Study H-821 November 15, 2004

First Supplement to Memorandum 2004-31

Mechanics Lien Law: Comments of Sam Abdulaziz

Attached are comments of Sam Abdulaziz concerning a number of issues raised in Memorandum 2004-31. We will bring up his points during the discussion at the meeting of the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

COMMENTS OF SAM ABDULAZIZ

November 8, 2004

SENT VIA EMAIL ONLY!
<mailto:sterling@clrc.ca.gov>sterling@clrc.ca.gov
Nathaniel Sterling

RE: MECHANIC'S LIEN LAW -- GENERAL REVISIONS

Dear Mr. Sterling:

I have had an opportunity to review your draft and submit some comments. I will appear on November 19, 2004.

At the outset, this is done without any substantial research. It is preliminary in nature. Further, in that you state that you will be taking a "moderate" approach to general revisions, I agree that some simplification and reorganization is necessary. I do not agree that "substantial change" is either necessary or appropriate. I believe that a substantial change will run into the same problems as Assembly Member Honda's and Assembly Member Dutra's prior proposals. Further, not withstanding prior positions taken by the Law Revision Commission, substantive changes could run afoul of the California Constitution as I have argued previously. With that in mind, my preliminary comments following your memorandum follow:

"Original Contractor"
The term "original contractor" is rarely used in the construction industry. Original contractor is typically defined to mean the prime contractor. And although you do not wish to utilize the term "prime contractor" due to your fear that there will be mistakes thinking in terms of one prime contractor, the term multiple primes is one that is quite often used and understood. "Original Contractor" is confusing to the construction industry. You may wish to use the term "one with a direct contractual relationship with the owner."

Co-Owners
How you deal with the "Co-Owners" is a critical and not just a nominal issue. I agree that you must deal with it and my gut feeling is that it should work in the manner in which you have drafted it. However, I would suggest to add elsewhere that service on one co-owner is valid as to all owners.

“Stop Notice”
Any change in terminology will create some problems. That those problems may pass by the wayside in time is probably true. I happen to like the term “Notice to Withhold” rather than “Stop Notice” because, as you state, it is confused with stopping the construction.

“Writing”
I would not take on your issue of electronic communication until the ability to obtain electronic recording and providing proof of electronic delivery is handled.

“Notice of Recording Notice of Completion”
With respect to the Notice of Recording a Notice of Completion or a Notice of Cessation, Notice by the “public official” is problematic. The American Subcontractors Association states that less than half of the public entities actually send the notice that is required by law. This is true even though they are required to do so. There is no punishment for failing to do so.

“Possible Substantive Revisions”
You are correct in your statement that, “however, the suggestions often favor one side or another in the construction dispute equation.” To the extent that you are creating new law, I would strongly oppose it and suggest that you will run into the problems mentioned previously.

“Use of Material in Structure”
I reiterate my prior comment that there should be a rebuttable presumption that materials delivered are in fact incorporated into the structure.

“Completion Issues”

For some applications, substantial completion is appropriate. However, the present state of the law is that for Mechanic’s Lien purposes, actual completion is to be used.

“Attorneys Fees”
I strongly, again, urge you not to make the substantive change or even mention it in your closing remarks, which is the second full paragraph on your page 19. I would not even consider a trade off for “protection from double payment liability.” I again am stating that Mechanic’s Liens are protected by the California constitution, regardless of what your predecessor has opined.

“Preliminary Notice”
I am not at all sure that the Preliminary Notice actually achieves its intended goal. The Mechanic’s Lien Warning, required by the Contractors’ License Law for Home Improvement Contracts is more in line with what I perceive to be the purpose of the Preliminary Notice.

“Notice From Original Contractor to Construction Lender”
Your interpretation of the statute is correct. At one time, the construction industry was waiting for a decision from the California Supreme Court dealing with this

matter. However, the decision never came about. I, again, suggest that subsection (b) be deleted.

These are my preliminary thoughts. I will be glad to work with you on this matter as I have in the past.

Very truly yours,

ABDULAZIZ & GROSSBART
SAM K. ABDULAZIZ

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