Study H-820

Report to Law Revision Commission Regarding Recommendations for Changes to the Mechanic's Lien Law [Part 1]

Gordon Hunt

November 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

Recommendations for Changes to the Mechanic's Lien Law
[Part 1] *

Gordon Hunt

CONTENTS

1. Introduction

The Mechanic's Lien law has long been a part of California law. The first California statute relating to Mechanic's Liens was the Act of April 12, 1850.[1] The basic right to a Mechanic's Lien was guaranteed by the California Constitution of 1879 and has remained unchanged to this date. Article XIV, Section 3, of the California Constitution provides:

> 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 materials furnished; and the

---

* The report is divided into two parts, on request of the Commission staff. Part 1, in this document, concerns technical and minor substantive improvements and clarifications of the existing mechanic's lien law, consistent with the conclusion that the law, as a whole, should remain as it is. Part 2, to be issued later, will address some broader proposals for substantive reform of the law. See, e.g., ACA 5, AB 742 (1999-2000 Session).

1. Roystone Co. v. Darling, 171 Cal. 526, 530 (1915).

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

No other creditor's remedy enjoys this "constitutionally enshrined status."[2]

The Constitution is not self-executing and, therefore, the Legislature must enact the procedures for enforcing Mechanic's Lien rights.[3] The California courts have liberally construed the Mechanic's Lien law to effectuate its purpose, which is to provide payment to those persons who have furnished labor, service, equipment, or material for a work of improvement and which has resulted in a work of improvement to the owner's real property.[4] The California Supreme Court has held the Mechanic's Lien and Stop Notice remedy constitutional.[5]

---

2. Wm. R. Clarke Corp. v. Safeco Ins. Co., 15 Cal. 4th 882, 889 (1997).

3. Frank Curan Lumber Co. v. Eleven Co., 271 Cal. App. 2d 175 (1969).

4. A few quotations from our Appellate Courts clearly illustrate this principle:

(1) Sunlight Electric Supply Co. v, McKee, 226 Cal. App. 2d 47, 50 (1964):

The mechanic's lien law including the stop-notice provisions is an integrated and harmonious scheme and applicable code sections must be construed together. It "is remedial in character, and should be liberally construed in its entirety with a view to effect its objects and to promote justice." (Hendrickson v. Bertelson, 1 Cal. 2d 430, 432 [35 P.2d 318]; Nolte v. Smith, 189 Cal. App. 2d 140, 144 [11 Cal. Rptr. 261, 87 A.L.R. 2d 996].)

(2) Connolly Dev., Inc. v. Superior Court, 17 Cal. 3d 803, 807-08, 825-27 (1976).

(3) Bentz Plumbing & Heating v. Favaloro, 128 Cal. App. 3d 145, 148-49 (1982):

"[T]he courts have uniformly classified the mechanic's lien law as remedial legislation, to be liberally construed for the protection of laborers and materialmen." (Fn. omitted.) (Connolly Development, Inc. v. Superior Court (1976) 17 Cal. 3d 803, 826-827 [132 Cal. Rptr. 477, 553 P.2d 637]; Hendrickson v. Bertelson (1934) 1 Cal. 2d 430, 432 [35 P.2d 318].)

(4) Brown Co. v. Appellate Dep't, 148 Cal. App. 3d 891, 901 (1983):

"The statute is a remedial statute, adopted in obedience to the requirements of the constitution (art. XX, sec. 15), and is to be liberally construed in furtherance of the purposes for which it was authorized." [Quoting Corbett v. Chambers, 109 Cal. 178, 184, 41 P. 873 (1895).]

(5) Truestone, Inc. v. Simi West Industrial Park II, 163 Cal. App. 3d 715, 723 (1984):

Holders of mechanic's liens are protected by constitutional mandate. "The mechanic's lien derives from the California Constitution itself; the Constitution of 1879 mandated the Legislature to grant laborers and materialmen a lien upon the property which they have improved; no other creditors' remedy stems from constitutional command. (See Martin v. Becker (1915) 169 Cal. 301, 316 [146 P. 665].) Indeed this state, from the earliest days, and consistently thereafter has asserted its interest in protecting the claims of laborers and materialmen. In 1850 the first session of the California Legislature enacted a mechanic's lien law (Stats. 1850, ch. 87, §§ 1-4, at pp. 211-213). Moreover, the courts have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen." [Fns. omitted.] (Connolly Development, Inc. v. Superior Court (1976) 17 Cal. 3d 803, 826-827 [132 Cal. Rptr. 477, 553 P.2d 637].)

(6) Harold L. James, Inc. v. Five Points Ranch, Inc., 158 Cal. App. 3d 1, 6 (1984):

"If there is a single unifying thread which explains most, though not all, of the bewildering array of cases in this field, it is the principle that where the purpose of the requirement of [the relevant statute] is achieved and no one is prejudiced, technical requirements shall not stand in the way of achieving the purpose of the Mechanics Lien Law. Professor Bottomley, in a recent article felt justified in saying this: 'The decisions dealing with defective claims of lien seem generally to be in accord with the objectives of [the relevant statutes]. In the absence of a showing of intent to defraud (extremely difficult to prove) the courts have almost uniformly upheld the claim unless the defect is

The guarantee of the right to a lien has always been simply stated in the constitutional provision set forth above. The procedure for enforcement of that lien right has never been a simple process. Courts and text writers alike have recognized the difficulty in understanding, interpreting, and enforcing the Mechanic's Lien right. Justice Henshaw, in his concurring opinion in the leading case of *Roystone* that the Mechanic's Lien law was a "…confused and confusing statute."[6] In 1961, the court in *Nolte v. Smith*[7] stated that the Mechanic's Lien law of California has been changed at nearly every session of the Legislature since the first statute on the subject was passed. The amending process has continued to present date and currently numerous proposed statutes are pending before the California Legislature on the subject of Mechanic's Liens.

The Assembly Judiciary Committee has asked the Law Revision Commission to make a "comprehensive review" of the Mechanic's Lien laws and to make "suggestions for possible areas of reform." The Commission has requested this author to review and recommend changes to the Mechanic's Lien law.

---

one which would not charge the owner or, more importantly, a new owner with constructive notice of the claims.' [Citation.] (*Id*., at pp. 861-862, fn. omitted.)" [Quoting Wand Corp. v. San Gabriel Valley Lumber Co., 236 Cal. App. 2d 855, 862 (1965).]

(7) Industrial Asphalt, Inc. v. Garrett Corp., 180 Cal. App. 3d 1001, 1006-09 (1986):

Ancient authority enunciates the purpose of the mechanics' lien: to prevent unjust enrichment of a property owner at the expense of a laborer or material supplier. "The principle upon which liens are allowed in favor of mechanics and material-men is, that their labor and materials have given value to the buildings upon which they have been expended, and that it is inequitable that the owner of land, who has contracted with them for such improvement, or who has stood by and seen the improvement in progress without making objection, should have the benefit of their expenditures without making compensation therefore." (Avery v. Clark (1981) 87 Cal. 619, 628 [25 P.919].)

… The laborer or material supplier has invested his labor, or added materials originally in his possession, to improve property of another and increase its value. They thus "have, at least in part, created the very property upon which the lien attaches." ….

….

In interpreting statutes effecting the constitutional lien remedy, the courts have traditionally supported this historic preference for the interests of laborers and suppliers by applying a rule of liberal construction.… From *Roystone* to *Truestone*, courts have "uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen." ….

(8) Basic Modular Facilities, Inc. v. Ehsanipour, 83 Cal. Rptr. 2d 462, 464 (1999):

The Legislature enacted sections 3109 et seq. to implement and enforce this constitutional lien. (Lambert v. Superior Court (1991) 228 Cal. App. 3d 383, 385, ….) The purpose of a mechanics' lien is to prevent unjust enrichment of a property owner at the expense of laborers or material suppliers. (Abbett Electric Corp. v. California Fed. Savings & Loan Assn. (1991) 230 Cal. App. 3d 355, 360, ….) "The mechanics' lien is the only creditors' remedy stemming from constitutional command and our courts 'have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.'" (Wm. R. Clarke Corp. v. Safeco Ins. Co. (1997) 15 Cal. 4th 882, 889, ….)

5. Connolly Dev., Inc. v. Superior Court, 17 Cal. 3d 803 (1976).

6. 171 Cal. at 546.

7. 189 Cal. App. 2d 140, 143 (1961).

2. Definition of "Original Contractor" Under the Lien Law

Chapter 1 of Title 15 (Works of Improvement), Civil Code Sections 3082-3106,[8] sets forth numerous definitions relating to the Mechanic's Lien law. Specifically, Section 3095 defines an "original contractor" as any contractor who has a direct contractual relationship with the owner. The remainder of the sections relating to the Mechanic's Lien law are inconsistent in terms of following the definition set forth in Section 3095.

In Section 3097(a), the Preliminary Notice is required to be given to the "original contractor or reputed contractor." Section 3097(b) provides that persons "except the contractor" having a direct contractual relationship with the owner must give a Preliminary Notice to the construction lender. (More will be said about the Preliminary Notice subsequently in this report.) Furthermore, in subdivision (b) of Section 3097, under the "Notice to Property Owner," the property owner is informed that it can protect itself by requiring your "contractor" to furnish signed releases before making payment to your "contractor." In subdivision (k) of Section 3097, it is provided that every "contractor" who is required to pay fringe benefits must include certain information in the Preliminary Notice. In other parts of Section 3097, there is appropriate reference to the term "original contractor."

The term "contractor" is likewise used in Section 3098. In Section 3110, it is stated that for the purpose of the Mechanic's Lien law, every "contractor" or other person having charge of a work of improvement or portion thereof shall be held to be the agent of the owner. In Section 3112, in referring to payment, there is a reference to "contractor." In Section 3123(c), it is provided that the owner shall notify the "prime contractor" of any changes in the contract. In Section 3124, the statute refers to a claimant being employed by a "contractor." There are other examples of these discrepancies throughout the statutes.

All sections dealing with the Mechanic's Lien law should be consistent and the word "original contractor" should be substituted wherever the term "contractor" or "prime contractor" is used.[9]

3. Preliminary Notice: Delete Civil Code Section 3097(b)

One of the key provisions of the Mechanic's Lien law is the requirement for Preliminary Notices on both public and private works of improvement. With regard to private works of improvement, Section 3097 requires a Preliminary Notice to the owner, original contractor, and construction lender. This notice is a condition precedent to the right of the claimant to record a Mechanic's Lien, serve a Stop Notice, or bring an action on any payment bond. Similarly, under Section 3098, with regard to public works, a Preliminary Notice to the public agency and the

8. Unless otherwise indicated, all statutory citations are to the Civil Code.

9. Specific changes are set forth in the Exhibit, at pp. 1-2.

"contractor" must be given by any person not having a direct contractual relationship with the "contractor." The Preliminary Notice, under Section 3098, is a condition precedent to the claimant's right to file a Stop Notice or bring an action on the payment bond on public work.

The purpose of these Preliminary Notice provisions is to provide notice to the owner of who the potential claimants are on the project so that appropriate steps can be taken during the progress of a job, to see to it that those persons are paid so that Mechanic's Liens are not recorded, Stop Notices not filed, and actions on payment bonds are not brought. In the case of private works of improvement, the owner, of course, has direct knowledge of the persons with whom it has its contractual relationship, to-wit, the "original contractor."

The lender, likewise, as a practical matter, will have knowledge of who the "original contractor" is. Construction lenders, as a matter of diligent administration of their construction loans, will require a copy of the contract between the owner and the "original contractor" and will have in their files a cost breakdown, usually provided by the "original contractor" for the various line items involved in the construction project as to the amount to be paid for various scopes of work, such as plumbing, electrical, roofing, masonry, drywall, and other such items.

As a result, neither the owner nor the construction lender needs a Preliminary Notice from the "original contractor." Thus, Section 3097(a) provides that any person not having a direct contractual relationship with the owner must, as a condition precedent to its right to record a Mechanic's Lien, serve a Stop Notice or bring an action on a payment bond, give a Preliminary Notice to the original contractor, construction lender, and owner. This provides the owner and the construction lender with knowledge of who the potential lien, Stop Notice, and bond claimants are on the project. This, in turn, enables the owner, lender, and original contractor the opportunity to obtain releases pursuant to Section 3262 as progress payments are processed during the progress of the job, to pay the potential claimants by joint check, or to pay the potential claimants directly so that Mechanic's Liens, Stop Notices, and bond claims can be avoided.

As noted in the case of *Kim v. J.F. Enterprises*,[10] the rationale for excepting those under direct contract with the owner from serving a Preliminary Notice is that the owner is generally apprised of potential lien claims by those with whom the owner deals directly, whereas it is difficult for the owner to learn of potential liens by those not under direct contract with the owner.[11]

Section 3097(a) works well in the industry and should not be changed.

Subdivision (b) of Section 3097 has created confusion in the construction industry. Subdivision (b) provides that, except for "the contractor" or one performing actual labor for wages or an express trust fund, all persons who have a direct contract with the owner and who furnished labor, service, equipment, or material for

10. 42 Cal. App. 4th 849, 855 (1996).

11. See also Windsor Mills v. Richard B. Smith, Inc., 272 Cal. App. 2d 336, 340 (1969).

which a lien or payment bond can otherwise be claimed under the Mechanic's Lien law, or for which a Stop Notice can otherwise be given shall, as a necessary prerequisite to the validity of any claim of lien, claim on a payment bond, or of a Stop Notice (Notice to Withhold), cause to be given to the construction lender, if any, or the reputed construction lender, a written Preliminary Notice.

On the one hand, subdivision (a) of Section 3097 provides that persons not having a direct contractual relationship with the owner must provide a Preliminary Notice to the owner, contractor, and construction lender. Subdivision (b) provides that a person having a direct contractual relationship with the owner "except the contractor" must give a Preliminary Notice to the construction lender. The term "contractor" as noted above is not defined anywhere in the Mechanic's Lien statute. The question is, who is the "contractor" that Section 3097(b) exempts from giving a Preliminary 20 Day Notice? It is the belief of the author that this subdivision of Section 3097 was inserted to cover those situations where the owner was acting as an "owner/builder," that is, where the owner was contracting directly with the trade subcontractors for the various phases of the work.

For example, an owner/builder would contract directly with a subcontractor to do the grading and excavation, then a follow-on subcontractor to do the foundation work, a follow-on subcontractor to do framing and so on through the project. Construction lenders may desire a Preliminary Notice from those "subcontractors" where there is no true "original contractor" in the picture. The statute, however, is ambiguous in that regard.

The problem was addressed by Ronald J. Mandell and Bernard S. Kamine in a 1992 article[12] concluding that the Legislature should amend the section to designate either an "original contractor" or a "general contractor," and if it is to be a "general contractor," then that term should be separately defined as an "A" or "B" licensed original contractor who is responsible for the overall work of improvement under its contract with the owner.

This author recommends that subdivision (b) be eliminated from Section 3097. Subdivision (a) is adequate and serves the purpose for which it was intended, that is, it places the owner, contractor, and construction lender on notice of all the potential lien, Stop Notice, and bond claimants on the job. Subdivision (b) is ambiguous and unnecessary. Certainly an "owner/builder" knows exactly who all of the trade subcontractors are that it is contracting with for the work of improvement. The owner/builder is therefore in the best position to advise the construction lender who those "subcontractors" are. Further, as a practical matter, during the administration of the project, a diligent construction lender will be demanding from the "owner/builder" copies of all the "subcontracts" that the owner has with the separate trade "subcontractors" and will be requiring waiver and release forms under Section 3262 in the processing of the monthly progress payments.

---

12. *Who Is the Contractor That Civil Code Section 3097(b) Exempts from Giving a Preliminary 20-Day Notice?*, 10 Cal. R. Prop. J. 45 (Winter 1992). Copy attached, Exhibit pp. 3-9.

This ambiguity in the statute was addressed in *Kodiak Industries, Inc. v. Ellis*.[13] In that case, a plumbing contractor had a direct contractual relationship with an owner/builder. The court referenced subdivision (b) of Section 3097, which provides that "except the contractor" all persons who have a direct contract with the owner must give a Preliminary Notice to the construction lender. In a footnote,[14] the court discussed that ambiguity as follows:

> The exception of the "contractor" is puzzling here. Presumably it refers to someone other than "all persons who have a direct contract with the owner." But section 3088 defines a "contract" as an "agreement between an owner and any original contractor providing for the work of improvement or any part thereof." And section 3095 in turn defines "original contractor" as "any contractor who has a direct contractual relationship with the owner." As has been noted, "[t]he Mechanic's Lien law often is inartfully drawn and leaves much room for doubt, as in this instance." (Killeen, *The 20-Day Preliminary Notice in Private Construction Work* (1997) 53 L.A. Bar J. 113, 120, fn.42.) Despite this apparent contradiction because the single word "contractor" is not defined, it has sensibly been construed to mean the general or prime contractor for the entire project. (See *Korherr v. Bumb* (9th Cir. 1958) 262 F.2d 157, 161-162, construing the phrase "except the contractor" in former Code Civ. Proc., § 1190.1, subd. (h) [Stats. 1951, ch. 1382, § 1, p. 3305], the predecessor of § 3097, as referring to the general or prime contractor; see also 1 Miller & Starr, Current Law of Cal. Real Estate (rev. pt. 2, 1975) Pre-lien Notice, § 10:20, pp. 550-552, noting that if the term "contractor" referred to the original contractor, § 3097, subd. (b) "would read that 'all persons having a direct contract with the owner, except any contractor who has a direct contractual relationship with the owner' must give the notice to the lender.") (*Ibid*.)

Elsewhere, this author has given a conservative interpretation of Section 3097(b) and has recommended that "subcontractors" contracting with an "owner-builder" send a Preliminary Notice to the construction lender.[15]

This ambiguity can best be eliminated by deleting subdivision (b) from Section 3097.

---

13. 185 Cal. App. 3d 75 (1986).

14. *Id.* at 82 n.3.

15. See CEB Action Guide, *Handling Mechanic Law and Related Remedies,* Fall 1998, p. 16; California Construction Law § 8.13, at 130-31 (15th ed. 19__); California Mechanic's Liens and Related Construction Remedies §§ 3.14-3.15, at 107-09 (Cal. Cont. Ed. Bar, 3d ed. 1998).

4. Requirements in Civil Code Section 3097 To Set Forth the Identity and Address of any Trust Fund in a Preliminary Notice Given by a Subcontractor Who Is Required Pursuant to a Collective Bargaining Agreement To Pay Supplemental Fringe Benefits Into an Express Trust Fund (Section 3097(b)(6)) Should Be Deleted

The courts in California have held that ERISA has occupied the field and therefore, trust fund claimants have no lien rights.[16] It is recommended that the requirement for listing the identity and address of trust funds be deleted from Section 3097. That would likewise require deletion of subdivision (k) of Section 3097.

5. Time To File Stop Notices Should Be Clarified

The time limits for recording Mechanic's Liens are set forth in Civil Code Sections 3115 and 3116. Section 3115 provides that each original contractor, in order to enforce a lien, must record a claim of lien after completing the contract and before the expiration of 90 days after completion of the work of improvement, if no Notice of Completion or Notice of Cessation has been recorded or within 60 days after recordation of a Notice of Completion or Notice of Cessation. Thus, as to original contractors, they may not record their liens until they have completed their contract and no later than 90 days after completion or 60 days after recordation of a Notice of Completion or Notice of Cessation. With regard to claimants other than an original contractor (to-wit, subcontractors and material suppliers), Section 3116 provides that they may record their liens after they have ceased furnishing labor, service, equipment, or materials and no later than 90 days after completion of the work if no Notice of Completion or Notice of Cessation has been recorded or within 30 days after the recordation of a Notice of Completion or Notice of Cessation. As a result of these two sections, if an original contractor records its lien before it has completed its contract, that lien would be premature. Likewise, if a subcontractor or material supplier were to record its lien before it had ceased furnishing labor, service, equipment, or materials, its lien would be premature.

With regard to "Stop Notices for Private Works of Improvement" in Chapter 3, Sections 3156-3176.5, the statute provides in Section 3158 that claimants other than the "original contractor" may give to the owner a Stop Notice. It further provides that any person who shall fail to serve such a Stop Notice, after a written demand therefor from the owner, shall forfeit his right to a Mechanic's Lien. Section 3159 provides that claimants may, prior to the expiration of the period of time within which his or her claim of lien must be recorded under Chapter 2, serve upon the construction lender a Stop Notice or bonded Stop Notice.

---

16. See Carpenters of S. Cal Admin. Corp. v. El Capitan Dev. Co., 53 Cal. 3d 1041 (1991); Carpenters Health & Welfare Trust Fund v. Developers Ins. Co., 11 Cal. App. 4th 1539 (1992); Carpenters Health & Welfare Trust Fund v. Tri Corp., 23 F.3d 849 (9th Cir. 1994); Carpenters Health & Welfare Trust Fund v. Surety Co., 13 Cal. App. 4th 1406 (1993); Operating Engineers Pension Trust v. Insurance Co. of the West, 35 Cal. App. 4th 59 (1995).

Section 3103 defines a Stop Notice and provides what it must contain, including a statement in subdivision (c) that the Stop Notice must contain the amount in value as near as may be of that already done or furnished and the whole agreed to be done or furnished. This statement is necessary by reason of the last sentence in Section 3158, which provides that "Any person who shall fail to serve such a Stop Notice after a written demand therefor from the owner shall forfeit his right to a Mechanic's Lien." The purpose of that last sentence in Section 3158 is to enable the owner to determine, during the progress of the job, what subcontractors or material suppliers have outstanding claims and if, in fact, a demand is made by the owner upon a subcontractor or material supplier to file a Stop Notice, when they are in the middle of the job, they would set forth in the Stop Notice, under Section 3103, the amount in value of that they had already done and the whole agreed to be done or furnished.

Some practitioners have concluded, by virtue of the foregoing, that an unpaid claimant may, at any time during the progress of the job, serve a Stop Notice on the owner or a bonded Stop Notice on the construction lender, even though that claimant is still furnishing labor, service, equipment, or material to the jobsite. As a practical matter, that practice is being conducted in the construction industry and creating havoc on construction projects. Once the Stop Notice or bonded Stop Notice is filed, the owner and/or construction lender will withhold progress payments. The foregoing procedure is inconsistent with the provisions of Sections 3115 and 3116. It is therefore recommended that Sections 3115 and 3116 be amended to make them applicable to both Mechanic's Liens and Stop Notices or bonded Stop Notices. As amended, Section 3115 would read as follows:

> Each original contractor, in order to enforce a lien or bonded stop notice, must record his or her claim of lien or serve his or her bonded stop notice upon the construction lender after he or she completes his or her contract and before the expiration of….

The wording set forth above is to make Section 3115 the guiding statute as to both the recordation of the lien or the service of a bonded Stop Notice on a construction lender. The reason that it only references a bonded Stop Notice filed with the construction lender is that original contractors may file bonded Stop Notices under Section 3159, but only persons other than original contractors may serve Stop Notices on an owner pursuant to Section 3158.

Section 3116 would be amended to read as follows:

> Each claimant other than an original contractor, in order to enforce a mechanic's lien, or to serve a stop notice upon an owner or a bonded stop notice upon a construction lender, must record his or her claim of lien or serve upon the owner a stop notice or serve upon the construction lender a bonded stop notice after he or she has ceased furnishing labor, services, equipment, or materials….

The foregoing amendments would make it clear that the time limits for recording Mechanic's Liens and serving Stop Notices are identical. The only time that a

claimant would have the obligation or the right to serve a Stop Notice upon the owner before the claimant finished its work or before it ceased furnishing labor and material on the project would be in that limited circumstance where the owner would, pursuant to Section 3158, demand that the claimant serve a Stop Notice upon it.

6. Civil Code Section 3176 Should Be Amended To Clarify an Ambiguity

Civil Code Section 3176 allows courts to award attorney's fees and costs to the prevailing party in any action against an owner or construction lender to enforce payment of a claim stated "in a bonded stop notice." This section is ambiguous by reason of the fact that a Stop Notice served upon an owner need not be bonded.

As noted above, Section 3158 provides that claimants other than the original contractor may give to the owner "a Stop Notice." Section 3103 defines a Stop Notice and states that in the case of a private work, it shall be delivered to the owner personally or left at his or her residence of place of business with some person in charge or delivered to his or her architect, if any. With regard to the service of a Stop Notice on a construction lender, it is served on the construction lender. The only requirement for bonding is with regard to a Stop Notice served upon a construction lender on a private work of improvement. Specifically, under Section 3162, withholding by the construction lender on a private work of improvement, is optional unless the Stop Notice is bonded, in which event withholding is mandatory.

As a result of the foregoing, there is no provision for a "bonded stop notice" to be served on a private owner. Accordingly, Section 3176 should be amended by amending the first paragraph to read as follows:

> In any action against an owner <u>on an unbonded stop notice</u> or <u>against a</u> construction lender to enforce a payment of a claim stated in a bonded stop notice, the prevailing party shall be entitled to collect from the party held liable by the court for payment of the claim, reasonable attorney's fees in addition to other costs and in addition to any liability for damages.

This will make Section 3176 compatible with the requirements for Stop Notices served upon an owner and bonded Stop Notices served upon a construction lender.

7. Civil Code Section 3123 Should Be Amended To Expressly Cover Stop Notices in Addition to "Liens"

Civil Code Section 3123 sets forth the amount of the "lien." Section 3123(b) was amended to allow claimants to include in their "lien" amounts due for written modifications of the contract or as a result of the rescission, abandonment, or breach of the contract. This section does not set forth that Stop Notices may likewise include those sums.

Section 3123(b) was recently interpreted in *Basic Modular Facilities, Inc. v. Ehsanipour*[17] to expressly hold that a lien claimant could include, in its Mechanic's Lien, damages for breach of contract. No court has yet addressed whether or not a Stop Notice can include damages for breach of contract and the other items specified in Section 3123(b). Most practitioners believe that the Stop Notice is co-extensive with the Mechanic's Lien and whatever amounts are includable in a Mechanic's Lien would likewise be includable in a Stop Notice or bonded Stop Notice.

In order to clear up any ambiguity in that respect, it is suggested that Section 3123 be amended to apply to both liens and Stop Notices by adding a reference to "stop notice and bond claims" after references to "lien" or "liens" in this section.

8. The Mechanic's Lien Law Should Be Amended To Provide That Proof of Delivery of Material Creates a Rebuttal Presumption of Use of the Material in the Work of Improvement

It is a simple matter for a contractor or subcontractor to testify directly as to the work, labor, service, or material that it provided in connection with the work of improvement. Material suppliers, however, sell their materials either to original contractors or subcontractors. Sometimes those materials are delivered directly to the jobsite and other times they are not. In some instances, the materials are delivered, first of all, to an original contractor's or subcontractor's place of business for fabrication and later installation in the work of improvement.

A classic example of this procedure is the furnishing of steel materials by a steel supplier to a subcontractor who has contracted to fabricate and erect the structural steel on a project. In most instances, that steel will be delivered directly by the material supplier to the subcontractor's place of business and will be fabricated at that place of business in accordance with the plans and specifications and then delivered to the jobsite for installation.

Where a material supplier delivers its material directly to the jobsite, once the material arrives at the jobsite, the material supplier loses control of the material and typically has no direct knowledge as to the installation of the material in the work of improvement. The courts have held that mere delivery to the jobsite is not sufficient. The claimant is obligated to prove not only that its materials were furnished for use in the work of improvement, but that, in fact, the materials were used in the work of improvement.[18]

A logical inference to be drawn upon proof of delivery of material to the jobsite is that, in fact, the material was used in the job, in absence of some evidence that it was removed from the job after delivery. Accordingly, it is recommended that a

17. 83 Cal. Rptr. 2d 462 (1999).

18. See Consolidated Elec. Distrib., Inc. v. Kirkham, Chaon & Kirkham, Inc., 18 Cal. App. 3d 54 (1971); San Pedro Lumber Co. v. Kreis, 111 Cal. App. 466 (1931); H.G. Fenton Material Co. v. Noble, 127 Cal. App. 338 (1932); Arthur v. Newhouse Bldg. Corp., 217 Cal. App. 2d 526 (1963).

section be added to the Civil Code providing that proof of delivery to the jobsite creates a rebuttable presumption that the material was used in the job and the burden of proof then shifts to the owner to prove that it was not. In that connection, I would recommend a section be added to the "Miscellaneous Provisions" of the Civil Code reading as follows:

Civ. Code § 3267.5 (added). Delivery of materials; rebuttable presumption of use

3267.5. In any action to foreclose a Mechanic's Lien, to enforce a Stop Notice on public or private work or to enforce a claim on a payment bond on public or private work, proof by the materialman (as defined in Section 3090) of delivery of its materials to the work of improvement (as defined in Section 3106) creates a rebuttable presumption that the materials were used in the work of improvement.

9. Attorney's Fees in Mechanic's Lien Foreclosure Proceedings

The treatment of attorney's fees in the Mechanic's Lien law is not consistent. As noted above, with regard to Stop Notices and Bonded Stop Notices on private works of improvement, the Code provides for attorney's fees to the prevailing party in an action on a Bonded Stop Notice.[19] There is no attorney's fees provision in the statute with regard to Mechanics' Liens. In fact, the courts have held that attorney's fees are not recoverable pursuant to a Mechanics' Lien.[20] On public works of improvement, attorney's fees are recoverable on the Payment Bond (Section 3250), but are not recoverable in an action to enforce a Stop Notice on public works.[21] The question therefore arises as to whether or not attorney's fees ought to be provided for by statute with regard to an action to foreclose a Mechanics' Lien or to enforce a Stop Notice on public works of improvement. In light of the fact that attorney's fees are recoverable in an action on a Payment Bond on public works, it is recommended that there is no need to provide for attorney's fees on a Stop Notice on public works.

The question is more difficult with regard to private works of improvement. There appears to be no rational basis to allow attorney's fees in an action on a Stop Notice on private works but not allow attorney's fees in an action to foreclose a Mechanics' Lien. The provision for attorney's fees is important in that it quite often results in serious settlement negotiations between the parties and enhances the possibility of settlement where the parties know that the prevailing party will be entitled to recover attorney's fees. A recent California Supreme Court case[22] highlights the importance of attorney's fees and the interplay with the statutory offers of settlement that can be made under Code of Civil Procedure Section 998

19. See Sections 3176 & 3176.5.

20. See Abbett Elec. Corp. v. California Fed. Sav. & Loan Ass'n, 230 Cal. App. 2d 355 (1991).

21. See Sections 3179-3214.

22. Scott Co. of Cal. v. Blount, Inc., 20 Cal. 4th 1103, 979 P.2d 974, 86 Cal. Rptr. 2d 614 (1999). See also recent article by undersigned, *Contractor Recovers Attorney's Fees Where Subcontractor Rejects Contractor's Offer of Settlement*, AGC California. Legal Briefs, Issue 99-5, in Exhibit, pp. 10-11.

coupled with the provisions of Civil Code Section 1717 allowing the prevailing party to recover attorney's fees where attorney's fees are provided for.

It is therefore recommended that the Mechanics' Lien law be amended to provide for attorney's fees to the prevailing party in an action to foreclose a Mechanics' Lien. This could be accomplished by adding a subdivision (c) to Section 3144, as follows: "In any action to enforce a Mechanic's Lien, the court may award the prevailing party reasonable attorney's fees." This section is based upon Arizona Revised Statutes, Section 33-998(B).

10. Revisions to Civil Code Section 3262

For years, the construction industry operated on the assumption that lien waiver and release forms used during the processing of progress payments during the job would result in waiver of the claimant's lien, Stop Notice, or bond rights once payment was in fact made. In the case of *Bentz Plumbing & Heating v. Favaloro,*[23] Bentz Plumbing as a subcontractor submitted lien waivers to the original contractor totaling $14,500. Bentz Plumbing only received $6,750 from the original contractor and recorded a Mechanic's Lien for $14,406.49. The owner had paid the original contractor in reliance upon the waivers that Bentz Plumbing had executed. The appellate court held that the waivers were null and void under Section 3262 as it existed at that point in time.

The industry was taken aback by virtue of that decision and sought to amend Section 3262. As a result, the Legislature got into the "form writing business." The statute was amended in 1984 to provide for four waiver and release forms, to-wit, a conditional and unconditional waiver and release upon progress payment and a conditional and unconditional waiver and release upon final payment.

In 1992, the case of *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*[24] denied a material supplier its Mechanic's Lien for material delivered to the job site, but not installed, where the material supplier signed a conditional waiver waiving all lien rights for material "furnished" through a date subsequent to the date of the delivery of the materials to the job site. The court held that the material supplier had therefore waived its lien rights.

In response to the *Halbert's Lumber* case, the statute was amended again effective January 1, 1994. The new forms provide that any retention retained before or after the release date is not waived.[25] They further provide that any "extras" furnished before the release date for which payment has not been received are not waived. Although the term "extras" is not defined in the statute, it is a term of common knowledge in the construction industry meaning labor, service, equipment, or material furnished beyond the scope of the work as called for in the original contract documents. The forms also do not release "extras" or "items" fur-

23. 128 Cal. App. 3d 145 (1982).

24. 6 Cal. App. 4th 1233, 8 Cal. Rptr. 2d 298 (1992).

25. The current four statutory forms are set out in the Exhibit, pp. 12-15.

nished after the release date. The forms also provide that rights based upon work performed and items furnished under a written change order which has been fully executed by the parties prior to the release date are released unless the claimant specifically reserves those rights in the release. The language that has created substantial ambiguity, and which has not been decided by the courts, is the language in Section 3262(d)(1) reading as follows:

> This release of any mechanics' lien stop notice or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment.

This language, if interpreted in accordance with its plain terms, seems to convert the conditional waiver and release upon progress payment to a mere receipt. In other words, the language states that if the claimant is not being paid for "furnished" (past tense), labor, services, equipment or material, then the claimant is not waiving its rights with regard to that "furnished" (past tense) labor, services, equipment, or material.

The statuate has been subject to much criticism:

Joseph Geri states the following:[26]

> Contrary to the Halberts court's desire for releases that owners and lenders could rely on, the forms of progress payment releases do not release claims for work, equipment or materials that have not been paid for. Thus, the new release forms are valueless unless supported by evidence of payment. Since such evidence is not readily available to owners and construction lenders, the new forms of release are essentially ineffective as are pre-construction waivers.

Everett McGuire and Pamela Davis state the following:[27]

> This new legislation will create many problems and in effect has traded certainty for confusion in connection with progress payment releases.
>
> We believe the Halbert's decision introduced certainty and served justice. The confusing new amendment is the result of the AGC's [sic] unnecessary "knee-jerk" reaction.
>
> Why was Civ. Code Section 3262 amended? Although the 1993 amendment to Section 3262 does not render waivers and releases "null and void," per se, the new form allows a subcontractor to assert that a given payment and release were not "for" oral change orders or extras furnished to the project prior to the release date. The waivers and release become little more than a glorified receipt. No rights will be released that would not be released by virtue of the payment anyway. Subcontractors may hesitate to sign written change orders in order to automatically exclude all change orders and extras from their releases. Beginning

26. *Mechanics' Lien Rights — Can They Be Waived?*, Shepard's California Construction Law Reporter (May 1994, p. 75).

27. *Lien Releases: From Certainty to Confusion*, Shepard's California Construction Law Reporter (Feb. 1994, pp. 9-11).

January 1, 1994, owners and lenders will simply not be able to rely upon waivers and releases signed by subcontractors and suppliers.

Thus, ironically, the amendment that was supposed to roll back Halberts failed in that purpose. But even this is not certain. It will be argued that the language preserves all of the lien claimant's remedies, including Mechanic's Lien and contractual rights which predate the release. Such a judicial interpretation would take us all the way back to Bentz, under which the only defense to a Mechanic's Lien claim was proof of payment.

James Acret states the following:[28]

Compensation for work or material 'not compensated by the progress payment': this language is flagrantly ambiguous. At minimum, it means the claimant preserves all personal causes of action and releases only Mechanics Lien, Stop Notice, and bond rights. This would include the contract rights discussed above. Thus, the language seems duplicative unless it also (under a broader interpretation) preserves the claimant's Mechanics Lien, Stop Notice, and bond rights for all work or materials 'not compensated by the progress payment'. But such an interpretation seems absurd. It would nullify the effectiveness of the release in the only circumstances under which it could be of any practical value, since it is only 'unpaid' claimants who assert Mechanics Lien, Stop Notice, and payment bond rights to begin with.

The amendments to the unconditional release on progress payment track the amendments to the conditional release on progress payment, but one provision of the Unconditional Waiver and Release moves from the Byzantine to the Rococo: it is the notice that this release is enforceable against you if you sign it even if you have not been paid. Wait a minute! Didn't we just read that this release does not cover claims that were not compensated by the progress payment?

Kenneth Gibbs and Leon F. Mead, II, state the following:[29]

This convoluted run-on sentence has two potential consequences. First, the clause clearly states that the claimant is not releasing contract rights or remedies against those with whom the claimant directly contracted. This is of great significance to owner, general contractor, and subcontractor. No longer can an owner accept only a statutory release from the general contractor; nor can general contractors accept only a statutory release from subcontractors. They should additionally require releases of personal (i.e., contract) rights. An alternative would be to modify the statutory form to also exclude personal (contract) rights. Doing so, however, could invalidate the effectiveness of the release, as Section 3262(b) requires that the release language 'substantially follow' that set out in the statute.

The murky enumeration invites speculation as to whether the form: (1) does not release the right to recover compensation for labor, services, equipment, or materials under the contract; or (2) does not release Mechanic's Lien, Stop Notice, or bond rights by which the claimant may 'recover compensation' for the labor, services, equipment, or materials not included in the progress payment. It will be argued that the right to recover compensation includes the right to enforce a Mechanic's Lien, Stop Notice, or bond. It will also be argued, however, that since

28. *Mechanics' Lien Releases*, Shepard's California Construction Law Reporter (Dec. 1993, p. 204).

29. *The Progress Payment Release Forms: The Cure Is Once Again Worse Than The Disease* in Shepard's California Construction Law Reporter (Jan. 1993, pp. 227, 230-31)

> the release, by its nature, releases Mechanic's Lien, Stop Notice, and bond rights, the only remedy reserved to 'recover compensation' is the personal/contract right.

In another article, James Acret states the following:[30]

> The Legislature presented the construction industry with a load of trouble when it changed the rules of the Mechanic's Lien game by passing Senate Bill 934. The new forms prescribed by the Legislature do not release claims for unsigned extras furnished before the release date. Worse, under a fair and literal interpretation, the new release forms do not cover claims for labor, services, equipment, or material furnished by the claimant but not compensated by the progress payment. (The new release forms also made explicit something recognized by most practitioners as implicit under prior law: the releases apply only to Mechanic's Lien, Stop Notice, and payment bond rights and do not affect personal 'contract' rights of the claimant.)
>
> Shorn of Euphemisms: progress releases are worthless unless supported by evidence that all labor, services equipment, and material (including unsigned extras) were fully paid for through the date of the release. Standing alone, the official release forms are insignificant scraps of paper since only dishonest or totally incompetent claimants are likely to make Mechanic's Lien, Stop Notice, or payment bond claims for bills that have been fully paid. If a defendant can prove that a claimant has been fully paid, who needs a release?

The industry operates on the assumption that if the claimant is paid a certain amount through a given date, then all of its liens, Stop Notices, and Bond rights through that date are waived with the exceptions noted in the release form. Most people in the industry believe that they are giving full releases when in fact they are not. It is clear that the forms in Section 3262 need to be revised or the statute itself revised. In light of the fact that these waiver and release forms have become common practice in their usage in the construction industry, it is recommended that the forms be revised.[31]

11. Proposed Revision to Civil Code Section 3086

Civil Code Section 3086 defines "completion" and the equivalents of completion. Completion is defined in the case of any work of improvement other than a public work of improvement as the actual completion of the work of improvement. This of course is a question of fact in each case that needs no further amendment. Section 3086 also sets forth certain equivalents of completion in subdivisions (a), (b), and (c). The last paragraph of Section 3086 up to the semicolon should remain as is. The language reading as follows should be deleted:

> …provided, however, that except as to contracts awarded under the State Contract Act, Chapter 3 (commencing with Section 14250), Part 5, Division 3, Title 2 of the Government Code, a cessation of labor on any public work for a continuous period of thirty (30) days shall be deemed a completion thereof.

---

30. *Mechanics' Lien: Working With The New Release Forms*, Shepard's California Construction Law Reporter (Jan. 1994, p. 232).

31. The revised forms should read as shown in Exhibit pp. 16-19.

The foregoing provision is unnecessary and a trap for the unwary. There is no legitimate reason for an exception for local public works contracts which have a cessation of labor for thirty days to start the time for filing Stop Notices or claims on the payment bond to run. On many public works projects there will be delays that exceed thirty days. Those are adequately covered in subdivisions (a), (b) and (c). In the case of *W.F. Hayward Co. v. Transamerica Ins. Co.*, 16 Cal. App. 4th 1101 (1993), a subcontractor lost its bond rights when the original prime contractor was terminated on a County of Los Angeles job and labor ceased for more than 30 days. The time for filing claims should be as set forth in subdivisions (a), (b), and (c), and therefore it is recommended that the language quoted above be deleted.

12. Make Failure of Contractor To Make Available Name and Address of Owner and Lender a Ground for Disciplinary Action

Subdivision (*l*) of Civil Code Section 3097 now provides that the "original contractor" "shall" make the name and address of the owner and lender as shown in their contract available to any person wanting to serve a Preliminary Notice. Even though the statute uses the word "shall" (mandatory), there are no teeth in the statute. As a practical matter, many times when potential claimants (subcontractors and material suppliers) contact the "original contractor" to obtain the name and address of the owner and lender as shown in the original contractor's contract with the owner, the original contractor is uncooperative and either fails to furnish the information or furnishes inaccurate information. It is recommended that subdivision (*l*) be amended by adding the following language:

> The failure or refusal of the original contractor, licensed under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, to make this information available as required by this subdivision, constitutes grounds for disciplinary action by the Registrar of Contractors.

13. Require Owner To Furnish Copy of any Payment Bond to any Claimant Who Serves a Preliminary Notice on the Owner

Often times an owner will acquire a payment bond on a private work of improvement and not record it. Additionally, it is difficult for the subcontractors and material suppliers to search the records of the County Recorder's office to ascertain whether or not a payment bond has been recorded. Arizona's Preliminary Notice section has such a provision.[32] This procedure could be implemented by adding subdivision (q) to Section 3097 reading as follows:

> Within ten (10) days of the receipt of a Preliminary Notice, pursuant to this section, if any payment bond has been obtained but not recorded or obtained and recorded in compliance with Section 3235, the owner and contractor must provide a copy of the payment bond, including the name and address of the surety and

32. See Ariz. Rev. Stat. § 33-992.01.

bonding agent providing the payment bond, to the person who has given the Preliminary Notice. In the event that the owner or contractor fails to provide the bond information within that ten-day period, the claimant shall retain lien rights and stop notice rights to the extent precluded or prejudiced from asserting a claim against the bond as a result of not timely receiving the bond information.

The language set forth is adopted from the Arizona Mechanic's Lien law.

14. Time To Sue on Stop Notice Release Bond Does Not Start To Run Until a Copy of the Release Bond Is Served on Claimant

The Mechanic's Lien Release Bond Section (Section 3144.5) provides that the time to sue on the Mechanic's Lien release bond does not start to run until a copy of the bond is served upon the claimant. There is no similar provision with regard to Stop Notices.

In one case, a court ruled that the statute of limitations on a Stop Notice release bond was three years and the claimant did not even know of its existence until after the three years from execution of the bond had expired. The claimant lost.[33]

The Stop Notice law should be consistent with the lien law. This can be implemented by adding language to Section 3171 (the Release Bond section for Private Works) and Section 3196 (the Release Bond section for Public Works) reading as follows:

1. Section 3171 — add:

Any person who obtains a Stop Notice release bond pursuant to this section shall give notice of the obtaining of such bond to the Stop Notice claimant by mailing a copy of the bond to the Stop Notice claimant at the address appearing on the Stop Notice. Service of the notice shall be certified or registered mail, return receipt requested. Failure to give the notice provided by this section shall not affect the validity of the Stop Notice release bond, but the statue of limitations on any action on the bond shall be tolled until the notice is given. Any action on the release bond shall be commenced by the claimant within six (6) months of the receipt by the claimant of the notice provided for herein.

2. Section 3196: — add:

Any person who obtains a Stop Notice release bond pursuant to this section shall give notice of the obtaining of such bond to the Stop Notice claimant by mailing a copy of the bond to the Stop Notice claimant at the address appearing on the Stop Notice. Service of the notice shall be certified or registered mail, return receipt requested. Failure to give the notice provided by this section shall not affect the validity of the Stop Notice release bond, but the statute of limitations on any action on the bond shall be tolled until the notice is given. Any action on the release bond shall be commenced by the claimant within six (6) months of the receipt by the claimant of the notice provided for herein.

33. See Winick Corp. v. General Ins. Co., 187 Cal. App. 3d 142 (1986).

15. Requirement for Recipient of Preliminary Notice To Notify Claimant of Inaccuracies

Mistakes in Preliminary Notices are often made. A recipient of the Preliminary Notice is not required to notify the claimant of the error. In fact, the recipient will probably use the inaccuracy as a defense in the lien foreclosure action. The purpose of the Preliminary Notice is to provide accurate notice to the owner, contractor, and lender. If the claimant has made an error, it should be cleared up so that accurate notice is given to the correct owner, contractor, and lender.

This proposal seeks to overcome the above and require the recipient of the Preliminary Notice to notify the claimant of any inaccuracies. This proposal is patterned after Arizona law.[34] This could be accomplished by adding the following language to Section 3097:

> A. Within ten (10) days after receipt of a Preliminary Notice given pursuant to this section, the recipient shall notify the claimant of any inaccuracies in said Preliminary Notice. The failure of the recipient of the Notice to give the claimant notice of the inaccuracies does not excuse the claimant from giving a Preliminary Notice, but it does stop the recipient of the notice from raising as a defense any inaccuracy of such information in the Preliminary Notice, provided the claimant's Preliminary Notice otherwise complies with the provisions of this section. If the claimant receives a notice of such inaccuracies, the claimant shall, within thirty (30) days of the receipt of any notice of inaccuracies, give an Amended Preliminary Notice in the manner provided by this section. Such Amended Preliminary Notice shall be considered as having been given at the same time as the original Preliminary Notice.

The foregoing language is patterned after the Arizona statute.

16. Amendments Made to Civil Code Section 3097 in 1999 Should Be Repealed

In 1999, Senate Bill 914 was enacted as Chapter 795. Unfortunately, the amendments to Civil Code Section 3097 now require both claimants serving Preliminary Notices and owners to comply with a statute that was not, in fact, enacted. In subdivision (c)(5), in the "Notice to Property Owner," a new item (2) was added reading as follows:

> … (2) requiring your contractor to furnish a receipt to establish that you paid the contractor in full and recording no later than 30 days from receipt of this preliminary notice an affidavit that you paid the contractor in full….

In addition, the amendment added a subdivision (q) to Section 3097 reading as follows:

> (q) A claimant, as defined in Section 3155, who provides a preliminary notice to an owner, as defined in Section 3155, shall also provide the owner with an affidavit form and notice of rights, made available pursuant to Section 3155.15.

34. See Ariz. Rev. Stat. § 33-991.01(i).

The "Notice to Property Owner" has been changed by notifying the owner that the owner should require the contractor to furnish a receipt to establish that the owner paid the contractor in full and to record no later than 30 days from the receipt of the Preliminary Notice an affidavit that the owner paid the contractor in full. In subdivision (q), a claimant "as defined in Section 3155" who provides a Preliminary Notice to an owner "as defined in Section 3155" shall also provide the owner with an affidavit form and notice of rights made available pursuant to Section 3155.15.

The code sections referenced in subdivision (q), which form the basis for the warning in the Notice to Property Owner in subdivision (c)(5), were not enacted. They were part of trust fund legislation in AB 742, which has not been enacted. What you now have in Section 3097 are requirements of both owners and claimants to comply with a law that was not, in fact, passed. Those two sections should be deleted as an urgency measure. Provision should also be made to make sure that old forms of Preliminary Notices, which are in wide use in the industry, will not be rendered invalid. It is indeed unfortunate that such an error could be made in our legislative process. It needs to be revised immediately.

17. Conclusions

The foregoing report addresses numerous issues relating to the Mechanic's Lien Law. The report essentially recommends that the lien law, as a whole, remain as is. The changes proposed herein are changes to clarify ambiguities in the law and to make some improvements to the law as a whole. The author of this report looks forward to reviewing the recommendations made in this report with the Law Revision Commission.

October 28, 1999

Respectfully submitted,

Gordon Hunt

EXHIBIT

to

Report to Law Revision Commission Regarding

Recommendations for Changes to the Mechanic's Lien Law

[Part 1]

1. In *Civil Code* §3097(a), the words "...the original contractor, or reputed contractor..." should be changed to read: "...the original contractor, or reputed original contractor".

2. As noted elsewhere in this report, the author is recommending deletion of Subdivision (b) of *Civil Code* §3097. If that recommendation is not adopted, then the word "contractor" in *Civil Code* §3097(b) should be changed to "original contractor".

3. In *Civil Code* §3097(c)(5), in the Notice to Property Owner, the word "contractor" should be changed to "original contractor".

4. In *Civil Code* §3097(h), the word "contractor" should be changed to "subcontractor".

5. In *Civil Code* §3097(k) the word "contractor" should be changed to "original contractor". The same change should be made to *Civil Code* §3097(k)(1) and (4).

6. *Civil Code* §3098(a) and (b) should be amended to change the word "contractor" to "original contractor".

7. *Civil Code* §3180 should be amended to change the word "contractor" to "original contractor".

8. *Civil Code* §3112 should be amended to change the word "contractor" to "original contractor".

9. *Civil Code* §3123(c) should be amended to change the word "prime contractor" to "original contractor".

10. *Civil Code* §3124 should be amended to change the word "contractor" to "original contractor".

11. *Civil Code* §3253 should be amended to change the word "contractor" to "original contractor".

12. *Civil Code* 3161 should be amended to change the word "contractor" to "original contractor".

13. *Civil Code* §3166 should be amended to change the word "contractor" to "original contractor".

14. *Civil Code* §3172 should be amended to change the word "contractor" to "original contractor".

15. *Civil Code* §3191 should be amended to change the word "contractor" to "original contractor".

16. *Civil Code* §3210 should be amended to change the word "contractor" to "original contractor".

17. *Civil Code* §3248 should be amended to change the word "contractor" to "original contractor".

18. *Civil Code* §3260.1 should be amended to change the word "contractor" to "original contractor".

19. Although *Civil Code* §3262.5 has within it the definition of "a contractor", it should be amended as follows:

a. Delete the words "hereinafter referred to in this section as a contractor."

b. Change the word "contractor" to "original contractor".

Who Is the "Contractor" that Civil Code Section 3097(b) Exempts from Giving a Preliminary 20-Day Notice?

By Ronald J. Mandell* and
Bernard S. Kamine**

I. INTRODUCTION.

Many construction projects in California are built by "owner-builders." Instead of hiring a single general contractor to be responsible for the overall work of improvement, the owner-builder enters into several direct contracts with various contractors for separate parts of the work.[1]

Although the owner-builder is fairly commonplace in California, the state's mechanics lien laws[2] fail to address directly the owner-builder/multiple-prime contractor situation. Instead, those statutes use the all-inclusive term "original contractor" to describe any contractor who "has a direct contractual relationship with the owner," regardless of whether that contractor is responsible for all or only a portion of the work of improvement.[3] The failure of the current mechanics lien statutes to distinguish adequately between the contractors involved in an owner-builder situation where multiple prime contractors are engaged and the contractors involved in a situation in which the owner engages a general contractor for the overall work of improvement has given rise to considerable litigation over compliance with preliminary requirements for the enforcement of mechanics liens and stop notices.

The California mechanics lien laws provide that, with certain exceptions, a claimant seeking a mechanics lien or a stop notice, as "a necessary prerequisite" to the validity of that mechanics lien or stop notice, must serve a preliminary 20-day notice. The 20-day notice informs the recipient that the potential claimant is providing labor, services, equipment or materials to the project and that the potential claimant has the right to record a mechanics lien against the project or to serve a stop notice upon the project's construction lender if the potential claimant is not paid.

Under Section 3097(a) of the Civil Code,[4] unless a claimant has a direct contract with the owner, a preliminary notice must be served on the project's owner or reputed owner, construction lender or reputed construction lender and original contractor or reputed original contractor. Further, under Section 3097(b) of the Civil Code,[5] except for "the contractor," even parties with direct contracts with the owner must serve a preliminary notice on the lender only.

The authors recently battled over what type of "contractor" is exempted under Section 3097(b) of the Civil Code from giving a preliminary notice to a lender in a case involving a $1,000,000 stop notice. The case was settled before the court had a chance to rule on the issue. This Article presents two opposing arguments on what type of contractor Section 3097(b) contemplated. These arguments, though diametrically opposed to one another, lead to a single conclusion: the Legislature should amend the mechanics lien laws to acknowledge the owner-builder and to clarify the use of the term "contractor," not only in Section 3097(b) but also in other sections where that term appears alone and without qualification.

II. POLICY CONSIDERATIONS.

At the outset, it must be recognized that there is a strong public policy favoring liberal construction of the mechanics lien laws in favor of the claimants, i.e., against property owners and construction lenders. As the California Supreme Court stated in *Connolly Development, Inc. v. Superior Court*:[6]

> The mechanics' lien derives from the California Constitution itself... no other creditors' remedy stems from constitutional command.... Moreover, the courts have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.[7]

On the other hand, there are the immediate public policies driving Section 3097. The purpose of the preliminary 20-day notice is to forewarn those persons whose rights may be affected by liens and stop notices. Once notified, those people can take steps to insure that potential claimants are paid and to prevent the recording of mechanics liens and the serving of stop notices. Because an owner already knows of the potential claims of all contractors with whom it has a direct contract, there is no need for those contractors to give a preliminary notice to the owner. Thus, Section 3097(a) expressly exempts direct contractors from the obligation to give the 20-day notice.

Similarly, when one contractor is responsible for the overall project (i.e., a general contractor), the construction lender usually has knowledge of that contractor's involvement. Typically, the loan is conditioned upon the lender's receipt of a copy of the contract. Sometimes the lender takes an assignment of the contract with the general contractor's express written consent. However, when no general contractor is involved and the owner deals directly with numerous speciality contractors, it is difficult for the lender to learn of the existence of all potential lien and stop notice claimants. Accordingly, to enable the lender to take steps to protect itself, the lender needs the preliminary 20-day notice from all contractors about whom the lender is not likely to be aware.

III. THE STATUTORY CONSTRUCTION ISSUE.

The California mechanics lien laws specifically define many words and phrases.[8] Under these laws, the universe of contractors is divided into just two categories: "original contractors" and "subcontractors." An "original contractor" is defined as one who has a direct contract with the owner,[9] a "subcontractor" is defined as one who does not have a direct contract with the owner.[10]

Although "original contractor" and "subcontractor" have definite meanings, nowhere in the statutes is the generic term "contractor" defined.[11] Worse yet, that term is used indiscriminately to mean different things in different contexts. Sometimes "contractor" refers to an original contractor,[12] and sometimes it refers to a subcontractor.[13] Sometimes "contractor" refers to both original contractors and subcontractors,[14] and sometimes it is difficult to de-

Continued on page 46

"Who Is the "Contractor" that Civil Code Section 3097(b) Exempts from Giving a Preliminary 20-Day Notice?

Continued from page 45

termine to whom the term refers.[15]

Because the term "contractor" lacks a definite meaning in the mechanics lien laws, the courts have been compelled to construe its meaning in light of its context and the purposes of the statutory scheme. For example, in *Korherr v. Bumb*,[16] the plaintiff, a licensed flooring contractor, entered into contract with an owner-builder to furnish the material and labor to install flooring in a construction project. There was no general contractor responsible for the whole project. The owner-builder had entered into numerous contracts directly with plumbers, electricians and other speciality contractors. After receiving only a partial payment, Korherr filed a stop notice with Perpetual Savings, the construction lender. The owner-builder subsequently filed bankruptcy and the bankruptcy trustee sought to claim the construction loan funds as an asset of the bankrupt estate. The issue before the court was whether Korherr was "the contractor," who, under former Code of Civil Procedure Section 1190.1(h)[17] was not entitled to file a stop notice. In the mid-1950s, when the *Korherr* case arose, Section 1190.1(h), the predecessor of current Civil Code Section 3159, provided that any one of a number of persons identified in the mechanics lien laws of the time could serve a stop notice "except the contractor."

The district court granted summary judgment in favor of the trustee, holding that Korherr was "a contractor" and, therefore, not entitled to avail himself of the stop notice remedy.[18] The Ninth Circuit Court of Appeals reversed, construing the phrase "except the contractor" as referring only to a general contractor who was responsible for the entire work of improvement. The court noted that, if Section 1190.1(h) had been intended to exempt any of the various original contractors on any given job from the right to the stop notice remedy, the statute would have used either the phrase "a contractor" instead of "the contractor" or would have used the plural word "contractors."[19]

The reasoning of the *Korherr* court should be equally applicable to the exception from the preliminary notice requirement contained in Section 3097(b). If the Legislature had intended more than one contractor to be relieved of the obligation of giving a preliminary notice to a construction lender, the Legislature would have used the plural "contractors" (or at the very least the singular "contractor" with the indefinite article "a") in Section 3097(b), instead of the singular "contractor" with the definite article "the."

Moreover, the legislative history indicates that the phrase "except the contractor" should logically apply to that same phrase in Civil Code Section 3097(b). The predecessor of Civil Code Section 3097(b) is Code of Civil Procedure Section 1193(b), which was enacted at the same time as Section 1190.1(h), in Senate Bill 594. Section 1193(b), like Sections 3097(b) and 1190.1(h), uses the phrase "except the contractor." If the Legislature intended the term "contractor" in Section 1190.1(h) to mean only the general contractor, it must have intended the same term used in an identical phrase in Section 1193(b), which it had enacted at the same time, to have an identical meaning. Naturally, the term "contractor" in Section 3097(b) should have the same meaning as that same term in Section 1193(b), the predecessor of Section 3097(b).

The contrary argument is that the court in *Korherr* was just construing the statutory language liberally to protect laborers and materialmen. As the court pointed out, "[Korherr] has the same relationship to the construction project as do the subcontractors in the above described situation. The same reasons that led the legislature to provide for the stop notice for subcontractors and materialmen apply to Korherr."[20]

Thus, the rationale for permitting Korherr to serve the stop notice was not a hypertechnical reading of the statutory language. Instead, it was a common sense analysis of the relative positions of the parties in light of the overall policies expressed by the mechanics lien laws. The court in *Korherr* limited the meaning of "contractor" in the stop notice statute in order to give as many laborers and materialmen as possible the right to serve stop notices. Applying the same approach to the construction of Section 3097(b), a court would expand the meaning of the term "contractor" to encompass more than just the general or prime contractor because such an expanded definition is more protective of laborers and materialmen and, thus, more consonant with the purposes of the mechanics lien laws. The more persons who come within the definition of "contractor" in Section 3097(b), the smaller the number of laborers and materialmen who will lose their mechanics lien and stop notice rights for failing to serve a preliminary 20-day notice on lenders.[21]

Only one case has considered what the word "contractor" means in Civil Code Section 3097. In *Kodiak Industries, Inc. v. Ellis*,[22] the plaintiff, a plumbing contractor, entered into a direct contract with the owner-builder of the construction project. When the plaintiff commenced work on the project, it had no actual knowledge of the existence of a lender or reputed lender. Thereafter, but less than twenty days after plaintiff had started working, a construction loan between the owner-builder and the defendant bank was consummated and the construction deed of trust recorded. The plaintiff did not know of the loan, and therefore, it did not serve a preliminary 20-day notice on the bank. When the plaintiff later sought to foreclose its mechanics lien against the bank, the trial court charged the plaintiff with constructive notice of the bank's lien and ruled that the plaintiff's failure to serve a preliminary notice on the bank precluded the enforcement of its mechanics lien. The court of appeal reversed on the ground that the plaintiff was under no duty to serve a preliminary notice on the bank because the bank was not a lender when the work commenced.

Regarding the exception of the "contractor" in Civil Code Section 3097, the *Kodiak* court observed:

> The exception of the "contractor" is puzzling here. Presumably it refers to someone other than "all persons who have a direct contract with the owner...." As has been noted, "[t]he Mechanics lien Law often is inartfully drawn and leaves much room for doubt, as in this instance."[23]

But, the *Kodiak* court proceeded to rely upon *Korherr* for the proposition that the word "contractor" should be "construed to mean the general or prime contractor for the entire project."[24] The *Kodiak* court also cited an argument posited by Miller & Starr:[25]

> [I]f the term "contractor" referred to the original contractor, §3097, subd. (b) "would read that 'all <u>persons</u> having a direct contract with the owner, except any <u>contractor</u> who has a direct contractual relationship with the owner' must give the notice to the lender."[26]

Miller & Starr concludes that such a reading of the statute would be nonsense, arguing that such an interpretation is unacceptable because all statutory language should be construed to have meaning.[27] Miller & Starr and the *Kodiak* court would both argue that "the contractor" referred to in Section 3097(b) is only a general contractor responsible for the overall work of improvement.

On the other hand, the application of the meaning of "contractor" in one provision of the mechanics lien laws to the term "contractor" in another provision, especially when such a practice operates to bar a claimant's recovery, cannot be done without serious reflection on the policy implications involved. Also, the rarified reasoning of Miller & Starr is questionable. It is not "nonsensical" to construe Section 3097(b) to read "all persons having a direct contract with the owner, except any contractor who has a direct contractual relationship with the owner." There are many "persons" aside from "contractors" who provide labor, services, equipment or materials to a project under a direct contract with the owner. These "persons" include:

> mechanics, materialmen... lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists... teamsters... draymen, and all [other] persons and laborers... performing labor or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in, or furnishing appliances, teams or power contributing to [the project].[28]

It is these "persons," and true subcontractors as defined in Section 3104 of the Civil Code, who must give preliminary 20-day notices to lenders under Section 3097(b), not contractors who have direct contracts with the owner.[29]

However, there is no reason for treating contractors and other claimants differently with respect to giving a preliminary notice to a lender. A lender is no more likely to be aware of the identity of the numerous contractors having direct contracts with the owner than of the identity of the other persons providing labor, services, equipment or material to the project.

On the other hand, Section 3097(h) subjects "subcontractors" who fail to give preliminary 20-day notices to administrative discipline by the Contractors State License Board, which is the state agency that licenses and regulates contractors. There is no reason to subject only subcontractors to that discipline, unless only those subcontractors are required to give that notice. Consistency requires the word "contractor" in subsection (b) of Section 3097 to be synonymous with the rest of the universe of contractors, i.e., all original contractors, regardless of whether they are responsible for an entire work of improvement or only part of it. Under this reading no original contractor would have to give a preliminary 20-day notice under Section 3097(b).

However, there may be a reason for subjecting only subcontractors to discipline for failure to give a 20-day notice. Section 3097(a) of the Civil Code requires everyone who does not have a direct contract with the owner to serve a preliminary notice on the owner, lender and original contractor. In other words, subcontractors, i.e., contractors who do not have a direct contract with the owner, must always serve the owner with a preliminary notice. It is likely that Section 3097(h) was enacted to insure that owners, who are the class of persons most in need of the protections provided by the preliminary notice, are served with preliminary notices by subcontractors, who are always required to serve them. Because original contractors are not required to serve the owner with a preliminary notice, there appears to be no reason to include them in the sanction provided by Section 3097(h).

At another level, many legal commentators have read Section 3097 (and its predecessor provision) as requiring the preliminary 20-day notice from any contractor who is <u>not</u> responsible for the entire work of improvement.[30] The current mechanics lien law, including Section 3097(b), was recodified in 1969 with the passage of Senate Bill 316, which moved the body of the law from the Code of Civil Procedure and other codes to the Civil Code under Title 15 thereof. Senate Bill 316 was intended merely to recodify the mechanics lien laws; it was not intended to make substantive changes to them.[31] The legislative history of the statute suggests that only a general contractor responsible for an entire project was exempted from serving the lender with a preliminary notice under the preexisting law.[32]

Furthermore, significance must be given to every word of a statute provided that the resulting interpretation is reasonable and consistent with the apparent purpose of the statute.[33] If "the contractor" cannot mean an "original contractor," it must mean something else or the entirety of Section 3097(b) would have no effect or meaning. The only other available interpretation is that the term is synonymous with a "general contractor" who is responsible for the overall work of improvement.

On the other hand, when Civil Code Section 3097(b) was enacted, the Legislature could not have intended "contractor" in that section to mean only a general contractor because it was not until nineteen years later, with the 1988 amendments to Civil Code Section 3159, that general contractors first obtained stop notice rights. Logically, therefore, there would have been no reason to exempt general contractors from the preliminary 20-day notice requirement in 1969. As noted above, it is axiomatic that statutory language should be construed to have meaning, not to be superfluous nonsense.[34] Thus, the exemption from the preliminary notice requirement for a "contractor" must be construed to mean a contractor who had the right to file a stop notice against the lender. Until 1988 such a "contractor" could only be an "original contractor" on a multiple original contractor project.

None of the foregoing points or counterpoints in support of one or the other statutory construction of Section 3097(b) is clearly decisive. The Legislature has the courts, the contractors and the lenders in a legal morass. To leave them there is criminal; legislative clarification of Section 3097(b) is imperative.

IV. THE DUE PROCESS ISSUE.

Not only is a mechanics lien a property interest in the encumbered real property, arising from the physical contribution made to that property, but a stop notice is also a property right.[35] The basis for the stop notice is the increase in the value of the property resulting from the work or material provided by the stop notice claimant. That work or material also increases the security for the construction fund, i.e., the construction deed of trust, and the stop notice is the statutory successor to the equitable lien, which was a direct attachment to the loan fund.[36]

Both the United States Constitution, Amendments 5 and 14, and the California Constitution, Article I, Section 7, require due process of law before a person can be deprived of a property right. Due process requires fair warning of the conduct required of a person. A statute that is so vague and ambiguous that it fails to give fair warning violates due process and is unconstitutional.

> [A] statute which either forbids or requires the doing of an act in terms

Continued on page 48

Who Is the "Contractor" that Civil Code Section 3097(b) Exempts from Giving a Preliminary 20-Day Notice?

Continued from page 47

> so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. ... The decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them... or a well-settled common-law meaning, notwithstanding an element or degree in the definition as to which estimates might differ... or... "that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."[37]

Although the majority of the cases that have construed unconstitutional vagueness and ambiguity have arisen in the criminal law context, the constitutional standards established in those cases apply equally to civil statutes that, either facially or as applied, may interfere with a constitutionally protected interest.

> Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies.[38]

The standard test of constitutionality is the void-for-vagueness doctrine:

> The void-for-vagueness doctrine rejects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.... The requirements that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the possibility of caprice and discrimination in the administration of the laws, enables individuals to conform their behavior to the requirements of law, and permits meaningful judicial review.[39]

Under this standard, the use of the ambiguous, generic term "contractor" in Civil Code Section 3097(b) probably renders that statute unconstitutionally vague and ambiguous and violative of due process on its face.

Only one interpretation of that word can save the statute. Under the mechanics lien law definitions, every contractor must fall into one or the other of just two classes: An "original contractor," who has a direct contractual relationship with the owner, or a "subcontractor," who does not have a direct contractual relationship with the owner. As a result, people of common intelligence can only conclude that the generic term "contractor" in Section 3097(b) must mean either original contractor or subcontractor. Of those two choices, the context allows only one: original contractor.

On the other hand, some cases suggest that only civil statutes which prohibit conduct are required to be reasonably definite in order to comply with substantive due process.[40] Therefore, because Civil Code Section 3097(b) does not involve prohibited conduct, the foregoing substantive due process argument would have no application.

Furthermore, even assuming that Section 3097(b) must be reasonably definite and certain so as not to violate substantive due process, construing "the contractor" to mean a general contractor with overall responsibility for the entire project is reasonably certain and definite.

> Statutes will be upheld unless their unconstitutionality as to vagueness clearly, positively and unmistakenably appears.... Indeed, reasonable certainty under the circumstances is all that is required; for statutory provisions will not be declared void for uncertainty if any reasonable and practical construction can be attached to the language.[41]

Interpreting Section 3097(b) as exempting contractors with overall responsibility for an entire project from the preliminary 20-day notice requirement is both reasonable and practical. This interpretation gives a singular effect to the singular term "the contractor." It also comports with the reasons for giving preliminary notices to lenders because only those claimants whose identity is least likely to be known to the lender are required to give the lender a preliminary 20-day notice. Furthermore, the authorities, including the only cases that have addressed the issue, have had no difficulty in reaching the conclusion that "the contractor" refers to the general contractor.

> It goes without saying that "all presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appear...." Further, "reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." Also, it is not required that a statute, to be valid, have that degree of exactness which inheres in mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct.[42]

It may be that Civil Code Section 3097(b) does not have the degree of exactness of a mathematical theorem. However, the term "the contractor" as used in the mechanics lien laws is certain enough that the only two courts that have discussed the term and numerous commentators agree that it means a general contractor responsible for the overall work of improvement.

On the other hand, the statute contains no textual basis for this construction. Contractors with direct contracts with an owner for part of a project are not told by the language used in Section 3097 that they risk losing their valuable mechanics lien and stop notice rights by failing to serve a preliminary 20-day notice. If this is what the Legislature intended Section 3097 to mean, then the statute fails to "enable individuals to conform their behavior to the requirements of law." The wording of the statute does not apprise them of what the requirements of the law really are.

Another significant problem with construing "the contractor" to be only a general contractor with overall responsibility for the entire work of improvement is defining

that elusive phrase "entire work of improvement." For example, it is common for an owner to exclude such work as landscaping, floor covering, furnishing built-in appliances, tile work or any number of other specific items from a contract that otherwise covers an entire building. Do any of those exclusions take the contract out of the realm of one for the entire work of improvement? Again, the statute is so vague that people of ordinary intelligence would have to guess at its meaning at the hazard of losing valuable property rights.

Furthermore, the Contractors State License Board instructs contractors that no contractor who is a "prime contractor" (defined as "original contractor") has to give a preliminary 20-day notice as a prerequisite to recording a lien or serving a stop notice.[43] Many contractors and many of their trade associations have also read Section 3097(b) that way. These are all people of ordinary intelligence and, if the phrase "the contractor" in Civil Code Section 3097(b) refers only to a general contractor with overall responsibility for an entire project, then they have been grossly misled for over twenty years by the language of that section.

On the other hand, the Board's and contractors' misreading of the statute is not the law. The Board and contractors should conform their views to the law, not *vice versa*.

As with the statutory construction arguments, the due process points and counterpoints fail to decide the controversy. The Legislature must step in and explain Section 3097(b).

V. THE STATE CONSTITUTIONAL ISSUE.

Article XIV, Section 3 of the California Constitution provides:

> 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.

If the Legislature has enacted a statute that is so vague and ambiguous that reasonable contractors cannot tell what is required of them, then the Legislature has violated its duty under Article XIV, and the offending statute is rendered void. To preserve the validity of Section 3097(b) under Article XIV, that statute must be construed in a way that preserves and protects stop notice and mechanics lien rights. If the Legislature intends to condition or restrict the enforcement of liens and stop notices, it must do so in a way that is clear, unambiguous and understandable to reasonable contractors. Section 3097(b) would only meet this requirement if the term "contractor" means "original contractor."

On the other hand, the substantive due process analysis probably applies as well to this state constitutional provision. Thus, if construing "the contractor" to be a general contractor with overall responsibility for the entire project passes muster under due process, then it should also be acceptable under Article XIV of the state constitution.

VI. CONCLUSION.

The ambiguity in Section 3097(b) resulting from the use of the generic phrase "the contractor" has created an intolerable problem for California's multi-billion dollar construction industry. Instead of waiting for the courts to sort it out—at the potential loss of millions of dollars by contractors or lenders—the Legislature should act immediately. The section should be amended to designate either an "original contractor" or a "general contractor." If it is to be a "general contractor," then that term should be separately defined as "the 'A' or 'B' licensed original contractor who is responsible for the overall work of improvement under its contract with the owner."[44] What constitutes the "overall work of improvement" should also be defined by the Legislature.

While the Legislature is at it, the numerous other ambiguous uses of the generic term "contractor" in the mechanics lien laws should also be cleared up.[45]

Endnotes

1. The rise of construction managers has accelerated this trend. They usually advise owners and manage projects, but do not enter into any subcontracts with the contractors. Instead, the owner enters into those contracts directly. *See, e.g.*, American Institute of Architects Document A101/CM-1980, Standard Form of Agreement between Owner and Contractor, Construction Management Edition, which the AIA advises "has been prepared with multiple prime Contractors in mind, so if a single general Contract is let, AIA Document A101 should be used."
2. Cal. Civ. Code § 3082 *et seq.*
3. Cal. Civ. Code § 3095.
4. Cal. Civ. Code § 3097(a), which provides in pertinent part:

   Except one under direct contract with the owner... every person who furnishes labor, service, equipment, or material for which a lien otherwise can be claimed under this title, or for which a notice to withhold can otherwise be given under this title, shall, as a necessary prerequisite to the validity of any claim of lien, and of a notice to withhold, cause to be given to the owner or reputed owner, to the original contractor, or reputed contractor, or the construction lender, if any, or to the reputed construction lender, if any, a preliminary notice as prescribed by this section.
5. Cal. Civ. Code § 3097(b), which provides in pertinent part:

   Except the contractor..., all persons who have a direct contract with the owner and who furnish labor, service, equipment, or material for which a lien otherwise can be claimed under this title, or for which a notice to withhold can otherwise be given under this title, shall, as a necessary prerequisite to the validity of any claim of lien, and of a notice to withhold, cause to be given to the construction lender, if any, or to the reputed construction lender, if any, a written notice as prescribed by this section.
6. 17 Cal. 3d 803, 553 P. 2d 637, 132 Cal. Rptr. 477, (1976).
7. *Id.* at 826-827.
8. *E.g.*, "original contractor" (Cal. Civ. Code § 3095), "subcontractor" (Cal. Civ. Code § 3104), "contract" (Cal. Civ. Code § 3088), "materialman" (Cal. Civ. Code § 3090) and "construction lender" (Cal. Civ. Code § 3087).
9. Cal. Civ. Code § 3095.
10. Cal. Civ. Code § 3104.
11. The term "prime contractor" also is not defined. There appears to be a split between legal and industry sources on who is a "prime contractor," and that split also causes considerable confusion. Some legal commentators use that term to describe a general contractor who has overall responsibility for an entire work of improvement. *Blacks Law Dictionary* (5th ed. 1979) p. 615; CEB, *California Mechanics Liens and Other Remedies* (1988) p. 239; 2 Miller & Starr, *Current Law of California Real Estate* (1989) § 26:25, pp. 461-462. On the other hand, industry sources define a "prime contractor" in the same way the mechanics lien laws define an "original contractor," namely any contractor who has a direct contractual relationship with the owner. For example, both the American Institute of Architects, *Glossary of Construction Industry Terms* (1982) p. 16, and Smit, *Means Illustrated Construction Dictionary* (R. S. Means Co. 1985) p. 219, define prime contract as: "Contract between Owner and Contractor for construction of the Project or portion thereof," and prime contractor as: "Any Contractor on a Project having a contract directly with the Owner." Harris, *Dictionary of Architects and Construction* (McGraw-Hill 1975), p. 380, defines the terms in almost exactly the same language. Contractors State License Board, *California Contractors License Law and Reference Book* (1988 ed.), Glossary of Terms Associated with Mechanics' Liens, pp. 791-792, defines prime contractor by reference to the definition of original contractor; defines original contractor as: "Original contractor, also known as prime contractor, is usually a general contractor" and defines subcontractor as: "Subcontractor is any person who does not have a contract directly with an

Continued on page 50

Who Is the Contractor" that Civil Code Section 3097(b) Exempts from Giving a Preliminary 20-Day Notice?

Continued from page 49

owner. The subcontractor has a contract with and from the prime contractor or another subcontractor. A subcontractor is usually a specialty contractor, but can also be a general contractor." *See also* California Public Contract Code § 4113.

12. *E.g.*, Cal. Civ. Code §§ 3095, 3097(a) and 3161.
13. *E.g.*, Cal. Civ. Code §§ 3097(h) and 3104.
14. *E.g.*, Cal. Civ. Code §§ 3110, 3112 and 3153.
15. *E.g.*, Cal Civ. Code §§ 3124, 3166 and 3172 (where "contractor" probably refers to an original contractor).
16. 262 F. 2d 157 (9th Cir. 1958).
17. Former Cal. Civ. Proc. Code § 1190.1(h) is the decessor of Cal. Civ. Code § 3159. In the ..d-1950s, Section 1190.1(h) read: "Any of the persons mentioned in Sections 1181 and 1184.1, except the contractor, at any time prior to the expiration of the period within which claims of lien must be filed... may [serve a stop notice]."
18. 262 F. 2d at 160.
19. *Id.* at 161.
20. *Id.* at 162
21. In *Miller v. Mountain View Sav. & L. Assn.*, 238 Cal. App. 2d 644, 655, 48 Cal. Rptr. 278 (1965), the holding in *Korherr* was unnecessarily and inappropriately extended. The *Miller* court declared that all contractors on multiple prime contractor projects were "subcontractors," even though the mechanics lien law definition of "subcontractors" clearly excluded everyone who had a direct contract with the owner. In 1969, the Legislature rendered the *Miller* decision moot by enacting Civil Code Section 3159, which then stated, in relevant part: "For the purposes of this section, where an owner undertakes construction on his own behalf, one who contracts with him for a portion of the work is a subcontractor and shall be entitled to give a stop notice" (emphasis added). Therefore, after 1969 the mechanics lien laws expressly defined "subcontractors" as those who had no contract with the owner, and "original contractors" as the rest of the universe of contractors. However, when it came to the section of the statute describing who could serve stop notices on lenders, certain ..riginal contractors were treated as though they re subcontractors.
22. 185 Cal. App. 3d 75, 229 Cal. Rptr. 418 (1986).
23. *Id.* at 82, n. 3.
24. *Id.*
25. 1 Miller & Starr, *Current Law of Cal. Real Estate*, Pre-lien Notice, § 10:20, pp. 550-552 (rev. pt. 2, 1975).
26. 185 Cal. App. 3d at 82, n.3 (emphasis added).
27. Cal. Civ. Proc. Code § 1858; Cal. Civ. Code § 3541.
28. Cal. Civ. Code § 3110.
29. This interpretation also corresponds to the distinction in Civil Code Section 3112 between a "contractor" and other "persons" who may have direct contracts with the owner.
30. Pasadena Lawyer Gordon Hunt was a member of the Citizen's Advisory Committee to the Senate Judiciary Committee on Mechanics Liens which participated in drafting the 1969 recodification of the lien law. With regard to former Code of Civil Procedure Section 1193, the predecessor to Civil Code Section 3097, Mr. Hunt wrote in 9 *Santa Clara Lawyer* (1968) 101, 111:

    > The next major area where the Legislature has created an ultra-technical and burdensome scheme for the enforcement of the lien right is the notice requirement under Code of Civil Procedure §1193, recently amended. The new notice provisions require that for a claimant to preserve his lien and stop notice rights, he must give a written notice to the owner, the original contractor and the construction lender within 20 days after he first furnishes labor or materials to the job site, unless he is a laborer for wages or a "contractor" as that term is used in subdivision (b) of the Code of Civil Procedure §1193.31.

    Footnote 31 states:

    > The word "contractor" as used in subdivision (b) of Cal. Code of Civ. Proc. §1193 (West Supp. 1967), means the traditional definition of prime contractor, that is, a person contracting with the owner to erect the entire work of improvement as a whole. A "contractor" (usually operating as a subcontractor dealing with a prime contractor) dealing directly with an owner-builder, where there is no true prime contractor, must give the notice to the construction lender only. That is the reason for subdivision (b) which, at first blush appears to conflict with subdivision (a).

    Twenty years later, Mr. Hunt maintained the same opinion in CEB, *California Mechanics Liens and Other Remedies*, § 29, p. 62 (2d ed. 1988).

    In 2 Miller & Starr, *Current Law of California Real Estate* § 26:25, pp. 461-462 (1989) the authors state:

    > Any mechanic who has a "direct contract" with the owner, other than the general (prime) contractor, cannot enforce a mechanics lien or stop notice unless he has given the preliminary lien notice to the construction lender (or reputed lender).
    >
    > In other words, the general or prime contractor is not required to give a preliminary lien notice. Other mechanics who have a direct contract with the owner need not give a notice to the owner... but must give a notice to the construction lender. (Emphasis added)

    Matthew E. Marsh states in his treatise, *California Mechanics Lien Law and Construction Industry Practice* § 4.25, pp. 4-28 (1989):

    > [W]here there is a construction loan, even persons having a direct contract with the owner (except the general contractor or the laborer for wages or trust fund) must give this preliminary notice to the construction lender.
    >
    > . . .
    >
    > NOTE: The foregoing conclusion is based on our assumption that the legislature, in the first three words of subdivision (b) of Civil Code §3097, meant to say "Except the [general] contractor..."

31. Historical Note to Civil Code Section 3097(b) (West, 1977); Analysis of Senate Bill 316 (Grunsky, 1969), as introduced, prepared for the Senate Committee on Judiciary; Analysis of Senate Bill 316 (1969), prepared for the Assembly Committee on Judiciary.
32. Senate Bill 805 which was not enacted was the precursor to Senate Bill 316. It was the subject of an interim study by the Citizen's Advisory Committee to the Senate Judiciary Committee on Mechanics Liens. The purpose of this study was to insure that there would be no substantive change in the recodification of the mechanics lien laws. This study ultimately led to the enactment of Senate Bill 316. (Analysis of Senate Bill 316 (Grunsky, 1969), as introduced, prepared for the Senate Committee on Judiciary; Analysis of Senate Bill 316 (1969), prepared for the Assembly Committee on Judiciary.)

    Senate Bill 805 contained a proposed Section 3115(a) which section was not included in Senate Bill 316. Proposed Section 3115(a) read:

    > All claimants, other than an original contractor, or laborer, in order to enforce a lien, shall give a pre-lien notice as defined by Section 3098 not later than 20 days after the claimant has first furnished labor, services, equipment or materials to the jobsite. Any agreement made by an owner whereby the owner agrees to waive the rights conferred upon him by this section shall be void. (Emphasis added)

    A comparative analysis of Senate Bill 805 was prepared for the Senate Committee on Judiciary. That analysis first summarizes the then current law, former Code of Civil Procedure Section 1193(b), the predecessor to Civil Code Section 3097(b) as follows: "A 20 day notice to the construction lender is required from all persons having a contract with the owner except the contractor." (Emphasis in original)

    The analysis next summarizes proposed Section 3115(a) of Senate Bill 805 as follows: "All claimants must give a 20 day notice except an original contractor." (Emphasis in original)

    Finally, the analysis indicates the effect of Section 3115(a) to be: "Subcontractors who contract directly with the owner would no longer have to give a 20 day notice, as they now must do if there is a construction loan." (Emphasis added)

    The "original contractor" terminology in proposed Section 3115(a) was not carried into Senate Bill 316. Instead, the Legislature stuck with the term "contractor" that appeared in the pre-existing statute, Code of Civil Procedure Section 1193(b). From this preference for the origi... terminology, it can be argued that the new term... nology would have worked a change, and its rejection demonstrates that the term "the contractor" as used in former Code of Civil Procedure Section 1193(b) did not exempt all original

contractors from giving preliminary notices to construction lenders. Therefore, Civil Code Section 3097(b) cannot be interpreted to exempt all original contractors from the notice requirement.

33. *DeYoung v. City of San Diego*, 147 Cal. App. 3d 11, 18, 194 Cal. Rptr. 722 (1983).
34. *Id;* Cal. Civ. Proc. Code § 1858; Cal. Civ. Code § 3541.
35. *Connolly Development, Inc. v. Superior Court*, 17 Cal. 3d 803, 821, 826-827, 553 P. 2d 637, 132 Cal. Rptr. 477 (1976).
36. *Id.; accord, Westinghouse Electric Corp. v. County of Los Angeles*, 129 Cal. App. 3d 771, 181 Cal. Rptr. 332 (1982), where the stop notice was held to create an equitable garnishment on the funds due to the claimant.
37. *Connolly v. General Const. Co.*, 269 U. S. 285 (1925).
38. *Morrison v. State Board of Education*, 1 Cal. 3d 214, 231, 461 P. 2d 375, 82 Cal. Rptr. 175 (1969).
39. *Roberts v. U.S. Jaycees*, 468 U. S. 609, 629 (1984).
40. *Morrison v. State Board of Education, supra*, at 213, n.37, and *United Business Commission v. City of San Diego*, 91 Cal. App. 3d 156, 176, 154 Cal. Rptr. 263 (1979).
41. *Rutherford v. State of California*, 188 Cal. App. 3d 1267, 1276, 233 Cal. Rptr. 781 (1987).
42. *United Business Commission, supra*, at 176, n.39.
43. *California Contractors License Law and Reference Book* (8th ed.), Mechanics' Lien and Stop Notice Checklist and Flow Chart, pp. 782-788.
44. Cal. Bus. & Prof. Code §§ 7055-7057.
45. *Supra*, notes 12, 13, 14 and 15.

* *Ronald J. Mandell received his undergraduate and J.D. degrees from the University of Southern California. He is a partner in Brown & Brown Professional Corporation, specializing in construction industry matters. He is a member of the Construction Law Subsection of the Los Angeles County Bar Association Real Property Section and the Los Angeles Construction Lawyers Study Group. He represented the lender.*

** *Bernard S. Kamine received his undergraduate degree from the University of Denver and his J.D. from Harvard Law School. He is a partner with Kamine, Steiner & Ungerer, specializing in the litigation of construction industry disputes. He is a former chair of the Construction Law Subsection of the Los Angeles County Bar Association Real Property Section, is a member of the Los Angeles Construction Lawyers Study Group, and writes columns on construction law for the* Los Angeles Daily Journal. *He represented the contractor.* ■

AGC CALIFORNIA
The VOICE of the Construction Industry

Legal Briefs

Cases, statutes and legal issues of interest to AGC Members.

ISSUE 99-5

CONTRACTOR RECOVERS ATTORNEY'S FEES WHERE SUBCONTRACTOR REJECTS CONTRACTOR'S OFFER OF SETTLEMENT

By Gordon Hunt
Hunt, Ortmann, Blasco, Palify & Ross / Pasadena, California

A case decided by the California Supreme Court on July 19, 1999, (Scott Co. of California v. Blount, Inc.) should promote and foster settlement of construction disputes. In this case, Blount, Inc. was the general contractor for the construction of the San Jose Convention Center. Blount, Inc. entered into a subcontract with Scott Co. of California to perform mechanical work on the project. The subcontract contained an attorney fee provision reading as follows:

"Should subcontractor default in any of the provisions of this subcontract and should contractor employ an attorney to enforce any provision hereof or to collect damages for breach of the subcontract...subcontractor and his surety agree to pay contractor such reasonable attorney's fees as he may expend therein."

The subcontractor sued the contractor claiming that its actions had caused the subcontractor to incur large cost overruns in performing work on the project. The subcontractor alleged that the contractor by its poor management of the project had breached the contract and had been negligent. The subcontractor sought damages of over $2,000,000.00. Before trial, the contractor offered to settle for $900,000.00. The contractor made a "statutory offer" under Code of Civil Procedure §998. Section 998 of the Code of Civil Procedure provides, in part, that if an offer is made by a defendant and is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his or her post-offer costs and shall pay the defendant's costs from the time of the offer. The subcontractor made its own settlement offer of $1.5 million.

The trial judge found that the contractor's management of the project, as a general contractor, was at time inadequate constituting negligence and in breach of the implied obligation to the subcontractor of good faith and fair dealing. As a result, it awarded the subcontractor $442,054.00 in damages. After the trial, both the subcontractor and the contractor sought awards of costs and attorney's fees. The subcontractor sought its costs, including attorney's fees, for the entire lawsuit as it was the prevailing party. In other words, it had recovered an affirmative judgment of $442,054.00 against the contractor. The contract had an attorney fee clause and under Civil Code §1717, the "prevailing party" is entitled to attorney's fees. The contractor, under Code of Civil Procedure §998, sought its attorney's fees incurred after the time of its offer of $900,000.00 to the subcontractor on the ground that the subcontractor's recovery was less than the contractor's offer. The trial judge held that the contractor was entitled to its post-offer costs, including its attorney's fees and therefore awarded the contractor its post-offer attorney's fees and other costs in the amount of $633,983.60 (of which $568,925.00 were attorney's fees) and the contractor's expert witness fees of $247,652.00 for a total award to the contractor of $881,635.60. The trial court ruled that the subcontractor was entitled to its "pre-offer costs", including attorney's fees which totaled $226,812.00. Thus, the total award to the subcontractor for damages ($442,054.00) and "pre-offer costs and attorney's fees" ($226,812.00) totaled $668,866.00. That total award to the subcontractor was, of course, less than the contractor's settlement offer of $900,000.00.

The Supreme Court noted that from the above facts, two issues arise concerning the entitlement to attorney's fees and other costs. The first issue is whether or not the subcontractor could recover its pre-offer attorney's fees and other costs under the contractual provision for attorney's fees in the subcontract and under Civil Code

(Continued)

§1717 as the prevailing party, or does the Code of Civil Procedure §998 cut off the subcontractor's right to fees and other costs to which it would otherwise be entitled.

The second issue is whether or not the contractor could recover its post-offer attorney's fees either under the cost shifting provisions of Code of Civil Procedure §998 or as the prevailing party under Civil Code §1717. The Supreme Court concluded that the subcontractor was entitled to its pre-offer attorney's fees and costs and the contractor was likewise entitled to its post-offer attorney's fees and costs.

The California statutes (Code of Civil Procedure §1032) sets forth the costs that are to be awarded to a prevailing party in an action. Section 1032 provides that a prevailing party is entitled, as a matter of right, to recover costs in any action proceeding. Another section (Code of Civil Procedure §1033.5) specifies that the items allowable as costs under Section 1032 includes attorney's fees when authorized by contract. The Supreme Court held that the subcontract in this case did have an attorney fee clause and since the subcontractor did prevail in its suit for breach of contract (to the extent of $442,054.00), the subcontractor was a prevailing party on the contract and therefore under Civil Code §1717, it was entitled to its attorney's fees.

The next question was what was the effect of the contractor's offer of $900,000.00, which was more than the total amount awarded to the subcontractor (to-wit, $442,054.00 in damages and $226,812.00 in attorney's fees and costs). The Supreme Court noted that Code of Civil Procedure §998 provided that if an offer is made by defendant (here, the contractor) and it is not accepted and the plaintiff (here, the subcontractor) fails to obtain a more favorable judgment or award, the plaintiff (here, the subcontractor) shall not recover his or her post-offer costs and shall pay the defendant's (here, the contractor's) costs from the time of the offer. The Supreme Court concluded that the subcontractor (the plaintiff in this case) who rejects a settlement offer that is greater than the recovery it ultimately obtains may still recover its costs incurred prior to the settlement offer including any attorney's fees where the contract contains an attorney fee clause.

The Supreme Court then turned its attention to the second question presented as to whether the contractor could recover its post-offer attorney's fees. The Supreme Court held that the contractor could recover its post-offer attorney's fees. In coming to that conclusion, the Supreme Court stated that the very essence of Section 998 is to encourage both the making and acceptance of reasonable settlement offers and therefore, a losing defendant whose settlement offer exceeds the judgment obtained by the plaintiff is treated for purposes of post-offer costs as if it were the prevailing party. To require a defendant to show that it was the prevailing party, in order to be entitled to costs, is to misunderstand Section 998. When a defendant seeks costs on the basis that the plaintiff did not recover more than the defendant's offer, the defendant's entitlement to costs drives not from its status as the prevailing party, but by virtue of the plaintiff's failure to accept a reasonable settlement offer. The Supreme Court held there must be symmetry under these code sections. Where the plaintiff (in this case, the subcontractor) recovers less than the offer of the defendant (in this case, the contractor), the plaintiff is denied all costs that it incurs after the offer, but receives all costs that it incurred prior to the offer. To provide symmetry in the statute, where the plaintiff (the subcontractor) recovers less than the defendant's (the contractor's) offer, the defendant is entitled to its costs incurred after the offer. As a result, affording a defendant (the contractor) its post-offer attorney's fees, as well as its other costs, encourages settlement by providing a strong financial disincentive to a party, whether it be a plaintiff or a defendant, who fails to achieve a better result than that party could have achieved by accepting the opponent's settlement offer. The stick in this circumstance is that if a plaintiff fails to accept such an offer, the plaintiff runs the risk of being liable for the defendant's costs including attorney's fees if there is an attorney fee provision in the contract. The carrot is that by awarding costs to the defendant who makes the offer which is greater than the plaintiff's recovery provides a financial incentive to make reasonable settlement offers.

As a result of this decision, it is clear that the subcontractor won the battle and lost the war. The net recovery to the contractor of $881,635.00 was greater than the subcontractor's recovery of $668,866.00. The Supreme Court has now given parties to construction disputes where attorney's fees can be awarded under the contract documents incentive to settle those cases where reasonable offers of settlement are made by either side. If the plaintiff receives a reasonable offer of settlement and proceeds to go forward in any event and recovers less than the offer, then that plaintiff will be subject to the costs and attorney's fees incurred by the defendant after the offer. On the other hand, the defendant is encouraged to make reasonable offers of settlement so that if the plaintiff recovers less than the offer, the defendant will receive its costs and attorney's fees (if provided for by contract) after the date of the offer. The Supreme Court clearly acknowledged in this opinion that its ruling should provide greater incentive for parties to make and accept reasonable offers of settlement prior to trial.

Conditional Waiver and Release
Upon Progress Payment

CALIFORNIA CIVIL CODE SECTION 3262 (d)(1)

Upon receipt by the undersigned of a check from _____
(Maker of Check)

in the sum of $ _____
(Amount of Check)

payable to _____
(Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanics' lien, stop notice, or bond right the undersigned has on the job of

_____
(Owner)

located at _____
(Job Description)

to the following extent. This release covers a progress payment for labor, services, equipment, or material furnished

to _____
(Your Customer)

through _____
(Date)

only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanics' lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

Dated: _____ _____
(Company Name)

By _____
(Title)

NOTE: CIVIL CODE 3262 (d)(1) PROVIDES: *Where the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall follow substantially the form set forth above.*

Form 6-A (Rev. 1/94) BICA (213) 251-1100 A Construction Credit Reporting Agency.

Unconditional Waiver and Release
Upon Progress Payment

CALIFORNIA CIVIL CODE SECTION 3262 (d)(2)

The undersigned has been paid and has received a progress payment in the sum of $ _____

for labor, services, equipment, or material furnished to _____
(Your Customer)

on the job of _____
(Owner)

located at _____
(Job Description)

and does hereby release any mechanics' lien, stop notice, or bond right that the undersigned has on the above referenced job to the following extent. This release covers a progress payment for labor, services, equipment, or materials furnished to _____
(Your Customer)

through _____ only and does not cover any retentions retained
(Date)

before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanics' lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment or material covered by this release if that furnished labor, services, equipment or material was not compensated by the progress payment.

Dated: _____

_____
(Company Name)

By _____
(Title)

"NOTICE TO PERSONS SIGNING THIS WAIVER: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM."

NOTE: CIVIL CODE 3262 (d)(2) PROVIDES: *Where the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment, the waiver and release shall follow substantially the form set forth above.*

Form 6-C (Rev. 1/94) BICA (213) 251-1100 A Construction Credit Reporting Agency

Conditional Waiver and Release Upon Final Payment

CALIFORNIA CIVIL CODE SECTION 3262 (d)(3)

Upon receipt by the undersigned of a check from _____
(Maker of Check)

in the sum of $ _____ payable to
(Amount of Check)

_____ and when the check has been
(Payee or Payees of Check)

properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanics' lien, stop notice, or bond right the undersigned has on the job of _____ located at
(Owner)

_____
(Job Description)

This release covers the final payment to the undersigned for all labor, services, equipment or material furnished on the job, except for disputed claims for additional work in the amount of $ _____

Before any recipient of this document relies on it, the party should verify evidence of payment to the undersigned.

Dated: _____

_____
(Company Name)

By _____
(Signature)

_____
(Title)

NOTE: CIVIL CODE 3262 (d)(3) PROVIDES: *Where the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a final payment and the claimant is not , in fact, paid in exchange for the waiver and release or a single payee check or joint check is given in exchange for the waiver and release, the waiver and release shall follow substantially the form set forth above.*

Unconditional Waiver and Release Upon Final Payment

CALIFORNIA CIVIL CODE SECTION 3262 (d)(4)

The undersigned has been paid in full for all labor, services, equipment or material furnished

to _____
(Your Customer)

on the job of _____
(Owner)

located at _____
(Job Description)

_____

and does hereby waive and release any right to a mechanics' lien, stop notice, or any right against a labor and material bond on the job, except for disputed claims for extra work in the amount of $ _____.

Dated: _____

_____
(Company Name)

By _____
(Signature)

_____
(Title)

NOTICE TO PERSONS SIGNING THIS WAIVER: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

NOTE: CIVIL CODE 3262 (d)(4) PROVIDES: *Where the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a final payment and the claimant asserts in the waiver it has, in fact, been paid the final payment, the waiver and release shall follow substantially the form set forth above.*

CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Civil Code Section 3262(d)(1)

Upon receipt by the undersigned of a check from _____
(Maker of Check)

in the sum of $_____ payable to _____
(Amount of Check) (Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice or bond rights the undersigned has on the job of_____, located at
(Owner)

_____ to the following extent only:
(Job Description)

Labor, services, equipment or material (hereinafter "Work") furnished to _____
_____, through _____,
(Your Customer) (Date)

the date of the application for payment/invoice of the undersigned.

This document does not release any mechanic's lien, stop notice, bond or contract rights for: (a) any retentions retained before or after the release date; (b) Work beyond the scope of the contract, furnished before the release date, for which payment has not been received; (c) Work furnished after the release date; or (d) contract rights. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.

Dated: _____

_____
(Company Name)

By _____
(Signature)

_____
(Title)

NOTE: CIVIL CODE §3262(d)(1) PROVIDES: *Where the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall follow substantially the form set forth above.*

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

California Civil Code Section 3262(d)(2)

The undersigned has been paid and has received a progress payment in the sum of $_____ for labor, services, equipment or material furnished to _____ (Your Customer) on the job of _____ (Owner)

located at _____ (Job Description)

and does hereby release *** any mechanic's lien, stop notice or bond right that the undersigned has on the above-referenced job to the following extent. This release covers a progress payment for labor, services, equipment or material furnished to _____ (Your Customer)

through _____, 19_ only.

This document does not release any mechanics lien, stop notice, bond or contract rights for: (a) any retentions retained before or after the release date; (b) work beyond the scope of the contract, furnished before the release date, for which payment has not been received; (c) work furnished after the release date; or (d) contract rights.

Dated: _____

_____ (Company Name)

By _____ (Signature)

_____ (Title)

*** Each unconditional waiver in this provision shall contain the following language, in at least as large a type as the largest type otherwise on the document:

NOTICE: TO THE EXTENT PROVIDED IN THIS DOCUMENT, THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY, AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. TO THE EXTEND PROVIDED HEREIN, THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

NOTE: CIVIL CODE §3262(d)(2) PROVIDES: *Where the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment, the waiver and release shall follow substantially the form set forth above.*

CONDITIONAL WAIVER AND RELEASE
UPON FINAL PAYMENT

California Civil Code Section 3262(d)(3)

Upon receipt by the undersigned of a check from _____
(Maker of Check)

in the sum of $_____, payable to _____
(Payee or Payees of Check)

and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice or bond right the undersigned has on the job of _____
(Owner)

located at _____
(Job Description)

This release covers the final payment to the undersigned for all labor, services, equipment or material furnished on the job, except for disputed claims for additional work in the amount of $_____.

Before any recipient of this document relies on it, the party should verify evidence of payment to the undersigned.

Dated: _____

_____
(Company Name)

By _____
(Signature)

_____
(Title)

NOTE: CIVIL CODE 3262(d)(3) PROVIDES: *Where the claimant is required to execute a waive rand release in exchange for, or in order to induce payment of, a final payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint check is given in exchange for the waiver and release, the waiver and release shall follow substantially the form set forth above.*

\\Pasadena\company\Hunt\Form.construction\COND WAIVER - FINAL PAYMENT.wpd

UNCONDITIONAL WAIVER AND RELEASE
UPON FINAL PAYMENT

California Civil Code Section 3262(d)(4)

The undersigned has been paid in full for all labor, services, equipment or material furnished to _____
(Your Customer)

on the job of_____
(Owner)

located at_____
(Job Description)

and does hereby waive and release any right to a mechanic's lien, stop notice or any right against a labor and material bond on the job, except for disputed claims for extra work in the amount of $_____.

Dated: _____

_____
(Company Name)

By _____

_____
(Title)

NOTICE TO PERSONS SIGNING THIS WAIVER: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

NOTE: CIVIL CODE §3262(d)(4) PROVIDES: ***Where the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a final payment and the claimant asserts in the waiver it has, in fact, been paid the final payment, the waiver and release shall follow substantially the form set forth above.***