

ROGERS JOSEPH O'DONNELL

RJO Update: Construction **June 2012**

Recodification of the Mechanic's Lien Laws and Related Construction Remedies

By RJO Construction Practice Group

The construction industry's most significant statutory remedies, including the constitutionally-protected mechanic's lien, have undergone a significant modernization. Effective *July 1, 2012*, Senate Bill 189 has moved these remedies to a different section of the California Civil Code, reorganized the provisions in a more logical fashion, and provided a number of modest substantive changes to the procedures. Although the substantive changes are not extensive, they are still significant as they do impact the ability to enforce important payment remedies. A summary of the key changes is provided below. Please contact Rogers Joseph O'Donnell if you have any questions or concerns about these changes.

Reorganization of Statutes

Although the substantive changes are not legion, SB 189 has extensively changed the format of the mechanic's lien statutory scheme. It has effected a total repeal of the existing statutes at Civil Code sections 3082 to 3267, and reinstated these laws at Civil Code sections 8000, *et seq.* In the process, it has rephrased and restructured the lien laws and related remedies, including stop notices, payment and performance bonds, notice provisions and prompt payment statutes.

The reorganization divides the laws into three distinct sections: (1) Works of improvement generally [§§ 8000-8154]; (2) Private works of improvement [§§ 8160-8848]; and (3) Public works of improvement [§§ 9000-9566]. While this will initially require some familiarization, it is a more logical flow than the prior statutory scheme.

New Terminology

The new statutes provide an update for all of the defined terms, and change the names of certain key terms. For example, the term "direct contractor" replaces the more opaque term "original contractor." The more descriptive "stop payment notice" replaces the simpler "stop notice." A "preliminary notice" is the new term for a 20-day preliminary notice. And "material supplier" replaces the outdated "materialman."

Completion of Project as Trigger for Lien Deadline

"Acceptance by the Owner," a somewhat vague standard, has now been eliminated as the equivalent of project completion of the purposes of the commencing the lien deadline. Now,

completion is only achieved by occupation or use of the work of improvement, coupled with cessation of labor, or by recording a notice of completion or cessation. For public works, cessation of labor as constituting completion has been expanded from a 30-day period to a 60-day period.

Notice of Completion

An owner may now record a separate notice of completion for each direct contract (i.e., a contract between the owner and a contractor), even if the contractor's work is part of a larger general project. Each separate notice of completion must be timely served and recorded. The time period for recording the notice has been expanded from within ten (10) days to within fifteen (15) days after actual completion.

Waiver and Release Forms

The statutory forms for conditional and unconditional releases upon either progress or final payment have been revised. There is new mandatory language in these forms, and all project owners need to ensure that they "substantially" follow this new language to effectuate a proper release.

Notices in General

The process and content of various notices have been standardized. This includes the timing of notices that are served by mail versus personal service. Consistent with another recent revision, a mechanic's lien may not be required unless notice of the lien has been served on the owner or purported owner with required information, including identification of certain project information.

Preliminary Notices

As under the prior law for private projects, a claimant that contracts directly with the owner (i.e., a direct contractor) need not provide a preliminary notice to the owner to enforce a mechanic's lien and related payment remedies against the owner. However, it is now expressly codified that a preliminary notice is necessary to enforce these remedies against a construction lender. Also consistent with prior law for public projects, director contractors and their direct subcontractors are exempt from the preliminary notice requirement. However, there are now two distinct notice forms for public works and private works.

Notice of Pendency of Actions

Consistent with the January 1, 2012 revisions, a notice of pendency of the lien action (aka "Lis Pendens") must be served and recorded within twenty days of recording a lien. If not, a purchaser or encumbrancer will not be deemed to have notice of the lien. Although the new statute deems this mandatory, there is no express penalty for failing to record a Lis Pendens.

Release of Liens

The amount of a lien release bond has been reduced from 150% to 125% of the amount of the lien. As with prior law, property owner may also file a petition to release or "expunge" a

lien. Under the new law, the owner must first demand that the claimant release the lien at least ten (10) days prior to filing the petition, and must include a certified copy of the claim of lien with the petition. However, the \$2,000 cap on recovery of attorneys' fees for a successful petition has been eliminated, creating a significant incentive for a claimant with an unenforceable mechanic's lien to voluntarily release it. Also under the new law, an owner may now file a petition to release the lien even after a foreclosure action to enforce the lien has been filed. Moreover, an owner can now record a court order or judgment denying the claim of lien in order to effectuate a release, without the need for a petition. Finally, the new law clarifies that an expired lien has no effect on the property and provides no notice to subsequent purchaser or encumbrancer, meaning it can be ignored in all transactions.

Stop Payment Notice Release Bonds

There is very little change to the stop notice procedure, except that stop notice release bonds (now called "stop *payment* notice release bonds") must now clearly be issued by an "admitted surety insurer" as opposed to the more vague "good and sufficient sureties."

Payment Bonds

Consistent with prior law, a preliminary notice need only be given within seventy-five days of completion (or fifteen days of notice of completion) to enforce a payment bond claim. However, the principal on the bond is now protected from lower-tier subcontractor and supplier bond claims if they did not provide the preliminary notice prior to the principal's payments to the first-tier subcontractor.

Construction Lenders

Under the new law, all construction contracts must now identify any construction lender(s) for the project, or provide notice if a loan is obtained after the contract is executed. This is intended to make it easier for contractors to provide the requisite preliminary notice to the lender.

Design Professionals

The definition of "Design Professionals" has been clarified to expressly include landscape architects. Thus, landscape architects are now clearly entitled to pursue liens and other design professional remedies.

How We Can Assist

If you have any questions about this subject, please contact Rob Osier (rosier@rjo.com) and Tyson Arbuthnot (tarbuthnot@rjo.com), or another member of the Construction Law Practice Group (<http://www.rjo.com/construction.html>). RJO's Construction Law Practice Group regularly represents and counsels a wide variety of construction industry clients. The Construction Law Practice Group's articles are available on our web site, at http://www.rjo.com/pub_construction.html. Please visit our web site now and in the future as we continue to track and analyze developments in construction law.

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