Study H-821 December 4, 2006

First Supplement to Memorandum 2006-48

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

This supplement continues the staff's analysis of submitted comments relating to the Commission's tentative recommendation on *Mechanics Lien Law* (June 2006).

We have received the following new comments:

Mr. Brown's just received comments address several revisions proposed by the staff in CLRC Memorandum 2006-48. Due to distribution time requirements, the staff was unable to include within this memorandum a further discussion of Mr. Brown's comments. However, the comments will be analyzed by the staff before the Commission's December meeting.

LABORERS COMPENSATION FUND ISSUES

J. David Sackman, an attorney with Reich, Adell, Crost & Cvitan, a law firm in Los Angeles that represents employee benefit funds in California, has provided the Commission with extensive information relating to the sections of the mechanics lien law that confer rights on these funds. CLRC Memorandum 2006-39, Exhibit p. 53.

Mr. Sackman explains that a part of the mechanics lien statute that previously granted lien rights to these funds was declared by the California Supreme Court to be preempted by the federal Employment Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 et seq.). See *Carpenters Southern California Administrative Corp. v. El Capitan Development Co.*, 53 Cal. 3d 1041, 811 P.2d 296, 282 Cal. Rptr. 277 (1991).

The precise rationale of the Supreme Court in *El Capitan* is somewhat unclear. One part of the majority opinion interpreted the preemption provision of ERISA (29 U.S.C. § 1144) in an extremely expansive manner, reading it to encompass any state law that "has a connection with or reference to" such a plan. *Id.* at 1048. However, in deciding whether the statute before it was preempted by ERISA, the court looked to whether the state statute was "specifically designed to affect employee benefit plans," and whether it "provides to such funds a mechanic's lien remedy not provided by Congress." *Id.* at 1049.

Mr. Sackman explains that following the *El Capitan* decision, new legislation relating to these funds was carefully drafted and enacted in 1999 in an effort to preserve lien rights for these funds against a preemption challenge. This new legislation — existing law — was subsequently upheld by both the Ninth Circuit Court Appeals and the California Supreme Court against ERISA preemption challenges. See *Southern California IBEW-NECA Trust Funds v. Standard* of *Industrial Electric*, 247 F. 3d 920 (9th Cir. 2001), *Betancourt v. Storke Housing Investors*, 31 Cal. 4th 1157, 82 P.3d 286, 8 Cal. Rptr. 3d 259 (2003).

Mr. Sackman indicates that at least one rationale for these latter holdings was that, as contrasted with former law, the new sections no longer "single[d] out" laborers funds for special treatment, different than that afforded similarly situated parties. CLRC Memorandum 2006-39, Exhibit p. 59.

Mr. Sackman believes that the proposed law provides separate statutory treatment for these funds, and thus may again establish grounds for ERISA preemption. He proposes several revisions to the proposed law that he believes would avoid that problem. Lori Nord, an attorney with McCarthy, Johnson & Miller, a law firm in San Francisco that also represents laborers funds, shares Mr. Sackman's views on the issue. See Second Supplement to CLRC Memorandum 2006-43, Exhibit p. 1.

At the October meeting, the Commission directed the staff to work with Mr. Sackman on a resolution of the preemption problem.

After discussion with Mr. Sackman and further analysis of the proposed law, the staff has prepared new revisions, intended to protect the proposed law as much as possible from an ERISA preemption challenge while not making any significant substantive change in existing law. Mr. Sackman has reviewed the prepared revisions, and generally agrees the revisions should be sufficient to preclude a successful ERISA preemption challenge. Exhibit p. 5.

In general, the approach of the proposed revisions is to eliminate any statutory distinction that singles out a laborers fund for special treatment.

In order to best insulate the proposed law from a future ERISA preemption challenge, the staff recommends that **the proposed law be revised as follows**:

~~**§ 7014. Express trust fund**~~

~~7014. "Express trust fund" means a laborers compensation fund 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.~~

~~**Comment.** Section 7014 continues a portion of former Section 3111 without substantive change.~~

~~See also Sections 7018 ("laborer" defined), 7020 ("laborers compensation fund" defined).~~

§ 7018. Laborer

7018. (a) "Laborer" means a person who, acting as an employee, performs labor, or bestows skill or other necessary services, on a work of improvement.

(b) "Laborer" includes a person or entity to which a portion of a laborer's compensation for a work of improvement, including but not limited to employer payments described in Section 1773.1 of the Labor Code and implementing regulations, is paid by agreement with that laborer or the collective bargaining agent of that laborer.

(c) A person or entity described in subdivision (b) that 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 for a work of improvement, shall have standing to enforce any rights or claims of the laborer under this part, to the extent of the compensation agreed to be paid to the person or entity for labor on that improvement. This subdivision is intended to give effect to the long-standing public policy of this state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which that compensation is to be paid.

Comment. Subdivision (a) of Section 7018 continues former Section 3089(a) without substantive change.

Subdivision (b) continues the first sentence of former Section 3089(b) and a part of former Section 3111, without substantive change. ~~"Laborer" is no longer defined to include a compensation fund, which is treated separately in this part. Cf. See Section 7020 ("laborers compensation fund" defined).~~

Subdivision (c) continues the second and third sentences of former Section 3089(b), and former Section 3111, without substantive change.

See also Section 7046 ("work of improvement" defined).

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

~~7020. "Laborers compensation 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.~~

~~**Comment.** Section 7020 continues the first sentence of former Section 3089(b) without substantive change. See also Section 7070 (standing to enforce laborer's rights).~~

~~See also Sections 7014 ("express trust fund" defined), 7018 ("laborer" defined), 7032 ("person" defined).~~

~~Article 3. Laborers Compensation Fund~~

~~**§ 7070. Standing to enforce laborer's rights**~~

~~7070. (a) A laborers compensation fund that has standing under applicable law to maintain a direct legal action in its own name or as an assignee to collect any portion of compensation owed for a laborer, has standing to enforce rights under this part to the same extent as the laborer.~~

~~(b) This section is intended to give effect to the long-standing public policy of the state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which the compensation is to be paid.~~

§ ~~7072.~~ 7103. Notice of overdue laborer compensation

~~7072~~ 7103. (a) A contractor or subcontractor that employs a laborer and fails to pay the full compensation due the laborer, including any employer payments described in Section 1773.1 of the Labor Code and implementing regulations, ~~or laborers compensation fund~~ shall~~,~~ not later than the date the compensation became delinquent, give the laborer, the laborer's bargaining representative, if any, and the construction lender or reputed construction lender, if any, notice that includes all of the following information, in addition to the information required by Section 7102:

(1) The name and address of any ~~laborers compensation fund~~ person or entity described in subdivision (b) of Section 7018 to which employer payments are due.

(2) The total number of straight time and overtime hours on each job.

(3) The amount then past due and owing.

(b) Failure to give the notice required by subdivision (a) constitutes grounds for disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Comment. Section ~~7072~~ 7103 restates former Section 3097(k) without substantive change. See also Sections 7100-7116 (notice). The reference to the Registrar of Contractors in the final sentence of former Section 3097(k) is revised to refer to the Contractors' State License Law. This is a technical, nonsubstantive change.

~~The information required in this notice is in addition to the information required by Section 7102 (contents of notice).~~

See also Sections 7004 ("construction lender" defined), ~~7014 ("express trust fund" defined),~~ 7018 ("laborer" defined), ~~7020 ("laborers compensation fund" defined),~~ 7028 ("owner" defined), 7038 ("site" defined), 7044 ("subcontractor" defined), 7050 (application of part).

§ 7200. Preliminary notice prerequisite to remedies

7200. ….

(b) ….

(2) A laborer ~~or laborers compensation fund~~ is not required to give preliminary notice.

….

Comment. Subdivision (a) of Section 7200 restates part of the introductory clause of former Section 3097 without substantive change. This chapter is limited to private work. See Section 7050 (application of part).

Subdivision (b) restates ~~part~~ parts of former Section 3097(a) and (b) without substantive change.

Subdivision (c) restates parts of former Section 3097(a) and (b), omitting the exception of "the contractor". Although a direct contractor is generally excused from the preliminary notice requirement, the direct contractor must give preliminary notice to a construction lender under Section 7202(c).

The transitional provisions of former Section 3097(p) are not continued due to lapse of time.

See also Sections 7002 ("claimant" defined), 7018 ("laborer" defined), ~~7020 ("laborers compensation fund" defined),~~ 7024 ("lien" defined), 7012 ("direct contractor" defined).

§ 7204. Contents of preliminary notice

7204. (a) Preliminary notice shall include the following statement in boldface type:

NOTICE TO PROPERTY OWNER

If the person or firm that has given you this notice is not paid in full for labor, service, equipment, or material provided or to be

provided to your construction project, a lien may be placed on your property. Foreclosure of the lien may lead to loss of all or part of your property, even though you have paid your contractor in full. You may wish to protect yourself against this by (1) requiring your contractor to provide a signed release by the person or firm that has given you this notice before making payment to your contractor, or (2) any other method that is appropriate under the circumstances.

If you record a notice of completion of your construction project, you must within 10 days after recording send a copy of the notice of completion to your contractor and the person or firm that has given you this notice. The notice must be sent by registered or certified mail. Failure to send the notice will extend the deadline to record a claim of lien. You are not required to send the notice if you are a residential homeowner of a dwelling containing four or fewer units.

(b) If preliminary notice is given by a subcontractor that has not paid all compensation due to a laborer ~~or laborers compensation fund~~, the notice shall include the name and address of the laborer and any ~~laborers compensation fund~~ person or entity described in subdivision (b) of Section 7018 to which payments are due.

(c) If an invoice for material or certified payroll contains the information required by this section and Section 7102, a copy of the invoice or payroll, given in the manner provided by this part for giving of notice, is sufficient.

Comment. Section 7204 continues the substance of former Section 3097(c)(1)-(6), the unnumbered paragraph following paragraph (6), and the requirement of former Section 3097(a) that the preliminary notice be written. See also Sections 7100-7116 (notice). The reference to an "express trust fund" is replaced by ~~the defined term, "laborers compensation fund." See Section 7020 ("laborers compensation fund" defined)~~ a reference to a generalized category of persons or entities included within the definition of "laborer." See Section 7018 ("laborer" defined).

The information required in this notice is in addition to the information required by Section 7102 (contents of notice).

See also Sections 7008 ("contract price" defined), 7016 ("labor, service, equipment, or material" defined), ~~7018 ("laborer" defined),~~ 7024 ("lien" defined), 7032 ("person" defined), 7038 ("site" defined), 7044 ("subcontractor" defined).

§ 7216. Disciplinary action

7216. A licensed subcontractor is subject to disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, if all of the following conditions are satisfied:

(a) ~~The subcontractor does not pay all compensation due to a laborers compensation fund.~~

~~(b)~~ The subcontractor fails to give preliminary notice or include in the notice the information required by subdivision (b) of Section 7204.

~~(c)~~ (b) The subcontractor's failure results in ~~the laborers compensation fund~~ a person or entity described in subdivision (b) of Section 7018 recording a claim of lien, filing a stop payment notice, or asserting a claim against a payment bond.

~~(d)~~ (c) The amount due the ~~laborers compensation fund~~ person or entity described in subdivision (b) of Section 7018 is not paid.

Comment. Section 7216 continues the substance of the second paragraph of former Section 3097(h). The first paragraph, relating to disciplinary action if a subcontractor fails to give preliminary notice on a work of improvement exceeding $400, is not continued.

The reference to an "express trust fund" is replaced by ~~the defined term, "laborers compensation fund" which arguably expands the scope of the provision. See Section 7020 ("laborers compensation fund" defined)~~ a reference to a generalized category of persons or entities included within the definition of "laborer." See Section 7018 ("laborer" defined).

See also Sections 7024 ("lien" defined), 7034 ("preliminary notice" defined), 7044 ("subcontractor" defined), 7046 ("work of improvement" defined).

§ 7400. Persons entitled to lien

7400. A person that provides work authorized for a work of improvement, including but not limited the following persons, has a lien right under this chapter:

(a) Direct contractor.
(b) Subcontractor.
(c) Material supplier.
(d) Equipment lessor.
(e) Laborer.
(f) Design professional.
(g) Builder.

Comment. Section 7400 supersedes the part of former Section 3110 providing a lien for contributions to a work of improvement. It implements the directive of Article XIV, Section 3, of the California Constitution that, "Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

The reference in the introductory portion of Section 7400 to work "authorized" replaces the references in former Section 3110 to the "instance or request of the owner (or any other person acting by

his authority or under him, as contractor or otherwise)." See Section 7406 (who may authorize work).

The type of contribution to the work of improvement that qualifies for a lien right is described in the introductory portion of Section 7400 as provision of "work." Elimination of the former references to "bestowing skill or other necessary services" or "furnishing appliances, teams, or power" or "work done or materials furnished" is not a substantive change. See Section 7045 ("work" defined).

The listing of classes of persons with lien rights in subdivisions (a)-(g) restates without substantive change the comparable part of former Section 3110. This provision does not continue the former listing of types of contractors, subcontractors, laborers, and design professionals, such as mechanics, artisans, machinists, builders, teamsters, draymen, architects, registered engineers, and licensed land surveyors. This is not a substantive change; these classes are included in the defined terms used in this section.

A person or entity described in Section 7018(b) has the same lien right as the laborer in subdivision (e), to the extent of the laborer's compensation agreed to be paid to the person or entity for labor on the improvement. See Section 7018 "(laborer" defined).

See also Sections 7010 ("design professional" defined), 7012 ("direct contractor" defined), ~~7018 ("laborer" defined),~~ 7024 ("lien" defined), 7026 ("material supplier" defined), 7032 ("person" defined), 7044 ("subcontractor" defined), 7045 ("work" defined), 7046 ("work of improvement" defined).

~~**§ 7402. Lien right of express trust fund**~~

~~7402. An express trust fund has the same lien right under this chapter as a laborer on a work of improvement, to the extent of the compensation agreed to be paid to the express trust fund for labor on that work of improvement only.~~

~~**Comment.** Section 7402 continues a portion of former Section 3111 without substantive change. The duplicative description of the laborer's lien right and other unneeded language is omitted. These are technical, nonsubstantive changes.~~

~~See also Sections 7014 ("express trust fund" defined), 7018 ("laborer" defined), 7024 ("lien" defined).~~

§ 7416. Time for claim of lien on separate residential unit in condominium

7416. Notwithstanding any other provision of this chapter, completion of a residential structure containing multiple condominium units, together with any common area, garage, or other appurtenant improvements, does not operate in any manner to impair the lien right of ~~an express trust fund under Section 7402~~ a person or entity described by subdivision (b) of Section 7018 if the

claim of lien is recorded within 120 days after completion of the residential structure.

Comment. Section 7416 continues the last paragraph of former Section 3131 without substantive change.

See also Sections 7002 ("claimant" defined), ~~7014 ("express trust fund" defined),~~ 7018 ("laborer" defined), 7024 ("lien" defined).

Two issues relating to laborers funds require additional discussion.

Subcontractor Discipline

As proposed in the tentative recommendation, Section 7216 would continue existing law, providing for subcontractor discipline when (1) a subcontractor fails to give preliminary notice, and (2) as a result of the failure, an unpaid laborers *fund* pursues a mechanics lien remedy:

§ 7216. Disciplinary action

7216. A licensed subcontractor is subject to disciplinary action if all of the following conditions are satisfied:

….

(b) The subcontractor fails to give preliminary notice ….

(c) The subcontractor's failure results in the laborers compensation fund recording a claim of lien, filing a stop payment notice, or asserting a claim against a payment bond.

(d) The amount due the laborers compensation fund is not paid.

This section on its face provides special treatment for a laborers fund, and thus could trigger a preemption challenge. (Note, however, that the proposed section does not grant a laborers fund any special right to bring an action, nor any right to a special recovery.)

To address the issue, the staff has recommended replacing the section's reference to a laborers fund with a reference to *any* entity that receives a portion of a laborer's compensation pursuant to the employment contract. See proposed Section 7018(b). That would include a laborers fund, but would also include other entities, such as a union that receives a portion of a laborer's compensation for dues.

This revision would generalize the reference so that it applies to a class of entities, does not single out laborers funds for special treatment, and would still be consistent with the substance of existing law. The staff believes this revision, which is consistent with other revisions the staff has proposed, would adequately protect the section from any ERISA preemption challenge.

Mr. Sackman asserts that, to protect against a preemption challenge, the section should either be revised to provide for subcontractor discipline whenever any unpaid *laborer* pursues a lien remedy, or the provision should be deleted entirely. Exhibit p. 4.

Preemption aside, Mr. Sackman also argues that making this section applicable to all laborers makes sense from a policy standpoint. He suggests the change will further protect owners from surprise lien claims, and should not unduly burden contractors, who he asserts are already required to give preliminary notice on all jobs.

Mr. Sackman's proposed change might provide some benefit for an owner. But it would also increase the risk of a subcontractor being disciplined.

The benefit to an owner would not appear to be substantial. Under existing law (continued by the proposed law), laborers are not required to give preliminary notice before recording a lien. Civ. Code § 3097(a), proposed Civ. Code § 7200. Providing notice to an owner of the possibility of a few more unidentified laborers who may also record a lien does not appear to be a strong policy justification for extending the applicability of this section.

Another reason for making the section applicable to an individual laborer might be additional protection of a laborer's full compensation. A subcontractor who risks discipline if he or she fails to give preliminary notice and an unpaid employee thereafter records a lien is more likely to pay the employee in all cases, or at minimum give preliminary notice to preserve the *contractor's* right to compensation (so the contractor can then pay the employee).

On the other hand, extending the law in this area would add to a subcontractor's current statutory responsibility. As the Commission has discussed, a subcontractor is *not* required by existing law (or by the proposed law) to give a preliminary notice on every job. Failure to do so will cause the subcontractor to forfeit most lien remedies, but at least on smaller jobs, many contractors make that choice.

The staff invites comment from practitioners on whether extending the law in this area would cause any problems. However, in the absence of consensus support for the change, **the staff believes the extension would be too substantive for this study.**

Assignment of Lien Rights

Under Section 7400 of the proposed law, only a claimant that provides work has an inchoate (unrecorded) lien right:

> **§ 7400. Persons entitled to lien**
>
> 7400. A person that provides work authorized for a work of improvement … has a lien right under this chapter ….

However, if the staff's recommended revisions above are incorporated, Section 7018(c) of the proposed law would continue a provision of existing law that allows a laborer to assign his or her inchoate lien right to certain specified persons or entities:

> **§ 7018. Laborer**
>
> 7018. (a) "Laborer" means a person who, acting as an employee, performs labor, or bestows skill or other necessary services, on a work of improvement.
>
> (b) "Laborer" includes a person or entity to which a portion of a laborer's compensation for a work of improvement, including but not limited to employer payments described in Section 1773.1 of the Labor Code and implementing regulations, is paid by agreement with that laborer or the collective bargaining agent of that laborer.
>
> (c) A person or entity described in subdivision (b) that 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 for a work of improvement, **shall have standing to enforce any rights or claims of the laborer under this part**, to the extent of the compensation agreed to be paid to the person or entity for labor on that improvement. This subdivision is intended to give effect to the long-standing public policy of this state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which that compensation is to be paid.

Mr. Sackman proposes that Section 7400 be revised to allow *any* lien claimant to assign an inchoate lien right to *anyone*. Exhibit pp. 5-6. He argues that by limiting assignment to a fund described in Section 7018(b), the proposed law is again singling out these funds for special treatment, thereby again raising the prospect of ERISA preemption.

Mr. Sackman also asserts that current case law may already allow any claimant to assign an inchoate lien right.

The staff disagrees. As with the section on subcontractor discipline, proposed Section 7018 would refer to *any* entity that by agreement receives a portion of the

laborer's compensation (e.g., a union), not only a benefit fund. That provides a rule for a class of entities, and does not single out a fund for special treatment.

The staff also disputes that current law allows for universal assignment of lien rights. Instead, long established (but still valid) opinions of the California Supreme Court express unequivocally that a claimant's inchoate lien right is *not* assignable, unless otherwise provided by statute. *Rauer v. Fay*, 110 Cal. 361, 42 P. 902 (1895), *Mills v. La Verne Land Co.*, 97 Cal. 254, 32 P. 169 (1893). None of the cases cited by Mr. Sackman hold to the contrary, as none involve the non-statutory assignment of a lien *right* (as contrasted with the assignment of a lien *claim,* which was discussed in both *Union Supply Co. v. Morris*, 220 Cal. 331, 30 P.2d 394 (1934), and *Koudmani v. Ogle Enterprises, Inc.*, 47 Cal. App. 4th 1650, 55 Cal. Rptr. 2d 330 (1996)). Under existing law, absent special statutory authority, the right to *enforce* a recorded claim of lien can be assigned, but the right to record a lien cannot.

That being said, a provision allowing any claimant to assign an unrecorded lien right to anyone might be good policy. But it would represent a significant substantive change in the law, which could adversely affect owners.

Broadened assignment rights would make recording a lien easier, and therefore add to the difficulties an owner faces following recordation.

The staff solicits input from practitioners as to Mr. Sackman's suggestion. However, again in the absence of consensus support for allowing the assignment of lien rights, **the staff does not recommend adoption of this change in the context of this study.**

MORE MECHANICS LIEN ISSUES

Section 7016 (Labor, service, equipment, or material)

In the tentative recommendation, proposed Civil Code Section 7016 provides:

> 7016. "Labor, service, equipment, or material" includes but is not limited to labor, skills, services, material, supplies, equipment, appliances, transportation, power, surveying, construction plans, and construction management provided for a work of improvement.
>
> **Comment.** Section 7016 is a new definition. It is included for drafting convenience. The phrase is intended to encompass all things of value provided for a work of improvement, and replaces various phrases used throughout the former law, including "labor or material," "labor, services, equipment, or materials,"

> "appliances, teams, or power," and the like. The definition applies to variant grammatical forms of the phrase used in this part, such as "labor, service, equipment, *and* material."

(Emphasis in original.)

Revision of Section 7016 is discussed in CLRC Memorandum 2006-48, pages 7-9. In that discussion, the staff recommends deletion of the references to transportation, construction plans, and construction management.

Bryan Weaver, the business development manager for Scholefield & Associates, a law firm in San Diego that provides representation in construction cases, urges further revision of this section. Exhibit pp. 15-16.

Mr. Weaver does not propose any new language for the section. However, the thrust of his comment is that the broad language of the section will only serve to amplify the many ambiguities that exist under current law as to what is or is not lienable. He offers several examples in which courts have reached inconsistent results on whether a contribution to a work of improvement generates a lien right.

It appears Mr. Weaver is asking that the Commission attempt to reconcile the body of case law that has developed on this issue, and then codify one or more "bright line" rules.

The staff agrees there is much in the mechanics lien law that is not codified, and further agrees that judicial interpretations of the existing statute have not always been consistent. However, the staff believes that the reconciliation Mr. Weaver seeks cannot be accomplished in the context of a study intended to be largely a reorganization of existing statutes.

Any attempt to add to Section 7016 the precise rules Mr. Weaver seeks would likely be the subject of intense debate among all stakeholders, particularly in the unsettled areas Mr. Weaver describes. The chance of reaching consensus on these matters is remote.

The staff does not recommend any further revision of Section 7016, based on Mr. Weaver's submitted comment.

Respectfully submitted,

Steve Cohen
Staff Counsel

Exhibit

COMMENTS OF J. DAVID SACKMAN

From: J. David Sackman <jds@racclaw.com>
Date: November 29, 2006
To: scohen@clrc.ca.gov
Subject: Law Review Commission Study of Mechanics Lien Law

Comments from California State Council of Laborers Legislative Dept. and Construction Laborers Trust Funds for Southern California on Tentative Recommendation for Mechanics Lien Law

Dear Members of the Commission:

At the last Commission Meeting, you directed your staff counsel, Steve Cohen, to review with me the drafting issues regarding ERISA preemption and "Laborers Benefit Funds." We have done so, and Mr. Cohen has issued a draft proposal as to these sections which reflect this discussion. A copy (labor2.doc) is attached, for reference.

Mr. Cohen has done an excellent job of simplifying the Code, while retaining its substance, and avoiding the preemption problem. The basic idea is that laborer benefit funds are included (among others) within the definition of "laborers" and given the same standing to assert claims, consistent with the stated legislative purpose in the 1999 amendments "to clarify that the protections offered in this title are meant to cover the entire compensation package of employees, and not to single out or treat differently any particular form of compensation." Stats 1999, ch. 795 § 9. We recommend adoption of these changes, subject to the comments below.

There remain four areas which we ask be put forth for further comment. These may go beyond drafting issues to policy issues. They are:

Standing of Agent §§ 7018(c) and 7060

We support the changes.

Disciplinary Action § 7216

We ask that § 7216 be modified to avoid ERISA preemption.

Standing of Assignees § 7400

We propose that assignees of all claimants be given standing, and ask that public comments be solicited on this issue.

Completion §§ 7414 and 7416

We ask that § 7416 be deleted as preempted by ERISA. We propose that liens be explicitly allowed for labor and materials supplied after completion, and ask that public comments be solicited on this issue.

Our comments on these sections is attached (MLnotes2.doc). I am available for questions, discussion or further input, at the address, phone and e-mail listed here. The best way to contact me is at this e-mail address: jds@racclaw.com

Thank you for your consideration.

Sincerely,

J. David Sackman

of Reich, Adell, Crost & Cvitan

encl: MLnotes2.doc (comments by Laborers)
labor2.doc (proposed changes by CLRC staff)

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

Comments from California State Council of Laborers Legislative Department
and Construction Laborers Trust Funds for Southern California
on Tentative Recommendation for Mechanics Lien Law

Standing of Agent §§ 7018(c) and 7060

In the 1999 amendments to Civil Code § 3089(b), it was meant that agents of laborers, such as their collective bargaining agent, have standing to file mechanic liens, to the extent of their agency. This is reflected in the language "*To the extent that a person or entity defined in this subdivision 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 title to the same extent as the laborer.*" However, the language may not have fully accomplished this.

This was raised in the *Betancourt v. Storke Housing Investors*, 31 Cal.4th 1157, 82 P.3d 286, 8 Cal.Rptr.3d 259 (2003) case. However, the Supreme Court avoided deciding the standing issue:

> "Storke maintains that plaintiffs also lack standing to bring an action to recover funds owed directly to the employee trust fund: "The Union's trust funds are the actual and only entities entitled to recover the delinquent contributions due under the collective bargaining agreement between the Union and R.P. Richards." (Fn.omitted.) Plaintiffs counter that under "the plain meaning of Section 3110, there can be no doubt that the laborers or Individual Plaintiffs have standing to enforce their mechanics' lien rights. In fact, both the laborers and their representative, the Union, have standing under Sections 3089 and 3110." We need not determine this issue because it does not directly bear on the issue presented in this case, i.e., whether ERISA preempts a section 3110 action. (See *Rush Prudential, supra,* 536 U.S. at p. 363, fn. 3, 122 S.Ct. 2151 [defendant's "true status ... is immaterial to our holding"].)" 31 Cal.4th 1157, 1169 n. 7.

It was pointed out to us that proposed Section 7060 may address this issue:

> 7060. *An act that may be done by or to a person under this part may be done by or to the person's agent to the extent the act is within the scope of the agent's authority*.

We therefore support the addition of this section. Just as contractors and suppliers use agents, including attorneys, to file liens and perform other duties for them, so laborers should be able to have their collective bargaining agent perform these functions for them. Individual laborers usually do not have the skill, knowledge, or time, to file their own liens. Allowing their agent to perform this function enables them to use the remedy which was designed for their benefit in the first place.

Disciplinary Action § 7216

This section, based on current § 3097(h), refers back to the notice required in proposed § 7204(b), which in turn is based on Civil Code § 3097(c)(6). We concur with the most recent proposed § 7204(b):

"*If preliminary notice is given by a subcontractor that has not paid all compensation due to a laborer, the notice shall include the name and address of the laborer and any person or entity described in subdivision (b) of Section 7018 to which payments are due*."

Proposed § 7216 allows disciplinary action to be imposed if a subcontractor fails to give this notice AND "*The subcontractors failure results in a person or entity described in subdivision (b) of Section 7018 recording a claim of lien, filing a stop payment notice, or asserting a claim against a payment bond*" AND "*The amount due the person or entity described in subdivision (b) of Section 7018 is not paid*."

Thus, special notice is required for ANY failure to pay laborers, whether wages or benefits, but discipline can only be imposed if the BENEFITS remain unpaid and result in a lien. If WAGES are unpaid and result in a lien, no discipline can be imposed. It would appear that this provision "singles out ERISA employee welfare benefit plans for different treatment" and thus may be preempted. *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 830, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). This is unlike the other provisions of the lien law, as amended in 1999, which the California Supreme Court concluded were not 'specifically designed to affect employee benefit plans" and thus not preempted. *Betancourt v. Storke Housing Investors*, 31 Cal.4th 1157, 1166-6782 P.3d 286, 8 Cal.Rptr.3d 259 (2003), *quoting Mackey*, *supra*.

We note that the purpose of these sections is to protect the owner. Section 7204 requires the owner to be notified of possible liens for the failure to pay laborers. Section 7216 gives the owner a remedy if it is not provided the notice, resulting in a lien and a "double payment" by the owner.

We propose, then, that Section 7216 (b) and (c) be modified to read as follows:

*(b) The subcontractor's failure results in **any laborer** recording a claim of lien, filing a stop payment notice, or asserting a claim against the payment bond.*

*(c) The amount due **the laborer** is not paid*.

This will provide the owner with some protection against surprise liens, without risking ERISA preemption. It places no extra burden on contractors, since they are already required by § 7204 to provide notice as to all labor claims. We note that a contractor is already subject to the much harsher and *mandatory* consequence of license suspension if the failure to pay a laborer, supplier, subcontractor or consumer results in an unpaid court judgment. Bus. & P. Code § 7071.17.

Standing of Assignees § 7400

Proposed § 7400 (based loosely on current § 3110) defines the "Persons entitled to lien" (i.e. standing) as "*A person that provides labor, service, equipment, or material authorized for a work of improvement, including but not limited [to] the following persons, has a lien right under this chapter: . . . (e) Laborer.*"

This would seem to limit the persons who have standing to one who themself "provides labor" and not assignees, such as laborers benefit funds. On the other hand, proposed § 7018(c) (based on current § 3089(b)) specifically provides that:

"*A person or entity described in subdivision (b) [laborers benefit funds] that 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 for a work of improvement, shall have standing to enforce any rights or claims of the laborer under this part, to the extent of the compensation agreed to be paid to the person or entity for labor on that improvement*."

The apparent contradiction between §§ 7400 (giving standing only to those who themselves provide labor) and § 7018(c) (giving standing to assignees of laborers) is resolved by a proposed comment to § 7018:

"*A person or entity described in Section 7018(b) has the same lien right as the laborer in subdivision (e), to the extent of the laborer's compensation agreed to be paid to the person or entity for labor on the improvement. See Section 7018 ("laborer") defined.*"

We support this comment to clarify the law. One of the purposes of the 1999 amendments was to make clear that all assignees of laborers be given standing to assert lien claims "to clarify that the protections offered in this title are meant to cover the entire compensation package of employees, and not to single out or treat differently any particular form of compensation." Stats 1999, ch. 795 § 9.

This raises the issue, however, of whether laborers benefit funds are the only assignees who have standing to assert claims under proposed § 7400. If so, this may "single out" and "treat differently" laborers benefit funds, which could raise ERISA preemption issues. **We propose that § 7400 be modified to clarify that all assignees have standing to assert lien claims. We believe that this is the current state of the law**.

Section 1084 of the Civil Code provides that "The transfer of a thing transfers also all its incidents, unless not expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself." Based upon this statute, courts have long held that an assignment of the underlying claim for labor or materials transfers with it the right to assert mechanic lien or other claims under this Title. *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) (assignee of lien rights does not have to give separate preliminary notice); Dept. Ind. Rel. v. Fidelity Roof Co., 60 Cal.App.4th 411, 426-27, 70 Cal.Rptr.2d 465 (1997) (statutory assignment to Labor Commissioner allowed it to bring stop notice and bond claims); Bernard v. Indemnity Ins. Co., 162 Cal.App.2d 479, 487, 329 P.2d 57 (1958) (laborers benefit funds are effectively assignees of laborers payment bond claim on public works, entitled to assert those rights). Thus, "the lien is an incident of the debt and passes with it by operation of law." Union Supply, 220 Cal. 331, 339. An assignee thus "stands in the shoes of his or her assignor" and should have the same standing, and be subject to the same procedures, as their assignor. 7 Cal.Jur.3d Assignments § 31 at 57 (1989). "It is well settled that an assignee of a chose in action does not sue in his own right but stands in the shoes of the assignor." Koudmani, 47 Cal.App.4th 1650, 1660, *quoting* Bush v. Superior Court, 10 Cal.App.4th 1374, 1380, 13 Cal.Rptr.2d 382 (1992).

However, there are some old cases to the contrary. In Mills v. LaVerne Land Co., 97 Cal. 254, 32 P. 169 (1893) it was held that the right to record a mechanic lien (as opposed to the recorded lien itself) is personal and can only be asserted by the one actually providing labor or materials. *See also* Willett v. Peppers Cotton Lumber Co., 91 Cal.App. 798, 266 P. 1028 (1928) (same); Burr v. Peppers Cotton Lumber Co., 91 Cal.App. 268, 266 P. 1025 (1928) (same). It would seem that Union Supply is in direct contradiction to the earlier decision of Mills and its progeny. Yet Mills has never been expressly overruled.

We suggest that this contradiction be clarified by expressly allowing any valid assignee to assert claims under the mechanic lien law, to the extent of their assignment. There is no cogent reason to limit standing to those who, themselves, provide labor and material. There is no reason why Civil Code § 1084 should apply to every other "incident" of a debt, but not mechanic liens. As in Union Supply, it is common for smaller claimants to sell and assign their claims to another, who is in a better position to enforce it.

The Laborers support the idea of extending standing to all other assignees, because it would lessen the possibility of ERISA preemption. We believe this is the current status of the law, and is good public policy. **We therefore request that this idea be put forth for public comment**.

Completion §§ 7414 and 7416

There is one more issue I would like to raise; determining the time of completion for purpose of calculating the time to file a lien. In my prior review, I missed the reference to an "express trust fund" in proposed § 7416:

> "*Notwithstanding any other provision of this chapter, completion of a residential structure containing multiple condominium units, together with any common area, garage, or other appurtenant improvements, does not operate in any manner to impair the lien right of an express trust fund under Section 7402 if the claim of lien is recorded within 120 days after completion of the residential structure*."

This is based on the last sentence of current § 3131. While we would appreciate the longer period to file a lien, this section clearly "singles out" benefit funds for special treatment**. It should be deleted, since it would likely be preempted by ERISA**.

This brings up a broader issue of the definition of "completion" and the time to file a lien. Proposed § 7414 restates current § 3116:

A claimant other than a direct contractor may not enforce a lien unless the claimant records a claim of lien within the following times:
(a) After the claimant ceases to provide labor, service, equipment, or material.
(b) Before the earlier of the following times:
(1) Ninety days after completion of the work of improvement.
(2) Thirty days after the owner records a notice of completion.

What would happen if labor or materials are provided, and unpaid, *after* the deadline to file a lien? This is not a hypothetical situation. Completion can occur, not only upon "actual" completion, or a Notice of Occupancy, but upon "substantial completion." *See* Hammond Lumber Co. v. Yeager, 185 Cal.355, 197 P. 111 (1921); Mott v. Wright, 43 Cal.App.21, 184 P. 517 (1919); *see also* In Re Showplace Square Loft Co., 289 B.R. 403, 409-410 (B.C. N.D. Cal. 2003) (material issue of fact when completion occurred, and whether lien for work on "punch list" was timely).

This may often occur with landscaping work, which is expressly included as part of a "work of improvement." Civil Code § 3106, Proposed § 7046. Landscaping is often not even begun until *after* the building structure is completed, and may go on even after the building is occupied. I currently have several cases with such facts, involving landscape labor.

If a work of improvement is considered complete by the fact of occupancy, or by virtue of the doctrine of "substantial completion," before the landscape work is actually completed, then it would be physically impossible for anyone providing labor or materials on that job to assert a lien. They cannot assert a lien until after the work is

complete, which may be beyond the deadline, calculated by the current definition of completion.

I have not found any cases addressing this precise issue, but it seems such a construction would be contrary to the Constitutional mandate that laborers "shall have a lien upon the property upon which they have bestowed labor . . . for the value of such labor done . . . ." Cal. Const. Art. 14 § 3. If the statute is construed to make it impossible to assert a lien for work actually done and unpaid, then the Legislature has failed its mandate to "provide, by law, for the speedy and efficient enforcement of such liens." Id. This is now the opportunity for the Legislature to fulfill its Constitutional mandate.

We suggest that proposed § 7414 be rewritten as follows:

A claimant other than a direct contractor may not enforce a lien unless the claimant records a claim of lien within the following times:
(a) After the claimant ceases to provide labor, service, equipment, or material.
(b) Before the earlier of the following times:
(1) Ninety days after completion of the work of improvement**, or the last labor, service, equipment or material provided by that claimant, whichever is later**.
(2) Thirty days after the owner records a notice of completion improvement**, or the last labor, service, equipment or material provided by that claimant, whichever is later**.

A similar suggestion has been made by a commentator who has more thoroughly analyzed the issue. Craig Penner Bronstein, TRIVIAL (?) IMPERFECTIONS: THE CALIFORNIA MECHANICS' LIEN RECORDING STATUTES, 27 Loy. L.A. L. Rev. 735 (Jan. 1994). We would recommend that Article, and suggest that comments be solicited as to this issue.

~~**§ 7014. Express trust fund**~~

~~7014. "Express trust fund" means a laborers compensation fund 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.~~

~~**Comment.** Section 7014 continues a portion of former Section 3111 without substantive change.~~

~~See also Sections 7018 ("laborer" defined), 7020 ("laborers compensation fund" defined).~~

§ 7018. Laborer

7018. (a) "Laborer" means a person who, acting as an employee, performs labor, or bestows skill or other necessary services, on a work of improvement.

(b) "Laborer" includes a person or entity to which a portion of a laborer's compensation for a work of improvement, including but not limited to employer payments described in Section 1773.1 of the Labor Code and implementing regulations, is paid by agreement with that laborer or the collective bargaining agent of that laborer.

(c) A person or entity described in subdivision (b) that 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 for a work of improvement, shall have standing to enforce any rights or claims of the laborer under this part, to the extent of the compensation agreed to be paid to the person or entity for labor on that improvement. This subdivision is intended to give effect to the long-standing public policy of this state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which that compensation is to be paid.

Comment. Subdivision (a) of Section 7018 continues former Section 3089(a) without substantive change.

Subdivision (b) continues the first sentence of former Section 3089(b) and a part of former Section 3111, without substantive change. ~~"Laborer" is no longer defined to include a compensation fund, which is treated separately in this part. Cf. See Section 7020 ("laborers compensation fund" defined).~~

Subdivision (c) continues the second and third sentences of former Section 3089(b), and former Section 3111, without substantive change.

See also Section 7046 ("work of improvement" defined).

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

~~7020. "Laborers compensation 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.~~

~~**Comment.** Section 7020 continues the first sentence of former Section 3089(b) without substantive change. See also Section 7070 (standing to enforce laborer's rights).~~

~~See also Sections 7014 ("express trust fund" defined), 7018 ("laborer" defined), 7032 ("person" defined).~~

~~Article 3. Laborers Compensation Fund~~

~~§ 7070. Standing to enforce laborer's rights~~

~~7070. (a) A laborers compensation fund that has standing under applicable law to maintain a direct legal action in its own name or as an assignee to collect any portion of compensation owed for a laborer, has standing to enforce rights under this part to the same extent as the laborer.~~

~~(b) This section is intended to give effect to the long standing public policy of the state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which the compensation is to be paid.~~

§ ~~7072~~ 7103. Notice of overdue laborer compensation

~~7072~~ 7103. (a) A contractor or subcontractor that employs a laborer and fails to pay the full compensation due the laborer, including any employer payments described in Section 1773.1 of the Labor Code and implementing regulations, ~~or laborers compensation fund~~ shall~~,~~ not later than the date the compensation became delinquent, give the laborer, the laborer's bargaining representative, if any, and the construction lender or reputed construction lender, if any, notice that includes all of the following information, in addition to the information required by Section 7102:

(1) The name and address of any ~~laborers compensation fund~~ person or entity described in subdivision (b) of Section 7018 to which employer payments are due.

(2) The total number of straight time and overtime hours on each job.

(3) The amount then past due and owing.

(b) Failure to give the notice required by subdivision (a) constitutes grounds for disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Comment. Section ~~7072~~ 7103 restates former Section 3097(k) without substantive change. See also Sections 7100-7116 (notice).

The reference to the Registrar of Contractors in the final sentence of former Section 3097(k) is revised to refer to the Contractors' State License Law. This is a technical, nonsubstantive change.

~~The information required in this notice is in addition to the information required by Section 7102 (contents of notice).~~

See also Sections 7004 ("construction lender" defined), ~~7014 ("express trust fund" defined),~~ 7018 ("laborer" defined), ~~7020 ("laborers compensation fund" defined),~~ 7028 ("owner" defined), 7038 ("site" defined), 7044 ("subcontractor" defined), 7050 (application of part).

§ 7200. Preliminary notice prerequisite to remedies

7200. (a) ….

(b) A laborer ~~or laborers compensation fund~~ is not required to give preliminary notice.

….

Comment. Subdivision (a) of Section 7200 restates part of the introductory clause of former Section 3097 without substantive change. This chapter is limited to private work. See Section 7050 (application of part).

Subdivision (b) restates ~~part~~ parts of former Section 3097(a) and (b) without substantive change.

Subdivision (c) restates parts of former Section 3097(a) and (b), omitting the exception of "the contractor". Although a direct contractor is generally excused from the preliminary notice requirement, the direct contractor must give preliminary notice to a construction lender under Section 7202(c).

The transitional provisions of former Section 3097(p) are not continued due to lapse of time.

See also Sections 7002 ("claimant" defined), 7018 ("laborer" defined), ~~7020 ("laborers compensation fund" defined),~~ 7024 ("lien" defined), 7012 ("direct contractor" defined).

§ 7204. Contents of preliminary notice

7204. (a) Preliminary notice shall include the following statement in boldface type:

NOTICE TO PROPERTY OWNER

If the person or firm that has given you this notice is not paid in full for labor, service, equipment, or material provided or to be provided to your construction project, a lien may be placed on your property. Foreclosure of the lien may lead to loss of all or part of your property, even though you have paid your contractor in full. You may wish to protect yourself against this by (1) requiring your contractor to provide a signed release by the person or firm that has given you this notice before making payment to your contractor, or (2) any other method that is appropriate under the circumstances.

If you record a notice of completion of your construction project, you must within 10 days after recording send a copy of the notice of completion to your contractor and the person or firm that has given you this notice. The notice must be sent by registered or certified mail. Failure to send the notice will extend the deadline to record a claim of lien. You are not required to send the notice if you are a residential homeowner of a dwelling containing four or fewer units.

(b) If preliminary notice is given by a subcontractor that has not paid all compensation due to a laborer ~~or laborers compensation fund~~, the notice shall include the name and address of the laborer and any ~~laborers compensation fund~~ person or entity described in subdivision (b) of Section 7018 to which payments are due.

(c) If an invoice for material or certified payroll contains the information required by this section and Section 7102, a copy of the invoice or payroll, given in the manner provided by this part for giving of notice, is sufficient.

Comment. Section 7204 continues the substance of former Section 3097(c)(1)-(6), the unnumbered paragraph following paragraph (6), and the requirement of former Section 3097(a) that the preliminary notice be written. See also Sections 7100-7116 (notice). The reference to an "express trust fund" is replaced by ~~the defined term, "laborers compensation fund." See Section 7020 ("laborers compensation fund" defined)~~ a reference to a generalized category of persons or entities included within the definition of "laborer." See Section 7018 ("laborer" defined).

The information required in this notice is in addition to the information required by Section 7102 (contents of notice).

See also Sections 7008 ("contract price" defined), 7016 ("labor, service, equipment, or material" defined), ~~7018 ("laborer" defined),~~ 7024 ("lien" defined), 7032 ("person" defined), 7038 ("site" defined), 7044 ("subcontractor" defined).

§ 7216. Disciplinary action

7216. A licensed subcontractor is subject to disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, if all of the following conditions are satisfied:

(a) ~~The subcontractor does not pay all compensation due to a laborers compensation fund.~~

~~(b)~~ The subcontractor fails to give preliminary notice or include in the notice the information required by subdivision (b) of Section 7204.

~~(c)~~ (b) The subcontractor's failure results in ~~the laborers compensation fund~~ a person or entity described in subdivision (b) of Section 7018 recording a claim of lien, filing a stop payment notice, or asserting a claim against a payment bond.

~~(d)~~ (c) The amount due the ~~laborers compensation fund~~ person or entity described in subdivision (b) of Section 7018 is not paid.

Comment. Section 7216 continues the substance of the second paragraph of former Section 3097(h). The first paragraph, relating to disciplinary action if a subcontractor fails to give preliminary notice on a work of improvement exceeding $400, is not continued.

The reference to an "express trust fund" is replaced by ~~the defined term, "laborers compensation fund" which arguably expands the scope of the provision. See Section 7020 ("laborers compensation fund" defined)~~ a reference to a generalized category of persons or entities included within the definition of "laborer." See Section 7018 ("laborer" defined).

See also Sections 7024 ("lien" defined), 7034 ("preliminary notice" defined), 7044 ("subcontractor" defined), 7046 ("work of improvement" defined).

~~**§ 7402. Lien right of express trust fund**~~

~~7402. An express trust fund has the same lien right under this chapter as a laborer on a work of improvement, to the extent of the compensation agreed to be paid to the express trust fund for labor on that work of improvement only.~~

~~**Comment.** Section 7402 continues a portion of former Section 3111 without substantive change. The duplicative description of the laborer's lien right and other unneeded language is omitted. These are technical, nonsubstantive changes.~~

~~See also Sections 7014 ("express trust fund" defined), 7018 ("laborer" defined), 7024 ("lien" defined).~~

§ 7400. Persons entitled to lien

7400. A person that provides labor, service, equipment, or material authorized for a work of improvement, including but not limited the following persons, has a lien right under this chapter:

(a) Direct contractor.
(b) Subcontractor.
(c) Material supplier.
(d) Equipment lessor.
(e) Laborer.
(f) Design professional.
(g) Builder.

Comment. Section 7400 supersedes the part of former Section 3110 providing a lien for contributions to a work of improvement. It implements the directive of Article XIV, Section 3, of the California Constitution that, "Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material

furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

The reference in the introductory portion of Section 7400 to labor, service, equipment, or material "authorized" replaces the references in former Section 3110 to the "instance or request of the owner (or any other person acting by his authority or under him, as contractor or otherwise)." See Section 7406 (who may authorize work).

The type of contribution to the work of improvement that qualifies for a lien right is described in the introductory portion of Section 7400 as provision of "labor, service, equipment, or material." Elimination of the former references to "bestowing skill or other necessary services" or "furnishing appliances, teams, or power" or "work done or materials furnished" is not a substantive change. See Section 7016 ("labor, service, equipment, or material" defined).

The listing of classes of persons with lien rights in subdivisions (a)-(g) restates without substantive change the comparable part of former Section 3110. This provision does not continue the former listing of types of contractors, subcontractors, laborers, and design professionals, such as mechanics, artisans, machinists, builders, teamsters, draymen, architects, registered engineers, and licensed land surveyors. This is not a substantive change; these classes are included in the defined terms used in this section.

A person or entity described in Section 7018(b) has the same lien right as the laborer in subdivision (e), to the extent of the laborer's compensation agreed to be paid to the person or entity for labor on the improvement. See Section 7018 "(laborer" defined).

See also Sections 7010 ("design professional" defined), 7012 ("direct contractor" defined), 7016 ("labor, service, equipment, or material" defined), ~~7018 ("laborer" defined),~~ 7024 ("lien" defined), 7026 ("material supplier" defined), 7032 ("person" defined), 7044 ("subcontractor" defined), 7046 ("work of improvement" defined).

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November, 29, 2006

Steve Cohen- Staff Counsel
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4000 Middlefield Road, Room D-1
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Mr. Cohen,

For some time I have been monitoring the activities and suggestions of the Law Review Commission regarding the proposed changes to the Mechanics' Lien laws. It is unfortunate that we have not had the luxury of having time to digest, analyze and provide any input until now. Please accept my comments, not as a critique but as additional input from the "field". I hope that my comments and observations are of assistance to you and your staff.

RE: § 7016 ("Labor, service, equipment, or material")

Comment: The narrative for the intent of the phrase "is intended to encompass all things of value provided for a work of improvement" will on its own, probably raise more questions than provide clarifications. Specifically, applying the phrase "all things of value" will spark debate over what is provided directly or indirectly to the work of improvement either by its application or performance or just by its intrinsic value, some of which may or may not be quantifiable.

As a law firm that applies the mechanics lien laws on a daily basis, it would be preferable that more study and thought be considered for more concise and specific wording to be used to accomplish the intent of this section. It is our wish that a clearer definition or rule can be crafted to minimize subjective interpretation of the applicability of lien rights. Rather than using broader and more globally encompassing terms which we believe would invite more subjective opinion on the meanings of seemingly clear, yet ambiguous words, more specificity is needed. Unfortunately, this may require more verbiage rather than less.

As an example, in *Moses v. Pacific Bldg. Co.*, 58 Cal. App. 90, electrical wiring was provided and installed on a tenant improvement project, where the courts found that although the wires, switches and lights were installed and were actually used during the work of improvement, yet because they were not permanently installed, did not qualify for a mechanic's lien, even for the labor to install and remove the wires. On the other hand, equipment rental companies are routinely granted mechanics lien rights for equipment that is never expected to become a permanent part of the property, but are used during the work of improvement. It seems to be a double edged sword.

Another example is whether or not equipment (rental or not) that is on-site but not used has benefited the work of improvement. We have experienced the courts interpretations that back-up generators on site solely as insurance against a power failure benefited the work of improvement even though the equipment was not necessary to perform any of the work and was never used. Insurance policies have never been lienable, yet this is a similar situation and subject to interpretation.

The same would apply to services or equipment that are more for the benefit of the contractor than the work of improvement. A motor transportation broker is entitled to file a mechanics lien *Contractors Dump Truck Service, Inc. v. Gregg Constr. Co.,* 237 Cal. App. 2d 1. This is even one step farther down the food chain of indirect "improvement" of a property, and seems to fall into the argument previously referenced to whether or not transportation of materials is lienable.

In summary, the broader the language for what is and what isn't considered applicable to a mechanics lien will only serve to amplify the ambiguities that now exist. Section 7016 could be considered the root of a mechanics' lien action. It is here that the definition determines whether or not a mechanics lien right is applicable.

I realize that it is impossible to expect that the laws be drafted to account for all possible situations, but it is refreshing to see this monumental undertaking by the Law Review Commission coming to fruition. For that you have my highest respect. Thank you.

Sincerely,

Bryan Weaver
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My file No. 3066

December 1, 2006

Via: e-mail attachment
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STEVE COHEN
Staff Counsel
California Law Revision Commission
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Palo Alto, CA. 94303–4739

Dear Steve:

This will acknowledge the Commissions's Report of November 29, 2006 #2006-48. As requested by the Commission that only certain issues should be addressed, I will confine my comments only to those and not re-argue any former issues, with one exception. They will be discussed in the same order as raised by you and the Commission in the aforesaid report. In numerous cases I have no comment to make and will accept the Commissions' Report and acknowledge that I have accepted them.

Section 7150, Definition of Completion, page 13: accepted as redrafted.

Section 7055, Calculation of Time "Day," page 15: accepted as redrafted.

Section 7156, Deadline for giving notice, page 24: requiring that the notice of the recording be given within 10 days of recordation, is reasonable and acceptable as redrafted.

Section 7160, Subcontractors, page 26: accepted as redrafted.

Sections 7170 and 7172, Releases, page 28: The modification is not clear. Although included on page 34 it states that the release does not apply to any "retentions in the $_____" this is omitted on page 35. The modification stated at the beginning of page 34 is correct. The release should not release (1) any retentions, (2) any extras in a specified amount which amount should be clearly stated; and (3) any contract rights based on rescission, abandonment or breach of contract or contract work not compensated by payment.

I do believe, however, that the last phrase referring to "contract work not compensated by payment" could be eliminated since it is superfluous as duplicating the previous statement of "extras in a specified amount."

Sections 7200 and 7202, Notices, pages 35, 36: acceptable as rewritten at the bottom of page 36 and continuing on page 37.

Section 7208, Coverage of Preliminary Notice, page 40: The modification on page 41 of the term "contractor" is now confusing. The terms "direct contractor" and "subcontractor" are defined elsewhere but the term "contractor" is not defined. If not defined I would think it would be advisable to include in subparagraph "b" the terms "direct contractor or subcontractor" in lieu of the existing "contractor."

Section 7400(g) Builder, p. 46: Accepted as redrafted.

Section 7240, Notice, p. 52: Although I am strongly opposed to this additional unnecessary and useless provision as I have previously expressed, since I have been unsuccessful in persuading the Commission to abandon this provision, if it must be added to existing law, as written it accomplishes the Commission's purpose.

Section 7242, Notice. The notice provision set forth in section 7242 uses the word "affidavit." This should be changed to "declaration" since there is a technical difference. Code of Civil Procedure § 2015.5 permits a declaration to be used whenever an affidavit is required recognizing a distinction although CCP § 2003 does not make clear what it may be. I do know, however, that most attorneys and institutions treat an affidavit as different from a declaration by requiring a notarization for an affidavit.

Section 7426 Damages, p. 56. The Commission has requested comments on this new section. Although I am uncertain about the effect of this provision, I have encountered situations where I had wished it was available. Only time will tell whether it will have the desired effect. As drafted it is acceptable.

Civil Code Section 3123. Damages inclusion, p. 60. This provision is accepted as drafted. However, I have difficulty in conceiving how it is possible to perform work as a result of rescission, abandonment, or breach of contract? If a contractor fails to perform because of one of these three conditions, then it would not be working and could not assert a claim for anything except possibly for breach of contract. If anything it would actually seem to be the "failure to perform work as a result of rescission, abandonment, or breach of contract." Is it possible that some court would interpret this new provision to sanction such claim, that is, to assert a lien for such work not performed, notwithstanding the last sentence? The more often I read this paragraph, the more confusing it becomes.

Section 7460, lis pendens, p. 68: As rewritten starting on the bottom of page 71, this is acceptable.

Section 7480, Petition for Review p. 77: With the modification on page 78, this is acceptable.

Section 7480(b), Joinder with Petition for Release of Order, pp. 80 and 81: If a claimant acts before the owner by bringing an action to enforce a lien and the owner/defendant then brings a petition but no other action, is this not unfair if the owner wants to assert a claim against the claimant for breach of the contract, for example, failure to complete the project, for defective work, or even allowing other claimants to assert claims of liens against the owner for the failure of the claimant to pay other subs or materialmen? To bar every other action by the defendant/owner is unfair and unreasonable. Claims by the owner against the claimant arising out of the subject matter of the claimant 's action to foreclose its lien, should be permitted. Otherwise, the owner would be required to file a separate action and perhaps re-litigate matters already litigated.

Section 7486, time of hearing, p. 85: Although I still think the time is too short, as written on page 85, it is acceptable.

Section 7488, burden of proof, p. 85: The version quoted on page 85 is acceptable The problem I have is with the court orders in section 7490 and 7492 and the revised section 7488 on page 86.

Sections 7490 and 7492, Court Orders. The two sections are rewritten on page 88 . I realize that the Commission has considered and rejected my previous objections to this language. The Commission notes the staff's concern regarding the possibility of procedural and even technical difficulties in refiling a law suit. I perceive the problem to be more than “a possibility” but a probability. As stated, the section will lead to substantial confusion and more litigation.

As written, if the court grants the motion to dismiss the lien action, and the court order is recorded the property is now released by the recording of the court order. However, if the court order dismissing the lien foreclosure action is dismissed without prejudice, although the lien is held to be invalid, the court order cannot be recorded! If this is correct, then how is anyone, including the title company or lender will know that the lien foreclosure action has been dismissed? The owner may send a copy of the court order to the title company or the lender but each will want — but will be unable — to record it so as to clear the title.

Invariably a claimant files an action for goods, wares, and merchandise and includes a cause of action to foreclose a lien for the sum requested in that cause of action.

I believe that what was intended was that if the court order dismissed the lien foreclosure action was because of the claimant's failure (say) to follow the lien laws, for example, by not serving a preliminary notice, then the lien foreclosure action would and should be dismissed with prejudice but only insofar as the lien action was concerned. If the claimant still has and has asserted a cause of action for a valid claim for labor, services, equipment, or materials furnished, it should be permitted to proceed with that action. The section should be re-written to specifically state that if the petition to

dismiss was based upon a technical failure to comply properly with the lien laws, then the action should be dismissed with prejudice as to the lien causes of action only, but if the claimant still had a valid claim for LSEM furnished to the project, or even a breach of some other cause of action, that action should not be dismissed and the claimant be allowed to proceed with them.

Section 7498, collateral estoppel, p. 90: As written it is acceptable and I recommend its adoption.

Thanks for the opportunity to be of service. I have a four day arbitration hearing starting on Monday, but if you will call or send an e-mail regarding the time of the lien portion of the hearing on Friday, December 8th, I would appreciate it. I look forward to your and the Commission's comments regarding the above.

Sincerely,

HOWARD B. BROWN

HBB:ss
cc: Craig P. Bronstein, Esq.