

Laborers disagree with the Staff proposal to further change Proposed Civil Code § 7612. This proposal was made to address the problem created when a late notice is given. In addressing that problem, however, the proposal would renew another problem which the Commission had previously addressed. We speak of the situation of those who are not required to give a preliminary notice at all, including laborers.

Under current Civil Code § 3097(a), "one performing actual labor for wages as described in subdivision (a) of Section 3089, or a person or entity to whom a portion of a laborer's compensation is paid as described in subdivision (b) of Section 3089" is excepted from the

requirement of providing a preliminary notice. This exception is repeated in § 3097(b), and is reflected in the proposed new Civil Code §7202(a), as modified in Memorandum 2006-43, approved at the October 27, 2006 Meeting: "(a) A laborer is not required to give preliminary notice."

Under current law, "a claimant shall give the 20-day private work preliminary notice provided in Section 3097." Civil Code § 3242(a). The extra notice is not required, unless "the 20-day private work preliminary notice was not given *as provided* in Section 3097, . . ." Civil Code § 3242(b) (*emphasis added*). Since § 3097 (twice) "provides" that laborers are not required to give preliminary notice, they are similarly not required to give the extra notice.

A previously proposed Civil Code § 7612 would have effectively added a requirement to make a preliminary notice as a condition of enforcing a payment bond, when that is not in current law. At the April 26, 2007 meeting of this Commission, it was decided to return to the language (including any ambiguity) of the current law in this respect. The following change in the proposal was approved:

Civ. Code § 7612. Notice prerequisite to enforcement

~~7612. A claimant may not enforce the liability on a payment bond unless any of the following conditions is satisfied:
(a) The claimant has given preliminary notice to the extent required by Chapter 2 (commencing with Section 7200).
(b) The claimant has given notice to the principal and surety within the earlier of 75 days after completion of the work of improvement or 15 days after recordation of a notice of completion. The notice shall comply with the requirements 1 of Article 4 (commencing with Section 7100).~~

(a) In order to enforce a claim against a payment bond under this part, a claimant shall give the preliminary notice provided in Chapter 2 (commencing with Section 7200).
(b) If preliminary notice was not given as provided in Chapter 2 (commencing with Section 7200), a claimant may enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.

The new proposed revisions to Civil Code § 7612 in Memorandum 2007-57 would be:

§ 7612. Notice prerequisite to enforcement

7612. (a) In order to enforce a claim against a payment bond under this part, a claimant shall give either of the following notices no later than 15 days after recordation of a notice of completion, or if no notice of completion has been recorded, no later than 75 days after completion of the work of improvement:

(a) ~~the~~ The preliminary notice provided in Chapter 2 (commencing with Section 7200).

(b) ~~If preliminary notice was not given as provided in Chapter 2 (commencing with Section 7200), a claimant may enforce a claim by giving written~~ Written notice of the claim to the surety and the bond principal ~~within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.~~

This change would revive the problem we pointed out and the Commission addressed in April. In particular, we object to the language added which requires that “a claimant shall give either of the following notices no later than” the specified time after completion. As with the previous proposal, this would place a notice requirement on laborers which is not present in current law.

As we pointed out before, there is a good reason why laborers are exempt from the requirement of a preliminary notice. It is the same reason why they are also exempt from the alternative notice of this section. Laborers are both the most vulnerable players in the construction industry, and the least able to assert the rights originally meant for their protection. While a supplier or subcontractor can withstand non-payment as part of the cost of doing business, the loss of wages or benefits for workers can mean the difference between homelessness, or even life. Laborers are also the least likely to have the information and skills necessary to give preliminary notice and perfect their rights. They typically move between many jobs in the course of their employment, and are not provided information on any of their jobs, other than the location to show up for work.

We do not see why such a major change in the previously-approved Section 7612 is necessary. The problem which was supposed to be addressed here is the anomaly that a claimant giving a late preliminary notice may have their claim limited, while a claimant giving no preliminary notice at all would have no limit. Everyone agrees that such an anomaly should not

occur. We suggest addressing it simply and directly, without altering the existing language. Instead, a new subsection could be added to address the problem directly:

(c) Any such claim against the payment bond may include all unpaid labor and materials incurred on the work of improvement.

A comment can also be added to describe the problem being addressed. We would oppose any other proposal which would place a notice requirement on laborers that is not in current law.

3. Conforming Revisions to Business & Professional Code

We support the proposed conforming provisions to the Business & Professions Code. These conform the Business & Professions Code to reflect the changes approved earlier, to avoid federal preemption. They effect no substantive change.

We thank you for your consideration.