Study H-820 June 2, 2000

# Memorandum 2000-36

## Mechanic's Liens: Constitutional Issues

### INTRODUCTION

At the April meeting, the Commission requested the staff to assess the constitutionality of revising the mechanic's lien statute to provide a defense against the lien by an owner who has made full payment of the contract price to the prime contractor. This proposal, put forward by James Acret, is intended to address the inequity arising where a homeowner makes a good faith payment to the prime contractor, but then is subjected to mechanic's lien claims by subcontractors and suppliers who have not been paid by the prime contractor. Mr. Acret's proposal is outlined in his letter to Assembly Member Mike Honda of August 25, 1999 (see Second Supplement to Memorandum 2000-9, Exhibit p. 15):

> The essentials could be established by legislation that would include the following provisions:
>
> 1. A lien claimant other than an original contractor dealing directly with the owner of a home improvement project may not enforce a claim of mechanics lien if:
>
> a) the original contract price established by the owner and the original contractor represents a good faith evaluation of the value of the work to be performed and the equipment and materials to be supplied under the original contract, and
>
> b) the owner has paid to or for the original contractor the original contract price as established by the contract documents including any signed change orders.
>
> 2. If the owner has paid part, but not all of the original contract price, the amount of all mechanics lien claims shall not exceed the difference between the original contract price and the amounts paid by the owner in good faith to or for the original contractor.

This memorandum will not evaluate the advisability of the Acret proposal or its details. It is set out here to put some flesh on the bare bones of the question under consideration: the constitutional limits on the Legislature's power to shape the mechanic's lien remedy.

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## THE CONSTITUTION

### Constitutional Language

The mechanic's lien is the only creditor's remedy set out in the state constitution. As adopted in the 1976 constitutional revision, Article XIV, Section 3, reads:

> Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.

This language is identical to the original 1879 provision in Article XX, Section 15, except that "persons furnishing materials" was substituted for the original "materialmen" by an amendment in 1974.

The language "shall have a lien" appears to create the mechanic's lien, particularly when read with the direction to the Legislature to provide for the "speedy and efficient enforcement of such liens." Courts have occasionally struggled with the significance of the constitutional lien as distinct from the statutory implementation. In an early case, the court described it as follows:

> This declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action.
>
> So far as substantial benefits are concerned, the naked right, without the interposition of the legislature, is like the earth before the creation, "without form and void," or to put it in the usual form, the constitution in this respect is not self-executing.

*Spinney v. Griffith*, 98 Cal. 149, 151-52, 32 P. 974 (1893). Without legislative action pursuant to the constitutional direction, the lien is inchoate.

Cases have distinguished between the constitutional right to the lien and the statutory lien itself. See, e.g., *Solit v. Tokai Bank, Ltd.*, 68 Cal. App. 4th 1435, 1445-47, 81 Cal. Rptr. 2d 243 (1999); *Koudmani v. Ogle Enter., Inc.*, 47 Cal. App. 4th 1650, 1655-56, 55 Cal. Rptr. 2d 330, (1996). The constitutional provision is "not self-executing and is inoperative except to the extent the Legislature has provided by statute for the exercise of the right." *Wilson's Heating & Air Conditioning v. Wells Fargo Bank*, 202 Cal. App. 3d 1326, 1329, 249 Cal. Rptr. 553 (1988); *Morris v. Wilson*, 97 Cal. 644, 646, 32 P. 801 (1893). The court in *Frank Curran Lumber. Co. v. Eleven Co.*, 271 Cal. App. 2d 175, 183, 76 Cal. Rptr. 753 (1969), explains that the constitution is

> inoperative except as supplemented by the Legislature through its power reasonably to regulate and to provide for the exercise of the right, the manner of its exercise, the time when it attached, and the time within which and the persons against whom it could be enforced. *The constitutional mandate is a two-way street, requiring a balancing of the interests of both lien claimants and property owners.* In carrying out this constitutional mandate the Legislature has the duty of balancing the interests of lien claimants and property owners.

[Emphasis added.]

**Persons Protected by Lien**

Care must be taken to distinguish between the constitutional lien and the statutory extension in Civil Code Section 3110 — part of the current law governing the constitutionally mandated provisions for "speedy and efficient" enforcement — which grants a lien to the following persons (the constitutional classes are in bold):

> **Mechanics**, **materialmen**, contractors, subcontractors, lessors of equipment, **artisans**, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all

> persons and **laborers of every class** performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement ….

Initially we can see that there should be no constitutional difficulty under Article XIV, Section 3, in qualifying or limiting, or even abolishing, mechanic's lien rights of contractors, subcontractors, equipment lessors, and the others listed only in the statute and not in the constitution. In other words, subcontractors and sub-subcontractors do not have a constitutionally protected right to a mechanic's lien to the extent they are neither workers (mechanics, artisans, or laborers) nor material suppliers.

The constitutional (and statutory) language is a bit old-fashioned, and the meaning of the terms may not be immediately clear. Where different classes of potential lien claimants have had to follow distinct procedures under the series of statutory schemes in place since 1850, the courts have had to determine the coverage of each class. Depending on the peculiarities of the statute in effect at the time, the lien right could hinge on whether the claimant was acting as a contractor or employee or as a subcontractor or material supplier.

The statutes do not define "mechanic" or "artisan," but "laborer" is defined in Section 3089(a) as "any person who, acting as an employee, performs labor upon or bestows skill or other necessary services on any work of improvement." The Bender-Moss *Treatise on the Law of Mechanics' Liens and Building Contracts* (S. Bloom edition 1910) gives the following guidance from a time when the terms may have been more commonly used to make distinctions:

- The contracts of "laborers" seem to be to labor personally, and not to furnish labor; to work, and not for work to be done. [§ 109, at 102]
- Many of the terms … are more or less synonymous, although clear distinctions can be drawn between some of them; the degree of skill, the character of the work, and the relation to the actual, ultimate work, being the principles of differentiation. [§ 110, at 102]
- Artisan. One trained to manual dexterity in some mechanic art or trade; a handicraftsman; a mechanic.… [*Id.* n.8.]
- Mechanic. One who works with machines or instruments; … one who practices any mechanic art, one skilled or employed in shaping and uniting materials, as wood, metal, etc., into any kind of structure, machine, or other object, requiring the use of tools, or instruments.… [*Id.*]

- Laborer. One who labors in a toilsome occupation; a man who does work that requires little skill; … one who for hire performs any physical labor requiring little skill or training …. [*Id.*]
- The man who constructs anything by mere routine and rule is a mechanic. The man whose work involves thought, skill, and constructive power is an artificer. The hod-carrier is a laborer; the bricklayer is a mechanic; the master mason is an artificer.… [*Id.*]

The 1879 constitutional provision introduced the terms "mechanic" and "artisan." The statutory formulations before 1880, when Code of Civil Procedure Section 1983 was amended to reflect the constitutional terms, simply gave a lien to "every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair" of the listed types of property. The lien was granted whether the work was done or materials furnished at the instance of the owner or his agent. In the 1872 Code of Civil Procedure, no lien was given specifically to contractors or subcontractors, although Section 1187 applied a 60-day claim filing period to the "original contractor" and Section 1192 defined "sub-contractors" as all "persons entitled to liens on the structure or improvement, except those who contracted with the owner thereof," for the purposes of giving them priority over the contractor. Under current law, a subcontractor is "any contractor who has no direct contractual relationship with the owner" (Civ. Code § 3104); an original contractor is "any contractor who has a direct contractual relationship with the owner" (Civ. Code § 3095).

**Purpose and Justification of Lien**

The mechanic's lien was unknown at common law, and the early cases adopted the traditional strict construction approach to the statute. See, e.g., *Bottomly v. Grace Church*, 2 Cal. 90, 91 (1852). The lien is usually justified on the ground that the lien claimant has increased the value of the owner's property through labor, services, or materials supplied, and it would unjustly enrich the owner if the benefits could be enjoyed without payment. See, e.g., *Avery v. Clark*, 87 Cal. 619, 628, 25 P. 919 (1891). Thus, it is fitting that the laborer and supplier should follow the fruits of their activities into the building (and some land) that has been enhanced. Traditionally the measure of the lien has been tied to a contract price or the value of the claimant's contribution, however, not a specific measure of the increase in the value brought about by the claimant's enhancements through labor and supplies.

**Original Intent of Constitutional Provision**

We have the luxury of detailed transcripts of the *Debates and Proceedings* of the California Constitutional Convention of 1878-79. The language of the mechanic's lien provision placed in Article XX, Section 15, was discussed in some detail. Keith Honda provided a copy of the relevant transcripts along with his analysis at the February Commission meeting. (See Second Supplement to Memorandum 2000-9, Exhibit pp. 9-11, 20-24.) Mr. Honda notes that a specific amendment to make clear that "no payment by the owner … shall work a discharge of a lien" was soundly rejected by the Convention. This rejection took place with the certain knowledge that the Supreme Court had consistently held that liens were limited to the contract price under the statutes in force at the time. Mr. Honda concludes:

> Wholly consistent with the arguments of Mr. Acret, the delegates clearly left the decision regarding the enforcement of liens for the Legislature to determine by statute. In rejecting the amendment, the delegates preserved the right of [the] Legislature to enact reasonable regulations limiting mechanic's liens, including statutes that grant homeowners a defense based on full payment. When viewed within the context of the Debates and Proceedings, the very system that is now in place was in fact rejected by the delegates of the Constitution Convention.

(*Id.*, Exhibit p. 7.)

The constitutional history of the mechanic's lien provision has been summarized in a law review comment, as set out in the following discussion of the competing interests:

> The owner cannot complain if he is forced to discharge fully the obligations of his contract or lose his property, so long as he is not required to pay more than the contract price.…
>
> Unlimited liens are quite another matter. In considering the propriety of unlimited liens, the basic question is whether the owner should be made the involuntary guarantor of the fulfillment of another's contract with a third party.…
>
> What can be said in favor of unlimited mechanics' liens? It is undoubtedly true that they "grease the wheels" of the construction industry by permitting contractors to operate who could not otherwise get credit. In many cases this benefits the owner. But the price which the owner must pay when a job "goes sour" is so great that it is doubtful that any owner who truly understood the risks involved would take the chance.
>
> ….

> … The delegates participating in the debate were obviously aware of the fact than an earlier decision had construed mechanics' liens as limited to the amount found due and owing to the contractor. The drafting committee reported out the provision in the form in which it was ultimately enacted.
>
> A Mr. Barbour introduced an amended version which would have made the liens unlimited and would also have made the owner personally liable for them. There was some talk of revising the offered amendment to eliminate the feature of personal liability while retaining unlimited lien liability. Such a revision was never made, so the delegates never had the opportunity to vote on the simple issue of limited versus unlimited liens. The proponents of the Barbour amendment indicated that their primary interest was in aiding the laborer; materialmen were included as potential lienors without any real reason for including them advanced. No one contended that it was proper that an innocent homeowner should be subjected to "double payment." Instead, the proponents of the amendment assumed that the honest owner would be fully aware of the law and be able to protect himself. The principal argument in support of the Barbour amendment was that it would prevent "collusion" between "thieving contractors and scoundrelly owners who connive to swindle the workman out of his wages." … The opponents of the amendment used some rather strong language in asserting their position. One called the amendment a "fraud" and "infirm in principle." At all events, the amendment was voted down. Since most of the speakers seemed to be of the opinion that unlimited liens would not be permitted under the constitution unless expressly authorized therein, the fact that the Barbour amendment was defeated would seem to indicate an intention on the part of the delegates that unlimited liens should not be allowed. This cannot be stated with certainty, however, since one of the delegates was of the opinion that the provision as ultimately enacted would leave the question of limited or unlimited liens up to the legislature. Thus, there remains the possibility that the delegates adopted his view, and decided to dump the question into the legislators' laps. It can be stated categorically that, since no one thought that innocent homeowners should be subjected to "double payment," the delegates did not give their stamp of approval in advance to the present scheme of mechanics' liens.

(Comment, *The "Forgotten Man" of Mechanics' Lien Laws — The Homeowner*, 16 Hastings L.J. 198, 217-18 (1964) [footnotes omitted].)

If the original intent behind the constitutional mechanic's lien provision remains relevant to the issue of whether full payment of the contract price in good faith would be constitutional — and we do not see why it would not be

relevant, if not persuasive — then there should be no constitutional impediment to the Acret proposal. We have not found a single case among the 883 mechanic's lien cases since 1879, as reported on Westlaw, that refers to the constitutional *Debates and Proceedings*. Fewer than 10 cases have discussed the "double payment" problem and apparently none of them have found a need to go back to the intent of the constitutional mechanic's lien right.

As will be seen, a contrary interpretation is possible, since the Legislature in 1880 amended Code of Civil Procedure Section 1183 to provide that the lien "shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party." (1880 Cal. Code Amends. ch. 67, § 1.) As suggested in the *"Forgotten Man" Comment, supra*, it is possible to conclude from the transcript that the debate resulted in a stand-off, with the extent of the lien left to later legislative determination. However, our purpose is to make a judgment on the extent of legislative authority to shape and limit the mechanic's lien within the constitutional strictures. If the import of the *Debates and Proceedings* is merely that the matter should be left to the Legislature, then the Legislature would still be free to adopt something like the Acret proposal. In other words, both readings of the constitutional debates support the power to limit liens for policy reasons.

## DEVELOPMENT OF THE STATUTE

### Early History

The first Legislature enacted a rudimentary mechanic's lien statute on April 12, 1850 — five days before defining property rights of spouses. (Compiled Laws ch. 155.) Section 1 granted a lien to "master builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials" in constructing any building or wharf. Section 2 provided a notice procedure whereby any "sub-contractor, journeyman, or laborer" could, in effect, garnish payments from the owner. Section 3 provided for recording and commencement of an action "to enforce his lien."

The first mechanic's lien case reached the Supreme Court that same year. In *Walker v. Hauss-Hijo*, 1 Cal. 183 (1850), the court ruled that a lumber merchant did not have a lien on the building under the mechanic's lien statute where he had failed to comply with the 60-day recording period following completion of construction.

The potential double payment problem arose a few years later. In *Knowles v. Joost*, 13 Cal. 620 (1859), the Supreme Court ruled that, under the statute, an owner who had paid the contractor in full was not liable to materialmen:

> The Statute of 1856 intended that the liens of sub-contractors and material men should be satisfied by the owner of the building, out of moneys due from him to the contractor, and the 3d Section authorizes him, upon being served with proper notice, "to withhold from the contractor, out of the first money due, or to become due, to him, under the contract, a sufficient sum to cover the lien claimed by such sub-contractor, journeyman, or other person, performing labor or furnishing materials, until the validity of the lien shall be determined by the proper tribunals, if it be contested." It was not the design of the Legislature to make him responsible, except upon notice, or to a greater extent, than the sum due to the contractor at the date of the notice. The statute furnishes to material men and sub-contractors, cheap, easy, and expeditious means of attaching in the hands of the builder any money due from him to the contractor, but does not prevent him from agreeing to pay for the work as soon as it is completed, or from complying with such agreement when made.

In an earlier case involving priorities between a garnishment of the construction funds and claims of subcontractors, the court explained the statutory scheme as follows and noted for perhaps the first time the danger of double payment:

> The statute was designed for two classes of laborers and contractors: first, master builders, mechanics, lumber merchants, and all other persons furnishing labor or materials, by contract with the owner of the building himself; and second, sub-contractors, journeymen, etc., performing labor or furnishing materials, by contract, with the master builders or contractors, and between whom and the owner there is no privity of contract whatever. It frequently happens that persons in building or repairing houses, wharves, etc., prefer to supervise the labor themselves, and in such cases, those engaged in the construction of, or the furnishing of materials, have, by the first section of the Act, a lien on the building, by filing a notice thereof at any time within sixty days after its completion.
>
> The second class, those employed by the master builders, or who contract with or under the first contractors, are provided for by the second, third, and fourth sections of the Act. They look first to their employer, and next to the owner of the building, who is not responsible to them, except in case of notice served in conformity

> with the statute. As to the time in which notice shall be served, the law is silent. If they are to be allowed sixty days after the completion of the building to serve such notice on the owner, it will not unfrequently occur that he will be subjected to pay the same amount twice; as it will be impossible for him to ascertain the claims against the principal contractor, and his agreement with him may be for payment by instalments, or on the completion of the work.

*Cahoon v. Levy*, 6 Cal. 295, 296-97 (1856).

In *McAlpin v. Duncan*, 16 Cal. 126 (1860), the court again addressed the double payment problem, this time under the 1858 statute:

> The question presented by the record is, whether the defendant, having paid the contractor in full before notice of the claims of these parties, can be compelled to pay a second time.…
>
> [The 1858 statute] is not a little confused and difficult of satisfactory construction. If it were designed to give to the sub-contractor and laborer a lien upon the property of the owner for the entire amount of the last or sub-contract, without any regard to the amount of the principal contract, a very curious anomaly would exist, and the whole property of the owner might be placed at the discretion of the contractor, to be encumbered by him as he chose. Such laws, as we have held in this very class of cases, are to be strictly construed, as derogating from the common law.…
>
> We think all that can be gathered from this act, is that material-men, sub-contractors, etc., have a lien upon the property described in the act to the extent (if so much is necessary) of the contract price of the principal contractor; that these persons must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt; that by giving notice, the owner becomes liable to pay the sub-contractor, etc. (as on garnishment or assignment, etc.), but that if the owner pays according to his contract, in ignorance of such claims, the payment is good.
>
> Unless this view is correct, the grossest absurdities appear. We have, in the first place, a valid contract, with nothing appearing against it, which yet cannot be enforced — a clear right of action on the part of the contractor, with no defense by the defendant, and yet which cannot be enforced; *or* which the plaintiff may enforce at law, and yet, if the defendant pays the money, with or without suit, he must pay it again. Innumerable liens may be created, without the knowledge of the owner, for which he might be held liable; while the owner could never pay anything until after long delays, whatever the terms of the contract, or the contractor's necessity for money, unless payment were made at the expense, or at the risk of

> the payor. Such a construction would lead to law suits and difficulties innumerable. By the other construction, no injustice is done or confusion wrought. These sub-contractors, etc., have only to notify their claims to the owner, in order to secure them. *If they, by their own laches, suffer the owner to pay over the money according to the terms of his contract, they ought not to complain; for it was by their own neglect of a very simple duty that the loss accrued; and it would be unjust to make the owner pay a second time because of that neglect.*

(Emphasis added.) Remember that cases such as *McAlpin* were decided before the constitutional provision was in place, and in the early cases, the courts were inclined to construe the statute strictly since it provided a remedy in derogation of the common law. But *McAlpin* touches on several themes that are relevant to us 140 years later. The court was faced with a "confused" and "difficult" statute, and balanced the interests of the parties by placing responsibility where it logically lay, in order to avoid the injustice of double payment.

These cases were the beginning of a long line of consistent rulings, even though the statute changed in its details from time to time. Thus, in *Renton v. Conley*, 49 Cal. 185, 188 (1874), the court ruled under the 1868 statute, as it had under the 1856 and 1858 statues, that

> notwithstanding the broad language of the statute, … where the owner had made payments to the contractor in good faith, under and in pursuance of the contract, before receiving notice, either actual or constructive, of the liens, the material men and laborers could not charge the buildings with liens, exceeding the balance of the contract price remaining unpaid when notice of the lien was given.

The first codification of the mechanic's lien statute in the 1872 Code of Civil Procedure included, in Section 1183, a provision that "the aggregate amount of such liens must not exceed the amount which the owner would otherwise liable to pay." But the code revisions of 1873-74 restored much of the language of the 1868 act, including the provision making contractors and subcontractors agents of the owner, and omitted the limitation on the aggregate amount of liens.

Nevertheless, the line of contract-based cases continued through the period of the Constitutional Convention in 1878 and thereafter, up until the "direct lien" revision in 1911 (with a brief detour in the 1880 amendment, as mentioned above, and discussed in detail in *Roystone, infra*). This case law was reflected in the constitutional debates, as discussed earlier. In 1885 the statute was amended to

reflect the basic contract analysis of the cases, with some creative rules applicable where the contract was void or not completed.

The strict limitations imposed by the courts through the contract analysis resulted in hardship to subcontractors, suppliers, and laborers employed by the contractor where there were no payments were due because the contract was void or where the contractor abandoned the project. Under the cases in this era, only the amount remaining due and unpaid was available for claims of subcontractors, suppliers, and laborers not in privity with the owner. See, e.g., *Dingley v. Greene*, 54 Cal. 333, 336 (1880) ("if there is no existing lien on the original contract, none exists on the subsidiary contract"); *Wiggins v. Bridge*, 70 Cal. 437, 11 P. 754 (1886); F. James, The Law of Mechanics' Liens upon Real Property in the State of California §§ 80-81, at 83-85 (1900, Supp. 1902).

In 1885, however, the situation of the void contract was addressed, giving the claimants under the original contractor a direct lien for the *value* of their work, not limited by the contract amount. (See 1885 Cal. Stat. ch. 152, §§ 1, 2.) Section 1200 was added to the Code of Civil Procedure to address the abandoned project problem.

Reflecting the perspective of 100 years ago, Frank James in his treatise analyzes Section 1200 as follows:

> The effect of section 1200 is, in all cases coming within its provisions, to charge the property of the owner with liens of persons other than the owner to the extent in value of the work actually done or of the materials actually furnished by them measured always by the standard of the contract price. If the effect was to charge the property of the owner with such liens beyond the limit of the contract price, it would according to all of the authorities, be unconstitutional.

(James, *supra*, § 310, at 329.) Clearly it was the expectation at the time that the mechanic's lien right was subject to overriding contract principles.

The 1885 amendments did not change the fundamental rule existing from the earliest years that protected a good-faith owner from liability for double payment where payments had already been made under the contract with the original contractor. Payment of any part of the contract price before commencement of the project was forbidden and at least 25% of the contract price was required to be withheld until at least 35 days after final completion. Code of Civil Procedure Section 1184 was revised to impose a duty on the owner to withhold "sufficient money" due the contractor to pay the claim of other lien claimants who gave

notice to the owner. The amendments also required payment in money (later held unconstitutional), mandated written contracts for jobs over $1000, and provided for allowances for attorney's fees of claimants (later held unconstitutional).

**End of the Contract Era**

The dominance of the law of contract — which had survived legislative tinkering in the 1850s through 1880, the Constitutional Convention of 1878-79, and the more significant legislative revisions in 1885 and after — came to an end with the revision of 1911. (1911 Cal. Stat. ch. 678.) Code of Civil Procedure Section 1183 was amended to adopt the "direct lien" approach: "The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided …." The pre-1911 limitation on the liability of the owner to amounts remaining due under the contract was now only available through obtaining a payment bond in the amount of 50% of the contract price. In general terms, the current statute is a direct descendent from the 1911 revisions.

The leading case of *Roystone Co. v. Darling*, 171 Cal. 526, 530-34, 154 P. 15 (1915) (which has been emphasized by Gordon Hunt in his submissions to the Commission), gives a useful overview of the 1911 revision and the reasons for it, and places the statutory history in context with the case law. *Roystone* also is significant for the fact that it reflects a broad view of legislative power to implement the constitutional mandate:

> [The 1911 statutory] revision made some radical changes in the law, and it presents new questions for decision. It will aid in the understanding of the purpose and meaning of this act if we call to mind, as briefly as may be, the history of the mechanic's lien laws in this state and the state of the law on the subject at the time the amendments in question were enacted.
>
> Prior to the adoption of the constitution of 1879 the lien of mechanics and materialmen for work done and materials furnished in the erection of buildings was entirely a creature of the legislature. The former constitution contained no declaration on the subject. Numerous decisions of the supreme court had declared that all such liens were limited by the contract between the owner and the contractor, and could not, in the aggregate, exceed the contract price. The doctrine that the right of contract could not be invaded by legislative acts purporting to give liens beyond the

price fixed in the contract between the owner and the contractor, or regardless of the fact that the price had been wholly or partially paid, was so thoroughly established that litigation involving it had virtually ended. Section 1183 of the code, as amended in 1874, declared that every person performing labor or furnishing materials to be used in the construction of any building should have a lien upon the same for such work or material. It did not limit the liens to the contract price. In this condition of the law the constitution of 1879 was adopted.…

….

In 1880 section 1183 was again amended by inserting a direct declaration that "the lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party." This amendment of 1880 first came before the supreme court for consideration in *Latson v. Nelson*, [2 Cal. Unrep. 199], … a case not officially reported. The court in that case considered the power of the legislature to disregard the contract of the owner with the contractor and give the laborer or materialman a lien for an amount in excess of the money due thereon from the owner to the contractor. In effect, it declared that section 15, article XX, of the constitution was not intended to impair the right to contract respecting property guaranteed by section 1, article I, thereof, and that the provisions of the code purporting to give a lien upon property in favor of third persons, in disregard of and exceeding the obligations of the owner concerning that property, was an invalid restriction of the liberty of contract …. In the meantime the legislature of 1885 …, apparently recognizing and conceding the force of the decision in *Latson v. Nelson*, undertook to secure and enforce the constitutional lien by other means, that is, by regulating the mode of making and executing contracts, rather than by disregarding the right of contract. It amended sections 1183 and 1184 of the code by providing that in all building contracts the contract price should be payable in installments at specified times after the beginning of the work, that at least one-fourth thereof should be made payable not less than thirty-five days after the completion of the work contracted for, that all such contracts exceeding one thousand dollars should be in writing, subscribed by the parties thereto, and should be filed in the office of the county recorder before the work was begun thereunder, that if these regulations were followed, liens upon the property for the erection of the structure should be confined to the unpaid portion of the contract price, but that all contracts which did not conform thereto, or which were not filed as provided, should be void, that in such case the contractor should be deemed the agent of the owner, and the property should be subject to a lien in favor of any person performing labor or furnishing material to the contractor upon the

building for the value of such labor or material. This law, with some amendments not material to our discussion, remained in force until the enactment of the revision of 1911 aforesaid.

In the meantime the supreme court has followed the rule established by the cases … and has uniformly declared, with respect to such liens, that if there is a valid contract, the contract price measures the limit of the amount of liens which can be acquired against the property by laborers and materialmen. [*Citations omitted.*]… In addition to these express declarations there are many cases in which the rights of the parties were adjudicated upon the assumption that this proposition constituted the law of the state. Each one of the large number of decisions regarding the priorities of liens in the unpaid portion of the contract price, each decision respecting the right to reach payments made before maturity under such contract, each decision as to the formal requisites of contracts under the amendment of 1885, and each decision as to the apportionment under section 1200 of the Code of Civil Procedure, upon the failure of the contractor to complete the work, constitutes an affirmance of the doctrine that the contract, legally made, limits the liability of the owner to lien claimants. There has been scarcely a session of this court since the enactment of that amendment at which one or more cases have not been presented and decided which, in effect, amounted to a repetition of this doctrine. The legislature has also recognized the doctrine by subsequent amendments following out the theory of the amendment of 1885.

The scheme of regulation embodied in the amendments of 1885 and continued until 1911, did not work well in practical operation. Disputes frequently arose concerning the terms of contracts, the time of maturity of installments, the making of payments, the time of beginning the work, with respect to the filing of the contract for record, and many other details which, under the somewhat elaborate plan of the statute, would affect the validity of the contract, or the right to a lien to the unpaid part of the price when the contract was valid. Our reports show many decisions on these questions. Amendments to the statute were made from time to time, but, upon the whole, conditions were not improved. The act of 1911 was obviously designed for the purpose of removing, as far as possible, the objections to the former law.

….

We have shown that when this act was passed it was the established doctrine of this state that the legislature cannot create mechanics' liens against real property in excess of the contract price, where there is a valid contract, but that it is within the legislative power, in order to protect and enforce the liens provided for in the constitution, and so far as for that purpose may be

> necessary, to make reasonable regulations of the mode of contracting, and even of the terms of such contracts, and to declare that contracts shall be void if they do not conform to such regulations.…
>
> The portions of the act of 1911 above quoted clearly show that the legislature did not intend thereby to depart from this doctrine, but that, on the contrary, the design was to follow it and to protect lienholders by means of regulations concerning the mode of contracting and dealing with property for the purposes of erecting improvements thereon. The first declaration on the subject is that the liens provided in the chapter shall be "direct liens" (whatever that may mean), and that persons, other than the contractor, shall not be limited by the contract price "except as hereinafter provided." The proviso referred to is found in the following declaration in the same section:
>
> "It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided."
>
> A plainer declaration of the intention to make the contract price the limit of the owner's liability, where the bond and contract have been filed as required by this section, could scarcely be made.…

We regret the length of this quotation from *Roystone*, but it is a useful exposition of the issues at a critical time when the contract era gave way to the direct lien era. There is more of interest in the decision, but we have resisted any further quotation from it. From what is set out above, and more in the full decision and the concurring opinion, it can be seen that the questions about the extent of legislative power remain uncertain. *Roystone* did not overrule the earlier cases; the court upheld the new payment bond statute through the guise of declaring it to be consistent in intent with 60 years of case law. Experience since *Roystone*, as we understand it, shows that the payment bond has not served the purpose imagined by the *Roystone* court of substituting for the protections in the old contract cases. Particularly in the home improvement context, we think it is agreed that many or most contractors won't qualify for a payment bond and homeowners are unlikely to know how to get a payment bond nor want to pay for one.

Following *Roystone*, the court had occasion to reflect on its significance with respect to limiting the Legislature's power in *Pacific Portland Cement Co. v.*

*Hopkins*, 174 Cal. 251, 254-55, 162 P. 1016 (Cal., Jan 24, 1917). Responding to the appellant's arguments, the three-judge Department 1 of the court wrote:

> The final point made is that, since the Constitution gives a lien on property upon which labor is bestowed or materials furnished (Const. art. XX, sec. 15), the legislature has no power to enact a statute which shall limit the lien-claimant's recovery to the unpaid portion of the contract price. Whatever might be thought of this as an original question, it is no longer open or debatable in this court. In the recent case of *Roystone Co. v. Darling*, 171 Cal. 526, [154 Pac. 15], we reviewed the long line of decisions which had established in this state the soundness of the rule that "if there is a valid contract, the contract price measures the limit of the amount of liens which can be acquired against the property by laborers and materialmen." In the present case, the portion of the contract price applicable to the payment of liens was fixed in accordance with the rule laid down in section 1200 of the Code of Civil Procedure. That the specific method provided by this section is not in conflict with the Constitution was expressly decided in *Hoffman Marks Co. v. Spires*, 154 Cal. 111, 115, [97 Pac. 152]. The findings show that there was no unpaid portion of the contract price applicable to the payment of claimants who had furnished labor or materials to the original contractor. The conclusion of law that the defendant was entitled to judgment necessarily follows.

## LIMITS ON LEGISLATIVE POWER

Gordon Hunt argues strenuously that eliminating the mechanic's lien right on single-family, owner-occupied dwellings where the owner had paid the contractor in full would be unconstitutional. (See First Supplement to Memorandum 2000-26, considered at April 2000 meeting; see also Hunt, *Report to Law Revision Commission Regarding Recommendations for Changes to the Mechanic's Lien Law* [Part 1], at 1-3, esp. n.4, attached to Memorandum 99-86.) In these materials, Mr. Hunt presents a number of quotations from the cases that give an overview of judicial statements about the status of the mechanic's lien. Most relevant to an understanding of the extent of the Legislature's power to shape the implementing statute and to condition and limit the broad constitutional language are the following:

*Roystone*, quoted at length above, is probably the most significant decision because it held the 1911 payment bond reform valid and attempted to harmonize the contract rule. Mr. Hunt also cites the concurring opinion in *Roystone*, 171 Cal. at 544, to the effect that it is "wholly beyond the power of the Legislature to

destroy or even impair this lien." Justice Henshaw was frank in saying that the contract analysis as reflected in *Latson* was a "mistaken view," though he recognizes that "[i]t is too late, perhaps, for this court to recede" from that position. If the concurring opinion's view of the mechanic's lien right were to prevail today, we suspect that the Acret proposal would likely not pass constitutional muster. Justice Henshaw appears to have believed that even the bonding provision was suspect:

> The owner may have paid the contractor (and he is not prohibited from so doing) everything that is due, and in such case this language would limit the right of the recovery of the lien claimant to what he could obtain under the bond. In short, he would have no lien upon the property at all. Here is as radical a denial of the constitutional lien as is found in any of the earlier statutes. The inconsistency between this language and other parts of the act is too apparent to require comment. Yet, as this seems to have been the deliberate design of the legislature, it is perhaps incumbent upon this court under its former decisions to give that design legal effect. If the legislature in fact means to give claimants the rights which the constitution guarantees them, as it declares its desire to do in section 14 [of 1911 Cal. Stat. ch. 678] …, it alone has the power to do so by language which will make it apparent that a lien claimant may still have recourse to the property upon which he has bestowed his labor if the interposed intermediate undertaking or fund shall not be sufficient to pay him in full. This court is, however, justified, I think, in waiting for a plainer exposition of the legislature's views and intent in the matter than can be found in this confused and confusing statute.

(*Id.* at 546.) Missing from the concurring opinion is any notion of balancing the rights of the owner. And, of course, the era of consumer protection and greater regulation of commerce was decades in the future.

*Martin v. Becker*, 169 Cal. 301, 316, 146 P. 665 (1915), contains some strong language: "[T]he lien of the mechanic in this state … is a lien of the highest possible dignity, since it is secured not by legislative enactment but by the constitution …. Grave reasons indeed must be shown in every case to justify a holding that such a lien is lost or destroyed." This language is directed toward the exercise of judicial authority in a case where the court was called upon to determine whether the right to a mechanic's lien was lost when the claimant had also obtained security by way of a mortgage. The sentiments seem sound, but are

not directed at the standards for reviewing a legislative determination of the proper balance between competing interests.

The staff does not consider judicial statements about liberal interpretation of the "remedial" mechanic's lien statute to be relevant to the issue of the Legislature's role. Statements in support of a liberal interpretation of a statute in existence at a particular time, in a context where the court is attempting to avoid a harsh result, are not germane to the search for the limits of legislative authority under the constitution. The fact that the mechanic's lien is the only creditor's remedy in the constitution may help support the conclusion that it is remedial in nature and entitled to a liberal interpretation; but it is irrelevant to determining the extent to which the Legislature can promote or limit the lien in relation to other valid interests.

So, too, recognition that the state has a "strong policy" favoring laws giving laborers and materialmen security for their liens (e.g., *Connolly Dev., Inc. v. Superior Court*, 17 Cal. 3d 803, 827, 553 P.2d 637, 132 Cal. Rptr. 447 (1976), upholding constitutionality of mechanic's lien) does not tell us the outcome were the Legislature to determine that the owner of a single-family, owner-occupied dwelling needs special protection from the risk of having to pay twice.

In *English v. Olympic Auditorium*, 217 Cal. 631, 20 P.2d 946 (1933), quoted by Mr. Hunt, the court said: "Should the lien laws be so interpreted as to destroy the liens because the leasehold interest has ceased to exist, such interpretation would render such laws unconstitutional." But in this case there was no double payment — there was not even a single payment. In *English* the court ruled that mechanic's liens remained on a structure built by the lessee whose lease had terminated, notwithstanding the lease provision making any construction a fixture inuring ultimately to the lessor's benefit.

*Young v. Shriver*, 56 Cal. App. 653, 655-66, 206 P. 99 (1922), is cited presumably for the felicitous language "we presume that no one will say that the right to the remedy expressly authorized by the organic law can be frittered away by any legislative action or enactment." But this is a case where the court rejected a mechanic's lien claim based on the labor of plowing agricultural land, based on an attempt to distinguish between the first plowing and later plowings. The court did not find plowing at any time to be an "improvement" within the constitutional or statutory language.

*Hammond Lumber Co. v. Barth Inv. Corp.*, 202 Cal. 606, 610, 262 P. 31 (1927), repeats the *Martin v. Becker* language in a case concerning a technical question of

whether a building had actually been completed for purposes of a 90-day lien-filing period. The court wrote: "The function of the legislature is to provide a system through which the rights of mechanics and materialmen may be carried into effect, and this right cannot be destroyed or defeated either by the legislature or courts, unless grave reasons be shown therefor." The case didn't involve an issue of the scope of the Legislature's power to "destroy or defeat" the lien upon a showing of grave reasons.

*Hammond v. Moore*, 104 Cal. App. 528, 286 P. 504 (1930), resolved the issue whether the Land Title Law, enacted by initiative, violated the mechanic's lien provision in the constitution. The court found that the lien recording requirement was not unduly burdensome. The court speculated that "the second sentence of section 93, by denying the creation of a lien unless the notice is filed, violates the forepart of article XX, section 15, of the Constitution, granting a lien," but that issue was not before the court, and similar procedural requirements have been accepted in the mechanic's lien law for years without challenge.

The source of some interesting language cited in a number of later cases is *Diamond Match Co. v. Sanitary Fruit Co.*, 70 Cal. App. 695, 701-02, 234 P. 322 (1925):

> The right of mechanics, materialmen, etc., to a lien upon property upon which they have bestowed labor, or in the improvement of which material which they have furnished have been used, for the value of such labor or materials, is guaranteed by the Constitution, the mode and manner of the enforcement of such right being committed to the Legislature.... Manifestly, the legislature is not thus vested with arbitrary power or discretion in attending to this business. Indeed, rather than power so vested in the legislature, it is a command addressed by the constitution to the law-making body to establish a reasonably framed system for enforcing the right which the organic law vouchsafes to the classes named. Clearly, it is not within the right or province of the legislature, by a cumbersome or ultratechnical scheme designed for the enforcement of the right of lien, to impair that right or unduly hamper its exercise. Every provision of the law which the Legislature may enact for the enforcement of the liens ... must be subordinate to and in consonance with that constitutional provision....
>
> But, while all that has been said above is true, it will not be denied that it is no less the duty of the legislature, in adopting means for the enforcement of the liens referred to in the constitutional provision, to consider and protect the rights of

> owners of property which may be affected by such liens than it is to consider and protect the rights of those claiming the benefit of the lien laws. The liens which are filed under the lien law against property, as a general rule, grow out of contracts which are made by and between lien claimants and persons (contractors) other than the owner of the property so affected, and such liens may be filed and so become a charge against property without the owner having actual knowledge thereof. The act of filing, as the law requires, constitutes constructive notice to the owners and others that the property stands embarrassed with a charge which will operate as a cloud upon the title thereof so long as the lien remains undischarged, and that the property may be sold under foreclosure proceedings unless the debt to secure which the lien was filed is otherwise sooner satisfied. The filing of the claim in the recorder's office is intended to protect the owner of the property against double payment to the contractor or payment for his services and the materials he uses in the work of improvement in excess of what his contract calls for. The notice is also intended for the protection of those who may, as to such property, deal with the owner thereof — that is, third persons as purchasers or mortgagees.

In this case, the court held the claimant to the statutory requirement that the owner's name be stated correctly on the lien claim, since otherwise no one examining the record index would know that the claim had been filed as to the owner's property.

There is also a presumption in favor of the validity of statutes. Legislative discretion was discussed in *Alta Building Material Co. v. Cameron*, 202 Cal. App. 2d 299, 303-04, 20 Cal. Rptr. 713 (1962), as follows:

> The following language in *Sacramento Municipal Utility Dist. v. Pacific Gas & Elec. Co.*, 20 Cal. 2d 684, 693, [128 P.2d 529] is applicable: "The contention that the section in question [Code Civ. Proc. § 526b] lacks uniformity, grants special privileges and denies equal protection of the laws, is also without merit. None of those constitutional principles is violated if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed. [Citations.] … Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it."

(See also: *Dribin v. Superior Court*, 37 Cal. 2d 345, 351-352 [231 P.2d 809, 24 A.L.R.2d 864]; *City of Walnut Creek v. Silveira*, 47 Cal. 2d 804, 811 [306 P.2d 453].)

While the essential purpose of the mechanics' lien statutes is to protect those who have performed labor or furnished material towards the improvement of the property of another (*Nolte v. Smith*, 189 Cal. App. 2d 140, 144 [11 Cal. Rptr. 261], inherent in this concept is a recognition also of the rights of the owner of the benefited property. It has been stated that the lien laws are for the protection of property owners as well as lien claimants (*Shafer v. Los Serranos Co.*, 128 Cal. App. 357, 362 [17 P.2d 1036]) and that our laws relating to mechanics' liens result from the desire of the Legislature to adjust the respective rights of lien claimants with those of the owners of property improved by their labor and material. (*Corbett v. Chambers*, 109 Cal. 178, 181 [41 P. 873].) As stated in *Diamond Match Co. v. Sanitary Fruit Co.*, 70 Cal. App. 695 [234 P. 322], at 701: "[I]t is no less the duty of the Legislature, in adopting means for the enforcement of the liens referred to in the constitutional provision, to consider and protect the rights of owners of property which may be affected by such liens than it is to consider and protect the rights of those claiming the benefit of the lien laws. The liens which are filed under the lien law against property, as a general rule, grow out of contracts which are made by and between lien claimants and persons (contractors) other than the owner of the property so affected, and such liens may be filed and so become a charge against property without the owner having actual knowledge thereof."

Viewing section 1193 within the framework of these principles, we are unable to state that the Legislature acted arbitrarily and unreasonably in making the classification which it did.

The section does not require a pre-lien notice by those under direct contract with the owner or those who perform actual labor for wages on the property. The logical reason for this distinction is that the owner would in the usual situation be apprised of potential claims by way of lien in connection with those with whom he contracts directly, as well as those who perform actual labor for wages upon the property.

However, as to materials furnished or labor *supplied* by persons not under direct contract with the owner, it may be difficult, if not impossible, for the owner to be so apprised and the clear purpose of section 1193 is to give the owner 15 days' notice in such a situation that his property is to be "embarrassed with a charge which will operate as a cloud upon the title thereof so long as the lien remains undischarged, and that the property may be sold under foreclosure proceedings unless the debt to secure which the lien was filed is

> otherwise sooner satisfied." (*Diamond Match Co. v. Sanitary Fruit Co., supra,* p. 702.)

The court in *Alta Building Material* distinguished the Supreme Court case of *Miltimore v. Nofziger*, 150 Cal. 790, 90 P. 114 (1907), a 4-3 decision holding unconstitutional a statutory rule giving priority to laborers over material suppliers in satisfaction of mechanic's lien claims against the proceeds from the sale of the liened property. (Subcontractors and original contractors were ranked third and fourth under Code of Civil Procedure Section 1194, as amended by 1885 Cal. Stat. ch. 152, § 4.) Although *Miltimore* is short on detail, the *Alta Building Material* court concluded that *Miltimore* involved classifications "as to substantive matters," whereas Section 1193 at issue in *Alta Building Material* involved a procedural matter — "the right itself is not denied or impaired." This distinction may be troublesome for the Acret proposal, since in its bare form, it represents more than a procedural change and would cut off the lien rights of a class of claimants who did not protect themselves. (The answer would be that claimants who would lose their liens could take measures, just as homeowners are expected to do now, to protect their interests; that subcontractors, suppliers, and other claimants are in business and are in a better position to know the options and the risks.)

## BALANCING INTERESTS

There have been a number of implementation schemes over the years, and several statutory provisions have been challenged for being unconstitutional as measured against the language of the constitution. Throughout the years, the courts have rejected most constitutional challenges to aspects of the statutory schemes, recognized a number of exceptions to the scope of the constitutional provision, and generally have deferred to the Legislature's balancing of the interests. Of course, this doesn't mean the Legislature can ignore the constitutional language, but the case law does not yet indicate the limit of statutory balancing of the respective interests.

In early cases, the fundamental property rights of the owner received frequent judicial attention. For example, in the course of striking down the statute requiring payment of construction contracts in money, the court in *Stimson Mill Co. v. Braun*, 136 Cal. 122, 125, 68 P. 481 (1902), explained:

> The provision in the constitution respecting mechanics' liens (art. XX 20, sec. 15) is subordinate to the Declaration of Rights in the

> same instrument, which declares (art. I, sec. 1) that all men have the inalienable right of "acquiring, possessing and protecting property," and (in sec. 13) that no person shall be deprived of property "without due process of law." The right of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society.

In considering whether it was constitutionally permissible to make procedural distinctions between different classes of lien claimants, the Supreme Court explained in *Borchers Bros., v. Buckeye Incubator Co.*, 59 Cal. 2d 234, 238, 379 P.2d 1, 28 Cal. Rptr. 697 (1963):

> The problem is therefore presented whether the Legislature's procedural distinction in section 1193 of the Code of Civil Procedure, requiring notice by a materialman but not by a laborer, is so arbitrary and unreasonable that there is no substantial relation to a legitimate legislative objective.
>
> The constitutional mandate of article XX, section 15, is a two-way street, requiring a balancing of the interests of both lien claimants and property owners. First, this argument could appropriately be presented to the Legislature and not to the courts. Second, in carrying out this constitutional mandate, the Legislature has the duty of balancing the interests of lien claimants and property owners.

**Examples of "Balanced Interests"**

A number of situations where the Legislature has balanced competing interests is evident in the discussion thus far and in quotations from some of the leading cases. Other "balancing acts" have been mentioned in materials submitted to the Commission. In support of the Legislature's power to enact a scheme like the Acret proposal, Mr. Acret and Mr. Honda have listed a number of other "balancing acts": limitation of lien rights to licensed contractors; the notice of nonresponsibility the frees an owner from liability for tenant improvements, even though they benefit the owner; the priority of future advances under a prior deed of trust; the exemption for public works. (See, e.g., materials attached to the Second Supplement to Memorandum 2000-9, Exhibit pp. 6-9, 15-18.) Mr. Acret concludes:

> In each of these cases, the legislature has made a policy decision that the constitutional right to a mechanics lien should yield to legitimate interests of property owners.
>
> In one case, the legislature decided that a property owner should be protected against liens for work ordered by a tenant even

> though construction ordered by a tenant is just as valuable as any other construction. In another case, the legislature decided that it was more important to encourage construction financing by institutional lenders than to protect mechanics lien rights. In the last case, the legislature simply decided that public agencies should be exempt from mechanics lien claims.

(*Id.* at p. 18.) We will consider two of these items in more detail.

*Licensed Contractor Limitation*

Since 1931, unlicensed contractors have been precluded from recovering compensation "in law or equity in any action," including foreclosure of mechanic's liens. See 1931 Cal. Stat. ch. 578, § 12. In *Alvarado v. Davis*, 115 Cal. App. Supp. 782, 783 (1931), the court denied enforcement of a mechanic's lien by an unlicensed contractor based on the licensing requirement enacted in 1929, even before the statute so provided. See 1929 Cal. Stat. ch. 791, § 1.

The current rule is set out in Business and Professions Code Section 7031. The courts have affirmed the intent of the Legislature "to enforce honest and efficient construction standards" for the protection of the public. See *Famous Builders, Inc. v. Bolin*, 264 Cal. App. 2d 37, 40-41, 70 Cal. Rptr. 17 (1968); *Cash v. Blackett*, 87 Cal. App. 2d 233, 237, 196 P. 2d 585 (1948). The severe penalty in the nature of a forfeiture caused some unease when courts were faced with technical violations of the licensing statute, giving rise to the substantial compliance doctrine. See, e.g., *Latipac, Inc. v. Superior Court*, 64 Cal. 2d 278, 279-80, 411 P.2d 564, 49 Cal. Rptr. 676 (1966). The Legislature acted to rein in the substantial compliance doctrine by amendments starting in 1991 restricting the doctrine to cases where the contractor has been licensed in California, had acted reasonably and in good faith to maintain licensure, but did not know or reasonably should not have known of the lapse. Bus. & Prof. Code § 7031(d)-(e); see also Bus. & Prof. Code § 143 (general bar to recovery by unlicensed individuals and prohibition on application of substantial compliance doctrine).

In *Vallejo Dev. Co. v. Beck Dev. Co.*, 24 Cal. App. 4th 929, 938, 29 Cal. Rptr. 2d 669 (1994), the court reaffirmed the authority of the licensing rules:

> California's strict contractor licensing law reflects a strong public policy in favor of protecting the public against unscrupulous and/or incompetent contracting work. As the California Supreme Court recently reaffirmed, "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services.... The licensing

> requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech, supra,* 52 Cal. 3d at p. 995, 277 Cal. Rptr. 517, 803 P.2d 370, citations omitted.)

The constitutional mechanic's lien provision predates the licensing regime by 50 years. The decisions do not question the propriety of this limitation on the constitutional lien. Even though a disfavored forfeiture can result from application of the licensing rules, the mechanic's lien right must bow before the policy of protecting the public implemented in the licensing statute. The scope of the licensing rules is limited. The bar only applies to those who are required to be licensed for the activity they are conducting. Thus, for example, a person who is hired as an employee to supervise laborers in constructing a house is not a contractor. See, e.g., *Frugoli v. Conway,* 95 Cal. App. 2d 518, 213 P.2d 76 (1950). We do not want to wade too deeply into a discussion of the issues that can arise in classifying those who have worked or performed services in the context of the bar of Section 7031. For present purposes, the point is that the broad language of the constitution is limited by the requirements of the contractor's licensing statute.

*Public Works*

The statutes make clear that the mechanic's lien does not apply to public works. See Section 3109. A "public work" is defined in Section 3100 as "any work of improvement contracted for by a public entity." See also Sections 3099 ("public entity" defined), 3106 ("work of improvement" defined). The constitutional mechanic's lien provision does not contain this limitation.

The statutory rule appears first in 1969. By 1891, the California Supreme Court had ruled that the constitutional mechanic's lien provision could not apply to public property as a matter of public policy. In *Mayrhofer v. Board of Educ.*, 89 Cal. 110, 26 P. 646 (1891), a supplier sought to foreclose a lien for materials furnished to a subcontractor for building a public schoolhouse. The constitutional provision is unlimited in its use of "property" to which the lien attaches for labor or materials furnished. But the court found that "the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affects its capacity to perform its functions, or establish a right of action against it." *Id.* at 112. The court termed it "misleading

to say that this construction is adopted on the ground of public policy," thus distinguishing this limitation on the scope of the mechanic's lien from other balancing tests. Rather, the interpretation follows from the original intent of the language to provide remedies for private individuals; it would be an "unnatural inference" to conclude otherwise. *Id.* at 113. Constitutional provisions for the payment of state debts through taxation and restrictions on suits against the state bolster the conclusion that general provisions like the mechanic's lien statute and its implementing legislation do not apply to the state and its subdivisions. Accord *Miles v. Ryan*, 172 Cal. 205, 207, 175 P.5 (1916).

**Special Protections of Single-Family, Owner-Occupied Dwellings**

It is worth remembering that modern California law provides a number of special protections for single-family, owner-occupied dwellings and other protections for owner-occupied dwellings in general. See, e.g., Bus. & Prof. Code § 10242.6 (prepayment penalties); Civ. Code §§ 2924f (regulation of powers of sale), 2949 (limitation on due-on-encumbrance clause), 2954 (impound accounts), 2954.4 (late payment charges). This special treatment evidences legislative concern for this fundamental class of property and suggests the propriety of balancing that interest with the mechanic's lien right.

This is not entirely a modern development. Just as the mechanic's lien is the only creditor's remedy with constitutional status, the homestead exemption is the only debtor's exemption constitutionally enshrined. See Cal. Const. art. XX, § 1.5 ("The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families.")

## OTHER CONSTITUTIONAL RULINGS

There have been a number of cases holding different parts of the mechanic's lien statute unconstitutional over the years. Perhaps we should be surprised there have not been more problems, but the courts have generally sought to uphold the statute, even while expressing despair about the confusing and unclear language.

Ideally, an examination of the unconstitutional rulings would provide guidance on the limits on legislative power. But the staff has not found much useful material in these cases.

*Gibbs v. Tally*, 133 Cal. 373, 376-77, 65 P. 970 (1901), invalidated the mandatory bond provision in Code of Civil Procedure Section 1203, as enacted in 1893, as an

unreasonable restraint on the owner's property rights and an unreasonable and unnecessary restriction on the power to make contracts. This case was distinguished in *Roystone*.

The allowance of attorney's fees as an incident to lien foreclosure under Code of Civil Procedure 1195, as enacted in 1885, was invalidated in *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 88 P. 982 (1907).

*Stimson Mill Co. v. Braun*, 136 Cal. 122, 125, 68 P. 481 (1902), held the cash payment requirement of Code of Civil Procedure Section 1184, as amended in 1885, was unconstitutional as an interference with contract rights.

The most potentially relevant case is *Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Ass'n*, 5 Cal. App. 4th 1264, 7 Cal. Rptr. 2d 456 (1992), which is discussed next.

## LEGISLATIVE COUNSEL OPINION

Assembly Member Mike Honda requested an opinion from the Legislative Counsel on the following question:

> Would a statute be unconstitutional if it provides the owner of residential real property who pays a contractor in full for a work of improvement on the property with a defense against a mechanics' lien filed by a subcontractor who has bestowed labor on, or furnished material for, that work of improvement?

[See Legis. Counsel Opinion #13279, May 11, 1999, copy attached to Second Supplement to Memorandum 2000-9, Exhibit pp. 25-30, hereinafter "Opinion."]

Following an admirably concise and arid analysis, the Opinion concludes that such a statute would be unconstitutional. The Opinion cites a broad statement in the case law concerning the legislative power in relation to the constitution (*Diamond Mine Co.*), but does not mention the limitations on the constitutional provision resulting from balancing competing policies, such as the contractor licensing rules. The Opinion does not consider the constitutional history as reflected in the *Debates and Proceedings*. Nor does the Opinion recognize that under early case law, and under the statutes from 1885 to 1911, good faith payment to the prime contractor without notice of other claims acted as a shield against mechanic's liens.

The Opinion recognizes that the Legislature has "plenary power to reasonably regulate and provide for the exercise of this right, the manner of its exercise, the time when it attached, and the time within which and the persons

against whom it could be enforced." (Citing *Borchers Bros*.) But the Opinion does not mention modern developments such as consumer protection legislation in general or other special rules applicable to single-family, owner-occupied dwellings.

While recognizing legislative authority as set out in the *Borchers* context, the Opinion concludes:

> However, on the other hand, we think that a statute that provides the owner of residential real property with a defense against a mechanics' lien by a subcontractor whenever the owner pays a contractor in full would effectively deny the subcontractor the right to enjoy the benefits of the lien because a payment in full to the contractor does not necessarily protect the subcontractor's right to be paid.

The staff does not believe this conclusion follows from what precedes it.

The Opinion neglects to consider the legislative balancing act between the interests of potential lien claimants and owners, as recognized in the lengthy text it quotes from *Borchers*. The Opinion does not analyze the interests involved at all, aside from quoting *Borchers*. The Opinion recognizes that failure to follow parts of the existing statutory procedure result in the loss of the lien right, but fails to consider how the defense of full payment might be implemented through similar notices, opportunities to object, demands, good-faith determinations and the like. The history of mechanic's liens in California until 1911 clearly shows that such a scheme can be implemented and, unless one adopts the more extreme view of Justice Henshaw in the *Roystone* concurrence, that it is constitutional.

The most significant point in the Opinion is the citation to *Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Ass'n*, 5 Cal. App. 4th 1264, 7 Cal. Rptr. 2d 456 (1992). The Opinion cites this case for the proposition that "the Legislature, in carrying out its constitutional mandate … may not effectively deny a member of a protected class the benefits of an otherwise valid lien by forbidding its enforcement against the property of a preferred person or entity." (Exhibit, *supra*, p. 26.) This is a sensible statement, but what does *Parsons* stand for? *Parsons* involved the conflict between a special debtor's exemption statute and the mechanic's lien law. To uphold the exemption would mean that the fund would receive a windfall. This is not the situation under the Acret proposal, where the homeowner has paid in full for the construction contracted for. The Acret proposal results in a reallocation of the risk where persons not in

privity with the owner are not paid. There is no categorical exemption of single-family, owner-occupied dwellings from liability on home improvement contracts, which would be the analogs result necessary to make *Parsons* on point.

## CONCLUSION

The staff is fairly confident that the Acret proposal, subject to appropriate technical qualifications, would be constitutional. However, we cannot be certain. The question is not a simple one, but we think the conclusion follows from our review of the constitutional intent, case law history, statutory development, balancing tests, and the opinions of experts in the field (including our two consultants), as well as a general sense of what is permissible consumer protection in the present era. But we must recognize that there is a strong view to the contrary, as illustrated by Mr. Hunt's remarks and the Legislative Counsel Opinion.

Our review of scores of cases has not led to any clear idea of what the governing standard might be. Perhaps this is due to a lack of insight on the staff's part, but we have sought cases on point in the mechanic's lien area and have found little concrete guidance. Most judicial discourse on the nature of the constitutional provision, the role of the Legislature in implementing it, and other affirmations of the sanctity of the mechanic's lien appear in cases involving technical issues or establishing the basis for a liberal, remedial interpretation of the statute. By and large, the cases are not concerned with limiting legislative power or rejecting legislative determinations of the proper balance of interests based on larger policy concerns.

The standard recitations pertaining to the force of the constitutional language suggest a general inclination of the courts to honor the protection of mechanics, suppliers, laborers, subcontractors, and contractors. But at the same time, it must be recognized that the concrete results in these cases have been largely to uphold statutory qualifications and policy balancing, notwithstanding the breadth of the literal language of the Constitution.

At a minimum, we see no serious impediment to the Commission investigating the Acret approach. We think it is, or can be, constitutional, without much doubt, and even if we are wrong, we would expect the decision to be 4-3, as two other major mechanic's lien cases have been in the last quarter century. (*Connolly Dev., Inc. v. Superior Court*, 17 Cal. 3d 803, 553 P. 2d 637, 132 Cal. Rptr.

477 (1976) (upholding constitutionality of mechanic's lien statute); *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15 Cal. 4th 882, 938 P. 2d 372, 64 Cal. Rptr. 2d 578 (1997) (pay-if-paid contract provision held unconstitutional)). This said, perhaps it is worth noting the obvious: the real hurdle for the Acret proposal is political, not constitutional.

Respectfully submitted,

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