Study H-820 May 16, 2001

Second Supplement to Memorandum 2001-41

Mechanic's Liens: General Revision
(Comments of Sam Abdulaziz & James Acret)

The Commission has received several letters and email from Sam Abdulaziz and a letter from James Acret concerning the general revision of the mechanic's lien statute and other matters:

We will discuss the specific points raised in these items at the meeting.

COMMISSION AUTHORITY AND SCOPE OF STUDY

Mr. Abdulaziz raises some questions about the Commission's authority and the proper extent of this study. See Exhibit pp. 1-2, 5. In particular, he seems to suggest that stop notices are outside the subject of mechanic's liens and that prompt payment statutes are not a part of the Commission's "charge" from the Assembly Judiciary Committee, and so should not be studied.

It bears repeating that while the Committee's request to the Commission was the triggering event in this study, the Commission's authority is based on its statutory duties and its concurrent resolution listing subjects for study. A request from a legislative committee would not be sufficient to authorize a Commission study of matters not authorized by statute or concurrent resolution. Of course, if a committee asked the Commission *not* to study some aspect of a subject area, the Commission would likely give that request all due deference.

In this case, the Assembly Judiciary Committee Chair and Vice-Chair requested a "comprehensive review of this area of the law," referring to "Mechanics Lien laws" mentioned earlier in the letter. Stop notices and prompt payment provisions are not mentioned in the letter, to be sure, nor are

preliminary notices, licenses, bonds, and a host of other topics that we believe are commonly assumed to fall within the general subject of mechanic's liens. We don't recall anyone suggesting at any prior meeting, or in the many written submissions, that stop notices are outside the proper scope of this study. In fact, Gordon Hunt's first report, in November 1999, suggested several revisions to stop notice procedures. See, e.g., Hunt, *Recommendations for Changes to the Mechanic's Lien Law [Part 1]*, at 8-10, 18 (attached to Memorandum 99-85). Perhaps Mr. Abdulaziz means to exclude only the consideration of stop notices in public works. In this case, we have a problem, because the two sets of statutes are cheek by jowl in the Civil Code, as discussed in Memorandum 2001-41, and revision of private stop notices will probably implicate public stop notices. The extent to which this type of revision is desirable and whether reorganization would improve the law are issues presented for consideration at this meeting — they are not determined by whether stop notices were mentioned in the Assembly Judiciary Committee's request to the Commission. In any event, the views of the current Chair of the Assembly Judiciary Committee are evident in the bill analysis and language amended into AB 543 and AB 568, as set out in Memorandum 2001-41, at pp. 6-8. These materials do mention "stop notices," as well as "related matters."

It is standard practice, evident in countless studies, to include "related matters" in preparing legislative recommendations. Mr. Abdulaziz has himself suggested requiring contractors to furnish $100,000 of general liability insurance, increasing license bonds, simplifying joint control agreements, and imposing blanket payment bonds. See, e.g., Memorandum 2000-37, Exhibit pp. 7-8. None of these topics is mentioned in the Committee's request letter, and three of them would probably involve amendments of the regulatory statutes in the Business and Professions Code, not the mechanic's lien law in the Civil Code. Yet, these matters, like stop notices, are related to mechanic's liens and need to be considered in the course of the study.

The prompt payment issue has just come up through a suggestion from James Acret. Mr. Abdulaziz may not believe these statutes need reform or, strictly as a jurisdictional matter, that the Commission does not have authority to study these statutes because they are not explicitly mentioned in the Commission's authority and are not closely enough related to mechanics liens. That is a matter to be considered and decided by the Commission in the course of this study.

Whether an area of law is properly within the scope of authority or is a permissible "related matter" is a judgment that the Commission makes in most of its studies, and the Legislature has nearly always accepted that judgment.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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SAM K. ABDULAZIZ
A Law Corporation

KENNETH S. GROSSBART
A Law Corporation

May 11, 2001

Stan Ulrich
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: MECHANIC'S LIEN STUDY

Dear Mr. Ulrich:

I'm writing this letter in the hope of putting our position in one place. This is definitely a plea to keep things from going haywire.

Admittedly, my office and I are advocating on behalf of contractors and material suppliers. Indeed, all of the entities that we are representing before the Law Revision Commission are construction related entities. One group alone, the Golden State Builders Exchange, is itself made up of approximately 25,000 construction related entities including prime contractors and subcontractors, as well as material suppliers and other construction related entities. Our practice strongly emphasizes construction related matters, including litigating mechanic's lien, stop notice, and bond issues. I have written books and given seminars on this subject for many years. I only make the above statement to point out that although one might argue that we have a bias, we also have a great deal of experience in this area, as do both of your consultants, Messrs. Hunt and Acret.

Although you would expect us to advocate a position, I believe that your memoranda appears to advocate a position indicating a bias. I am of the belief that your staff feels that something drastic needs to be done. Anytime something that would less severely curtail the lien process is suggested, it is quickly set aside. I hope, by this letter, to again suggest viable alternatives and to put any image of a lack of objectivity on my part into perspective.

First, the study is to conduct "a comprehensive review of the mechanic's lien law." I am not aware of any mention of stop notice

claims. Indeed, we have heard no horror stories concerning such claims, yet on more than one occasion you indicated that you intend to look at stop notices.

Secondly, I don't know that the term "review" requires overhaul. It has been admitted that any problem with the mechanic's lien process is not overwhelming. Indeed, the moving force for the entire study was a sole constituent of then-Assembly Member Honda. The system has and still does work. Although some changes might be appropriate, a total overhaul is unnecessary and inappropriate.

Your own first consultant's reports were not in favor of "major substantive revision." See Memorandum 2000-9, January 31, 2000.

With this background in mind, the first staff memorandum of any substance (Memorandum 2000-36, June 2, 2000) finds that an interpretation is "possible" that would allow for a full payment defense. This interpretation is supposedly based on a historical review by the staff. We urge the Commission not to consider "possibilities" that might abrogate long standing constitutionally protected rights. This decision cannot be made in an ivory tower. The risk of the "possibility" is not the Commission's place to take. There should be a great deal of thought given before such rights are abrogated.

A second issue with this Memorandum is that it gives little or no insight into the two most recent Supreme Court decisions, Connelly and Clarke, dealing with the constitutionally protected mechanic's lien. As an aside, a more recent case cited Clarke with approval in making a similar holding in a public works dispute. Capitol Steel Fabricators, Inc. v. Mega Construction Co. (1997) 68 Cal.App.4th 1049. The Capitol Steel case has a fine overview of the mechanic's lien rights in light of the Clarke case. Significantly, the California Appellate Court in Capitol Steel thought more of the Clarke decision than does the writer(s) of the Memorandum.

Third, both the Legislative counsel and one of your own consultants disagree with this Memorandum.

In contrast, we have put forward a number of alternatives that would not reek havoc on the construction industry. Each and every

one of those proposals has been "pooh-poohed" as not doing enough, not doing anything, or creating other possible misunderstandings. Our suggestions were made based on substantial experience in the area of the law being studied. Our suggestions dealing with bonding were supported by a witness representing one of the larger sureties in this state. To reject these matters out of hand, without any contradictory evidence, is inappropriate at best and divisive at worst.

Admittedly, one of your consultants, James Acret, has significant experience in the area being studied. However, every other person with any experience has disagreed with his proposal.

As an active participant and observer in the process, I can't help but believe that because of the legislative request for a review, the Commission feels almost compelled to make substantial revisions to the mechanic's lien process. This would be a major mistake. The old adage, "if it is not broken, don't fix it," should serve as a caution! Despite many meetings, there has never been anything presented that would remotely support the position that the existing mechanic's lien laws are a significant problem. Such a finding is necessary before making any substantial revisions. Before any change is made, I propose that the Commission obtain from the CSLB a listing of complaints that the CSLB has received over the past three to five years. I would suggest that very few of them deal with the issue of double payments.

I urge you not to change the laws just to show you've done something after expending time and resources on the issue; rather, I suggest it would be more appropriate to recommend further studies prior to changing laws that have worked for decades and were enacted pursuant to mandates in the California Constitution.

Although it was stated that you have not yet made your decision, I strongly feel that you are leaning towards the full payment defense. One of the reasons given in support of that theory is its simplicity. Standing alone, the only good thing about that theory is that it is simple. It provides no protection for subcontractors and material suppliers. It protects the one with the least need (prime contractor) for that protection.

If you are thinking of proposing this theory to the Legislature, I strongly urge you to couple that with an owner's bond requirement.

Stan Ulrich
RE: MECHANIC'S LIEN STUDY
May 11, 2001
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Although this is presently available, the availability in the Home Improvement sector is not well known. This is also true with respect to the use of licensed and unlicensed joint control companies. Highlighting such alternatives will protect everyone , including the homeowners, and would not create unwarranted problems in the construction industry.

Thank you for your consideration.

Very truly yours,
ABDULAZIZ & GROSSBART

SAM K. ABDULAZIZ

SKA: tmw

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Date: Mon, 14 May 2001 09:50:13 -0700
From: "Abdulaziz & Grossbart" <aglaw@earthlink.net>
To: sulrich@clrc.ca.gov
Subject: Memorandum 2001-41

May 14, 2001 **SENT VIA E-MAIL ONLY**
sulrich@clrc.ca.gov
CALIFORNIA LAW REVISION COMMISSION
C/O STAN ULRICH

RE: MEMORANDUM 2001-41

Dear Law Revision Commission:

This is in response to the referenced staff memorandum. At the outset, I agree wholeheartedly with the staff that nothing definitive or final should come at an early date. I believe that more dissemination of what the Commission proposes to do to the various stake holders is necessary before a final determination.

I also believe that if you propose to move things around, all of the provisions dealing with liens, stop notices, and bonds dealing with construction matters should be in one place for easy reference. The statement that the people representing contractors in the public works arena should know the process is not entirely accurate. Those people representing larger contractors should understand the various code sections. But not all contractors involved in public works are larger contractors. Quite often the subcontractors doing work for public entities are smaller and don't have a sufficient understanding of the processes. Further, some sections dealing with public works payments refer to private works sections (see as an example Civil Code §3181 referring to Civil Code §3110 etc.). In essence, the procedural differences between the public works remedies and the private works entities are not that great.

With respect to prompt payment statutes, it is my belief that that was not part of the charge that was given to the California Law Revision Commission. It was a long, hard fought and negotiated battle in having those bills codified. I don't believe that it is a project that should be undertaken by the California Law Revision Commission without a specific charge to do so.

Jim Acret's proposal is being addressed under separate cover. However, a copy of the letter to Mr. Acret is attached for your convenience.

Respectfully submitted,
Abdulaziz & Grossbart

SAM K. ABDULAZIZ
SKA:dak
Encl. F:\WP51\LAWREV\01\5-14-01.LRC

Date: Mon, 14 May 2001 09:51:25 -0700
From: "Abdulaziz & Grossbart" <aglaw@earthlink.net>
To: jacret@gte.net
Cc: GOFF@HOBPR.COM, sulrich@clrc.ca.gov
Subject: Mechanic's Lien/Stop Notice Study

May 14, 2001 **SENT VIA E-MAIL**
jacret@gte.net

James Acret
Thelen Reid & Priest LLP
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RE: MECHANIC'S LIEN/STOP NOTICE STUDY

Dear Jim:

First, I must say that your proposal must have taken you a substantial period of time and gives people like myself a jumping off place. Ken Grossbart and I had previously met with Gordon Hunt to go over your first draft. In essence, both Ken and I agree with Gordon's letter to you. I make comments only where my opinion may differ from Gordon's.

I just received the Memorandum dealing with the subject matter from the Law Revision Commission. However, this letter deals with only your letter as modified by Gordon's. After further reflection, the following are some additional thoughts:

§9 Release

I agree that there is a misunderstanding over the use of the present waiver and release forms. I would suggest keeping those forms in place. However, I would make it clear that the release is for the benefit of, and to be relied upon by the owner. It seems to me that the entire process is so that an owner who may not have sufficient information, will have something upon which he or she can rely. Although one may argue that the bonding company would be in a similar position, I believe that the recent cases have become relatively clear that the bonding company stands in the shoes of the bonded contractor and therefore should have no defenses that the contractor does not have.

§20 Payment Bond

I would like to see the specific language prior to commenting on this section. I generally agree with Gordon's thoughts.

§21 Preliminary Notice

I agree with Gordon's analysis. However, I am not sure that I

would advise anyone to check with the Contractors State License Board in order to determine how to better protect themselves from liens. If you would direct anyone to the Contractors State License Board by statute, then I would suggest that the statute specifically state that the Contractors Board is to prepare through regulation, a document that would fulfill the requirements of your statement rather than having them call the Board or look at its website.

§23 Amount of Claim

As a technical matter, I would include statutory interest in the last sentence dealing with stop notice and payment bonds. It seems to me that it may be excluded by implication.

Very truly yours,
ABDULAZIZ & GROSSBART

SAM K. ABDULAZIZ

SKA:dak

cc: Gordon Hunt (via e-mail goff@hobpr.com)
Stan Ulrich (via e-mail sulrich@clrc.ca.gov)

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May 17, 2001

Stan Ulrich
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Unfortunately I won't be able to attend a commission meeting until September 20, and the letters submitted by Mr. Hunt and Mr. Abdulaziz should be dealt with before that date.

Their comments are welcome. I agree with some and believe that others will be easily resolved.

In defense of the current draft:

> The construction industry should welcome service on the owner by certified mail return receipt requested in place of service by certified mail without the return receipt on owner, contractor, and construction lender. This will add certainty and reduce expense and paperwork. As a matter of course owners will provide their prime contractors with copies of the preliminary notices and will provide copies to construction lenders if requested to do so.
>
> Where a subject is adequately covered by general law it should not be duplicated or modified in the mechanics lien statute. This principle applies to "release."
>
> It is not necessary to duplicate in the mechanics lien statute existing legislation dealing with consolidation, joinder, lis pendens, or motions to release, nor should we deal in the mechanics lien statute with the insolvency of sureties.

Statutes of limitations on payment bonds and release bonds should be controlled by general law rather than special provisions. This insures that claims will not be unexpectedly cut off by a short statute of limitations.

The amount of a mechanics lien claim should be the reasonable value of the work and materials supplied or the contract price, whichever is less. Further explication is confusing and unnecessary.

As a simple matter of due diligence claimants should determine whether a payment bond has been recorded and it would not be difficult to obtain such information either from the recorder's office or from the owner.

To the best of my knowledge, the present draft removes ERISA problems for trust funds. I will solicit input from lawyers who represent trust funds.

No argument is needed to show that the California mechanics lien statute is long, complicated, and hard to understand. Only one whose professional life has been devoted to working with this statute could advocate leaving it as it is!

The present statute is an unruly beast that cannot easily be beaten into submission. This writer believes that the mechanics lien statute should be rewritten from scratch rather than redlined. That approach got us to where we are now!

JAMES ACRET

JA:ll
c: Sam Abdulaziz
Gordon Hunt