

Memorandum 2010-32

Legislative Program: Status of SB 189 (Lowenthal)

This memorandum reports on the status of Senate Bill 189 (Lowenthal), which would implement the Commission's recommendation on *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007). SB 189 is largely a nonsubstantive reorganization of the existing mechanics lien statute, intended primarily to clean up and simplify the presentation of that law.

The memorandum also advises the Commission about another round of amendments to the bill recently made by the author, seeks the Commission's assent to those amendments, and seeks approval of proposed revisions to Commission Comments on sections affected by the amendments.

All statutory references that follow are to sections of the Civil Code, unless otherwise noted.

STATUS OF BILL

The bill has passed the Senate, and has passed out of all Assembly committees scheduled to hear the bill. It will be voted on by the full Assembly sometime in August. If the bill passes out of the Assembly, it will return to the Senate for a concurrence vote on amendments that were made to the bill while it was pending in the Assembly.

ASSENT TO AMENDMENTS AND COMMENT REVISIONS

On August 2, 2010, the author of the proposed legislation made another round of amendments to the legislation. Most of the amendments were technical and nonsubstantive in nature, e.g., corrections of irregularities in statutory forms, or chaptering amendments to coordinate SB 189 two other pending mechanics lien bills, Assembly Bill 2216 (Fuentes) and Assembly Bill 2419 (Cook). See

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.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

discussion of chaptering amendments in Memorandum 2010-33. These amendments will not be further discussed in this memorandum.

With one exception, the remainder of the amendments were conforming revisions, inadvertently omitted from previous amendments, that were needed to implement those prior amendments. One last amendment, based on political considerations, extended the operative date of the proposed legislation.

As on previous occasions in this study, the Commission is asked whether it finds these amendments compatible with the overall purpose of the Commission's recommendation.

(The Commission has been asked whether it assents to other amendments made to SB 189 on prior occasions. See Memorandum 2009-45 and Memorandum 2009-48. In each instance, the Commission found the amendments compatible with the overall purpose of the Commission's recommendation.)

The staff recommends that **the Commission find these amendments acceptable**, as each furthers the Commission's primary objective in this study, which was to achieve nonsubstantive reorganization of the existing mechanics lien statute while avoiding any controversial substantive change.

If the Commission accepts these amendments, it will then need to decide whether to approve, with or without changes, proposed revisions to Commission Comments that would accompany sections affected by the amendments.

The proposed Comment revisions are presented, where needed, immediately following the statutory text of each amended section discussed below.

Proposed Section 8000 (Applicability of Definitions)

The existing mechanics lien statute governs both private and public works of improvement. The proposed legislation, which would appear in a new statutory Part in the Civil Code, would do the same. Section 8000 of the proposed legislation is intended to provide that the definitional provisions in the proposed legislation would govern all provisions of the proposed legislation.

In response to a stakeholder request, the author previously made a large number of amendments to the proposed legislation to place all provisions jointly applicable to private and public work (including definitional provisions) in the first title of the statutory Part in which the proposed legislation would appear. See discussion in Memorandum 2010-23, pp. 3-5.

An amendment to Section 8000 to facilitate that reorganization was inadvertently omitted from the previously submitted amendments. An amendment in this round of amendments corrected the omission:

8000. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this ~~title~~ part.

(No Comment revision is required as a result of this amendment.)

Proposed Section 8052 (Operative Date)

As introduced, the proposed law contained provisions that would have delayed the operative date of the legislation for a period of one year. These provisions were included to allow stakeholders extra time to become familiar with and prepare for application of the recodified mechanics lien statute. This delayed operative date meant that the legislation, if enacted in 2010, would become operative on January 1, 2012.

In response to a request from a stakeholder group for slightly more time to allow users to become familiar with the new provisions, the author agreed to delay the operative date of the legislation six more months, to July 1, 2012. This required amendments to Section 8052 of the proposed legislation, as follows:

8052. (a) This part is operative on ~~January~~ July 1, 2012.

(b) Notwithstanding subdivision (a), the effectiveness of a notice given or other action taken on a work of improvement before ~~January~~ July 1, 2012, is governed by the applicable law in effect before ~~January~~ July 1, 2012, and not by this part.

(c) A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment.

Comment. Section 8052 is new. Although this part applies generally to all works of improvement on or after ~~January~~ July 1, 2012, it does not govern notices given or actions taken prior to ~~January~~ July 1, 2012, on a work of improvement. Such notices or actions are governed by former law.

Subdivision (c) states the relationship between a provision of this part and a provision of former law that the provision of this part continues or restates. See also Section ~~108~~ 107 of Chapter ___ of the Statutes of 2010.

See also Section 8050 (“work of improvement”).

(Revision of the reference in the Comment to an uncodified bill section is needed because prior amendments to the bill resulted in renumbering of bill sections.)

Proposed Section 8204 (Effect of Preliminary Notice)

Section 8204, which relates to the giving of preliminary notice, was amended by the author solely to make use of a defined term, “design professional,” in the text of the section:

8204. (a) A preliminary notice shall be given not later than 20 days after the claimant has first furnished work on the work of improvement. If work has been provided by a claimant who did not give a preliminary notice, that claimant shall not be precluded from giving a preliminary notice at any time thereafter. The claimant shall, however, be entitled to record a lien, give a stop payment notice, and assert a claim against a payment bond only for work performed within 20 days prior to the service of the preliminary notice, and at any time thereafter.

(b) A ~~licensed architect, licensed landscape architect, registered engineer, or licensed land surveyor~~ design professional who has furnished services for the design of the work of improvement and who gives a preliminary notice not later than 20 days after the work of improvement has commenced shall be deemed to have complied with Section 8200 with respect to the design services furnished, or to be furnished.

Comment. Subdivision (a) of Section 8204 continues former Section 3097(d) without substantive change.

Subdivision (b) continues the unnumbered paragraph preceding former Section 3097(d) without substantive change, except to add a licensed landscape architect to the group of design professionals to which the provision is applicable.

See also Section 8058 (calculation of time).

See also Sections 8004 (“claimant”), 8014 (“design professional”), 8026 (“lien”), 8030 (“payment bond”), 8034 (“preliminary notice”), 8044 (“stop payment notice”), 8048 (“work”), 8050 (“work of improvement”).

(For reference, the proposed law would define “design professional” as follows:

8014. “Design professional” means a person licensed as an architect pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, licensed as a landscape architect pursuant to Chapter 3.5 (commencing with Section 5615) of Division 3 of the Business and Professions Code, registered as a professional engineer pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or licensed as a land surveyor pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code.)

Proposed Section 8432 (Limitation of Lien)

Section 8432, which would limit the work that may be included in a lien claim, is intended to continue Section 3124 of the existing mechanics lien statute without substantive change. As a result of an unrelated amendment to another section of the proposed legislation, amendments to Section 8432 were needed to bring its language into conformity with that used in Section 3124.

When the proposed legislation was introduced, Section 8008 of the legislation would have revised the statutory definition of “contract” in the existing mechanics lien statute to include within the meaning of the term a subsequent contract *change*. However, in response to a later stakeholder request, the author amended Section 8008 to restore the definition in existing law. See discussion in Memorandum 2010-23, pp. 16-19.

Prior to that amendment of Section 8008, the more expansively defined term “contract” had been used in the proposed legislation to replace joint references in existing law to a contract *and* a change to that contract. Existing Section 3124, the section that proposed Section 8432 would continue, contains such joint references.

Following the amendment of Section 8008, Section 8432 therefore required amendments to restore the language in existing Section 3124 that referred to contract *changes*:

8432. (a) A lien does not extend to work, whether or not the work is authorized by a direct contractor or subcontractor, if the work is not included in a direct contract or a modification of that contract, and the claimant had actual knowledge or constructive notice of the provisions of that contract or modification before providing the work.

(b) The filing of a contract or modification of that contract with the county recorder, before the commencement of a work of improvement, is constructive notice of the provisions of the contract or modification to a person providing work on that work of improvement.

Comment. Section 8432 restates former Section 3124 without substantive change.

In subdivision (a), “direct contractor” is substituted for the undefined “contractor.” The concept of “authorized” is substituted for “employed.” See Section 8404 (who may authorize work). ~~The reference to a modification of the contract is omitted in reliance of the definition of “direct contract,” which includes a contract change. See Section 8013 (“direct contract”).~~

See also Sections 1170 (recordation), 8060 (filing and recordation of papers).

See also Sections 8004 (“claimant”), 8008 (“contract”), 8016 (“direct contract”), 8018 (“direct contractor”), 8026 (“lien”), 8032 (“person”), 8046 (“subcontractor”), 8048 (“work”), 8050 (“work of improvement”).

Proposed Section 9554 (Public Work Payment Bond)

Section 9554 addresses the requirements for a payment bond on a public work. The section is intended to continue existing Section 3248, which specifies the same requirements for a public work payment bond.

In addition to Section 3248, the existing mechanics lien statute contains a section, applicable to both public and private work, that generally defines a “payment bond.” Section 3096. As the proposed legislation does not contain a definitional provision relating to the term “payment bond,” the substantive provisions of Section 3096 were intended to be continued in the substantive provisions of the proposed legislation relating to payment bonds.

However, one clause in Section 3096, applicable to both private and public work payment bonds, was inadvertently omitted from Section 9554. An amendment to Section 9554 corrected that omission, thereby more accurately continuing existing law:

9554. (a) A payment bond shall be in an amount not less than 100 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 a bond. The bond shall be executed by an admitted surety insurer.

(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 9100 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 be conditioned for the payment in full of the claims of all claimants and by its terms inure to the

benefit of any person authorized under Section 9100 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 under this section.

(No Comment revision is required as a result of this amendment.)

Government Code Section 27361.9 (County Recorder Fee)

This existing section of the Government Code authorizes the board of supervisors in any county to provide for a filing fee when a person files a preliminary notice in a county recorder's office. Under existing law, this filing triggers a duty on the part of the county recorder to send a return notice to the filer of the preliminary notice, advising of the completion of the project on which the filer had contributed work. Civil Code Section 3097(o).

The Commission had recommended that this filing and return notice procedure be discontinued, as the Commission had been advised that the procedure was no longer adequately serving the purpose for which it was intended. The proposed legislation as introduced therefore contained no section that would continue Section 3097(o), and would have repealed Government Code Section 27361.9.

However, in response to a later stakeholder request to reinstate the procedure, SB 189 was amended to add proposed Section 8214, intended to continue Section 3097(o) without substantive change. See discussion in Memorandum 2010-23, pp. 24-26.

Reinstatement of this procedure therefore also required reinstatement of the accompanying funding provision in Government Code Section 27361.9, which then required amendment solely to reflect the recodification of the mechanics lien statute:

27361.9. The board of supervisors of any county may provide for an additional fee for filing every preliminary ~~20-day~~ notice pursuant to ~~paragraph (1) of subdivision (o) of Section 3097~~ subdivision (a) of Section 8214 of the Civil Code for the exclusive purpose of defraying the cost of implementing and maintaining a system to facilitate compliance with ~~paragraph (2) of subdivision (o) of Section 3097~~ subdivision (b) of Section 8214 of the Civil Code.

Comment. Section 27361.9 is ~~not continued. Preliminary notice may no longer be filed with the county recorder. See Civ. Code § 8214~~ amended to correct cross-references and obsolete terminology.

Recommendation

The staff recommends that **the Commission assent to these amendments, and approve the indicated Comment revisions.**

Respectfully submitted,

Steve Cohen
Staff Counsel