

SB 189 OVERHAULS MECHANIC'S LIEN LAWS

The State of California has enacted sweeping changes to the lien laws. If you are a construction industry participant, you now need to know about SB 189.

The Assembly Judiciary Committee comments that SB 189's "few substantive provisions appear to be modest, thoughtful and harmonizing." Indeed, SB 189 does make some modest "substantive" improvements to the existing lien laws. However, in making those modest improvements, SB 189 causes the total repeal of the existing mechanic's lien statutes (Civil Code §§ 3082-3267). The new act moves, rephrases and restructures the lien laws, including the stop notice, payment bond, and prompt payment statutes on both private and public works.

The Assembly Judiciary Committee synopsis of SB 189 remarks:

"this venerable area of the law . . . has become unduly complex and impenetrable as the result of piecemeal amendments over the years. This bill would among other notable achievements streamline, reorganize, clarify and re-codify these statutes; it would modernize terminology and eliminate inconsistencies in language; make provisions more readable and easier to use; place provisions that apply exclusively to private or public work in separate titles, and place jointly applicable provisions in a common third title."

Thankfully, nearly all of SB 189 will not become operative until July 1, 2012, thereby providing time to absorb the new lien laws. These are some of the substantive changes:

1. Waivers and releases. The conditional and unconditional waivers and releases on progress and final payment formerly prescribed by Civil Code § 3262 have been recast. Section 8132 codifies new mandatory waiver and release forms.
2. Petition to expunge. The prevailing party on a petition to cause a mechanic's lien to be released is no longer subject to a \$2,000 cap on attorneys' fees. The prevailing party may now recover all of its reasonable attorneys' fees.
3. Notice of completion. Where there are multiple direct contractors, the owner may record a separate notice of completion with respect to the scope of work under each direct contract. The notice must be recorded within fifteen days instead of the ten day period allowed under existing law.
4. Preliminary notice. The preliminary notice required for private works is now different from the form of preliminary notice required for public works. It is now clear that a general contractor must give a preliminary notice to a construction lender on a private work.
5. Notices. Various notice periods required to be given under the mechanic's lien statutes are now standardized.
6. Completion. "Acceptance by the owner" is now eliminated as an equivalent of completion. "Completion" continues

(continued on back)

to mean occupation or use of the work of improvement by the owner, accompanied by a cessation of labor. In addition, an owner may record a notice of completion corresponding to a portion of a private work of improvement of the work is governed by a separate contract.

On publicworks, the thirty-day cessation of work period is now expanded to sixty days or more to constitute completion.

7. Lien release bond. The amount of the bond to be given in order to cause the release of the property from the affect of the lien has been reduced from 150% to 125% of the amount of the lien.
8. Notice of mechanic's lien. SB 189 carries over another recent statutory change, effective January 1, 2011, a mechanic's lien may not be recorded unless it is accompanied by proof of service of the mechanic's lien on the property owner. Failure to give the required notice renders the lien invalid.
9. Licensed landscape architects. While design professionals currently have lien rights, licensed landscape architects have now been added to the definition of "design professional" and are now accorded lien rights.
10. Design professional liens. The design professionals' lien statute (Civil Code § 3081.1, et seq.) is repealed. Those provisions are now incorporated into the new mechanic's lien statute.
11. Construction loans. Both direct contracts, meaning contracts between an owner and contractor, and subcontracts must provide a space for the identification of any construction lender(s). Where a construction loan is obtained after commencement of a work of improvement, the owner must give notice of the name and address of the construction lender(s) to each person that has given a preliminary notice.
12. Terminology. Various terms have changed. "Stop notice" is now referred to as a "stop payment notice." A 20-day preliminary notice is now referred to as a "preliminary notice." "Original contractor" has been replaced by "direct contractor" and "materialman" is replaced with "material supplier."
13. Removal of lien from title. The law now specifies that a court order or judgment dismissing a lien foreclosure action is the equivalent of the cancellation of the lien and is now a recordable instrument. Furthermore, where no action has been timely filed to enforce a lien, the claim of lien does not constitute notice of any of its content to any person dealing with the affected property. This appears to benefit title insurers.

After years of work by the California Law Review Commission on the lien laws, it appears that the Legislature felt compelled to produce a bill changing the mechanic's lien laws. While the goal of simplification is laudable, practitioners and the public will find the mechanic's lien laws no less "complex" and "impenetrable" than they were before. And while the new lien laws are marginally improved in various respects, the Legislature and the Law Review Commission whiffed on a number of opportunities to substantively improve the statutory scheme.

Finally, Section 107 of the act provides that, with the exception of thirty-six enumerated sections, the re-codification "is intended to be nonsubstantive in effect." Also, court decisions construing the former laws continue to apply to provisions of the new act to the extent that the act substantially follows the former laws. However, by substantially rewording and reordering prior provisions, and by changing terminology, the effect of prior court decisions is now uncertain and the industry's working understanding of the lien laws, developed over decades, will be similarly undermined. Over the next year, construction industry professionals will be challenged to re-learn a subject they thought they already knew.

For more information on SB 189 or the lien law remedies, please contact:

Robert G. Campbell at 310.284.2259 or rcampbell@coxcastle.com