Study H-821 October 27, 2006

Second Supplement to Memorandum 2006-43

Mechanics Lien Law
(Analysis of Comments: Private Work of Improvement)

The Commission has received the following comments responding to Memorandum 2006-39 (Comments on Tentative Recommendation), and to Memorandum 2006-43 (Analysis of Comments: Private Work of Improvement):

The staff will attempt to incorporate a discussion of these comments when presenting Memorandum 2006-43. However, some of the comments of Mr. Sackman and Mr. Brown may raise new issues that the staff has not yet had the opportunity to analyze.

Respectfully submitted,

Steve Cohen
Staff Counsel

Exhibit

COMMENTS OF LORI NORD

From: Lori Nord <lnord@mjmlaw.us>
Date: October 13, 2006
To: vmatias@clrc.ca.gov
Subject: mechanics' lien law revision

Unfortunately, I will not be able to attend the October 27 public meeting. Therefore, I want to tell you that I support everything contained in J. David Sackman's comments beginning at Exhibit page 53. I have represented laborer benefit funds and unions in this field since 1980. It is extremely important that we avoid further expensive and extensive litigation about ERISA preemption, which has now been resolved by the 1999 legislation and court cases he references in his comments.

Thank you.
Lori A. Nord
McCarthy, Johnson & Miller

COMMENTS OF J. DAVID SACKMAN

From: J. David Sackman <jds@racclaw.com>
Date: October 25, 2006
To: scohen@clrc.ca.gov
Subject: Law Review Commission Study of Mechanics Lien Law

Dear Mr. Cohen:

Thank you for what must have been the arduous task of analyzing the large number of comments to the Tentative Recommendations. I am writing to inquire what further opportunity for comment exists. Specifically, will the Commission accept written responses to the Staff Analysis, and will there be an opportunity for comment, oral or written, at the next Commission meeting (this Friday)?

I have enclosed a short Response to Staff Comments I would like to present. As you know, my comments are made on behalf of my clients, the California State Council of Laborers Legislative Department (Laborers), and the Construction Laborers Trust Funds for Southern California (Laborers Funds). Because of ERISA preemption of the earlier statute, construction workers lost many millions of dollars of benefits, which they had earned by their labor, over the decade these remedies were unavailable to them. If the Revisions finally submitted by the Commission are again vulnerable to ERISA preemption, it is likely that my clients, and the rest of Organized Labor will not support the legislation. Therefore, I would like to make sure that their concerns are met early in the process, and not wait until a bill is before the Legislature that we must support or oppose.

Thank you for your consideration and hard work. I do expect to attend the meeting on Friday.

Sincerely,

J. David Sackman

of Reich, Adell, Crost & Cvitan

encl: Response to Staff Comments Re: Laborers Compensation Fund Issues

cc: Mike Quevedo, Southern California District Council of Laborers
Jose Mejia, Cal. State Council of Laborers
Ric Quevedo, Construction Laborers Trust Funds for Southern California
John Miller, Cox Castle & Nicholson
Alexander Cvitan, Reich, Adell, Crost & Cvitan

CALIFORNIA STATE COUNCIL OF LABORERS LEGISLATIVE DEPARTMENT, AND CONSTRUCTION LABORERS TRUST FUNDS FOR SOUTHERN CALIFORNIA RESPONSE TO STAFF COMMENTS RE: LABORERS COMPENSATION FUND ISSUES

1. The change from "Laborers Compensation Fund" to "Employee Benefit Fund" could make the statute even *more* vulnerable to preemption by ERISA. A nearly identical term, "Employee Benefit Plan" is defined in ERISA § 3(3), 29 U.S.C. § 1002(3). Using the same term in the Mechanic Lien statute is certainly a red flag for "singling out" ERISA funds for special treatment. The definition was meant to be broader than "employee benefit funds" as defined in ERISA for this reason.

2. The Staff Recommendation for the definition of "Laborers Fund" in § 7018 is not the same, but *more narrow* than the current definition in current § 3098(b). We again suggest that the definition using the current language, with some of the language from current § 3111:

§ 7018. Laborer

7018. "Laborer" means a person who, acting as an employee, performs labor on, or bestows skill or other necessary services on, a work of improvement. **"Laborer" also includes any person or entity, including a "laborers benefit fund" described in Section 7020, to whom a portion of the compensation of a laborer is paid by agreement with that laborer or the collective bargaining agent of that laborer. To the extent that a person or entity defined here has standing under applicable law to maintain a direct legal action, in their own name or as an assignee, to collect any portion of compensation owed for a laborer, that person or entity shall have standing to enforce any rights under this Part to the same extent as the laborer. This section is intended to give effect to the long-standing public policy of this state to protect the entire compensation of laborers on works of improvement, regardless of the form in which that compensation is to be paid.**

3. The definitions of "Express Trust Fund" and "Employee Benefit Fund" in the Staff Recommendation are circular. Each refers back to the other, and the other sections of the statute refer sometimes to one, sometimes to the other. This is confusing and unnecessary. The terms "express trust" in the current statute, as in other parts of the Code, simply refers to a trust which is created by a written instrument; it was never meant to be separately defined for mechanic lien purposes. We again suggest a single definition of "Laborers Benefit Fund" (or whatever term is agreed upon) as:

§ 7020. Laborers ~~compensation~~ **benefit** fund

7020. "Laborers ~~compensation~~ **benefit** fund" means a person, including an express trust fund, ~~to which a portion of the compensation of a laborer is paid by agreement with the laborer or the collective bargaining agent of the laborer~~ **to which a portion of a laborer's total compensation is to be paid pursuant to an employment agreement or a collective bargaining agreement for the provision of benefits, including, but not limited to, employer payments described in Section 1773.1 of the Labor Code and implementing regulations**.

4. The section which is most vulnerable to ERISA preemption, § 7402 (matching current § 3111) should be deleted. This singles out employee benefit funds only. As we explained earlier, the current § 3111 is actually redundant and unnecessary. With the other revisions, this can be deleted without making any substantive change.

5. The Staff Recommendation did not address the "Laborers Compensation Fund" issues we raised, concerning proposed § 7400. We suggested explicitly adding "assignees" among the persons who can make a claim. Otherwise, an assignee (such as an "employee benefit fund") which itself does not "provides labor, service . . . " etc., could be held to lack standing to bring a claim. *See* *Mills v. LaVerne Land Co.*, 97 Cal. 254, 32 P. 169 (1893) (right to record a mechanic lien, as opposed to the lien itself, may not be assigned). One of the purposes of the 1999 revisions was to make clear that valid assignees, including but not limited to "employee benefit funds" had standing to bring claims. *See* *Union Supply Co. v. Morris*, 220 Cal. 331, 339, 30 P.2d 394 (1934) (supplier who received assignment of claims from other suppliers and subcontractors had standing to file lien for combined claims); *Koudmani v. Ogle Enterprises, Inc.*, 47 Cal.App.4th 1650, 1659, 55 Cal.Rptr.2d 330 (1996) (lien/bond rights may be assigned). If "employee benefit funds" are the only assignees allowed standing, then they are being "singled out" for special treatment.

6. Section 7216 still refers specifically to "an express trust fund." As we previously discussed, this language should be made generic, so as not to "single out" employee benefit funds for special treatment. This should refer instead to the failure to pay laborers, as we suggested.

COMMENTS OF HOWARD BROWN

From: Howard Brown <Hbb1000@aol.com>
Date: October 25, 2006
To: Steve Cohen
Subject: CLRC: Mechanics Lien laws
Cc: CPbronstein@lanak-hanna.com

Attached is my letter regarding the Memorandum 3006-39. I have not had the opportunity to review the latest memorandum but will do so later today. If you could forward it to me by e-mail. It would help. As I noted in this attached, I made it reasonably short. (For me, it is very short.) Thanks for letting me know about the schedule update on Friday. I look forward to meeting you and whatever staff attends. Thanks again for your very fine efforts. I mean it when I state that if I may be of any further service, please don't hesitate to call upon me. Howard Brown

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My file No.
3066

October 25, 2006

Via: e-mail attachment
Scohen@clrc.ca.gov

STEVE COHEN
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA. 94303–4739

Dear Mr. Cohen:

I will make this as short as reasonably appropriate. This letter addresses the issues raised by the Commission in the report of October 19th.[1] I don't intend to re-argue the problems that I discussed in my September 18th letter and as further discussed by the Commission in the aforesaid report. I am assuming that the position of the Commission is fairly firm, but in a few instances the Commission has requested comments. I will address these and a few other comments that I consider necessary.

First, I do wish to commend the Commission for its outstanding and comprehensive study, review, and knowledge. I know all the others that responded are equally impressed with the Commission's knowledge and work. My only other wish was, as I noted in my original letter, that the mechanics lien laws should really be re-written.

Reference to "page" followed by a number refer to the report of October 19th and are followed by my comments. For convenience, I have italicized and highlighted the references to the page and subject of the October 19th report.

Page 6: The omission of the recommendation that identical code sections in the private and public contract sections are not to receive identical interpretations. I agree that the omission should be made. Any identical provisions should received identical

[1] I received an e-mail copy of the report from John Heuer of Gibbs, Giden on October 20th. I received the hard copy from the Commission on October 23. Although I have read and reviewed the report, regrettably there was not sufficient time to digest it completely. I did, however, want you to have my comments in sufficient time before this coming Friday's meeting and thus the e-mail.

interpretations unless in the context of its location demands a different interpretation, but that should be determined by any court called upon to make an interpretation.

Page 8: Recommendation of GGLT of use of "claim." I did not believe that the original Commission comment that the original definition of a Design Claimant may have confused the issue, but the change suggested on page 9 in the definition of claimant seems to avoid any problem.

Page 11: Commencement. As restated this is a good and acceptable statement.

Page 14: Definition of "Direct Contractor." As restated this is a good and acceptable statement.

Page 17: Section 7018: Laborer**:** The Commission staff does not agree that the use of the word "on" may lead to a mis-interpretations and thus disagreed with my suggestion that the word be changed to "for and upon." Perhaps it would sufficient to substitute the word "upon" for "on" to avoid any such mis-interpretation that results from just the word "on" which seemingly would include those working elsewhere than being physically present upon the job site. Adding to the definition in § 7018, the word "physically" may resolve the problem.

Page 18: The Commission staff has stated in various portions of its report that it was its intent to only codify the law and not necessarily to codify appellate decisions; however in several instances it has done so. Further, there is an inconsistency when sometimes the report states that it is following existing law and other times states that it will change the law .

My thought is that if the Commission considers that some of the provisions of the existing law need changes, it should not hesitate in other areas where it considers that such changes would be helpful, but resists making the changes only because it considers it is under an obligation to adopt existing law. See my next comment as an example.

Page 18: Section 7020: Adding to CC 7020 a section (b) that describes materials supplied are presumed to have been incorporated therein; this presumption is as to the burden of proof. The commission has acknowledge that it is a change in the law as established by the Consolidated Electric Co case 12 CA3d 54 and acknowledges that this a departure from established law. However, I do agree with the suggested change.

Page 21 Jurisdiction: Frankly I found the original statement of this to be confusing and I do not believe that the restatement has made it any less confusing. If it is the intent, as I believe that it is, that actions to enforce a mechanic's lien by foreclosure shall be in the county where the property is located, why not just say so. Also, I would omit the reference to "superior court." It also does not resolve the problem that I originally raised (in Ex. 27), that is, when the property is located in one county, the lender upon whom a stop payment notice was served in another, and the surety on a Payment Bond in a third. Where is the jurisdiction?

***Page 22: Performance Bond*:** The Joint Surety committee comments on the "performance bond." You will recall that earlier I commented on the failure of the Commission to note the differences between Payment and Performance Bonds. See my letter page 6 re the differences between Payment and Performance bonds. Section 7030 and Section 7600 (Ex 26). This was not addressed by the Commission. There is a difference and it seems to create a problem with the statute.

Page 23: Co-owners. This becomes confusing. Subdivision § 7058(b) is confusing but so is § 7028(b). Why not simply state that if the property being developed is owned by more than one person, the preliminary notice may be served as herein provided on any owner?

Page 33: Preliminary Notice Section 7200: I originally questioned the use of the term "builder" as being undefined. Exhibit 26. Since it is not defined or explained, is the description of who is to serve the preliminary notice sufficient by naming only the "direct contractor?" Would it be too difficult for someone who identifies himself as a "builder" and those working for him, to claim to be excused from and not required to serve a preliminary notice since the statute does not require it?

Page 38: Mailing. Your comment about addition of a comma is appropriate, but why not "first class mail, certified mail, or registered mail.? But since you have eliminated "first class" the issue is moot. I have no serious problem with omitting first class: its just the expense of the other mailings.

Page 41: Electronic Service: Does the term "electronic" include e-mails or is it limited to faxes only? When the commission refers to "notice under this part may be given to a person in the form of an electronic record if the person has agreed to receive the notice in the form of an electronic record" may that "form of acceptance" — even if in a different document — be in electronic form? CC § 3163.5 doesn't help.

Page 45: Electronic Service: This is only applicable if electronic service includes e-mails. My problem with § 7114(f) is the word "transmitted." Regrettably, I have had frequent problems with e-mail. With faxes, at least there is a transmission report stating whether the fax was received. E-mail does not have this safeguard. I have no reasonable alternative, but so much depends upon the receipt of it and I personally would feel much better if an e-mail of a notice, even if e-mail has been agreed to, were accompanied with a written notice as well. You have added a provision on page 46, providing that such electronic transmission was completed and without error but this could only be accomplished with faxes.

Page 56: Substantial Completion: You have requested comments regarding this subject. Since I advocated it in the first instance, I can only reiterate what I stated in my original comments. This is the term most used by contractors, it is recognized in California as a legitimate term, and, in a sense, I believe that courts also think in terms of substantial. I do not perceive any misconceptions or difficulties that will be encountered by its use.

I am, however, confused by just what the Commission is recommending. On page 56 it recommends that 7150(a)(1) be changed to "substantial completion" but on

page 58, the recommendation reverts to "actual completion." I realize that the Commission is now seeking additional comments and if that is the purpose of the two versions of section 7150(a)(1), I will stick with substantial as the Commission orientally adopted.

Page 57: Notice of completion: This is now getting too complicated. Section 7150(3) defines completion as including a cessation of labor for a "continuous period of 60 days." Section 7150(4) provides of the recording of a notice of cessation for a continuous period of 30 days. Your original §7152(5) provided that the notice state the date of cessation. The contemplated change to §7150(a)(4) now adds an unnecessary element, i.e., that the cessation of labor be continuous for 30 days and the owner record a notice of completion and before labor recommences. I believe the original statement was fine and the contemplated change unnecessary and confusing. Cessation is not the same as completion and the differences should be maintained since completion triggers other events, e.g., loan payment provisions, etc. The original writing of this section was clear and should be maintained.

Moreover, under § 7152(b)(6) ("Notice of Completion") a cessation of labor notice is included and seemingly under § 7156 would be required to serve a Notice of Completion — although actually it is a cessation — upon every person who gave a preliminary notice. In principle I cannot argue that an owner relying upon a cessation should be required to notify potential claimants of a cessation since most persons working on a project rarely learn of a cessation except accidentally.[2] I do believe, however, as I stated earlier, requiring an owner to serve by registered, or certified mail (or possibly electronically assuming those serving have agreed to this mode of service) is just too much.

Page 68: Terms of contract: You have requested comments: I do not recall having encountered any problems with any sub attempting to restrict claimant's rights by contract. I see no practical purpose of changing it but I have no objection to your addition of "subcontractor."

***Page 71: Section 7166*:** "Certain" other rights now causes confusion. I would like to know what those "certain" other rights are. "Other rights" was a problem since no one could be sure what rights were involved and it would be left to some unknowledgeable court to decide. If given a choice, I would leave both words out. The release waives the lien claim and leave it there.

***Page 74: Unconditional Release*:** I don't think a change is necessary. Section 7172 is entitled "Unconditional Waiver and Release on Progress Payment." Eliminating the word "progress" in the title and placing "progress" in the language of the release, is unnecessary. It is intended to only change this one section. If you change the title of this one section, it probably is appropriate to change all the other titles of the other release

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[2] I doubt that anyone in California will remember Glenn Behymer's famous use of the "cessation" for the building of the Third Street Tunnel in Los Angeles many years ago. He simply had the contractor stop work, let the time run, and then re-commenced the work. No one was alerted to the cessation.

forms since the other release sections use the word "progress" or "final." I would not make the change.

Pages 74 to 76: Releases: You have requested comments regarding the modification of §§ 7170 and 7172. I have no objection to any of your suggested modification. I believe them to be appropriate if we are to retain the use of the form for progress payments. You have requested comments regarding the use of the word "payment' without the amount being stated. I am unaware of any situation causing any problems or disputes where the amount was not stated .

Page 80 ff: Preliminary Notice:[3] You have concluded not to omit the word "builder" in section 7400(g). There is no definition of what a builder is. The New Oxford American Dictionary page 225, defines a "builder" as "a person who constructs something by putting parts or materials together over a period of time" and "a person whose job it is to construct or repair houses or to contract for their construction and repair." Almost the same description is used to define a "contractor. " The Oxford English Dictionary on page1163 defines a "builder" as "One who builds; The [sic] erecter of a building."

Your description of who is to serve a preliminary notice, who is entitled to assert a lien as a "direct contractor" and omitting any reference to a "builder" will certainly permit a court to conclude that you are making some type of distinction between them. There is no basis to create any confusion or uncertainty. As I stated in my letter and comments dated September 18th, there is no reason to create this uncertainty of meaning. Ex. 36. Actually, as I noted, the words "contractor" and "builder" mean the same thing but that does not mean that in using the word "builder" without any definition, the public and counsel will believe that you intend something other than the Direct Contractor and rather simply conclude that since a "builder" is entitled to a lien or claim, and therefore it is not required to serve a preliminary notice since it is not named as one who is required to serve such notice. It would seem omitting the word "builder" resolves more problems than are resolved by including it. The term "builder" should be eliminated from section 7400 unless defined, for example, as the "same as Direct Contractor."[4]

Pages 97 ff: Direct Contractor: time to file a lien: The staff comment states that it does not believe that the draft statute is the appropriate vehicle to modify the provisions regarding the time for a Direct Contractor to record a lien. As I stated at the outset, this is inconsistent. The staff has made some significant changes. These were good, appropriate and, in some cases, necessary.

The suggestion to fix the time limits to be the same for the Direct Contractor and all others, is just a means of avoiding the prevailing and future confusion. This is a

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[3] Relating also to the Commission report on page 96 relating to section 7400: "Persons Entitled to Lien."

[4] In the Commission report on page 90 in connection with the Design Professional Lien, it is noted that the use of the term "landowner" rather than "owner" may suggest a distinction between them. So I suggest that use of "Direct Contractor" and ""Builder" will suggest a similar distinction.

good time to fix the discrepancy that exists without any reasonable reason. Just because it has had a lengthy existence, is not a valid reason not to reach a decision and reconcile the existing discrepancy without a valid reason.

Page 99: Contents of lien: The Commission has requested comments on this subject. I believe that the staff's present modification is appropriate without any further changes.

Page 100ff: Notice of Intended recording of lien: I do not favor such notice but the Commission does, and I abide with that decision. I do believe, however, that if accepted, for the reasons that I pointed out in my original letter (Ex 37) the time for recording the lien must be extended from the present time of 30 days for others than the direct contractor. If it not extended beyond the 30 days, the notice will serve no purpose: there just is not sufficient time to send the notice and fulfill the requirements for the filing of the lien and to have any meaningful discussions or communications regarding the intent to file a lien or have any meaningful discussions regarding resolution of the problem. Since this is the purpose of the service of the notice, it should be given time to attempt such resolution.

Page 104: County Recorder: This is a very good idea.

Page 106 and 107: False claim of lien Sections 7426 and 7424: My remarks in the following paragraphs may be as a result of my confusion with what the Commission is recommending since there was the original proposal, a revision on page 106, and another revision on page 107. I apologize for my misunderstanding.

The Commissions revision to § 426 of its earlier revision causes me some concern. I acknowledge the word "intent" in the revision, but this may create a problem since proving or disapproving intent would require some serious proof and time problems. Under the proposed revision, a claimant with a valid claim but who uses a totally wrong figure in the amount of the claim as a result, perhaps, of not giving a credit that was due or stating the wrong address, could be punished by having its claim forfeited. If it is called to the claimant's attention, should not the claimant be entitled to record a credit for the difference in the first example, but why not permit the claimant to record a "Corrected Lien Claim?" Section 7426(b) apparently would require the claimant to totally release the lien. I believe that if the claimant acts promptly, it should be permitted to re-record a lien with the correct amount or address or otherwise correct whatever was incorrect and it should relate back to the date of recording the original document.

Simply stated, I believe that the two sections should be combined so as to allow forfeiture and damages if it was the intent of claimant to slander, defraud, or intentionally state a false claim. But if the owner believes that to be the case, it should be permitted to demand the release or correction of the lien and the claimant be permitted to correct by recording a corrected lien.

Page 108ff. Amount of lien: I concur with the Commission that the specific amount of a change order should not be required to be stated. Section 7430(c) (amount of lien) is still perplexing and self-contradictory. The first clause of the section states that a claimant is

not precluded from including a claim in the lien for an amount due as a result of rescission, abandonment of breach of contract, but in the second clause it is stated that the amount of the lien may not exceed the reasonable value of the LSEM furnished. Under the first clause a claimant may assert the itemized claims but under the second clause cannot. I realize that this is a restatement of my earlier comments. Ex. 38. However, Civil Code section 3123, of which the present revision is based, is self-contradictory. Now is the time to correct this obvious mistake.

I hope that my comments will be of some assistance to the Commission. Thank you for the opportunity to be able to make a contribution to this important revision. I look forward to meeting you this coming Friday and, if I may be of any further assistance, to further participation in this important revision.

Very truly yours,

HOWARD B. BROWN

HBB:ss
cc: Craig P. Bronstein, Esq. Via e-mail