

## MECHANIC'S LIEN LAWS OVERHAULED

The California Legislature enacted sweeping changes to the lien laws which are effective July 1, 2012 (SB 189). As of that date, the existing lien law statutes are repealed and entirely replaced.

The Assembly Judiciary Committee commented 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 lien laws. However, in making those modest improvements, SB 189 effected the total repeal of the existing mechanic's lien statutes (Civil Code §§ 3082-3267). The new act (Civil Code §§ 8000, *et seq.*) 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 remarked:

"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."

The major substantive changes which become operative July 1, 2012 are as follows:

1. Petitions to expunge. Liens may remain on title even though the statutory period to foreclose on them has expired. Responding to the problem of stale liens clouding title, the Legislature eliminated the \$2,000 cap on the recovery of attorney's fees when a party is forced to file a petition to expunge a stale lien. The prevailing party on such a petition may now recover all of its reasonable attorneys' fees.
2. Completion. "Completion" triggers the periods for exercising the various lien law remedies. "Acceptance by the owner" is now eliminated as an equivalent of completion on *private works*. "Completion" continues to be defined as occupation or use of the work of improvement by the owner, accompanied by a cessation of labor. In addition, an owner may record separate notices of completion for separate direct contracts. On *public works*, the thirty-day cessation of work period is now expanded to sixty days or more to constitute completion.
3. Notice of completion. Notices of completion or cessation may be used to attempt to reduce the period for recording liens. They must be *timely recorded and served* to reduce the usual 90-day period to record liens. The Legislature has now provided that 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. In another change, the notice must be recorded within fifteen days instead of the ten-day period allowed under existing law.
4. Preliminary notice. Preliminary notices are the foundation for owners and lenders to protect themselves from lien, stop payment notice and payment bond claims. It gives them notice of who must be paid and from whom the statutory waivers and releases must be obtained. Instead of one form of notice, the Legislature has now mandated different forms of preliminary notice for private works and public works. Unlike existing law, changes have been made which now clarify that contractors must give a preliminary notice to a construction lender on a private work.
5. 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, *et seq.*, codify new mandatory waiver and release forms. The failure to "substantially" follow

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the new forms renders them invalid and will eliminate the protections they are designed to provide.

6. Payment bonds. As before, the failure to serve a preliminary notice will not defeat a payment bond claim if notice is given within 75 days of completion (or within 15 days of recording a notice of completion). However, this “second bite of the apple” will not apply where the direct contractor has paid its subcontractor in full, thus protecting the direct contractor from claims by lower-tier subs and suppliers.

7. Lis Pendens. Claimants must serve a notice of pending action within 20 days of filing an action to foreclose on a lien claim. Otherwise, no constructive notice is given to subsequent purchasers or encumbrancers. Now, parties with an interest in the property should receive timely notice of actions to foreclose on the property. Under existing statutes, serving a notice of pending action is optional.

8. Notices. Various notices required to be given under the mechanic’s lien statutes and their methods of service are now standardized.

9. 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, consistent with stop payment notice release bond amounts. These bonds are used to free the property from the effect of a recorded lien.

10. 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 also renders the lien invalid. Under prior law, no such notice was required.

11. 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.

12. 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 statutes.

13. 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.

14. 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.”

15. 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.

Finally, the Statute 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, legal arguments should be expected over the effect of prior court decisions. Construction industry professionals are challenged to re-learn a subject they thought they already knew.

For more information on the lien law remedies, and to seek guidance on either pursuing or protecting against liens, stop payment notices and bond claims, please contact Robert Campbell at (310) 284-2259.

*If you have any questions regarding this alert, please contact:*

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