

STAFF SUPPLEMENT TO FINAL CLRC RECOMMENDATION ON MECHANICS LIEN LAW (FEB. 2008)

In February 2004, the California Law Revision Commission began work on a general recodification of mechanics lien law. The main goal was to recast the existing statute into a more modern and understandable form. The Commission's recommendation to the Legislature was finalized in 2008. See *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007).

For the most part, the new legislation proposed by the Commission would continue existing law without substantive change. However, the proposed law does include a small number of substantive reforms that the Commission believes would improve the efficiency or fairness of the mechanics lien process.

The Commission's proposed legislation was introduced in the Legislature in 2008, as Senate Bill 1691 (Lowenthal). Because introduction in the second year of the two-year legislative session allowed limited time for legislative analysis of the bill, the more significant substantive reforms were removed from the bill. As amended, the bill would have recodified the mechanics lien statute to improve its organization and clarity, without making any significant substantive changes in the law.

In that amended form, SB 1691 was approved by both houses of the Legislature. However, due to the historic delay in passing the 2008-2009 State Budget, the Governor vetoed the bill, indicating in his veto message that the delay had left him unable to sign any bill enrolled near the end of the legislative session that was not of the highest priority.

This year, Senator Lowenthal has introduced Senate Bill 189 (Lowenthal), which would again implement the Commission's recommendation. However, because 2009 is the first year of the two-year session, there is no need to simplify the bill by deleting the substantive reforms recommended by the Commission. Instead, SB 189 largely duplicates the entirety of the Commission's proposed legislation. If analysis of the bill in that form takes more than a year, then the bill can proceed as a two-year bill.

The Commission's printed recommendation and this supplemental report are being provided to legislative staff and interested persons to facilitate review and analysis of SB 189. This supplement provides two types of information that will aid in reviewing the bill:

- (1) **A list of significant differences between the text of SB 189 and the Commission’s proposed legislation.**
- (2) **A list of the significant substantive reforms to existing law that would be made by SB 189.**

DIFFERENCES BETWEEN COMMISSION RECOMMENDATION AND PENDING BILL

This section of the supplement lists significant differences between the Law Revision Commission’s recommendation and SB 189. For the most part, these differences reflect amendments that were made to SB 1691 (Lowenthal) in 2008, in response to interest group comments. Each of the changes listed below have been approved by the Law Revision Commission.

Private Work Provisions

Civ. Code § 8011. “Contractor”

In response to a stakeholder request, proposed Civil Code Section 8011 has been added to clarify that, in the mechanics lien law, the term “contractor” includes both a direct contractor and a subcontractor.

Civ. Code § 8014. “Direct contractor”

The Commission’s recommendation adds the new term “direct contractor” to the mechanics lien law, defining the term as a contractor that has a direct contractual relationship with an owner. See proposed Civ. Code § 8014.

In response to a stakeholder request, Section 8014 has been amended to make clear that a reference to a “prime contractor” in a statute outside of the mechanics lien law has the same meaning as “direct contractor” when used in connection with the mechanics lien law.

Civ. Code § 8216. Subcontractor discipline

The Commission’s recommendation would not continue Civil Code Section 3097(h), which authorizes disciplinary action against a subcontractor on a private work for failure to comply with preliminary notice requirements in some circumstances.

The Commission did not see any reason to impose this punishment on a subcontractor who fails to give a required preliminary notice. In that situation, the subcontractor loses lien claim and stop payment notice rights, so there is little harm to the owner who doesn’t receive the preliminary notice.

However, the Commission received stakeholder comment asserting that the disciplinary provision does serve a practical purpose: it prevents a direct contractor from pressuring a subcontractor not to give preliminary notice. The subcontractor can resist such pressure by pointing out that failure to give notice could cause suspension of the subcontractor's license.

In light of that rationale, the Commission agreed that the disciplinary provision should be continued in the proposed legislation. It was added to SB 1691, and appears in SB 189, as proposed Civil Code Section 8216.

Civ. Code § 8502(d). Content of a stop payment notice

The Commission's recommendation would add language to existing law to clarify the work that may be claimed in a private work stop payment notice. Specifically, proposed Civil Code Section 8502(d) would provide that the notice may be given for work performed pursuant to contract, *and* for any work that is required to be performed as a consequence of rescission, abandonment, or breach of a contract.

This clarifying language was modeled after parallel language in existing law stating the work that can be included in a mechanics lien claim. See Civ. Code § 3123(b).

However, more than one stakeholder objected to the clarification, interpreting it to mean that a stop payment notice could be given for *damages* suffered by a claimant as a result of rescission, abandonment, or breach of a contract. That was not the Commission's intent. Because the "clarification" was actually causing confusion, it was removed from SB 1691, and does not appear in SB 189.

Civ. Code § 8609. Time period for claim against payment bond

Existing Civil Code Section 3239 invalidates certain terms of a payment bond that purport to shorten the time to bring an action on the bond. Any such term is invalid if the time provided to bring an action is less than six months after completion of the work of improvement. Any such term is also invalid if the bond is not recorded before commencement of the work of improvement.

The Commission's recommendation would have deleted this provision in reliance on another proposed provision (proposed Civil Code Section 8610) that appeared to make Section 3239 unnecessary.

Section 8610 would provide a fixed limitation period of six months after completion for all actions on a recorded payment bond.

However, upon further consideration, the Commission recognized that aspects of existing Civil Code Section 3239 still needed to be retained, in order to preserve existing law. Proposed Civil Code Section 8610 does not address the part of Section 3239 that invalidates a time shortening provision in an *unrecorded* bond, and it also arguably fails to continue the prohibition in Section 3239 against a contractual provision requiring an action to be commenced *less than* six months after completion.

Senate Bill 189 therefore includes a provision, proposed Civil Code Section 8609, that continues existing Civil Code Section 3239 without substantive change.

Public Work Provisions

Pub. Cont. Code § 43060. Subcontractor discipline

The same issue involving subcontractor discipline for failure to give preliminary notice (described above in the discussion of proposed Civil Code Section 8216) also exists on a public work.

For the reasons discussed above, the Commission reached the same decision in the public work context. Proposed Public Contract Code Section 43060 was therefore added to SB 1691, and SB 189, to continue the existing subcontractor discipline rule on a public work.

Pub. Cont. Code § 44120(d). Content of a stop payment notice

The same issue involving the Commission's attempt to clarify that a stop payment notice may include work performed as a consequence of rescission, abandonment, or breach of contract (discussed above in the discussion of proposed Civil Code Section 8502(d)) also exists on a public work.

For the reasons discussed above, the Commission reached the same decision in the public work context, and the "clarifying" language was deleted from proposed Public Contract Code Section 44120(d).

Legislative Counsel Style Edits

SB 189 also contains numerous stylistic revisions of language used in the Commission's recommendation. Those changes were made by Legislative Counsel, according to that office's standard drafting rules. The revisions, which the Commission staff has determined to be purely technical and nonsubstantive, are not listed here.

SIGNIFICANT SUBSTANTIVE CHANGES FROM EXISTING LAW

As discussed above, SB 189 would make a small number of substantive changes to existing law. Those changes are described below.

Private Works of Improvement

Claim of Lien of Material Supplier

Under existing law, a material supplier who wants to enforce a claim of lien bears the burden of proving that materials provided were actually used or consumed in the work. That can be difficult for a material provider, who typically has little involvement in a work of improvement beyond the delivery of materials.

A provision in SB 189, proposed Civil Code Section 8026(b), would create a rebuttable presumption that material delivered for use in a private work of improvement was actually used in the work of improvement. That would allow an unpaid material provider to enforce a claim of lien without needing to offer any affirmative evidence that the delivered materials were used on the job.

Recordation of Preliminary Notice

Under existing law, a claimant can record a preliminary notice in the county recorder's office. The county recorder is then required to provide notice to that claimant of any notice of completion or cessation that is recorded on the same property. See Civ. Code § 3097(o). However, the mechanics lien law does not provide a mechanism to enforce the recorder's duty, and the Commission has been informed that most recorders do not provide the notices required under Section 3097(o).

Because it appears that the procedure described above is not being followed by county recorders, SB 189 does not continue it.

Completion of a Private Work

Existing law specifies several circumstances that constitute the statutory "completion" of a private work of improvement. See Civ. Code § 3086. Completion of a work of improvement marks the beginning of various time periods for claimant remedies.

SB 189 would make two significant substantive changes to the definition of “completion” of a private work:

(1) Codifying existing case law, proposed Civil Code Section 8150(a)(1) would expressly provide that “substantial completion” of a private work is sufficient to establish completion. See cases collected in *Lewis v. Hopper*, 140 Cal. App. 2d 365, 367, 295 P.2d 93 (1956). (“Substantial completion” is understood by practitioners to mean the completion of all essential work contemplated by a contract for a work of improvement and excluding remedial, warranty, or punchlist work.)

That change would conform to the already existing common practice in the construction industry. The term “substantial completion” is also familiar to the industry as the event marking the beginning of the limitation period for a construction defect case. See Code of Civ. Proc. §§ 337.1, 337.15.

(2) Under existing law, “acceptance by the owner” also constitutes completion of a private work. See Civ. Code § 3086(b). But the law does not indicate how owner acceptance is to be expressed. This can create uncertainty as to whether this acceptance has occurred, and therefore confusion as to whether completion has occurred. The Commission was also informed that the construction industry rarely relies on acceptance as a means of establishing completion.

SB 189 does not provide for completion of a private work by acceptance.

Notice to Owner Before Recording Claim of lien

Existing law does not require a claimant to give notice to an owner before recording a claim of lien against the owner’s property. Consequently, the recorded claim of lien might not be discovered by an owner until the property is being sold or refinanced. That could cause serious problems to an owner.

Proposed Civil Code Section 8418 would require a claimant to give written notice to an owner before recording a lien claim against the owner’s property. Proposed Civil Code Section 8420 would require the claimant, when recording the claim, to attach an affidavit stating that notice of the lien claim had been given to the owner.

Notice of Contract Change

Under existing law, an owner is required to provide notice to the direct contractor and any construction lenders if a contract change has the effect of

increasing the original contract price by five percent or more. Civ. Code § 3123(c). However, existing law provides no consequence for a breach of this provision by an owner, and the Commission was informed that the provision is rarely observed (or even commonly known about) in practice.

SB 189 would delete this provision.

Mandatory Lis Pendens

Under existing law, a claimant must commence an action in court to enforce a recorded lien claim within 90 days after recording the claim (unless an extension of time is agreed upon). See Civ. Code § 3144. If the enforcement action is not commenced in time, the claim expires and becomes unenforceable.

Once the enforcement action is filed, the claimant can record a lis pendens in the county recorder's office providing notice that the enforcement action has been filed in court (but the claimant is not required to do so).

If the lis pendens is not recorded, however, a person reviewing title records in the county recorder's office has no way to know whether or not an enforcement action has been filed. This means that a person cannot tell from a review of title records whether a lien claim recorded more than 90 days earlier has expired based on the failure to file the required enforcement action. The Commission has been informed that, because of this lack of knowledge, title insurers are often unwilling to guarantee clear title on property on which a lien claim has been recorded for up to a year after the claim has been recorded.

Proposed Civil Code Section 8460 would require that a claimant record this lis pendens when filing a lien enforcement action. The provision will allow a person researching a recorded lien claim to determine, based on the presence or absence of the recorded lis pendens, whether the claim has expired for failure to file the required enforcement action.

Broadened Grounds for Release of Claim of lien

Existing law provides a summary court proceeding for the release of a recorded claim of lien, on the ground that the time for enforcement of the claim of lien has expired. See Civ. Code § 3154.

SB 189 would broaden this procedure to include the following new grounds for release of claim of lien:

- (1) The demand stated in the claim of lien has been paid in full.

- (2) None of the work stated in the claim of lien has been provided.
- (3) The claimant was not licensed to provide the work stated in the claim of lien.
- (4) There is a final judgment in another proceeding that the petitioner is not indebted to the claimant for the demand in the claim of lien.

See proposed Civ. Code § 8480.

The additional grounds would allow an owner to release a baseless claim of lien without having to wait for the claim of lien to expire.

In addition, proposed Section 8488 would remove the existing \$2,000 cap on attorney's fees that may be awarded to the prevailing party.

Finally, proposed Section 8486 would make minor modifications to the existing release procedure (including a 20 day hold on an order releasing a claim of lien, in order to allow a losing claimant time to seek a stay of the order, pending judicial review).

Posting of Bond to Release Stop Payment Notice

Existing law allows specified persons to obtain a release of a stop payment notice on a private work, by furnishing a release bond. See Civ. Code § 3171.

Proposed Civil Code Section 8510 would allow *any* person to provide this bond, and would also require that the bond be obtained from a licensed surety.

Surety on Payment Bond

Proposed Civil Code Section 8606 would require that a payment bond on a private work be issued by a surety licensed by the state. That would parallel the requirement in existing law for a payment bond on a public work. See Code of Civ. Proc. § 995.311(a).

Judicial Proceeding to Resolve a Stop Work Notice

Existing law provides an expedited procedure for a direct contractor or a direct contractor's surety to resolve a dispute underlying a stop work notice. See Civ. Code § 3260.2(d).

Proposed Civil Code Section 8844 would make the expedited proceeding also available to an owner who is involved in the dispute.

Public Works of Improvement

Completion of a Public Work

Existing law provides that statutory “completion” of most public work projects is deemed to occur when there has been cessation of labor on the project for a continuous period of 30 days. See Civ. Code § 3086. The Commission had received comment that this 30 day time period is too short, as it is not uncommon for an interim work stoppage of 30 days to occur on a public work that is *not* intended to constitute completion.

SB 189 would extend the period to 60 days. See proposed Pub. Cont. Code § 42210. This time period would be consistent with the rule for determining when cessation of labor constitutes completion of a private work. See Civ. Code § 3086(c).

Recordation of Notice of Completion by Public Entity Relating to Portion of Public Work

Proposed Public Contract Code Section 42240 would allow a public entity to record a notice of completion of a contract that governs a discrete part of a public work (rather than the whole work of improvement). This would parallel an existing provision governing a private work of improvement. See Civ. Code § 3117.

Notice to Claimant of Time Limitation on Public Work

Under existing law, a claimant on a public work may pay a fee to a public entity to receive notice of certain specified events that affect the time to enforce a stop payment notice. See Civ. Code § 3185.

Proposed Public Contract Code Section 44170 would modify this provision in the following ways:

- (1) The public entity would be required to provide notice of the time to enforce, rather than notice of the event that triggers the enforcement period.
- (2) The public entity would be required to provide notice after the occurrence of *each* triggering event, rather than only after the later of the events.
- (3) The fee that must be paid to the public entity to receive the notice would be raised from \$2 to \$10.

Private and Public Works of Improvement

Notice Of Overdue Laborer Compensation

Under existing law, a subcontractor and under some circumstances a direct contractor that fails to pay a laborer must provide notice of the nonpayment to specified individuals and entities, including the laborer, the laborer's bargaining representative, if any, and the construction lender or reputed construction lender, if any. See Civ. Code §§ 3097(c)(6), 3097(k).

SB 189 would generalize this notice requirement by making each of its provisions applicable to all contractors, and would also require that the notice be given to the owner or reputed owner. See proposed Civ. Code § 8104 (private work), proposed Pub. Cont. Code § 42130 (public work).

Notice By Electronic Communication

SB 189 would allow notices under the mechanics lien law to be given in the form of an electronic record, if the recipient of the notice has agreed in writing to receive the notice in that form. See proposed Civ. Code § 8112 (private work), proposed Pub. Cont. Code § 42110 (public work).

Recordation of Notice of Completion

Under existing law, an owner (including a public entity) may record a notice of completion, if the owner does so within 10 days of the statutory completion of the project. See Civ. Code § 3093. Recording a notice of completion shortens the time limitations for certain claimant remedies.

SB 189 would extend the time in which an owner may record a notice of completion, from 10 days after completion to 15 days. See proposed Civ. Code § 8152, proposed Pub. Cont. Code § 42230.

Time Limitation for Actions to Enforce Payment Bond Claim

Under existing law relating to both private and public work, the time to bring an action to enforce a claim against a payment bond can vary, depending on whether the action is brought against the surety on the bond, or against the principal on the bond. See Civ. Code §§ 3240, 3249.

SB 189 would make the limitation period uniform, regardless of whether an action is filed against the surety or the principal. See proposed Civ. Code § 8610, proposed Pub. Cont. Code § 45050.

Minor Changes

SB 189 would also make a number of minor changes to existing law, to resolve ambiguities and procedural inconsistencies. See, e.g., proposed Civ. Code § 8058 (generalizing notarization exception); proposed Civ. Code §§ 8110-8118 and proposed Pub. Cont. Code §§ 42110-42190 (standardizing notice provisions); proposed Civ. Code § 8160 (generalizing waiver and release provision); proposed Civ. Code § 8166 (generalizing stop payment notice release provision); proposed Civ. Code § 8202 (clarifying form language in preliminary notice); proposed Civ. Code § 8422 (confirming invalidity of lien claim if made with intent to slander title); proposed Pub. Cont. Code § 45010(c) (clarifying that all claimants on public work may claim under initial payment bond, if public entity waives additional bond for supplemental work).

This supplement was prepared by Law Revision Commission staff, as an aid to understanding and analyzing SB 189. If you have any comments or questions about this document, please contact Steve Cohen, California Law Revision Commission, 916-739-7068, scohen@clrc.ca.gov.

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