

Memorandum 2005-31

Mechanics Lien Law: Notice to Withhold Funds

This memorandum presents a redraft of the provisions of the mechanics lien law relating to the stop notice. In this draft we refer to the stop notice as a “notice to withhold funds.” The staff draft is attached as an Exhibit.

A stop notice or notice to withhold funds is in effect a garnishment that an unpaid claimant may serve on the owner or construction lender to halt payments to others out of construction funds. That puts a hold on the funds and gives the claimant a chance to reach them instead. This memorandum deals with the notice to withhold funds for private work. We will address the notice to withhold funds for public work separately, in conjunction with other public work remedies.

The objective here is principally to restate existing law in a more organized, clear, and comprehensible manner than existing law. We are not out to make substantial changes to existing law, except to the extent the changes are clearly called for and there is a consensus among interested parties that the changes are appropriate.

As usual, we discuss policy issues in the memorandum. Staff notes in the attached draft raise more technical drafting issues. We plan to cover at least the policy issues at the meeting. We will also cover the technical drafting issues at the meeting if time permits, but in any event we encourage input from interested persons on the technical issues.

This memorandum refers in places to comments of Gordon Hunt, Jim Acret, and Sam Abdulaziz. The text of their comments on these matters has been attached to several previous memoranda, and in the interest of economy we do no reproduce them here.

TERMINOLOGY

Notice to Withhold Funds

The stop notice is a directive to the owner, or construction lender, or other person holding construction funds not to pay out the funds until resolution of

the dispute over payment. The term “stop notice” is not particularly descriptive. The Commission has tentatively decided to call it a “notice to withhold funds.” That term is more descriptive, and is the term the staff has used in this draft. It is a mouthful, though. **Also worth considering** are simply “notice to withhold” (which has historical precedent and in fact may still be found in Civil Code Section 3097) and “stop payment notice”.

Bonded Notice to Withhold Funds

A notice to withhold funds may be bonded, which provides the claimant giving the notice greater rights under the statute. However, for many purposes the statute treats a bonded notice to withhold funds the same as an ordinary notice to withhold funds. In order to simplify drafting, we have used the generic term “notice to withhold funds” to include both a bonded and an unbonded notice, except where the statute treats the two differently.

Giving Notice to Withhold Funds

Some provisions of the existing mechanics lien law talk about giving a stop notice, others speak of filing the notice, and others refer to service of the notice. The notice is not “filed” in the traditional sense of registering it with the county recorder or lodging it with the clerk of court. Nor is it “served” with the formalities of court process. It is delivered by the claimant to the owner or construction lender either personally or by mail. We have used the phrase “give notice” in this draft, and will make conforming adjustments in the remainder of the mechanics lien law.

Enforcement of Claim Stated in Notice to Withhold Funds

Some provisions of the law refer to enforcement of the notice to withhold funds, others refer to enforcement of the claim stated in the notice. While the latter is technically correct, we have opted for the former in this draft as simpler and more direct.

Disposition of Funds Withheld

The holder of funds that have been withheld must distribute them as directed by the court in an action to enforce the notice to withhold funds. If the action is dismissed, the holder must “pay or deliver” the funds being held to the person to which they are due. But if a release bond is given before then, the holder must simply “release” the funds. Assuming there are theoretical differences between

payment, delivery, and release of funds, does it make any sense to maintain these distinctions here? The staff has tried to make the statutory language more consistent by using the standard phrase “release the funds” throughout.

CONTENTS OF NOTICE TO WITHHOLD FUNDS

Amount of Claimant’s Claim

Existing law requires the claimant to include in the notice to withhold funds “the amount in value, as near as may be” of the work already provided and of the whole agreed to be provided. See proposed Section 3084.130 (contents of notice). The meaning of the phrase “as near as may be” is obscure. Presumably it refers to the market value, rather than the contract price, of the claimant’s work. Perhaps it is intended to mean the claimant’s good faith and reasonable estimate of the value of the work.

The staff is not sure why this number should differ from the number in a claim of mechanics lien. A mechanics lien claimant must state the “claimant’s demand after deducting all just credits and offsets.” That is also a nebulous standard, but at least there is a substantial case law gloss on it. **The staff would import the mechanics lien standard into the notice to withhold funds**, for the sake of consistency.

Claim for Contract Changes and Damages for Breach

Gordon Hunt points out that statutes governing the mechanics lien allow a claimant to include in the claim of lien an amount due for written modification of the contract or as a result of rescission, abandonment, or breach of the contract. See Civ. Code § 3123. He suggests that the notice to withhold funds be made parallel.

Mr. Hunt points out that no court has yet addressed whether or not a notice to withhold funds can include damages for breach of contract and the other items specified in the claim of mechanics lien. He states that many practitioners believe the notice to withhold funds is co-extensive with the mechanic’s lien and whatever amounts are includable in a mechanic’s lien are likewise includable in a notice to withhold funds.

Mr. Hunt suggests that in order to clear up the ambiguity, the statute should state expressly that these items may be included in a claim covered by a notice to withhold funds. **This proposal makes sense to the staff.** We see no reason for

inconsistency between the remedies with respect to the claims covered by them. The statute should be simplified by eliminating this type of inconsistency.

Redraft of Statute

Incorporation of the preceding changes into the staff draft would look like this:

§ 3084.130. Contents of notice to withhold funds

3084.130. (a) A notice to withhold funds shall be signed and verified by the claimant, and shall contain all of the following information:

(1) A general statement of the kind of labor, service, equipment, or material provided or agreed to be provided by the claimant.

(2) The name of the person to or for which the labor, service, equipment, or material was provided or agreed to be provided.

(3) ~~The amount in value, as near as may be, of~~ A statement of the claimant's demand, after deducting all just credits and offsets, for the labor, service, equipment, or material already provided and ~~of~~ for the whole amount agreed to be provided.

(4) The name and address of the claimant.

(b) This section does not preclude the claimant from including in a notice to withhold funds an amount due for labor, service, equipment, or material provided pursuant to a contract change.

(c) This section does not preclude the claimant from including in a notice to withhold funds an amount due as a result of rescission, abandonment, or breach of the contract. If there is a rescission, abandonment, or breach of the contract, the amount of the notice to withhold funds may not exceed the reasonable value of the labor, service, equipment, and material provided by the claimant.

(d) A notice to withhold funds is not invalid by reason of any defect in form if the notice is sufficient to substantially inform the person given the notice of the information required by this section.

Comment. Subdivision (a) of Section 3084.130 restates subdivisions (a)-(d) of former Section 3103 without substantive change. Cf. Section 3082.235 (written notice). A notice to withhold funds may be executed by the claimant's agent. See Section 3082.270 (agency).

Subdivisions (b) and (c) apply provisions applicable to a claim of lien to the notice to withhold funds. Cf. Section 3083.410 (amount of lien).

Subdivision ~~(b)~~ (d) restates the last sentence of the second paragraph of Section 3103 and expands its coverage to include the construction lender.

See also Sections 3082.010 ("claimant" defined), 3082.020 ("construction lender" defined), 3082.030 ("labor, service,

equipment, or material” defined), 3082.090 (“notice to withhold funds” defined), 3082.110 (“person” defined).

TIME TO GIVE NOTICE TO WITHHOLD FUNDS

A direct contractor may not make a claim of mechanics lien until completion of the contract, and a subcontractor or material provider may not make a claim of mechanics lien until it has ceased to provide labor or materials. See Civ. Code §§ 3115, 3116.

By contrast, the law is silent concerning the time for giving a notice to withhold funds. There is perhaps an implication that a notice to withhold funds may be given at any time, since the notice includes the kind, value, and person to which labor, service, equipment, or material have been “or are agreed to be” provided. See proposed Section 3084.130 (contents of notice to withhold funds).

Gordon Hunt indicates some practitioners have concluded that an unpaid claimant may, at any time during the progress of the job, serve a notice to withhold funds on the owner or a bonded notice to withhold funds on the construction lender, even though that claimant is still furnishing labor, service, equipment, or material to the jobsite. He states that, “As a practical matter, that practice is being conducted in the construction industry and creating havoc on construction projects. Once the Stop Notice or bonded Stop Notice is filed, the owner and/or construction lender will withhold progress payments.”

Mr. Hunt recommends that the notice to withhold funds be subject to the same limitations as the claim of mechanics lien — the direct contractor could give the notice on completion of the contract and other persons could give the notice on cessation of their work on the project. Under this proposal the only time that a claimant would have the obligation or the right to serve a notice to withhold funds on the owner before the claimant finishes its work or before it ceases furnishing labor and material on the project would be in the limited circumstance where the owner demands that the claimant serve a notice to withhold funds. (See discussion of the demand procedure immediately below.)

That change would clarify the law on a matter that is currently unclear, and would do it in a way that makes the statute simpler and internally consistent.

However, the change could also erode the effectiveness of the notice to withhold funds. If a claimant has to wait until completion of work before giving the notice, the claimant would miss all funds disbursed during the interim. There might still be some funds still available, however, that a subcontractor or

material provider could capture at the expense of the direct contractor, relegating the direct contractor to lien remedies. The staff thinks **the Commission needs more input on the dynamics of this type of dispute** before making a policy decision on the matter.

Sam Abdulaziz agrees that the time to file a notice to withhold funds should be consistent with the time to record a mechanics lien. However, he believes any claimant that contributes to a work of improvement and is not paid should be entitled to enforce **lien rights** at the moment a payment becomes past due. The claimant should not have to wait until the claimant finishes the job or ceases performance.

In support of his position, Mr. Abdulaziz notes that “present statutes provide remedies to owners or contractors who feel that mechanic’s liens or stop notices have been served improperly. Release bonds are available for both mechanic’s liens and stop notices. There is an affidavit process that the prime contractor can invoke on public works projects.”

Regardless of the merits of Mr. Abdulaziz’ position, **the staff recommends against it**. We have expressed concern in the past about our ability to enact any statutory reform that one-sidedly favors lien claimants to the detriment of property owners and others. This proposal would worsen that aspect of the present draft.

DEMAND FOR NOTICE TO WITHHOLD FUNDS

Existing law allows an owner to demand that a claimant give the owner a stop notice. If the claimant fails to do so, the claimant forfeits the mechanics lien right (and presumably the right to give a notice to withhold funds as well). “Any person who shall fail to serve such a Stop Notice after a written demand therefor from the owner shall forfeit his right to a Mechanic’s Lien.” Civ. Code § 3158.

The purpose of this provision is unclear. Gordon Hunt’s background study for the Commission states, “The purpose of that last sentence in Section 3158 is to enable the owner to determine, during the progress of the job, what subcontractors or material suppliers have outstanding claims ...”

That may be, although nothing in the statute requires the claimant respond promptly. Presumably the claimant may wait until the deadline for recording a claim of lien before giving a notice to withhold funds.

The staff wonders how useful the provision is. If its purpose is merely to enable the owner to determine what is owing at various stages of the project, it would seem to be a cumbersome way to accomplish that goal. At least one authority has commented that the procedure is little known and is unused in practice.

In the interest of simplicity, **the staff recommends that the provision be eliminated** from our redraft of the mechanics lien law:

§ 3084.210. Notice to owner to withhold funds

3084.210. (a) Except as provided in subdivision (b), a person that has a lien right under Chapter 2 (commencing with Section 3083.110) may give the owner a notice to withhold funds.

(b) A direct contractor may not give the owner a notice to withhold funds.

~~(c) The owner may make a written demand that a person give the owner a notice to withhold funds. If the person fails to give the owner a notice to withhold funds, the person forfeits the right to a lien under Chapter 2 (commencing with Section 3083.110).~~

Comment. Section 3084.210 restates the first sentence of former Section 3158 without substantive change. The second sentence of former Section 3158 is not continued.

See also Sections 3082.025 (“direct contractor” defined), 3082.060 (“lien” defined), 3082.090 (“notice to withhold funds” defined), 3082.100 (“owner” defined), 3082.110 (“person” defined).

Staff Note. The explanation for this change in law will be included in the preliminary part of the Commission’s recommendation, rather than in the Comment.

RELEASE BOND FOR FUNDS WITHHELD PURSUANT TO NOTICE

Who May Give Bond

Existing law provides that “an owner, construction lender, direct contractor, or subcontractor” that disputes the correctness or validity of a notice to withhold funds may obtain release of funds withheld pursuant to the notice by giving the person withholding the funds a release bond. See Proposed Section 3084.170. Is there any reason to restrict who may put up a release bond? Why not allow a material supplier to do so, or anyone for that matter? Obviously only a person with an interest at stake is likely to give a release bond; but if a third party intermeddler wanted to give a bond, why prevent it? **The staff would simplify the statute by eliminating the restriction** on who can give a release bond.

Conditions for Giving Bond

Under existing law the release bond remedy is limited to circumstances where a person disputes the correctness or validity of a notice to withhold funds. What is to prevent a person from giving a bond who doesn't really question the correctness or validity of the notice to withhold funds? There appears to be no enforcement mechanism if a bond-giver chooses to dissemble and pretend there is a dispute. **Again, the staff would simplify the statute** by eliminating this condition on giving a release bond.

Sureties on Bond

The release bond for funds held pursuant to a notice to withhold is analogous to the lien release bond. However, under existing law a lien release bond requires an admitted surety insurer, whereas this bond does not. Given the similarity of function of the two bonds, and the fact that the release bond stands in place of funds or property that has been sequestered for a claim, **the staff suggests that an admitted surety insurer be required** as well for a notice to withhold funds release bond.

Amount of Bond

The notice to withhold funds release bond must be in an amount 1-1/4 times the claimant's claim. Jim Acret thinks this is somewhat anomalous, since a lien release bond is required to be 1-1/2 times the claim of lien. This is the case even though the lien release bond does not cover attorney's fees in a proceeding to enforce the claim, whereas the notice to withhold funds release bond must cover attorney's fees awarded in a proceeding to enforce the claim (at least in the case of a bonded notice to withhold funds).

The staff is not sure whether this discrepancy would argue for raising the amount of the notice to withhold funds release bond or reducing the amount of the lien release bond. The staff has been concerned about the tenor of most of our proposed changes to date favoring claimants over owners. Perhaps **this is one place where we can do a little to right the imbalance by reducing the amount of the lien release bond** to 1-1/4 times the amount of the claim of lien.

In this connection it is worth noting that the public work notice to withhold funds release bond is 1-1/4 times the amount of the claim. Civil Code § 3196. (Actually, the statute says "125 percent" rather than 1-1/4. The staff will find out

from Legislative Counsel which is the preferred usage and make all provisions of the draft statute consistent.)

Time to Sue on Release Bond

Gordon Hunt points out that the time to sue on a mechanic's lien release bond does not start to run until a copy of the bond is served on lien claimants. See Civ. Code § 3144.5. There is no similar provision for a notice to withhold funds. In one case, a court ruled that the statute of limitations on a notice to withhold funds release bond was three years, even though the claimant was not even aware of the bond's existence until after the three year period had run. *Winick Corp. v. General Ins. Co.*, 187 Cal. App. 3d 142 (1986).

Mr. Hunt recommends that the law governing notice to withhold funds be made consistent with the mechanics lien law. The effect of this proposal would be to make the time to sue on the notice to withhold funds release bond six months after notification of the bond, rather than three years after the bond is given.

The staff is doubtful about this proposal. In the lien release situation, a claim of lien is recorded and is a matter of public record. It is not a problem for the person giving the release bond to ascertain lien claimants and give claimants the notice that starts the statute of limitations running.

In the notice to withhold funds situation, however, a claimant's notice to withhold funds is not recorded but simply delivered to the owner or construction lender. The person giving a release bond may not know the identity of claimants who have given notices to withhold. It may not be a simple matter to notify claimants of the release bond.

The staff would not make the proposed change, absent a mechanism that would make it workable.

Redraft of Statute

Incorporation of the preceding changes into the staff draft would look like this:

§ 3084.170. Release bond

3084.170. (a) An ~~owner, construction lender, direct contractor, or subcontractor that disputes the correctness or validity of a notice to withhold funds~~ interested person may obtain release of funds withheld pursuant to the notice by giving the person withholding the funds a release bond.

(b) A release bond shall be given by an admitted surety insurer and shall be conditioned for payment of any amount the claimant recovers on the claim, together with any costs of suit the claimant is awarded in the action. The bond shall be in an amount equal to 1-1/4 times the amount claimed in the notice to withhold funds.

(c) On receipt of a release bond, the person withholding funds pursuant to the notice to withhold funds shall release them.

Comment. Section 3084.170 restates former Section 3171 ~~without substantive change~~ but eliminates the restrictions on the persons and the conditions under which a release bond may be given. The bond must be given by ~~sufficient sureties.~~ an admitted surety insurer. See Section 3082.510 (application of Bond and Undertaking Law); Code Civ. Proc. § ~~995.310 (sufficient sureties)~~ 995.120 (“admitted surety insurer” defined).

See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined), 3082.025 (“direct contractor” defined), 3082.090 (“notice to withhold funds” defined), 3082.100 (“owner” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined).

RELEASE OF NOTICE OR REDUCTION OF AMOUNT OF CLAIM

Legislation enacted in 2005, operative January 1, 2006, addresses the issue of a claimant’s release of a stop notice or reduction of the amount claimed in the notice. The legislation makes clear that the general statutory waiver and release forms prescribed in Civil Code Section 3262 are inapplicable to such a release or reduction:

3262. ... (b) No oral or written statement purporting to waive, release, impair or otherwise adversely affect a claim is enforceable or creates any estoppel or impairment of a claim unless (1) it is pursuant to a waiver and release prescribed herein, or (2) the claimant had actually received payment in full for the claim. Nothing in this section precludes a stop notice claimant from reducing the amount of, or releasing in its entirety, a stop notice that has been served upon an owner. The reduction or release of a stop notice, which shall be in writing, may be served in a form other than the forms of release set forth in this section. Any reduction or release of a stop notice: (1) shall not preclude the service of a subsequent stop notice that is timely and proper; (2) shall release the owner from any obligation to withhold money on account of the stop notice, to the extent of the reduction or release; (3) shall be effective to release the claimant's right to enforce the stop notice, to the extent of the reduction or release; and (4) shall not operate as a release of any right that the claimant may have, other than the claimant's right to enforce the stop notice, to the extent of the reduction or release.

This provision is somewhat difficult to interpret, since parts of it appear to relate only to a stop notice given to the owner, and other parts appear to relate to any stop notice, whether given to the owner or to a construction lender. This anomaly is perhaps explained by the fact that the drafters apparently had in mind the public work stop notice and not the private work stop notice. See, e.g., Assembly Judiciary Committee, *Analysis of SB 130 (Margett)* (6/6/05):

The author and sponsor state that subcontractors and others who provide labor and materials often file stop notices on public works projects because the prime contractor is slow in making payments. The filing of a stop notice signals a payment dispute, but one that may be easily corrected by payment of the amount owed and the release of the stop. The author and sponsor state:

For more than 30 years stop notice claimants and their prime contractors have been able to work out settlements that required "release" of the filed stop notices in exchange for the public entities paying the withheld money to the prime contractor who, in turn, would pay the stop notice claimants. These releases have always been for one filed stop notice and thus without prejudice to the filing of subsequent stop notices, if necessary (due to the prime contractor not making other payments later in the project). It is exactly due to this flexibility in the existing process that has facilitated settlements throughout all these years (and saved countless millions on attorney's fees and court costs).

Should this provision be recast and made clearly applicable to both a private work and public work notice to withhold funds? If so should it apply to a notice to withhold funds given to either an owner or construction lender? **We invite the comments of experts on these issues.** Our conclusion will influence not only the drafting of the statute, but its ultimate location.

Meanwhile, a cleaned up version of the statute, with broadest application and in the same location as its present location among the statutory waiver and release forms, would look something like this:

§ 3089.635. Reduction or release of notice to withhold funds

3089.635. (a) A claimant may reduce the amount of, or release in its entirety, a notice to withhold funds. The reduction or release shall be in writing and may be given in a form other than a form of waiver and release prescribed in this article.

(b) A claimant's reduction or release of a notice to withhold funds has the following effect:

(1) The reduction or release releases the claimant's right to enforce the notice to the extent of the reduction or release.

(2) The reduction or release releases the person given the notice from the obligation to withhold funds pursuant to the notice to the extent of the reduction or release.

(3) The reduction or release does not preclude the claimant from giving a subsequent notice to withhold funds that is timely and proper.

(4) The reduction or release does not release any right of the claimant other than the right to enforce the notice to withhold funds to the extent of the reduction or release.

Comment. Section 3089.635 restates the second, third, and fourth sentences of subdivision (b) of former Section 3262, but makes clear that the provisions apply to a notice to withhold funds given to a construction lender as well as to a notice to withhold funds given to the owner.

See also Sections 3082.010 (“claimant” defined), 3082.090 (“notice to withhold funds” defined), 3082.110 (“person” defined).

DUTY TO WITHHOLD FUNDS

Existing law states that if the owner is given a notice to withhold funds, it is the duty of the owner to:

withhold from the original contractor or from any person acting under his or her authority and to whom labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due or to become due to such contractor to answer such claim and any claim of lien that may be recorded therefore.

Civ. Code § 3161.

The staff finds this statute ambiguous and confusing. Is the person from which funds are to be withheld acting under authority of the owner or of the original contractor? Must labor or materials have been furnished to the owner, the original contractor, or the person acting under authority of one of them?

The comparable provision of the public work notice to withhold funds, from which this statute evolved, states simply that the public entity must withhold from the direct contractor, or from any person acting under the direct contractor’s authority, an amount sufficient to pay the claim stated in the notice.

Civ. Code § 3186. That seems to make a little more sense, and **the staff is inclined to revert to that formulation here:**

§ 3084.220. Duty of owner

3084.220. (a) On receipt of the notice to withhold funds, the owner shall withhold from the direct contractor or from any person acting under authority of a direct contractor ~~to which labor, service,~~

~~equipment, or material has been provided or agreed to be provided,~~ a sufficient amount due or to become due to the direct contractor to pay the claim stated in the notice and any claim of lien that is recorded.

(b) Notwithstanding subdivision (a), the owner may, but is not required to, withhold funds if the owner has recorded a payment bond (private work) under Section 3085.220. If the owner does not withhold funds, the owner shall, within 30 days after receipt of the notice to withhold funds, notify the claimant that a payment bond (private work) has been recorded and provide the claimant a copy of the bond. The claimant shall be notified at the address shown in the notice to withhold funds.

Comment. Section 3084.220 restates former Section 3161 ~~without substantive change~~ and makes it parallel to the notice to withhold funds for a public work. See Section 3186 (public work). Cf. Section 3082.235 (written notice).

See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined), Section 3082.030 (“labor, service, equipment, or material” defined), 3082.060 (“lien” defined), 3082.090 (“notice to withhold funds” defined), 3082.100 (“owner” defined), 3082.105 (“payment bond (private work)” defined), 3082.110 (“person” defined).

ENFORCEMENT OF NOTICE TO WITHHOLD FUNDS

Notice of Commencement of Enforcement Action

When a claimant commences an enforcement action, existing law requires the claimant, within five days after commencement of the action, to notify persons who have been given the notice to withhold funds. See proposed Section 3084.510(c). Apparently the five day notice supplements and does not replace normal service of process requirements.

The consequences of failure to give the five day notice are unclear. Presumably the enforcement action would be subject to dismissal. However, there is case law to the effect that the five day notice requirement is directory rather than mandatory. *Sunlight Elec. Supply Co. v. McKee*, 226 C.A. 2d 47, 37 Cal. Rptr. 782 (1964).

Sunlight Electric arose in the context of a public work. The rationale of the case is that a notice to withhold funds substitutes for a mechanics lien in a public work case, and therefore should be construed liberally in favor of a claimant, just as a mechanics lien is construed liberally in the private work context. In *Sunlight*

Electric, the owner was notified 14 days, rather than 5 days, after the action was commenced, and was not prejudiced by the delay.

The same considerations would not necessarily apply in the context of a notice to withhold funds for private work. In a private work, the notice to withhold funds augments, and is not exclusive of, the mechanics lien remedy.

The staff does not have a strong feeling about this either way. If the five day notice serves a useful purpose, then the consequences of failing to give the notice should be specified. If it does not serve a useful purpose, it should be eliminated. **The staff has left the provision in its current state of limbo** in this draft, but input from interested persons on the matter would be helpful.

Direct Contractor's Defense of Owner

Under existing law, if a mechanics lien is recorded against the owner's property and a foreclosure action is commenced, the direct contractor must defend the action. See Civ. Code § 3153. There is no comparable statute governing the contractor's defense of the owner in an action to enforce a notice to withhold funds. Jim Acret argues that the statute should be revised to fill this gap.

The staff is not sufficiently familiar with the practicalities of construction litigation to evaluate this proposal. It would seem that, since the notice to withhold funds disrupts the flow of payments to the direct contractor, the direct contractor would have an interest in defending against the notice. Compare that with the enforcement of a lien against the owner's property, which would have no direct effect on the contractor. Arguably a statute is needed to cover the lien situation, whereas the notice to withhold funds situation will take care of itself.

ATTORNEY'S FEES IN ACTION TO ENFORCE NOTICE TO WITHHOLD FUNDS

Under existing law, the court may allow attorney's fees to the prevailing party in an action to enforce a bonded notice to withhold funds. See proposed Section 3084.550 (attorneys fees in action to enforce bonded notice to withhold funds). Two issues have been raised concerning this section.

Attorney's Fees in Action on Unbonded Notice

The existing statute allows attorney's fees to the prevailing party in an action to enforce a bonded notice against "an owner or construction lender". Civ. Code § 3176. The provision is confusing because the statutes only provide for a bonded

notice to a construction lender; they do not provide for a bonded notice to the owner.

It is arguable that nothing in the statute precludes a claimant from voluntarily giving an owner a bonded notice to withhold funds, and in that circumstance from taking advantage of the attorney's fee statute when enforcing the bond. There is no case law addressing this possibility.

The more likely situation is that the owner is given an unbonded notice to withhold funds. Gordon Hunt argues in that situation the statute should cover attorney's fees in an enforcement action. "This will make Section 3176 compatible with the requirements for Stop Notices served upon an owner and bonded Stop Notices served upon a construction lender." Sam Abdulaziz supports this proposal.

The staff is not so sure that the two situations are parallel. A notice to withhold funds seeks to tap into a reservoir of construction funds. If the claimant prevails in an action to enforce the notice, the funds are there to cover the claimant's attorney's fees. But if the defendant prevails, what is there to guarantee payment of the defendant's attorney's fees? In the case of a bonded notice, the bond serves as security. See, e.g., *Flintkote Co. v. Presley of Northern California*, 154 Cal. App. 3d 458, 201 Cal. Rptr. 262 (1984). But in the case of an unbonded notice, there is no guarantee that the defendant will be made whole. **We would be cautious about extending attorney's fee liability without some assurance of mutuality.**

Attorney's Fees Without Enforcement Action

Sam Abdulaziz would expand the application of the attorney's fee statute by requiring that a bonded notice to withhold funds cover attorney's fees in circumstances where no enforcement action is brought. He observes:

There have been numerous instances where those that are required to pay under the stop notice, would refuse to pay attorneys fees in instances where a settlement had been reached prior to the filing of a law suit, despite the fact that a stop notice claimant has incurred attorneys fees. In other words, those responsible to pay the stop notice funds have refused to pay attorneys fees based upon the theory that without a lawsuit being filed, there is no "action," and therefore no legal requirement to pay attorneys fees. We see no rational basis for the distinction and therefore we suggest that section 3176 should be amended further to eliminate the word "action" and replace it with the word "claim."

The staff is dubious about this proposal. The purpose of the attorney's fee statute is to penalize a party that forces the matter to go to court without good cause, and to encourage settlement instead. If we revise the statute to award attorney's fees where there is a settlement, there is no incentive for settlement over litigation, and we will have effectively undermined the purpose of the statute.

Worse, a provision that a bonded notice to withhold funds covers attorney's fees would encourage a claimant routinely to give such a notice, whether or not there is actually a need for the remedy. After all, there would be no downside for the claimant, since the claimant's legal fees would always be covered. The staff does not think this is a desirable public policy.

In any event, the change suggested seems also to go against the policy of existing law. Under Civil Code Section 3176, there is no prevailing party for purposes of awarding attorney's fees if the enforcement action is dismissed pursuant to a settlement. It would be anomalous to deny attorney's fees in that situation, yet allow them where, due to a settlement, no enforcement action was ever brought.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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NOTICE TO WITHHOLD FUNDS (STOP NOTICE)

- 1 **§ 3082.090. Notice to withhold funds**
- 2 3082.090. (a) “Notice to withhold funds” means the notice given under Chapter
- 3 3 (commencing with Section 3084.110).

1 (b) A notice to withhold funds may be bonded or unbonded. A “bonded notice to
2 withhold funds” is a notice given with a bond under Section 3084.320. An
3 “unbonded notice to withhold funds” is a notice not given with a bond under
4 Section 3084.320.

5 (c) Except to the extent this title distinguishes between a bonded and an
6 unbonded notice to withhold funds, a reference in this title to a notice to withhold
7 funds includes both a bonded and an unbonded notice.

8 **Comment.** Subdivision (a) of Section 3082.090 is new. The term “notice to withhold funds”
9 replaces the term “stop notice” used in existing law. The new terminology is consistent with older
10 terminology in the mechanics lien law.

11 Subdivision (b) supersedes former Section 3083.

12 CHAPTER 3. NOTICE TO WITHHOLD FUNDS (PRIVATE
13 WORK)

14 Article 1. General Provisions

15 § 3084.110. Scope of chapter

16 3084.110. This chapter applies only to a private work and does not apply to a
17 public work.

18 **Comment.** Section 3084.110 restates former Section 3156 without substantive change.

19 See also Sections 3082.130 (“private work” defined), 3082.150 (“public work” defined).

20 **Staff Note.** This is a place holder section. When we relocate all public work provisions to the
21 Public Contract Code, this will be superseded by a general statute limiting the application of the
22 entire mechanics lien title.

23 § 3084.120. Notice to withhold funds exclusive remedy to reach construction funds

24 3084.120. (a) A person may not assert a legal or equitable right in a fund for
25 payment of construction costs, other than a right created by direct written contract
26 between the person and the holder of the fund, except as provided in this chapter.

27 (b) This chapter provides the exclusive remedy of a person that provides labor,
28 service, equipment, or material against a fund for payment of construction costs.

29 **Comment.** Section 3084.120 restates former Section 3264, but is limited to a private work. See
30 Section 3084.110 (scope of chapter). For a comparable provision applicable to a public work, see
31 Public Contract Code Section [to be provided].

32 See also Sections 3082.030 (“labor, service, equipment, or material” defined), 3082.110
33 (“person” defined).

34 **Staff Note.** A parallel provision will be included among the statutes governing a notice to
35 withhold funds for a public work.

36 § 3084.130. Contents of notice to withhold funds

37 3084.130. (a) A notice to withhold funds shall be signed and verified by the
38 claimant, and shall contain all of the following information:

1 (1) A general statement of the kind of labor, service, equipment, or material
2 provided or agreed to be provided by the claimant.

3 (2) The name of the person to or for which the labor, service, equipment, or
4 material was provided or agreed to be provided.

5 (3) The amount in value, as near as may be, of the labor, service, equipment, or
6 material already provided and of the whole amount agreed to be provided.

7 (4) The name and address of the claimant.

8 (b) A notice to withhold funds is not invalid by reason of any defect in form if
9 the notice is sufficient to substantially inform the person given the notice of the
10 information required by this section.

11 **Comment.** Subdivision (a) of Section 3084.130 restates subdivisions (a)-(d) of former Section
12 3103 without substantive change. Cf. Section 3082.235 (written notice). A notice to withhold
13 funds may be executed by the claimant's agent. See Section 3082.270 (agency).

14 Subdivision (b) restates the last sentence of the second paragraph of Section 3103 and expands
15 its coverage to include the construction lender.

16 See also Sections 3082.010 ("claimant" defined), 3082.020 ("construction lender" defined),
17 3082.030 ("labor, service, equipment, or material" defined), 3082.090 ("notice to withhold funds"
18 defined), 3082.110 ("person" defined).

19 **§ 3084.140. False notice to withhold funds**

20 3084.140. A claimant that willfully gives a false notice to withhold funds or that
21 willfully includes in the notice labor, service, equipment, or material not provided
22 or agreed to be provided to or for the person named in the notice forfeits all right
23 to participate in the distribution of the funds withheld and all right to a lien under
24 Chapter 2 (commencing with Section 3083.110).

25 **Comment.** Section 3084.140 restates former Section 3168 without substantive change.

26 See also Sections 3082.010 ("claimant" defined), Section 3082.030 ("labor, service,
27 equipment, or material" defined), 3082.060 ("lien" defined), 3082.090 ("notice to withhold
28 funds" defined), 3082.110 ("person" defined).

29 **§ 3084.150. Manner of giving notice to withhold funds**

30 3084.150. (a) A notice to withhold funds shall be given in the following manner:

31 (1) If given to an owner, the notice shall be delivered to the owner personally or
32 left at the owner's residence or place of business with a person in charge, or
33 delivered to the owner's architect, if any.

34 (2) If given to a construction lender holding construction funds, the notice shall
35 be delivered to the manager or other responsible officer or person at the office or
36 branch of the lender administering or holding the construction funds.

37 (b) A notice to withhold funds may be given by mail with the same effect as by
38 personal delivery.

39 **Comment.** Subdivision (a) of Section 3084.150 restates a portion of the second paragraph of
40 former Section 3103 and the last two sentences of former Section 3083 without substantive
41 change. A notice given to a construction lender under paragraph (2) of subdivision (a) is not
42 effective as against the lender unless given as provided in that paragraph.

1 Subdivision (b) restates the last paragraph of former Section 3103 without substantive change.
2 Mailed notice under this title may be given by registered or certified mail or by another method
3 providing for overnight delivery. See Section 3082.240 (mailed notice).

4 See also Sections 3082.020 (“construction lender” defined), 3082.090 (“notice to withhold
5 funds” defined), 3082.100 (“owner” defined), 3082.110 (“person” defined).

6 **☞ Staff Note.** There are provisions that prescribe the manner of giving various notices sprinkled
7 throughout the mechanics lien law. They are generally similar but vary in slight ways from
8 provision to provision. It is the staff’s intention ultimately to collect these provisions, generalize
9 them, and in the interest of simplicity propose one standard method of notice applicable
10 throughout the statute (except of course to the extent a particular notice appears to implicate
11 unique considerations).

12 **§ 3084.160. Requirements for valid notice to withhold funds**

13 3084.160. A notice to withhold funds is not valid unless both of the following
14 conditions are satisfied:

15 (a) The claimant gave a preliminary notice (private work) under Article 1
16 (commencing with Section 3089.110) of Chapter 7, if required by that article.

17 (b) The claimant gave the notice to withhold funds before expiration of the time
18 within which a claim of lien must be recorded under Chapter 2 (commencing with
19 Section 3083.110).

20 **Comment.** Section 3084.160 restates former Section 3160 and a portion of the first sentence of
21 former Section 3159 without substantive change. For the time within which a claim of lien must
22 be recorded, see Sections 3083.320-3083.340 (time for claim of lien); see also Section 3089.440
23 (notice of completion of contract for portion of work of improvement).

24 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.090 (“notice
25 to withhold funds” defined), 3082.120 (“preliminary notice (private work)” defined).

26 **§ 3084.170. Release bond**

27 3084.170. (a) An owner, construction lender, direct contractor, or subcontractor
28 that disputes the correctness or validity of a notice to withhold funds may obtain
29 release of funds withheld pursuant to the notice by giving the person withholding
30 the funds a release bond.

31 (b) A release bond shall be conditioned for payment of any amount the claimant
32 recovers on the claim, together with any costs of suit the claimant is awarded in
33 the action. The bond shall be in an amount equal to 1-1/4 times the amount
34 claimed in the notice to withhold funds.

35 (c) On receipt of a release bond, the person withholding funds pursuant to the
36 notice to withhold funds shall release them.

37 **Comment.** Section 3084.170 restates former Section 3171 without substantive change. The
38 bond must be given by sufficient sureties. See Section 3082.510 (application of Bond and
39 Undertaking Law); Code Civ. Proc. § 995.310 (sufficient sureties).

40 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
41 3082.025 (“direct contractor” defined), 3082.090 (“notice to withhold funds” defined), 3082.100
42 (“owner” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined).

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Article 2. Notice to Owner to Withhold Funds

§ 3084.210. Notice to owner to withhold funds

3084.210. (a) Except as provided in subdivision (b), a person that has a lien right under Chapter 2 (commencing with Section 3083.110) may give the owner a notice to withhold funds.

(b) A direct contractor may not give the owner a notice to withhold funds.

(c) The owner may make a written demand that a person give the owner a notice to withhold funds. If the person fails to give the owner a notice to withhold funds, the person forfeits the right to a lien under Chapter 2 (commencing with Section 3083.110).

Comment. Section 3084.210 restates former Section 3158 without substantive change.

See also Sections 3082.025 (“direct contractor” defined), 3082.060 (“lien” defined), 3082.090 (“notice to withhold funds” defined), 3082.100 (“owner” defined), 3082.110 (“person” defined).

§ 3084.220. Duty of owner

3084.220. (a) On receipt of the notice to withhold funds, the owner shall withhold from the direct contractor or from any person acting under authority of a direct contractor to which labor, service, equipment, or material has been provided or agreed to be provided, a sufficient amount due or to become due to the direct contractor to pay the claim and any claim of lien that is recorded.

(b) Notwithstanding subdivision (a), the owner may, but is not required to, withhold funds if the owner has recorded a payment bond (private work) under Section 3085.220. If the owner does not withhold funds, the owner shall, within 30 days after receipt of the notice to withhold funds, notify the claimant that a payment bond (private work) has been recorded and provide the claimant a copy of the bond. The claimant shall be notified at the address shown in the notice to withhold funds.

Comment. Section 3084.220 restates former Section 3161 without substantive change. Cf. Section 3082.235 (written notice).

See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined), Section 3082.030 (“labor, service, equipment, or material” defined), 3082.060 (“lien” defined), 3082.090 (“notice to withhold funds” defined), 3082.100 (“owner” defined), 3082.105 (“payment bond (private work)” defined), 3082.110 (“person” defined).

Article 3. Notice to Construction Lender to Withhold Funds

§ 3084.310. Notice to construction lender to withhold funds

3084.310. (a) A person that has a lien right under Chapter 2 (commencing with Section 3083.110) may give a construction lender a notice to withhold funds.

(b) If the person that gives a construction lender a notice to withhold funds is a claimant other than a direct contractor, the notice may only be given for labor, service, equipment, or material provided by the claimant.

1 **Comment.** Subdivision (a) of Section 3084.310 restates a portion of the first sentence of
2 former Section 3159 without substantive change. See also Sections 3082.090 (“notice to withhold
3 funds” defined), 3084.160 (requirements for valid notice to withhold funds).

4 Subdivision (b) restates the last sentence of former Section 3159(a)(3) without substantive
5 change.

6 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
7 3082.025 (“direct contractor” defined), Section 3082.030 (“labor, service, equipment, or
8 material” defined), 3082.060 (“lien” defined), 3082.090 (“notice to withhold funds” defined),
9 3082.110 (“person” defined).

10 § 3084.320. Bonded notice to withhold funds

11 3084.320. A claimant may give a construction lender a notice to withhold funds
12 accompanied by a bond in an amount equal to 1-1/4 times the amount of the claim.
13 The bond shall be conditioned that if the defendant recovers judgment in an action
14 to enforce the notice to withhold funds or to enforce a claim of lien recorded by
15 the claimant, the claimant will pay all costs that may be awarded the owner, direct
16 contractor, or construction lender, and all damages to the owner, direct contractor,
17 or construction lender that result from the notice to withhold funds or recordation
18 of the claim of lien, not exceeding the amount of the bond.

19 **Comment.** Section 3084.320 restates the first sentence of former Section 3083 without
20 substantive change. The former reference to “good and sufficient sureties” on the bond is omitted
21 as unnecessary. See Code Civ. Proc. § 995.310 (sufficient sureties on bond required). The second
22 two sentences of former Section 3083 are continued in Section 3084.150(a)(2) (manner of giving
23 notice).

24 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
25 3082.025 (“direct contractor” defined), 3082.060 (“lien” defined), 3082.090 (“notice to withhold
26 funds” defined), 3082.100 (“owner” defined).

27 **Staff Note.** Existing law states that the claimant’s bond covers costs that may be awarded
28 “against” the defendant. This is evidently a garbled way of saying that the claimant must cover
29 the prevailing defendant’s court costs. The staff has revised the provision accordingly.

30 § 3084.330. Objection to bond

31 3084.330. (a) A construction lender that objects to the sufficiency of sureties on
32 the bond given with a bonded notice to withhold funds shall notify the claimant of
33 the objection within 20 days after the bonded notice to withhold funds is given.

34 (b) The claimant may within 10 days after notification of the objection substitute
35 for the initial bond a bond executed by an admitted surety insurer. If the claimant
36 does not substitute a bond executed by an admitted surety insurer, the construction
37 lender may disregard the bonded notice to withhold funds and release all funds
38 withheld in response to the notice.

39 **Comment.** Section 3084.330 restates former Section 3163 without substantive change. Cf.
40 Section 3082.235 (written notice); Code Civ. Proc. § 995.120 (“admitted surety insurer” defined).

41 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
42 3082.090 (“notice to withhold funds” defined).

43 **Staff Note.** Various provisions of the notice to withhold funds statute refer to the time of
44 receipt of a notice, as opposed to the time a notice is given. The staff plans to propose standard

1 provisions governing the time of giving versus the time of receipt of notice, for use consistently
2 throughout the mechanics lien law.

3 **§ 3084.340. Duty of construction lender**

4 3084.340. (a) Except as provided in subdivision (b), on receipt of a notice to
5 withhold funds, a construction lender that is given a notice to withhold funds shall
6 withhold from the borrower or other person to which the lender or the owner is
7 obligated to make payments or advancement out of the construction fund
8 sufficient funds to pay the claim and any claim of lien that is recorded.

9 (b) The construction lender may, at its option, elect not to withhold funds in any
10 of the following circumstances:

11 (1) The notice to withhold funds is unbonded.

12 (2) A payment bond (private work) is recorded before the lender is given the
13 first notice to withhold funds. This paragraph does not apply to a bonded notice to
14 withhold funds given by a direct contractor.

15 **Comment.** Section 3084.340 restates paragraphs (1) and (2) of subdivision (a) of former
16 Section 3159, and subdivision (a)(1)-(2) of former Section 3162 without substantive change. The
17 reference to recordation of a payment bond “in the office of the county recorder where the site is
18 located” is omitted from subdivision (b)(2) as unnecessary. See Section 3082.250 (filing and
19 recording of papers).

20 If a bonded notice to withhold funds is given by a direct contractor, the construction lender
21 must withhold funds regardless of whether a payment bond has previously been recorded under
22 Section 3085.220.

23 See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”
24 defined), 3082.060 (“lien” defined), 3082.090 (“notice to withhold funds” defined), 3082.100
25 (“owner” defined), 3082.105 (“payment bond (private work)” defined), 3082.110 (“person”
26 defined).

27 **Staff Note.** The staff has radically recast this provision in an effort to simplify it.
28 Knowledgeable persons should examine the provision to ensure that we have not inadvertently
29 changed its meaning.

30 **§ 3084.350. Notice of election**

31 3084.350. (a) The claimant may make a written request for notice of an election
32 by the construction lender under Section 3084.340 not to withhold funds. The
33 request shall be made at the time the claimant gives the construction lender the
34 notice to withhold funds and shall be accompanied by a preaddressed, stamped
35 envelope.

36 (b) If the construction lender elects not to withhold funds under Section
37 3084.340, the lender shall, within 30 days after making the election notify a
38 claimant that has requested notice of the election under subdivision (a). If the basis
39 of the election is the recordation of a payment bond (private work) under Section
40 3085.220, the construction lender shall include a copy of the bond with the notice.

41 (c) A construction lender is not liable for failure to notify a claimant under this
42 section if all of the following conditions are satisfied:

43 (1) The failure was not intentional and resulted from a bona fide error.

44 (2) The lender maintains reasonable procedures to avoid an error of that type.

1 (3) The lender corrected the error not later than 20 days after the date the lender
2 discovered the violation.

3 **Comment.** Section 3084.350 restates paragraph (3) of subdivision (a) of former Sections 3159
4 and 3162 without substantive change. The last sentence of former Section 3159(a)(3) is continued
5 in Section 3084.310(b) (notice to construction lender to withhold funds).

6 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
7 3082.090 (“notice to withhold funds” defined), 3082.105 (“payment bond (private work)”
8 defined).

9 Article 4. Priorities

10 **§ 3084.410. Distribution of funds withheld pursuant to notice to withhold funds**

11 3084.410. (a) Except as provided in subdivision (b), funds withheld pursuant to
12 a notice to withhold funds shall be distributed in the following order of priority:

13 (1) First, to pay claims of persons that have given a bonded notice to withhold
14 funds. If funds are insufficient to pay the claims of those persons in full, the funds
15 shall be distributed pro rata among the claimants in the ratio that the claim of each
16 bears to the aggregate of all claims for which a bonded notice to withhold funds is
17 given.

18 (2) Second, to pay claims of persons that have given an unbonded notice to
19 withhold funds. If funds are insufficient to pay the claims of those persons in full,
20 the funds shall be distributed among the claimants in the ratio that the claim of
21 each bears to the aggregate of all claims for which an unbonded notice to withhold
22 funds is given.

23 (c) Pro rata distribution under this section shall be made among the persons
24 entitled to share in the distribution without regard to the order in which the person
25 has given notice to withhold funds or commenced an enforcement action, if any.

26 **Comment.** Subdivisions (a) and (c) of Section 3084.410 restate former Section 3167 without
27 substantive change. The amount of the claim for which payment is required is determined
28 pursuant to Article 5 (commencing with Section 3084.510) (enforcement of notice to withhold
29 funds).

30 See also Sections 3082.010 (“claimant” defined), 3082.090 (“notice to withhold funds”
31 defined), 3082.110 (“person” defined).

32 **Staff Note.** We believe this recasting of existing Section 3167 captures its meaning. Experts
33 should examine the rewrite closely.

34 **§ 3084.420. Amount withheld**

35 3084.420. Notwithstanding Section 3084.410:

36 (a) A direct contractor or a subcontractor may recover pursuant to a notice to
37 withhold funds given to a construction lender only the net amount due the direct
38 contractor or subcontractor after deducting the claims of all subcontractors and
39 material suppliers that have given a bonded notice to withhold funds for work
40 done on behalf of the direct contractor or subcontractor.

41 (b) In no event is the construction lender required to withhold, pursuant to a
42 bonded notice to withhold funds, more than the net amount provided in

1 subdivision (a). Notwithstanding any other provision of this chapter, a
2 construction lender is not liable for failure to withhold more than that net amount
3 on receipt of a bonded notice to withhold funds.

4 **Comment.** Section 3084.420 restates subdivisions (b) and (c) of former Sections 3159 and
5 3162.

6 See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”
7 defined), 3082.070 (“material supplier defined), 3082.090 (“notice to withhold funds” defined),
8 3082.180 (“subcontractor” defined).

9 **Staff Note.** This is a confusing provision; the staff would like to clarify it, but we can’t
10 without understanding what it means. Subdivision (a) relates to either a bonded or an unbonded
11 notice, and subdivision (b) relates only to a bonded notice. Yet they both seem to state the same
12 rule. The staff would appreciate some input on whether we can simply delete subdivision (b), or
13 whether it serves a useful purpose.

14 In any event, the statute seems to be an exception to the general rules on priorities, so we have
15 relocated it among the priorities statutes for ease of reference.

16 § 3084.430. Effect of notice to withhold funds on assignment of funds

17 3084.430. The rights of a claimant that gives a construction lender a notice to
18 withhold funds are not affected by an assignment of construction loan funds made
19 by the owner or direct contractor, and the notice to withhold funds has priority
20 over the assignment, whether the assignment is made before or after the notice to
21 withhold funds is given.

22 **Comment.** Section 3084.430 restates former Section 3166 without substantive change.

23 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
24 3082.025 (“direct contractor” defined), 3082.090 (“notice to withhold funds” defined), 3082.100
25 (“owner” defined).

26 Article 5. Enforcement of Notice to Withhold Funds

27 § 3084.510. Time for enforcement of notice to withhold funds

28 3084.510. (a) A claimant shall commence an action to enforce a notice to
29 withhold funds not earlier than 10 days after the date claimant gives the notice and
30 not later than 90 days after expiration of the time within which a notice to
31 withhold funds must be given. The action may not be brought to trial or judgment
32 entered before expiration of the time prescribed in this subdivision.

33 (b) If a claimant does not commence an action to enforce a notice to withhold
34 funds within the time prescribed in subdivision (a), the notice ceases to be
35 effective and the person withholding funds pursuant to the notice shall release
36 them.

37 (c) Within five days after commencement of an action to enforce a notice to
38 withhold funds, the claimant shall give notice of commencement of the action to
39 the persons and in the manner that a notice to withhold funds is given.

40 **Comment.** Section 3084.510 restates former Section 3172 without substantive change. A
41 notice to withhold funds must be given before expiration of the time within which a claim of lien
42 must be recorded under Chapter 2 (commencing with Section 3083.110). See Section 3084.160
43 (requirements for valid notice to withhold funds).

1 For the manner that notice of commencement of an enforcement action is to be given, see
2 Section 3084.150 (manner of giving notice).

3 Funds released for failure to timely commence an enforcement action must be paid or delivered
4 to the person to which they are due.

5 See also Sections 3082.010 (“claimant” defined), 3082.090 (“notice to withhold funds”
6 defined), 3082.110 (“person” defined).

7 **§ 3084.520. Joinder, consolidation, and interpleader**

8 3084.520. If more than one claimant has given a notice to withhold funds:

9 (a) Any number of claimants may join in the same enforcement action.

10 (b) If claimants commence separate actions, the court first acquiring jurisdiction
11 may order the actions consolidated.

12 (c) On motion of the owner or construction lender the court shall require all
13 claimants to be impleaded in one action, to the end that the rights of all parties
14 may be adjudicated in the action.

15 **Comment.** Section 3084.520 restates former Section 3175 without substantive change.

16 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
17 3082.090 (“notice to withhold funds” defined), 3082.100 (“owner” defined).

18 **Staff Note.** The reference in this section to the court “first acquiring jurisdiction” is evidently
19 a relic of pre-unification days when jurisdiction under the mechanics lien law could be in the
20 municipal or the superior court, depending on the amount in controversy. The staff has not
21 eliminated this provision because it arguably could still have relevance in the context of a work of
22 improvement that straddles a county line, in which case the superior court in either county would
23 have jurisdiction. See proposed Section 3082.220 (jurisdiction and venue). Is this a common
24 enough occurrence that it is worth addressing in the statute?

25 **§ 3084.530. Dismissal of enforcement action for lack of prosecution**

26 3084.530. Notwithstanding Section 583.420 of the Code of Civil Procedure, the
27 court may dismiss an action to enforce a notice to withhold funds that is not
28 brought to trial within two years after commencement.

29 **Comment.** Section 3084.530 restates former Section 3173 without substantive change. The
30 cross-reference to the Code of Civil Procedure is added to make clear that this section modifies
31 the general three-year period for discretionary dismissal. Cf. Section 3082.230 (rules of practice).

32 See also Section 3082.090 (“notice to withhold funds” defined).

33 **§ 3084.540. Dismissal of action or judgment against claimant**

34 3084.540. A notice to withhold funds ceases to be effective, and a person
35 withholding funds pursuant to the notice shall release them, if an action to enforce
36 the notice to withhold funds is dismissed (unless expressly stated to be without
37 prejudice) or if judgment in the action is against the claimant.

38 **Comment.** Section 3084.540 restates former Section 3174 without substantive change. Funds
39 released as a result of dismissal of the action or judgment against the claimant must be paid or
40 delivered to the person to which they are due.

41 See also Sections 3082.010 (“claimant” defined), 3082.090 (“notice to withhold funds”
42 defined), 3082.110 (“person” defined).

1 **§ 3084.550. Attorneys fees in action to enforce bonded notice to withhold funds**

2 3084.550. (a) In an action to enforce a bonded notice to withhold funds, the
3 prevailing party is entitled to reasonable attorneys fees in addition to other costs
4 and damages.

5 (b) The court, on notice and motion by a party, shall determine which is the
6 prevailing party for the purpose of this section, regardless of whether the action
7 proceeds to final judgment. The prevailing party is the party that recovers greater
8 relief in the action, subject to the following limitations:

9 (1) The court may determine that there is no prevailing party.

10 (2) If the action is voluntarily dismissed or dismissed pursuant to a settlement,
11 there is no prevailing party.

12 (3) If the defendant tenders to the claimant the full amount to which the
13 defendant is entitled, and deposits in court for the claimant the amount so
14 tendered, and the alleges those facts in the answer and the allegation is determined
15 to be true, the defendant is deemed to be the prevailing party.

16 **Comment.** Section 3084.550 restates former Section 3176 without substantive change.

17 See also Sections 3082.010 (“claimant” defined), 3082.090 (“notice to withhold funds”
18 defined).

19 **☞ Staff Note.** The existing statute refers to an action against an owner or construction lender to
20 enforce a bonded notice to withhold funds. But a bonded notice is only given to a construction
21 lender under existing Section 3083, not to an owner. The staff has omitted the reference to
22 particular defendants from this draft. The matter is further discussed in Memorandum 2005-31.

23 **§ 3084.560. Interest in action to enforce bonded notice to withhold funds**

24 3084.560. If the claimant is the prevailing party in an action to enforce a bonded
25 notice to withhold funds, any amount awarded on the claim shall include interest
26 at the legal rate calculated from the date the notice to withhold funds is given.

27 **Comment.** Section 3084.560 restates former Section 3176.5 without substantive change.

28 See also Sections 3082.010 (“claimant” defined), 3082.090 (“notice to withhold funds”
29 defined).

30 **☞ Staff Note.** The existing statute refers to an action against an owner or construction lender to
31 enforce a bonded notice to withhold funds. But a bonded notice is only given to a construction
32 lender under existing Section 3083, not to an owner. The staff has omitted the reference to
33 particular defendants from this draft. The matter is further discussed in Memorandum 2005-31.

34 The existing statute refers to the date the bonded notice is given to the owner or construction
35 lender “pursuant to Section 3172.” This cross reference is confusing because Section 3172 does
36 not deal with the giving of a notice to withhold funds; it prescribes the limitation period for
37 commencing an action to enforce a notice. Perhaps a reference to Section 3162 was intended; that
38 section deals with the duties of a construction lender on receipt of a notice to withhold funds. The
39 staff has simply eliminated the cross reference in this draft.