Legis. Prog., J-503 February 19, 2009

First Supplement to Memorandum 2009-1

2009 Legislative Program: Status of Bills

This supplement (1) continues a discussion of legislation that would implement the Commission's 2008 recommendation on mechanics lien law, and (2) introduces a potential new legislative assignment relating to charter schools.

MECHANICS LIEN LAW (SB 189)

Senator Alan Lowenthal has introduced SB 189 (Lowenthal) to implement the Commission's recommendation on *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007).

SB 189 is substantially based on SB 1691 (Lowenthal), a 2008 bill that would have implemented the nonsubstantive recodification of mechanics lien law recommended by the Commission. SB 1691 was vetoed by the Governor. The veto message indicated that the bill was vetoed due to the historic delay in approving a state budget for 2008-09.

SB 189 departs from the text of SB 1691 and the Commission's recommendation, as explained below.

Restoration of Substantive Reforms

A number of substantive reforms recommended by the Commission were removed from SB 1691 last year, in order to simplify the process of reviewing such a large bill in a single legislative year.

Because SB 189 can be analyzed by the Legislature over the full two years of the 2009-10 legislative session if need be, it is not necessary to simplify the bill in the same way.

The substantive reforms that had been removed from SB 1691 for process simplification purposes have therefore been restored in SB 189.

The most significant of these restored reforms are as follows:

- The addition of a presumption that material delivered for use in a private work of improvement was used in the work of improvement, thereby allowing an unpaid material provider to enforce a claim of lien without the need to offer affirmative evidence of such use.
- Substantive changes to the definition of "completion" of both a private and public work of improvement.
- A new requirement that a lien claimant give notice of an impending lien claim to the property owner before recording the claim.
- A new requirement that a lien claimant that files an action to enforce a lien claim record a lis pendens giving notice of that action, within 110 days of recording the claim.
- The expansion of an existing procedure that allows an owner to petition in court for release of a stale lien claim, to also allow an owner to petition for release of a clearly invalid (but not yet stale) claim.

The restoration of those reforms, all of which had been recommended by the Commission, was approved by the Commission's chair.

Continuation of Provisions Changed "For Cause"

A few changes were made to SB 1691 last year in response to stakeholder suggestions or objections, or to address a problem identified by the staff. Those changes were not made to simplify the process of legislative review of the bill in a single year, but were instead made "for cause."

These changes included:

- Minor clarifications of definitions of the terms "contractor" and "direct contractor."
- Revision of a provision requiring notice to an "owner," so as to also include notice to a "reputed owner."
- Clarification of a provision relating to an obligation of a surety, to indicate that the obligation referenced is that arising under the "direct" contract between the property owner and the direct contractor.
- Deletion of a clarification relating to the content of a stop payment notice, in response to opposition from the California State University and confusion expressed by others.
- Restoration of a subcontractor discipline provision in existing law (which the Commission had deleted), in response to stakeholder comment pointing out a legitimate purpose served by the provision.

Each of those changes was reviewed and approved by the Commission last year. See discussion in CLRC Memorandum 2008-11, pp. 21-23 and 26-27; CLRC Minutes (April 2008), p. 2; Second Supplement to CLRC Memorandum 2008-12, pp. 4-5; CLRC Minutes (June 2008), p. 4.

The staff saw no utility in revisiting those matters, and suggested to the Chair and to Senator Lowenthal's staff that the changes be continued in the 2009 bill. There was no objection, so each of the bulleted changes listed above is continued in AB 189.

Inadvertent Failure to Continue Substance of Existing Law

Finally, the staff has discovered an apparent error in the Commission's recommendation, and has corrected it in the 2009 bill draft. The error involves a misreading of the relationship between two related provisions of existing law, Civil Code Sections 3239 and 3240:

> 3239. No provision in any payment bond given pursuant to any of the provisions of this chapter attempting by contract to shorten the period prescribed in Section 337 of the Code of Civil Procedure for the commencement of an action thereon shall be valid if such provision attempts to limit the time for commencement of action thereon to a shorter period than six months from the completion of any work of improvement, nor shall any provision in any of such bonds attempting to limit the period for the commencement of actions thereon be valid insofar as actions brought by claimants are concerned, unless such bond is recorded, before the work of improvement is commenced, with the county recorder of the county in which the property referred to therein is situated.
>
> 3240. Notwithstanding Section 3239, if a surety on any payment bond given pursuant to this chapter records the payment bond in the office of the county recorder of the county in which the property is situated before the work of improvement is completed, then any action against the surety or sureties shall be commenced not later than six months after the completion of the work of improvement.

Section 3239 invalidates any term in a payment bond that purports to limit the time to commence an action on the bond, if the time limit specified is less than six months from completion of the work of improvement. The section further invalidates any term in a bond that would limit the time that a claimant has to commence an action on the bond, if the bond has not been recorded prior to commencement of the work of improvement.

Section 3240 shortens the statutory limitation period for an action on a payment bond to six months after completion, if the bond is recorded prior to completion of a work of improvement, *and* the action is brought against a surety.

In the Commission's recommendation, Section 3239 is not continued and Section 3240 is generalized (as proposed Section 8610) so that it governs all actions on a bond (not just an action against the surety):

> 8610. If a payment bond under this part is recorded before completion of a work of improvement, an action to enforce the liability on the bond may not be commenced later than six months after completion of the work of improvement.

That treatment of Sections 3239 and 3240 appears to have been based on the mistaken assumption that generalization of the rule in Section 3240 would make Section 3239 superfluous. That does not appear to be the case.

First, Section 3239 provides that any bond provision limiting the time for a claimant to bring an action against an unrecorded bond is invalid. Proposed Section 8610 does not achieve the same result, as it says nothing about the validity of a provision in an unrecorded bond. If Section 3249 is not continued, there would be nothing in the proposed law that would invalidate a time shortening provision in an unrecorded bond.

Further, proposed Section 8610 arguably specifies only the *latest* date by which an action on a bond may be commenced: "[A]n action … may not be commenced later than six months after completion…." Read literally, that language would not invalidate a bond provision that would require commencement by a date *earlier* than six months after completion. For example, a bond provision requiring commencement of an action within three months after completion would not be incompatible with proposed Section 8610 (because commencement within three months after completion is not "later than" six months after completion).

In order to avoid changing the substance of existing law, the staff has drafted proposed Section 8609, which would continue the substance of Section 3239:

> 8609. Any provision in a payment bond attempting by contract to shorten the period prescribed in Section 337 of the Code of Civil Procedure for the commencement of an action on the bond shall not be valid under either of the following circumstances:
>
> (a) If the provision attempts to limit the time for commencement of an action on the bond to a shorter period than six months from the completion of any work of improvement.

(b) As applied to any action brought by a claimant, unless the bond is recorded before the work of improvement is commenced.

After consulting with the Commission's Chair, that provision was added to SB 189. The Commission should now decide whether to approve that change.

CHARTER SCHOOLS AND THE GOVERNMENT CLAIMS ACT

Senator Mimi Walters has introduced Senate Bill 108 as an urgency measure. The bill provides as follows:

> SECTION 1. Section 815.1 is added to the Government Code, to read:
>
> 815.1. (a) The California Law Revision Commission may submit a report to the Legislature, on or before May 1, 2009, that addresses the question of whether charter schools should be added to the list of public agencies covered by this division.
>
> (b) This section shall remain in effect only until January 1, 2010, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2010, deletes or extends that date.
>
> SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:
>
> In order to authorize the California Law Revision Commission to promptly prepare and submit a report to the Legislature that would assist the Legislature in determining whether to amend existing law to protect charter schools from imminent financial harm as a result of a recent Court of Appeal decision, Knapp v. Palisades Charter High School (2007) 146 Cal. App. 4th 708, which held that charter schools are not public entities for purposes of the Tort Claims Act (Division 3.6 (commencing with Section 810) of Title 1 of the Government Code), it is necessary that this act take effect immediately.

As indicated in Section 2 of the bill, the Commission does not currently have authority to study the matter specified in Section 1 of the bill. SB 108 would grant that authority.

The staff will monitor the progress of this bill closely. If it is enacted, the staff will make the matter a high priority and shift available resources to completion of the study requested in the bill. Those resources would be constrained by the need to complete work on two other statutory assignments with deadlines of July 1, 2009 (the deadly weapons study and attorney-client privilege study).

The deadline specified in Section 1 of the bill means that the Commission will not be able to follow its ordinary process. At most there will be only a single scheduled Commission meeting during the time provided for preparation of the report. That would largely preclude public participation and would significantly limit the Commission's time to identify and weigh competing policies.

Respectfully submitted,

Brian Hebert
Executive Secretary