Study H-821 January 12, 2007

Third Supplement to Memorandum 2006-48

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

Pages 1 through 36 of CLRC Memorandum 2006-48 and the First and Second Supplements to CLRC Memorandum 2006-48 were presented to the Commission at the December 2006 meeting. The staff will continue presentation of the remainder of CLRC Memorandum 2006-48 at the January 2007 meeting.

This supplement analyzes additional comments the staff has received on the issues in CLRC Memorandum 2006-48 that have not yet been presented to the Commission.

Most of the comments discussed in this supplement relate to issues that the staff believes to be noncontroversial. We do not intend to discuss those matters at the meeting unless a Commissioner or member of the public requests discussion. The one exception is the proposed provision on damages for recording a false claim of lien (proposed Civ. Code § 7246). The discussion of that provision is marked with a pointing hand to indicate that it will be considered at the meeting.

Note that the statutory provisions set out in this memorandum are the current version of the Commission's proposed provisions, and **not** existing law. **Strikeout and underscore show changes to the Commission's proposal.**

The following comments are attached to this memorandum:

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

OVERVIEW OF COMMENTS

Mr. Nash's comments were attached as an exhibit to the Second Supplement to CLRC Memorandum 2006-48, but were not fully addressed at the December 2006 meeting. They are reproduced again in this supplement.

The comments from Ms. Nord are excerpts from email sent to the Commission. The reproduced excerpts include comments that are relevant to the matters under consideration in the remainder of CLRC Memorandum 2006-48. The omitted portions bear on matters that have already been addressed or will be addressed in later memoranda.

The letter from Associated General Contractors of California ("AGC"), which represents hundreds of large and small general contractors and subcontractors, is lengthy and addresses several aspects of the proposed law. Although the letter is reproduced in its entirety, this supplement only discusses the comments that bear on matters under consideration in the remainder of Memorandum 2006-48. AGC's other comments will be considered in future memoranda.

GENERAL CONCERN

AGC's overall view is that very few changes need to be made to the existing mechanics lien statute. Exhibit pp. 4-5, 8, 9, 36. AGC believes that years of stable case law have resolved most ambiguities in statutory language, and together with the existing statute provide a reasonable framework upon which practitioners currently rely. AGC is concerned that even seemingly innocuous statutory clarifications could disturb this arrangement.

AGC also warns that substantive changes favoring an owner could make lien resolution, which is key to a working mechanics lien law, much more difficult.

However, it appears that AGC may have misunderstood the aim of the current study. It seems to believe that we are working to resolve the "double payment" problem that can arise when an owner pays a direct contractor but that contractor does not pay subcontractors or material providers. See Exhibit pp. 5, 6-7, 11, 21. That is not the case. It is not clear to what extent AGC's overall concerns about the proposed law are informed by this misunderstanding of our present objective.

SECTION 7200 (PRELIMINARY NOTICE PREREQUISITE TO REMEDIES)

In general, preliminary notice is a prerequisite to enforcing a mechanics lien remedy. Proposed Section 7200(a) provides that, in the absence of an exception, a claimant must give preliminary notice to the owner, the construction lender, and "the direct contractor."

That provision contains an arguable ambiguity – when there is more than one direct contractor on a job, which one is "*the*" direct contractor to whom a claimant must give preliminary notice?

The Commission partially addressed this ambiguity at the December meeting, revising the section to require that preliminary notice be given to "the direct contractor … with whom the claimant has a direct contractual relationship." The objective of this revision was to make clear that each claimant should give preliminary notice to the direct contractor for whom the claimant provides work.

However, Dick Nash of the Building Industry Credit Association correctly points out that a lien claimant may not have a direct contractual relationship with *any* direct contractor, as the claimant may work for a *subcontractor*. Exhibit p. 2.

The staff therefore recommends that **proposed Section 7200 be revised as follows:**

> 7200. (a) Except as otherwise provided by statute, before the recording of a lien claim, giving of a stop payment notice, or assertion of a claim against a payment bond, a claimant shall give preliminary notice to the following persons:
>
> (1) The owner or reputed owner.
>
> (2) The direct contractor or reputed direct contractor ~~with~~ to whom the claimant ~~has a direct contractual relationship~~ provides work, either directly or through one or more subcontractors.
>
> ….

(Note that the term "work" is defined by proposed Section 7045 as "labor, service, equipment, or material provided to a work of improvement.")

SECTION 7420 (NOTICE OF INTENDED RECORDING OF LIEN)

This new provision would require a lien claimant to serve an owner with a copy of a lien claim before recording the claim.

AGC joins other interested parties in objecting to this provision. Exhibit pp. 16-17; see also CLRC Memorandum 2006-48, pp. 52-54. AGC objects for

substantially the same reasons as those expressed by the other parties, and these objections are addressed in CLRC Memorandum 2006-48, at pages 53 through 54.

However, AGC's main objection seems to be to the requirement that notice be given **before** recordation. Exhibit p. 17. For the reasons stated in CLRC Memorandum 2006-48 at page 54, **the staff recommends that the pre-recordation notice requirement be preserved.**

SECTION 7422 (NOTICE PREREQUISITE TO RECORDING CLAIM OF LIEN)

Proposed Section 7422 sets forth the duties of the county recorder before accepting a lien claim for recording:

> 7422. The county recorder shall not record a claim of lien that is filed for record unless accompanied by the claimant's proof of notice showing compliance with Section 7420.

Lori Nord, an attorney in San Francisco, suggests that Section 7422 should instead provide that the claim of lien be accompanied by a "proof of service by mail … showing that the claim has been mailed to the owner on or before the date of recording." Exhibit p. 40. Ms. Nord is concerned that otherwise, a clerk in a county recorder's office might be confused about what constitutes "compliance with Section 7420."

The staff **believes Ms. Nord's concern is addressed** by the staff's proposed revision to the section set forth on page 55 of CLRC Memorandum 2006-48.

☞ ### SECTION 7426 (DAMAGES FOR FALSE CLAIM OF LIEN)

Background

Section 7426, a proposed addition to existing law, would allow an owner to bring a civil action for damages when an erroneous lien is recorded to slander title or defraud:

> 7426. (a) If a claimant records a claim of lien containing erroneous information with intent to slander title or defraud, the claimant is liable for damages caused by the recordation, including costs and a reasonable attorney's fee incurred in a proceeding to invalidate the claim of lien and recover damages.
>
> ….

This section would reverse existing case law holding that the recordation of a lien claim is protected by the litigation privilege codified in Civil Code Section

47(b). See *Pisano & Associates v. Hyman*, 29 Cal. App. 3d 1, 105 Cal. Rptr. 414 (1972).

The Building Owners and Managers Association ("BOMA") commented that the section should also allow an action for damages when a claimant learns after recordation that the recorded claim is invalid, and then refuses to release it. At pages 55 to 56 of CLRC Memorandum 2006-48, the staff recommended making that change.

Concerns of AGC

AGC now expresses significant concern about the inclusion of *any* form of Section 7426, which it characterizes as a "radical" change in the law. Exhibit pp. 5-6, 19-21. Its more specific objections are discussed below.

Interference with Legal Representation of Claimants

To the extent the section renders the litigation privilege inapplicable to the recordation of a lien, AGC believes that the section could expose lien claimants' *attorneys* to damage claims. Exhibit pp. 6, 18. It will therefore be much more difficult for lien claimants to obtain legal representation when seeking to record a lien. That risks making the entire mechanics lien law unworkable.

The staff does not agree that Section 7426 would impair a lien claimant's ability to secure legal representation. The section expressly provides that "the claimant" may be held liable for damages in a subsequent action brought by the owner. Perhaps that could be made clearer in the Comment, by adding language along the following lines:

> Nothing in this section is intended to impose liability on an attorney or other agent of a claimant who records a lien on behalf of a claimant, pursuant to the instructions of the claimant.

Malicious Prosecution Action as Alternative to Section 7426

As an alternative to Section 7426, AGC suggests that the existing malicious prosecution cause of action should be sufficient to deter and redress a lien pursued with fraudulent intent. Exhibit p. 6.

However, the staff does not believe that a malicious prosecution action could be filed in response to the *recordation* of a lien. An owner almost certainly could not bring a malicious prosecution action until the lien claimant commences a frivolous lien enforcement *action* against the owner. See *Siam v. Kizilbash*, 130 Cal.

App. 4th 1563, 31 Cal. Rptr. 3d 368 (2005). A claimant who records a lien in order to slander title, would probably not bring an action to enforce the lien.

Interference with Claimant's Lien Right

AGC's main concern seems to be that Section 7426 would interfere with a claimant's ability to pursue a valid lien. The threat of liability could intimidate claimants, and might be used by an owner as a threat in lien negotiations. Exhibit pp. 6, 19-21. This is a valid concern, especially when the amount of the lien claim is small or the claimant unsophisticated.

In general, the litigation privilege protects *any* publication required or permitted by law in anticipation of prospective litigation. *Silberg v. Anderson*, 50 Cal. 3d 205, 212, 786 P.2d 365, 266 Cal. Rptr. 638 (1990). The rationale underlying the privilege is to provide "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Silberg*, at 213.

Consistent with that rationale, the privilege has been afforded an extremely broad scope. Conduct protected by the litigation privilege generally remains protected **even when the conduct is alleged to be fraudulent or malicious**. *Silberg*, 50 Cal. 3d at 213, 216.

The same general rationale applies to the right to record a lien, which is a prerequisite to litigation to enforce the lien. The threat of suit under proposed Section 7426 could deter claimants from pursuing their constitutional lien rights in court.

Analysis

The purpose of proposed Section 7426 is to provide a remedy to an owner when a claimant abuses the lien procedure with intent to slander title or defraud. For example, a contractor could record an entirely baseless lien in order to harass the owner. At a minimum, that would impose procedural hassles on the owner, who must act to clear the lien. In some circumstances, where the lien interferes with a pending sale or refinance, the owner could suffer a significant loss.

The standard for liability under Section 7426 is high. The owner must prove intent to slander title or defraud. Innocent error on the part of the claimant would not meet that standard. A claimant who acts in good faith would have little reason to fear liability.

However, a claimant with a valid lien could be deterred from recording the lien merely by the expense and hassle involved in defending against a Section 7426 action. Even if the claimant would expect to prevail in the action, the

claimant might still decide against recording a lien. That would seem to be the type of intimidation that the litigation privilege is intended to prevent.

Thus, the Commission is presented with a balancing of policy concerns. Is the value of the procedure as a protection for owners against slander of title worth the negative effect that the section would have on the ability of legitimate claimants to pursue their constitutionally protected lien rights in court?

Alternatives

There might be some ways in which the intimidation effect of proposed Section 7426 could be reduced. For example:

(1) Provide that a damage claim may not be brought unless the owner first prevails in the proposed lien release procedure (Section 7480). The validity of the lien could be determined relatively inexpensively. If the lien is upheld, then the threat of damages for slander of title would be eliminated.

(2) Provide that a damage claim may not be brought unless the 90 day period for commencement of a lien enforcement action has run, without an action being filed or the lien voluntarily released. Under such a rule, a good faith claimant could act to avoid liability by enforcing or releasing the lien.

    If the lien is enforced and is found to be invalid, the owner could then pursue a malicious prosecution action (rather than an action under Section 7426).

The staff is unsure that either of these alternatives sufficiently addresses the concern that a claimant with a valid lien would be deterred by the **threat** of a damage suit being filed, especially if the claim is for a small amount or the claimant is unsophisticated.

Recall that there is judicial precedent recognizing the application of the litigation privilege to the recordation of a mechanics lien. Reversal of that holding would be a significant substantive change in the law.

The Commission needs to **consider the competing arguments and decide whether a remedy of the type provided by Section 7426 should be added to existing law,** with or without limitations on when the action could be filed. If the Commission decides such a reform is advisable, it should further consider whether to propose the reform in the instant study or wait until a later time.

SECTION 7432 (LIEN LIMITED TO WORK INCLUDED IN CONTRACT OR MODIFICATION)

Proposed Section 7432 limits a lien claim to work specified in a construction contract, if the claimant has notice of the contract.

Ms. Nord supports the revision of this section proposed in Memorandum 2006-48. See Exhibit p. 1.

SECTION 7460 (TIME FOR COMMENCEMENT OF ENFORCEMENT ACTION)

A provision of proposed Section 7460 would render a lien claim unenforceable based on the failure to record a lis pendens within 100 days of the recording of the lien. AGC does not support this provision. Exhibit pp. 17-19.

Instead, AGC supports a revision of the section that is discussed in CLRC Memorandum 2006-48, in which the failure to record the lis pendens would invalidate the lien claim only as to a subsequent purchaser without notice of the claim. See CLRC Memorandum 2006-48, pp. 70-71. As an alternative, AGC suggests a revision in which a lien claimant is given 120 days after commencement of a lien enforcement action to either serve the owner with notice of the action, or record a lis pendens.

The staff has not received any formal comments on the proposed law from the title industry, but a representative of the California Land Title Association ("CLTA") has informally indicated that CLTA generally supports the version of Section 7460 in the tentative recommendation. CLTA indicates that virtually every purchaser of property first seeks a title policy, which would provide the purchaser with notice of the lien. Thus, a rule that only protects a BFP without notice would do very little.

The staff finds that point persuasive and now recommends that proposed Section 7460 be left unchanged, except to extend the time period for recording the lis pendens to 110 days (as discussed in CLRC Memorandum 2006-48, p. 70).

SECTION 7474 (PERSONAL LIABILITY)

Ms. Nord concurs in the staff's recommended revision of this section, as set forth on page 73 of CLRC Memorandum 2006-48. Exhibit p. 40.

SECTION 7476 (LIABILITY OF CONTRACTOR FOR LIEN ENFORCEMENT)

Proposed Section 7476 requires a contractor to defend an owner in litigation when a lien claimant brings a lien enforcement action against an owner.

The Contractors State License Board has informally advised the staff that the Board is preparing a legislative proposal providing for contractor discipline for violating Civil Code Section 3153, from which proposed Section 7476 is drawn. However, Michael Brown, the Board's Chief of Legislative Affairs, advises that the proposal would impose discipline only when a contractor *who has been paid* for the work corresponding to the lien claim fails to defend the owner. Both the staff and Mr. Brown read existing Civil Code Section 3153 as requiring a contractor to defend an owner, whether paid for the work corresponding to the lien claim or not.

Mr. Brown explained that the Board's proposal represents a compromise position intended to make legislative enactment more likely. He does not necessarily support a corresponding revision to proposed Section 7476, as commenters referenced in CLRC Memorandum 2006-48 suggest. Mr. Brown points out that the Board's proposal would provide for discipline (and thereby provide more protection for an owner) in the typical and most common case in which a contractor fails to provide a defense for the owner in a lien enforcement action. He agrees the Board's proposal would fail to provide such protection in the less common circumstance in which a good faith dispute exists as to the work underlying the lien claim (thereby causing the owner to withhold payment from the contractor), but views that as a necessary legislative concession.

The staff notes that while the Contractors State License Board is seeking to add a new disciplinary provision to existing law, the Commission for the most part is seeking only to continue provisions of existing law without substantive change.

The staff therefore continues to recommend against any change to proposed Section 7476e.

SECTION 7480 (PETITION FOR RELEASE ORDER)

Grounds for Petition

Proposed Section 7480(a)(2) provides that a lien release petition may be brought on the ground that "the claim of lien is invalid under proposed Section 7424." Proposed Section 7424 provides as follows:

§ 7424. Forfeiture of lien for false claim

7424. (a) Except as provided in subdivision (b), erroneous information contained in a claim of lien relating to the claimant's demand, credits and offsets deducted, the work provided, or the description of the site, does not invalidate the claim of lien.

(b) Erroneous information contained in a claim of lien relating to the claimant's demand, credits and offsets deducted, or the work provided, invalidates the claim of lien if the court determines either of the following:

(1) The claim of lien was made with intent to slander title or defraud.

(2) An innocent third party, without notice, actual or constructive, became the bona fide owner of the property after recordation of the claim of lien, and the claim of lien was so deficient that it did not put the party on further inquiry in any manner.

Comment. Section 7424 combines former Sections 3118 and 3261. The terminology of the combined provision is conformed to Section 7418 (claim of lien).

Subdivision (b)(1) expands the bases for invalidity to include intent to slander title. If the court finds intent to slander (i.e., falsely disparage) title or defraud, common law damages are available. See Section 7426 (damages for false claim of lien).

See also Sections 7002 ("claimant" defined), 7045 ("work" defined), 7024 ("lien" defined), 7028 ("owner" defined), 7038 ("site" defined).

AGC argues that a petition should not be permitted based on an allegation that a claim of lien was made with intent to slander title. Exhibit p. 19. AGC contends that "slander of title," which is a cause of action, is a "non sequitur" in this context, and is also duplicative of an allegation that a lien claim was made with intent to defraud. AGC instead suggests allowing a petition to be grounded on an allegation that a lien claim is "patently frivolous," and urges incorporating the sanction standard under Code of Civil Procedure Sections 128.5 and 128.7.

The staff has recommended that Section 7480(a)(2) be deleted from the proposed law in its entirety. See CLRC Memorandum 2006-48, p. 78. That would moot the first part of AGC's suggestion.

As to the remaining objections:

(1) Slander of title and fraud are very similar, but not identical. Slander of title requires the false and **malicious** publication of a disparaging statement regarding title to property. *Southcott v. Pioneer Title Co.*, 203 Cal. App. 2d 673, 21 Cal. Rptr. 917 (1962). Fraud requires intentional misrepresentation, but generally does not require malice. See, e.g., Civ. Code § 3294.

(2) The term "patently frivolous" is not used in either Code of Civil Procedure Section 128.5 or 128.7. The term "frivolous" is defined in Section 128.5 as meaning "totally and completely without merit" or "for the sole purpose of harassing an opposing party" (Code Civ. Proc. 128.5(b)(2)). A lien that is totally without merit could be dismissed on other grounds provided in Section 7480, which look to the factual merits of the lien. See, e.g., Section 7480(a)(3)-(5).

The staff **does not recommend adopting AGC's suggestion on this issue.** It seems unlikely that a reference to slander of title would cause any significant problems.

Jurisdiction

Mr. Howard Brown suggests that proposed Section 7480 should explicitly require that a lien release petition be filed in the county in which the lien was recorded. Exhibit pp. 38-39.

The staff believes this concern is addressed by proposed Section 7052, which provides:

> 7052. The proper court for proceedings under this part is the superior court in the county in which a work of improvement, or part of it, is situated.

The staff will add a reference to Section 7052 to the Comment to Section 7480.

Contractor Discipline

The discussion at page 82 of CLRC Memorandum 2006-48 misstates a concern raised by Michael Brown of the Contractors State License Board. Mr. Brown has since spoken with the staff and clarified that he intended to suggest the following revision to proposed Section 7480(b):

> (b) This article does not bar any other cause of action or claim for relief by the owner of the property, <u>including but not limited to the filing of a complaint with the Contractors State License Board,</u> nor does a release order bar any other cause of action or claim for relief by the claimant, other than an action to enforce the claim of lien that is the subject of the release order. However, another action or claim for relief may not be joined with a petition under this article.
>
> ….

That change would provide useful clarification. **The staff recommends that it be made.**

SECTION 7490 (COURT ORDER)

Proposed Section 7490 prescribes the content of a court order "dismissing an action to enforce a lien." Mr. Howard Brown points out that an "action" to enforce a lien may include a cause of action that is not based on the lien (for example, a cause of action for breach of contract). First Supplement to CLRC Memorandum 2006-48, Exhibit p. 19. It is therefore possible that a court might dismiss a cause of action to enforce a lien, without dismissing the entire action.

The staff recommends that proposed Section 7490(a) be revised as follows:

> 7490. (a) A court order dismissing ~~an~~ a cause of action to enforce a lien or releasing property from a claim of lien, or a judgment that no lien exists, shall include all of the following information:
> …..

Mr. Brown also suggests that Section 7490 should explicitly provide that the court order is to be recorded in the county where the lien was recorded. Exhibit pp. 38-39. The staff believes that this concern is addressed by proposed Section 7056, which provides:

> 7056. ….
> (b) If this part provides for recording a notice, claim of lien, release of lien, payment bond, or other paper, the provision is satisfied by filing the paper for record in the office of the county recorder of the county in which the work of improvement or part of it is situated.
> ….

The staff will add a reference to Section 7056 to the Comment to Section 7490.

Respectfully submitted,

Steve Cohen
Staff Counsel

Exhibit

COMMENTS OF LORI NORD

From: Lori Nord <lnord@mjmlaw.us>
Date: October 24, 2006
To: bhebert@clrc.ca.gov
Subject: Re: Mechanics' Lien Law Message

I have the following comments with respect to your memorandum and supplement to your memorandum:

….

3) Section 7432

Your proposed modification is better than the original revision. However, I do not believe a laborers' lien should be so limited unless they had actual or constructive notice of the fact that the TERMS of the contract between the owner and direct contractor did not call for the labor. A person could obviously have knowledge that there is a contract between the owner and direct contractor but not know that the particular labor or material being supplied to improve the property is not part of that contract. This should be revised.

Thank you for your consideration of these comments.

Sincerely,

Lori A. Nord

COMMENTS OF DICK NASH

From: Dick Nash <dnash@bicanet.com>
To: Steve Cohen
Subject: Response to Memo 2006-48
Date: December 4, 2006

Steve Cohen
Staff Counsel
California Law Revision Commission

Dear Steve,

(1) Definition of "Days" –
In the comment section for 7055 (page 18) a reference is made to "Sections 10 (computing time), 11 (holidays)". Are these sections part of the Code of Civil Procedure? We find the following sections from the code of civil procedure to be most helpful in understanding when an action must be taken under the mechanic's lien law:
Section 10 –Holidays
Section 12 – Computation of time, first and last days
Section 12a – Computation of time where last day for performance of act is holiday
Section 12b – Public office closed for whole of day to be considered as a holiday.
I believe a reference made to these sections would be most beneficial.

(2) Section 7200 (Preliminary notice requirement) –
Staff recommends that 7200 and 7202 be combined (page 36). Proposed section 7200 in identifying who is required to be given a preliminary notice states in (a)(2):
"The direct contractor or reputed direct contractor with whom the claimant has a direct contractual relationship."
Under this language could it be argued that a supplier who has a direct contract with a subcontractor, not the direct contractor, would not be required to send a preliminary notice to the direct contractor because he does not have a direct contract with the direct contractor. I assume that what is intended here is that notification be given to the direct contractor under whose direct contract the claimant is supplying labor or material, etc.

~~(3) Section 7208~~
~~I would suggest that the word "direct" be added to the recommended modification of 7208(b) (page 41) as follows:~~
~~"(b) If a claimant provides work pursuant to contracts with more than one direct contractor, the claimant shall give a separate preliminary notice with respect to work provided to each direct contractor.~~
(withdrawn by Mr. Nash)

(4) Section 7210 (Direct contractor's duty to provide information) –
On page 41 you report that Graniterock asserts that one of the most significant problems for lower tier subcontractors and suppliers in protecting lien rights is obtaining the information required to give a preliminary notice in a timely fashion. (This statement reflects their and my concern about the current law.) I am wondering if the new language in 7106, which now uses the word "may", when identifying source documents which "may" be used for lender, owner, direct contractor and surety name and address information, is sufficient to relieve a claimant from the necessity of obtaining those documents. If it were to be necessary for subs and suppliers to prove that the address of the person to be notified was not shown on the documents in subdivision (a) in order to send the notice to the place of business of those parties, their ability to establish their lien rights would be greatly diminished. As indicated by Graniterock subs and suppliers have no leverage in obtaining these documents from the parties holding them nor do they (as I contend) have reasonable means to acquire those documents from public sources.

I hope these comments have been helpful and, again, I would like to express my appreciation for having the opportunity to have input in this matter.

H. Richard (Dick) Nash
Building Industry Credit Association
2351 W 3rd St.
Los Angeles CA 90057
213-251-1179

AGC CALIFORNIA
The VOICE of the Construction Industry

November 30, 2006

CALIFORNIA LAW REVIEW COMMISSION
4000 Middlefield Rd. Room D-1
Palo Alto CA 94303-4739

Attention: Steven Cohen, Esq., Staff Counsel

Re: Tentative Recommendation – Mechanics Lien Law H-821

Dear Mr. Cohen:

The Associated General Contractors of California (AGC) respectfully makes these comments to the Law Review Commission's Tentative Recommendations on the Mechanic's Lien Law. The following is presented from the AGC's Legal Advisory Committee.

Who is the AGC

The AGC represents hundreds of large and small general contractors, as well as many specialty subcontractors. Many of AGC members work on both public and private works. AGC members experience both the problem of not being paid for work performed, and having to utilize lien remedies, and the problem of having to pay twice, when payments to a subcontractor are not in turn paid to a supplier or lower tier subcontractor. As a result, among stakeholders, AGC members are in a unique position to see "both sides" of the issue – the need for these collection remedies, and also, the need to address potential for abuse, or confusion in the lien law.

AGC's Summary Position – Much of the Lien Law works fine and should not be unduly modified, though certain changes are appropriate

AGC has reviewed the series of commentary from other stakeholders, and the Commission's various responses. Respectfully, AGC believes the questions, answers and focus often miss the mark. There is a need for some reform of the lien law, but it must be done, if done at all, on that very premise. It appears to AGC that the Commission has set up a potentially illogical premise in stating it does not seek to change the law, only to clarify it. This will result in a stymied and unsatisfactory

legislative process. Real change will be rebuffed by the argument that the Commission is not charged with the task of making changes. If the only changes are going to be modest ones, to make language uniform, it should be asked whether practitioners are currently confused by slight language differences arising from different legislative sessions.

In the whole, case law over many years has stabilized these legislative efforts. Practitioners rely on that stable case law as a certain backdrop to potential legal issues affecting a lien, stop notice or bond claim. This case law stability in turn permits efficient settling of most claims early in litigation, unless the issue is truly novel, the owner is without funds, or there are genuine compliance issues with the lien or the underlying monetary claim is in dispute.

A real concern of the AGC is that change for stylistic or harmonizing language will re-open years of stable case law that have become reliable in the main, and both supplement and "correct" some of the "unruly beast" (as described by Mr. Acret). This very tension is apparent from the long discussions over whether the lien law should define terms such as "claimant" and "contract" – seemingly simple and innocuous, but which have generated surprising controversy.

At the same time, the opportunity is too tempting for many stakeholders, to use the Commission's effort to streamline and simplify the lien law, as a moment to push the lien law more in favor of one or another stakeholder.

The proposed "cure" to address Homeowner complaints misses the mark

AGC recognizes that the Commission has been asked to create "curative" provisions to address the perception, from homeowner complaints, that the lien law unfairly results in owners paying twice, when the contractors they hire fail to pay subcontractors and suppliers. AGC is very concerned that the curative provisions will do nothing to address this concern, while complicating the early, efficient negotiating and resolution of lien claims that is the current norm.

The AGC further believes that the answer to the problem, "why do owners pay twice", is better settled through the Contractors State License Board, and improved training of owners over how to protect their rights and track second tier payments. This should be done by vigilant use of conditional and unconditional lien releases and joint checks. While the current "Notice to Owner" requirements under Business & Professions Code section 7059 tells owners about the risk of paying twice via lien claims, it does very little to spell out how to avoid that risk. A change in this area would be more valuable to owners, than the creation of "false lien claim" remedies that may end up being used by more affluent owner groups as a threat in lien negotiations, to intimidate small contractors.

Proposed Loss of Litigation Privilege is Radical and would lead to untoward results and less efficient settlements of valid liens

The AGC is very concerned over the proposal to abrogate the litigation privilege associated with liens, which are recorded in anticipation of lien foreclosure litigation. Attorneys cannot do their jobs if fearful that they will be sued if the lien they record, or sue on for a client, subjects the attorney to liability exposure without the protection of Civil Code section 47 privilege. This would truly be a radical shift in the current law. AGC is concerned that it would dramatically alter the way liens are presented and negotiated, and make this area of legal practice far more costly and risky.

Contractors with valid lien claims, that require some substantial compliance forgiveness now afforded in law, might not be pursued due to the risk of a counterclaim against both the claimant and his attorney for "slander of title." While owners do not like the leverage a lien gives, that leverage is constitutionally protected. The proposed loss of litigation privilege would create an illogical anomaly, that a constitutionally mandated remedy, the lien, would at the same time not have the litigation privilege. Good liens that have some problems simply would not be pursued because of the counterclaim exposure. Or, the efficient settlement of lien claims would suffer by virtue of threats of counterclaims.

For truly false and fraudulent lien claims, the existing remedy of malicious prosecution after proving the lien is frivolous, is sufficient. The additional remedy of an early, expedited mini-trial on the lien also makes sense. But, permitting a counterclaim without a determination on the merits, invites trouble and uncertainty, where it will risk making the lien law unworkable.

Many of the proposed changes to the lien law are overdue and make sense. Many others do not advance the lien law, and will invite uncertainty, de-stabilize reliable case law, and increase litigation and make efficient settlement of lien claims more difficult.

Some Needed Changes are not Addressed

At the same time, because the Commission professes to not seek to make substantive changes to the lien law, AGC believes the Commission is missing a real opportunity to correct some problem laws. AGC believes there is some consensus over certain lien laws that need changing, but which to date, the Commission has not touched. Those needed changes are also addressed below. A prime example, is the Civil Code section 3252(b) notice with creates a loophole contrary to the whole "checks and balances" requiring claimants to serve timely 20-day preliminary notices to secure lien rights.

With this pre-amble, the AGC makes the following comments to the proposed new lien law provisions, highlighting those that appear the most significant.

Overview of the Problem of Owner's Paying Twice

Owners should not have to pay twice for work performed. Conversely, claimants should not go unpaid for work performed which benefits the project.

The lien law attempts to provide both owners and claimants with tools to protect themselves. The extent of training and use of those lien law tools and protections, varies widely, and that is the true crux of the problem – not abusive, false or fraudulent liens. In fact, it is the experience of most lien law attorneys that claimants are, unless well trained, very likely to lose lien rights at the various points on a project where they need to give certain required notices, by administrative failures. It is AGC's collective experience that this is the far more common failure.

Claimants must serve 20-day preliminary notices to secure lien rights in most cases, and face short strict deadlines and formalities to pursue lien rights. Conversely, owners can protect themselves by joint checks, lien releases, retentions, demanding a payment bond, notices of completion and notices of non-responsibility. The CSLB also imposes on Contractors, a $10,000 license bond to protect owners and claimants, and requires specific notices and contract terms for home improvement contracts under B&P Code 7059.

In sophisticated project administration, both claimants and owners have trained staff who are familiar with these protection tools. In most cases, these parties have forms and form books that guide them, and internal accounting policies to make sure payments are tracked, subcontractors and suppliers paid, and monies withheld from the prime contractor if proof of downstream payment is not made. In contrast, in the one time, homeowner project, the homeowner usually relies on him or herself to make payment, and in fact, usually relies on the prime contractor who may or may not share the owner's true interest. The owner will not automatically be aware of the forms and procedures needed to keep claimants paid up, and avoiding liens. On a 20 day roofing project, for example, the general contractor could be paid, and divert payment, not pay the supplier, who on the 20th day serves a preliminary 20-day notice and records a lien. In that case, the owner will pay twice unless the owner has used a joint check, demanded unconditional lien releases before paying the general contractor, and will be limited to remedies against the general contractor and the license bond.

AGC perceives that the area of the Commission's concern is the single family dwelling homeowner, building a new home or a remodel, who is untrained and unfamiliar with the lien law. AGC agrees that this is an area of concern that needs to be addressed. However, and respectfully, the current proposed changes do not fix that problem, and are not well tailored to fix that problem. In fact, the proposed changes may be counterproductive and stymie good lien law practice elsewhere, where it is currently *working,* without actually fixing the problem at hand.

AGC members are concerned over the effort to change the lien law in the area of lien steps, and new owner remedies, and loss of the litigation privilege. From AGC's standpoint, the proposed changed, unless significantly reined in, will actually and inadvertently create a host of new problems and risks. Specifically,

the scope of new owner remedies, and reduced litigation privilege, would upset years of stable case law, lien practice, and efficient settlement of liens. This would affect all lien claims, on large commercial projects and sophisticated residential projects, where the core homeowner concerns are not as present. Those more sophisticated owners may well seek to use the new remedies in ways the Commission does not anticipate, but which will fundamentally alter the way liens are currently settled out based on the face of the paperwork.

AGC's perception of Current Lien Settlement Practice

Lien claims currently can be negotiated based on the paperwork – the contractor's license, the existence of a timely and properly served 20-day Preliminary Notice, and timely and substantially accurate mechanics lien (or stop notice or bond claim), and a timely lawsuit. In many cases, regular "lien law" practitioners can quickly evaluate whether the lien passes muster or not. That is, a fairly stable negotiating paradigm currently exists, based on a combination of forms, statutes and case law.

This practice, under girded by stable case law and form driven procedures, allows attorneys to evaluate the lien compliance with some predictability. It is largely "trade practice" in filing a mechanics lien complaint to attach as exhibits, the contract, the 20-day notice and copies of certified mail receipts, and the recorded lien. Why? It allows the owner or lender's attorney (or general contractor's attorney) to immediately size up whether the lien claim is in the ballpark or not, or whether there are substantial, even fatal flaws. These documents serve as if a shorthand "title report" that attorneys settling lien claims can discuss and resolve in most cases, relying of stable rules in case law and statute over timing, form of notice, and form of service.

This predictability helps attorneys negotiate lien claims more efficiently, and without extended costly litigation. Most lien law practitioners can swiftly categorize a lien as very strong, decent, iffy, or colorably fraudulent or false. Each of those sorts of liens is negotiated differently, and also depending on whether the owner has withheld enough money from the prime contractor to avoid paying twice.

Much of the benefit of the lien law, is that it aims at certainty on many issues, that can be evaluated by examining the paperwork (assuming there is no dispute over the work and its non-payment). Any change to the law that would make evaluating a lien, more fact intensive, or prone to subjective attacks, would risk creating uncertainty, and more litigation, and less motivation to settle these cases early. The vast majority of lien claims settle early, just before or after a suit is filed. Creating more "hoops" for claimants, and new counter-claim remedies for owners, is simply going to complicate a lien settlement process that, by and large, works fairly well.

Perhaps Case Law, Forms and Trade Practice has "tamed the unruly beast" – the "If it isn't broke, do not fix it" model

Every stakeholder, including AGC, has some statute or rule that it believes does not do justice currently, or which should be changed. Many of the comments from other stakeholders reflect those industry specific concerns. However, the goal for changing legislation should not be an effort to shade or tilt the statutes slightly more one way or another to suit selected stakeholders.

Rather, the goal should be addressing the homeowner complaint issue empirically, with a focused study, and in conjunction with guidance from the CSLB; and minimizing changes elsewhere, to those that are truly needed, and where case law has not already solved the potential ambiguity. Otherwise, AGC fears the Commission's effort will be mired in each stakeholder viewing this process as an opportunity to revamp a lien law more to its industry's interest. That adjustment has taken place over the last year, and those legislative compromises explain some of the unruliness in the lien law language in places. However, that history, of key stakeholders lobbying for competing language, has meted out a stable practice tool, despite the apparent unwieldiness in some of the statutes.

Mr. Acret's critique of the language of the lien law as an "unruly beast" is somewhat accurate. However, years of good case law, plus responsible legal practice by lien law attorneys, has largely *tamed the unruly beast.* In addition to largely supported and stable case law, there exists a fairly recognized and accepted " trade practice" among attorneys on how the lien law works and its "negotiating creases". Many lien law attorneys end up handing both prosecution and defense of lien law claims, and hence, develop a balanced perspective over years of practice of what sorts of liens should be paid in full, and which sorts will get discounted, or not pursued. Also, lien law is form driven, and California's lien law enjoys excellent support from forms publishers. There are five to ten excellent handbooks on California lien law readily available. The CSLB's own website has been recently updated and provides valuable information to consumers. Local builders exchanges, the AGC, and other providers offer seminars on lien law as well.

All these elements have helped develop some consensus on basic lien law rights and defenses. While on the fringe or in some unusual circumstances there are many potential ambiguities and contested legal issues, most liens in practice do not involve those peripheral issues. Most involve a claimant who is either unpaid for base work or who has disputed extra work, and who has complied or not with the lien prerequisites. Most negotiation takes place at that level – is the money due, is the contractor licensed, did he timely and properly serve the 20-day notice, and timely record the lien and file the lawsuit or not. In most cases, if fairly apparent whether the lien rights are good or not, and whether the unpaid amount is undisputed or not. That core area of lien law should not be measurably

disturbed by an effort to improve statutory language, that currently, does not get "in the way" in most lien claim settlements.

Most lien claims are not tried, but settle soon after the lien is recorded, or soon after suit is filed, based on "rough justice", the documentation, and avoiding unnecessary litigation costs. The Commission's efforts at improving the lien law should be guided by protecting, and enhancing, the efficiency of such lien law settlements, and avoidance of injecting factual issues or counter-claim rights that will create new risks and legal uncertainty, and invite the temptation to litigate issues that are currently settled early on.

Among AGC members, there is not a consensus to make wholesale changes where by and large, the "beast" has been tamed. Conversely, AGC is concerned that efforts to refresh the lien law by new legislation will undoubtedly invite a re-opening of case law, and actually create more uncertainty. AGC believes a "do no harm" approach that is both gradual and minimal may be better than a total revamp of the law, where the Commission itself states it does not intend to make significant changes.

Many attorneys practicing lien law find themselves frequently on both sides of the same issue, and wisely to do not take "hardball positions" for one client, where in the next case the attorney may represent a client on the opposite side of a similar lien law issue. This moderates the lien law considerably, at least among those attorneys who practice in the lien law area extensively. There is not truly a "plaintiffs bar" and a "defendants bar" that predominates in other areas of the law, such as personal injury/insurance defense, and home defect litigation. There are specialty areas, such as surety law, lenders, developers, suppliers and subcontractors, but even there those groups themselves also have important strategic business relationships with the other stakeholders. In other words, almost everyone involved in lien law at some point "walks in the shoes" of the other stakeholders. This alone creates a business culture of resolution.

That is not to say that there are not heated disputes in construction law. Rather, because of the repeat players – contractors, large owners, sureties, lenders, and their respective attorneys – a fair amount of good will and long working relationships exists that tend to create a better climate for conflict resolution than in other legal fields, where the parties and attorneys are at constant odds and have no overarching mutual interests or business relationships. Also, because non-payment or disputes do create chain reactions on a failed project, the parties inherently recognize interdependence for cash flow, success and repeat business. The Commission should be aware of these practical considerations in its approach to the lien law.

Why change anything if the stated Goal is not to make Changes?

Additionally, the Commission has professed an intention to "steer clear" of substantive changes, outside of curative provisions for homeowners facing invalid liens. However, this creates an "unruly box" in itself for the Commission. That is, many stakeholder's comments challenge proposed changes because they view them as, indeed, changes. If there is no need to change the law, and it works fine in practice, then the changes should not be sought. "If it isn't broke, do not fix it" comes to mind.

Instead, the focus of new legislation should be primarily upon the areas where there is *broad consensus* that change is needed. That is, the Commission should either change its objective, and flatly profess that it is seeking to *change* the lien law; of, if that is not the intent, then the Commission should be fairly circumspect and not change anything except those lien laws where substantive changes are intended and needed.

Unfortunately, some of the proposed changes will make those negotiations more difficult, and more factual laden, and hence, less efficient than currently. The proposed loss of litigation privilege would be a radical departure from current practice, and would potentially "gum up" the ability to settle lien claims quickly. In AGC's experience, the bigger problem is not false or fraudulent liens, but valid liens for which the owner did not anticipate, and could have protected him or herself by vigorous payment tracking via lien releases and joint checks.

Better Coordination with CSLB and More Research is Needed to Properly Tackle Homeowner complaints effectively

As part of this view, AGC thinks the Commission should not tinker with the current lien law steps and litigation privilege based on anecdotal complaints from homeowners, who, if their contractor diverts payment, do end up paying twice to subcontractors and suppliers who perfect their lien rights. Rather, more often than not, subcontractors and suppliers fail to follow the required steps and "work for free" after losing lien rights if unpaid by the prime contractor. The problem for owners and subcontractors, is improved knowledge of simpler forms, that ensure owners are armed with the intended statutory tools to protect themselves, and subcontractors do the same.

AGC believes that the Commission should undertake a study first, of what works or not, and do so in conjunction with the Contractors State License Board (CSLB). For example, the key to owner protection is vigilant use of lien releases, but the current "Notice to Owner" language under B&P Code section really is not very helpful. It tells the homeowner to beware, but really does not deliver the key tools in a meaningful way to avoid paying twice due to the lien law. Increasing owner remedies for false or fraudulent liens is not going to cure the problem of

owners paying twice for valid liens. It is simply going to make the law more complex, and invite more litigation, not less.

Another consideration for the Commission is start with developing more statutory forms to minimize errors. For example, recently the judicial counsel developed eviction notices, an area where much time and cost was wasted in unlawful detainer proceedings arguing over the correctness of the notice. Current form publishers are a good resource for developing an understanding of why certain information is important and included or not.

As one example, the Commission proposes reducing the required information for a stop notice, to no longer require the statement of the "value of the contract as a whole", and simply require the claimant to state the amount of the demand, like a lien. There is a reason for the difference, and it has to do with the fact Stop Notices can be served at any time during the work in progress by the claimant, unlike a lien which cannot be recorded until the claimant is complete with its own work. A stop notice tells the owner, or lender, not only how much is owed currently, but also how much more will be owed and potentially included in further stop notices. The Commission's comments assumed that the concept of "value" had to do with the reasonable value of the work. In fact, the term "value as a whole" simply was an effort to permit a stop notice claimant to predict in good faith the total amount of work that would be done, before the claimant had finished that work. That is, the current stop notice forms give valuable information to owners and lenders seeking to determine how much total stop notice exposure they may have.

BASIC LIEN LAW OBJECTIVES

From AGC's perspective, the lien law should:

A) Be clear, concise, user friendly, and organized in logical sequence;

B) provide guidance through statutory forms whenever possible. Many contractors, owners and lenders use the lien law without an attorney's assistance, and with rapid time pressure. Preprinted forms based on statutory language minimize errors and flaws, and in turn, provide certainty. A key component for lien law, is to know immediately if a lien is valid or timely or not, based on the lien law paperwork. Clear statutory forms are of great help.

C) develop and ensure the statutes are written with "checks and balances" to avoid unfair surprise to owners, prime contractors, lenders and sureties from unheard of lien claimants who never provided a 2—day preliminary notice;

D) modernize some of the service provisions to permit express mail, UPS and Federal Express deliveries, where a receipt or tracking record exists. These delivery methods are

reliable, the current business practice, and are is a functional equivalent of certified or registered mail, more timely and less expensive; and

E) while maintaining strictness of statutory deadlines and certain form elements, continuing to permit some leeway for substantial compliance in areas of property description, reputed owner and reputed lender concepts, and other items which do not deprive the party receiving a lien, bond claim or stop notice of actual notice of claim.

The Commission's efforts appear to have these core objectives of fairness, clarity and balance. AGC's comments therefore focus on those specific areas of importance, and where AGC believes the change is important to adopt, or whether the proposed change is inappropriate. Explanation is provided for each comment based on practical consideration in the actual practice of lien law.

Organization of AGC Comments

AGC's comments largely track the order of treatment in the Commission's Tentative Recommendations. AGC also adds a section, regarding, "Areas Needing Correction Not Yet Addressed."

SPECIFIC PROPOSED CHANGES

Bifurcating the Statutes. AGC does not oppose re-codifying the lien law into two codes, Business & Professions Code for private works, and the Public Contract Code for public works. There are two dangers to consider, however: One, more and more AGC members are seeing hybrid projects that do not fit neatly into either a public or private work of improvement. An example would be the De Young Museum project in Golden Gate Park in San Francisco. While the project was on public land, and hence, no lien permitted, the City created a private non-profit corporation to accept charitable donations to fund the construction. The City Attorney's, who represent the Non-Profit Corporation, determined that since the public entity did not contract with the prime contractor, Civil Code Section 3247 did not require a payment bond from the contractor. A conjoined lien law in a single code would simplify addressing these sorts of situations.

Secondly, some commentators have rightly pointed out that much of the stable case law, is "cross-fertilized" – meaning that for many concepts, appellate decisions, legal treatises and practitioners all routinely rely on earlier public works published decisions in private works cases, and vice versa. Therefore, care should be taken to reflect that placing the statutes in different Codes is not intended to alter the reliance in a public works setting where appropriate on case law addressing private works, and vice versa.

Thirdly, for smaller contractors, and occasional lien law practitioners, there is some ease of reference to have all the lien law in one code. Also, the Public Contract Code largely addresses duties between owners and public works

prime contractors, and except for the Subcontractor Listing Law (Pub. Contract Code 4100 et seq.), many public works subcontractors do not have much reason to use that Code.

Harmonizing Terms. AGC agrees that interchangeable use of the terms, "give", "provide", or "serve" to describe the method of dispatching a notice, is a bit unwieldy and should be made uniform. However, it is equally noted that this has not proven a problem in practice, since no matter what action verb is used, the action described usually involves use of registered or certified mail, and that form of notice requirement has been uniform.

Direct Contractor. This is an improved definition, but the term "original contractor", though archaic, was not creating significant problems in practice.

Material Supplier and the Proposed Presumption. AGC does not oppose some rebuttable presumption that delivery of materials creates lien rights, so long as the Commission defines what sort of evidence could defeat the lien (and not just the presumption). This could be as follows: "A party opposing the claim of lien that relies upon this presumption, can defeat the presumption and the lien claim by proof of any one of the following, and without limitation to other sorts of proof showing a lack of use or consumption: A) that the contracting party with the supplier used the property as a storage for multiple projects; B) that the sort of materials claimed as lien were not of the type used on the project; C) establishment by proof of loss, police report or other documentation of loss, theft, or destruction of the subject materials without incorporation; or D) other evidence that tends to show the materials were not used or consumed on the property."

Notice and Service Improvements. AGC agrees with the Commission's approach of permitting use of Express Mail, UPS and Federal Express, or even a messenger service, in lieu of traditional registered or certified mail service, for notices. These other forms are equally reliable, and often much faster than registered or certified mail, and less cumbersome to carry out.

Also, in homeowner situations, often the owner is not home when mail is delivered, and the registered or certified mail is never picked up from the Post Office. These alternatives would permit claimants from using multiple methods to improve service.

The term "overnight" should not be used, since most contractors are closed Saturdays. Next day business service is a better term.

Note, the Federal Government recently amended the Federal Miller Act statutes to permit any delivery method that was express and had a tracking or receipt document system. This is the right direction for California law as well.

Electronic Mail. AGC agrees that electronic mail notices will be the wave of the future. AGC believes the proposed statute should require that the agreement to accept electronic mail notices, should be in writing. Otherwise, AGC predicts needless litigation over whether an oral agreement was made over e-mail notices. The lien law works best when compliance can be evaluated on written records alone, and a lien's validity or not is not based on oral conversations and factual disputes of that nature. Note, that for many smaller contractors and owners, they may not use a website, and personnel and e mail addresses change, so e-mail has some inherent instability to it without some protective provisions. A written e-mail agreement, like a joint check agreement, will solve most of these problems.

Notice to Surety – AGC opposes deletion of the special notice provisions of CC 3227. Instead, AGC believes CC 3252(b) should be deleted. AGC does not agree that limiting the notice to surety to the notice on the bond is an appropriate change. Sureties are registered in State, and have home offices, and often give local brokers "powers of attorney" to sign payment bonds. A copy of the payment should be readily available, but often, is hard to obtain once there are payment disputes. The current notice choices are appropriate. Sureties do not need this added protection.

Most sureties and the agents that broker surety bonds have existing reporting protocols that in most instances, result in notices eventually reaching the designated bond claims department.

AGC views this narrowing of the notice as an indirect way to reduce the unfair bite of the CC 3252(b) loophole. However, reducing the places where notices can be sent, is not a real solution, as it does not address the real problem, and risks more litigation over bond notice. AGC would prefer that CC 3252(b) be abolished completely, rather than creating potential litigation over whether bond notice was sent to the right surety address.

Proposed Lien Step Changes – Some good, some not so good

AGC endorses the new provision that makes an expired or removed lien, no longer constructive notice. The current statute states an expired lien is void. However, title companies still reflect such liens as an exception in title policies. The new statute states an expired lien is not only void but no longer constructive notice. This may be well and good, but for the intended effect to take place, the Commission must assure itself that title companies will no longer except out such dead liens from their title insurance. It is recommended that the Commission contact title insurer associations to determine how this change will affect the preliminary title report display. It may not have the intended effect. The Commission may need to cross-reference this statute into the insurance code.

The larger issue concerns the situation where there is no lis pendens recorded, and a lawsuit is pending for lien foreclosure. The lien itself without the lis pendens may not give constructive notice to later, good faith purchasers. The lis pendens statutes are no

longer mandatory. So, how does a title company know for sure that a lien is expired or not? If perfected by a timely suit, it has not expired. Traditionally, when a lis pendens was mandatory, a title company could rely on the failure to record a lis pendens within 90 days after recording of a lien, as sufficient evidence that no suit had been filed timely, and therefore, the lien was expired. Not so anymore, now that the lis pendens statute is mandatory. A title company will except the lien irregardless of the existence or not of a lis pendens. It does not want to provide a defense to a purchaser, in a lien foreclosure action, and have to prove the purchaser is a good faith purchaser since there was no lis pendens. The title company would prefer to deny a duty to defend at all, by virtue of reflecting the lien, expired or not, as an exception to the title insurance coverage.

There should be a workable solution to this dilemma, but it will require coordination with title insurers over their title insurance practices and own risk management.

AGC does not endorse the Notice of Intent to Lien – Section 7421.
AGC opposes this additional lien step. The preliminary 20-day notice already states that, if the claimant is not paid, he or she may record a lien against the property. If the prime contractor has complied with B&P Code section 7059, the prime contractor to a homeowner has provided a "Notice of Owner" that warns of the same risk. The notice of intent to record a lien is redundant, and will risk more litigation over the form of the notice, and its timing.

The Commission states that the pre-lien intent notice will result in negotiation that will resolve the lien. This may be true or not. In practice, liens are often recorded as a last resort, and hence, at the last minute. So, in many cases, the notice of intent to record a lien may only be a day or two before the lien, to avoid a statutory time bar. There will be little or no time between the two for negotiations to take place. Also, AGC sees a risk that more estoppel cases will arise, where a claimant has failed to timely record a lien after serving a pre-lien intent notice, after receiving assurances of payment that are not honored. A single, hard and fast deadline without more notices makes the law simpler.

Secondly, currently many owners' attorneys advise, upon receipt of a lien from a lower tier participant, that the owner should A) stop paying the prime contractor; and B) not pay the lien until the lien period for the project has expired, and until after lien foreclosure suit has been filed. That is, seldom will there be only one lien on a troubled project, there will be several. Many claimants will fail to serve the 20-day notice, or fail to record the lien, or if recording the lien fail to timely file suit. An owner may choose to wait until the owner knows the total exposure to all claimants before paying any claimant. So, it is not necessarily the case that the pre-lien notice will serve its intended function, of prompting early settlement before a lien is recorded.

Finally, attorneys advising lien claimants, will invariably advise, send the pre-intent notice and the next day, record the lien, to avoid the risk of a time bar.

Do not wait for an owner response, because of the increased risk of inertia and causing the lien period to lapse.

The statute of limitations for lien recording is very short after a project is complete – 30 days after a notice of completion. A busy, sole proprietor contractor could easily miss that 30-day deadline. AGC therefore sees the pre-lien intent notice, while well intentioned, as creating more trouble and uncertainty without actually insuring the benefits hoped for.

Even as drafted, the statute is awkward. It does not state any waiting period. Conceivably, forms will develop to provide for same day recording after posting of notice of intent to record a lien. That will functionally be no different than requiring the recorded lien be served.

Service by Claimant of Lien. AGC considers it unfortunate that the Government Code was amended to make service on the owner by the recorder's office, voluntary not mandatory. The Recorder has access to accurate assessor's rolls reflecting the mailing address of the record owner, and hence, such service increases the likelihood of notice. This is because the Recorder's office has procedures in place for sending such notices, and hence, will be more likely to get it right.

The one problem experienced in some Counties with Recorder Service, is that it is slow – often taking several weeks, until the lien is scanned in and indexed. So, requiring the lien claimant to serve the lien at time of recording, and attaching a proof of service, seems probably necessary in Counties where the Recorder's office refuses to mail out the lien. So, AGC supports this amendment as necessary, absent a return to mandatory mailing by Recorder's offices.

AGC is not in favor of rendering a lien void due to attorney lapse in recording a lis pendens, where the service of the complaint on the owner has timely given the owner actual notice of the perfected lien, in addition to service of the lien itself. Currently, a lis pendens for a real property claim is no longer mandatory under CCP 405.010. Under the lien statutes, and in particular Civil Code section 3261, good faith errors in a lien, which are not intended to defraud, do not invalidate a lien except as to a subsequent purchaser who takes without actual or record notice. This is a good and fair rule. It means that if the lis pendens is not timely recorded, and the property owner sells the property to a good faith purchaser, the lien may be no good as to the purchaser.

It makes no sense to punish the lien claimant and invalidate an otherwise valid and timely mechanics lien for unpaid work or materials, because the claimant's attorney did not timely record a lis pendens. The lis pendens statute is already marred by undue complexity, and because the lis pendens statute is in the Code of Civil Procedure, and the lien law in Civil Code, this requirement does get missed. However, with Court mandated "Fast Track" rules under the Government

Code's Trial Delay Reduction Act, all civil complaints are expected to be served within 45 days of filing, or the court is authorized to impose monetary sanctions on the attorney, and ultimately, dismissal. This means that in virtually ever instance, the property owner named in the mechanics lien lawsuit, *receives actual notice of the lien foreclosure action within 45 to 60 days of suit.* Since actual notice is received, it cannot only be unduly technical and punitive to invalidate a lien if the lien claimant attorney neglects to protect the lien against subsequent purchasers by timely recording a lis pendens.

Note, the lien is also mailed, before suit. So, in most cases, the owner has had at least three notices or warning- the 20 day notice, that a lien may occur if the claimant is unpaid; the lien itself; and service of the lien action lawsuit.

AGC agrees with other commentators that some Recorder's offices "bounce" documents for many technical and unapparent reasons, which could make it difficult to timely meet a shortened lis pendens deadline. Also, an owner selling real property that is known to be subject to a lien or lien action, will have a legal duty of disclosure to any subsequent purchaser. In AGC's view, the proposed use of the lis pendens statute as a further "trip wire" to invalidate a lien is unnecessary, unfair, punishes contractors for attorney neglect, and will spawn

A better rule would be this:

"Under the lien removal statue, an owner may seek to invalidate a lien for failure to timely record a lis pendens, within 120 days after filing of suit, upon proof of lack of actual or constructive notice of such lien to the owner, or demonstrated proof that the owner is a subsequent purchaser of the property taking without actual or constructive notice. There shall be a rebuttable presumption that no such actual or constructive notice exists in the absence of proof that the underlying lien foreclosure action was not served upon the owner during said 120 days period or no lis pendens was recorded within 120 days of suit."

The Broader Petition to Remove a Lien and Lack of Record Notice to a Dead Lien. AGC agrees with the broadening of the grounds to remove a lien as facially invalid, due to payment, lack of license, or procedural defects. AGC agrees with the removal of the cap on attorneys fees, though, the attorneys fee remedy should be reciprocal if there is to be a "mini-trial" on the lien remedy. If the lien is truly invalid, this procedure will have a salutary effect, and sobering one for both lien claimant and owner contesting a lien. If the lien is valid, then the owner pays the claimant's attorneys fees in beating back the mini-trial petition proceeding. If the lien is invalid, then the claimant owes attorneys fees. This puts teeth into the remedy.

Where the AGC differs, is over proposed lien removal standards and language that require factual or subjective state of mind assessments before trial

of the merits of the underlying breach of contract/payment claim. A lien is valid or not. If it is invalid, it should be removed. The area of fraudulent lien, or erroneous information, needs to be treated with some care, since currently, good faith errors do not invalidate a lien, including getting the owner wrong, the property address slightly off, etc.

The further ground of fraud as a basis to remove a lien is appropriate, since lien law currently does not permit fraudulent liens or willfully overstated ones. However, the ground of "slander of title" creates confusion and is a misuse of that term and should be deleted.

A slander of title is a form of cause of action and damage *arising from* a fraudulent or maliciously recorded lien – one that has no potential merit, and was recorded to cloud title improperly. A slander is an improper cloud on title. A valid lien is a proper cloud on title. A fraudulent lien is by definition, a slander of title, or malicious prosecution, or abuse of process. Treating "slander of title" as a separate or additional ground for lien removal, from the fraud basis, is both redundant and a non sequitur. There has to be some other factual and legal grounds for the lien first to be invalid, frivolous or fraudulent, before there can a slander of title. The other grounds already address those issues. AGC would support replacing the ground, "slander of title" with the ground, "patently frivolous", and thereby adopt and incorporate the sanction standard under CCP 128.5 and 128.7 that applies to all pleadings generally.

AGC is concerned that, what is intended as a shield to protect homeowners, will become a sword in the hands of owners of large properties, who will claim that the intent of a lien was to cloud title, therefore slander title, simply because a lien was recorded before completion of a refinance or sale, where the lien is otherwise valid. A lien is constitutionally mandated. It would be anomalous for a constitutionally mandated remedy, the lien, to also be unprivileged and a slander of title, just because of the impact or leverage the lien would have in a given circumstance. Liens often get paid at the end of a project precisely because the developer or lender is selling or refinancing and cannot do so without settling liens. Those lenders and developers can secure payment bonds, retentions, and lien releases during the project to minimize the risk of lien claims.

AGC opposes abrogation of the litigation privilege and the Statutory Counterclaim. Currently, if a party is successful on the merits, and proves a cause of action to be without legal merit, frivolous, and filed with malice, a malicious prosecution remedy exists. The new mini-trial procedure to remove an invalid lien would create a right for a counter-suit for malicious prosecution, in addition to the attorney's fee remedy and removal order. However, the Commission should not go one step further, and permit an owner to file a cross complaint for false lien, without first obtaining a favorable order from the court in the mini-trial.

AGC believes this remedy goes too far, and will create a real shift in the negotiating dynamics in settling good liens that have some potential flaw that requires substantial compliance. Many liens have some problem – the owner's name is not correct, there is a "reputed owner" situation, the 20-day Preliminary Notice was returned unopened though served by certified mail, and property description is not exact. The current statutes give some leeway to validate liens absent bad faith or unfair surprise. See CC 3261, "Mistakes and Errors as Not Invalidating Lien Except With Intent to Defraud or as to Bona Fide Purchaser."

Currently, liens that rely on some "substantial compliance" often settle, but at a discount of some sort, as the attorneys "handicap" the probable outcome at trial, and cost of going forward. Given that attorneys fees are not recoverable for lien claims, both sides recognize that extending the dispute has diminishing returns for both sides. Compromise is currently encouraged by the law, and is the practice.

Contrast this with what may happen if the tools available to Owners include an immediate Cross-complaint for false lien if there is any erroneous information in the lien, and even without any judicial finding that the lien is invalid. The risks have dramatically gone up for the claimant, but not for the owner. The owner can recover attorney's fees if proven right, but the statute is not reciprocal. The Cross complaint is the "elephant in the room" – the claimant now must discount that much more to avoid increased litigation risks. The claimant and his or her legal counsel now have to evaluate whether to record or pursue liens for unpaid work that have some flaws, simply to avoid counterclaim exposure, especially to a financially strong owner or lender.

This risk and calculus is more acute once the short time fuses for recording a lien, or filing suit are factored in. One of the constitutional and statutory protections afforded owners currently, in the lien law, is the short 90 day statutes of limitations – 90 days after completion to record a lien, shorter if there is a recorded notice of completion, and then, 90 days to file suit. Those deadlines are very easy to miss, and often are. The current practice for legal counsel is to examine the contract, invoices, 20-day preliminary notice if required, lien, and if the look proper, proceed and file suit. If the attorney no longer has the litigation privilege, and he or she records the lien, or files suit, the attorney may be now vouching for the client in a way not required elsewhere in the law. To impose a high degree of factual investigation upon counsel, under such tight statutory deadlines, is unreasonable. Many times, the claimant comes to the lawyer close to the last day. If there is no litigation privilege, and both the claimant and claimant's counsel can be sued in cross-complaint if there is erroneous information, many prudent attorneys will decline to do lien law altogether.

Most importantly, the lien law currently works as a negotiating "*arbitrage*" or settlement of competing positions. This would be thrown up in the

air with creation of a new false lien claim remedy, before any adjudication, and by elimination of the litigation privilege.

AGC appreciates that having strong remedies for false liens seems to help "cure" the complaints of homeowners who have faced liens from unpaid subcontractors, after having paid a dishonest or bankrupt prime contractor. However, the remedy is truly worse that the disease in this case. The lien removal procedure makes sense, with the proposed changes above. A successful lien removal by an owner would result in a cross complaint for slander of title or malicious prosecution. But, that drastic remedy should not be provided before the traditional time, a finding on the merits that a lien was fraudulent.

As noted above, AGC believes the better course in this area is continued collaboration with the CSLB to improve upon the "NOTICE TO OWNER" requirements, so homeowners who read the notice can immediately grasp what to do to protect themselves. AGC suggests that home improvement contractors in their notice to owners provide the statutory lien release forms (CC 3262) and the notice describe their use, and the use of joint checks. This is a far better solution to this problem, which still needs more study to determine its breadth and genesis. Before tinkering in the area of litigation privilege, the Commission should be sure by virtue of real studies and empirical data, of what the problems are and whether there are better means to cure them.

AGC opposes introduction of an attorney fee remedy for lien claims and defenses, except in the removal petition procedure. The "American rule" applies currently in lien claims – the property owner and lien claimant do not obtain attorneys fees as a prevailing party absent a contract provision to that effect. The further rationale to preclude attorney's fees as part of a lien on real property, is due to the unjust enrichment rationale behind lien claims – that the owner benefits from the work, presumably in increased use and equity in the land and its improvements. AGC believes that the Commission should not adopt a broad attorney's fee recovery for liens against owners.

Liens differ from bonded stop notices and payment bond claims, where attorneys fees are recoverable. Neither remedy is against the land. Secondly, in both cases the attorneys fee recover is intended to promote project credit providers to make prompt decisions. In the bonded stop notice situation, prompt payment of a valid stop notice may result in lien avoidance. The lender holds the purse strings of a project and hence can make decisions over holding back money to address stop notice claims. In the case of sureties, the attorney's fee remedy appears to represent a recognition that absent such incentive large insurers and sureties providing such bonds might have an incentive to delay, unlike private property owners. In this way, the attorney's fee right under a bond claim is akin to the bad faith right against an insurer, creating a monetary incentive to avoid delay or avoidance by creating a legal consequence.

Finally, not only are the rationales different, the current regime seems to be working. Because no one recovers attorneys fees on a lien, all sides have an incentive to evaluate the risks and lien paperwork quickly, an settle quickly. Most lien claims settle with waiver of interest and court costs, unless actively contested, in the spirit of compromise. This trade practice of early compromise and settlement would be jeopardized by injecting an attorney's fee element into lien claims. Lien claimant attorneys will become tempted to insist on attorneys fees to settle, and will have that leverage if the lien claim is close to perfect; conversely, for liens with questionable compliance, owners will not settle or will demand higher discounts on account of their own fees.

Note, a contracting party will have an attorney fee right if the contract calls for attorney's fees. The fees will not be recoverable under the lien however, and only under the breach of contract remedy. In other words, the right of attorneys fees is currently available by prudent negotiation, and the risk of non-collection for a valid breach of contract claim, largely limited to situations where the contracting party who owes the money, becomes judgment proof.

Simply, a statutory attorney fee remedy should not be broadly adopted. However, attorney fee recovery by either side in a challenge to a lien's validity in the expedited procedure, makes good sense. An owner controls the risk by deciding to seek expedited removal, and is compensated for attorneys fees if vindicated, and must pay the lien claimant's attorneys fees for that expedited proceeding expense if the Claimant's lien withstands the challenge.

Acceptance and Completion. The AGC favors the Commission's use of "Acceptance of Performance by the public entity" as equal to completion in public works of improvement. AGC also agrees that the terms "Acceptance" is not appropriate in private works, except where there is a public dedication portion, such as in a subdivision where public streets are accepted, and private lots, completed.

The proposed shortening of the cessation period to 30 days is too short. This is particularly true in public works. Note, AGC's members are not uniform in this area, as there are two issues in tension. One, many public works subcontracts contain "paid when paid" clauses requiring subcontractors to wait for payment until the prime contractor has received payment from the owner. So, under current "Acceptance" rules, the subcontractor may wait until project acceptance before serving a stop notice, since it does not want to enforce a payment demand before the prime contractor has or is about to be paid.

A shorter cessation period, of 30 days, could result in public works subcontractors and suppliers who wait for payment until acceptance, to lose the stop notice rights. Conversely, the shortening of the cessation of labor period to 30 days will encourage vigilant subcontractors to serve stop notices early, before

public works acceptance, for fear of losing stop notice rights. More stop notices, could create unnecessary inconvenience for owners and prime contractors.

60 days cessation of labor, shortened to 30 days upon recordation of a notice of cessation, appears a workable solution. This is the current law.

Note, completion in lien law is absolute completion not "substantial completion." The Commission's comments at page 49-50, seem to equate substantial completion with actual completion. This is incorrect. Substantial completion usually means, the owner can move in, or that all that is left is punchlist sort of work, and often warranty periods commence upon substantial completion. Liquidated damages usually stop at substantial completion.

In contrast, actual completion means actual and complete completion, in order to permit recording of a valid notice of completion, or to start the running of the short lien recording period. So, courts require actual completion, and often find very small amounts of work left to do, as sufficient to preclude a finding of actual completion, in order to find a lien is timely recorded, or hold a notice of completion, invalid as premature. See *Fontana Paving v. Headly Bros, Inc. (1985)* 38 CA 3rd 146; Lewis v. Hopper (1956) 140 CA 2d 365; Rockwell v. Light (1907) 6 CA 563; E.D. McGillicuddy Const. v. Knoll (1973) 31 CA 3rd 891; Munger & Munger v. McBratney (1955) 131 CA 2d 866.

The reason is due to the short statute of limitation to record a lien after completion or recordation of a notice of completion. Punchlist items, missing specified fixtures, etc. may preclude completion and extend the lien period. It is not unusual to have a 30-day period of no activity, followed by activity on punchlist items or late ordered fixtures. A 30-day cessation of labor mid project may not call attention to itself, the way a 60-day period does, that it is time to record the lien. This is especially true for projects that shut down over winter months or due to rain, a material delivery issue, or a design issue in need of resolution and briefly resulting in project suspension. In those ordinary circumstances, it would be untoward for unpaid claimants to record liens out of fear that lien rights would be lost, when the project for all intents and purposes is basically on track. The cessation concept usually contemplates an unfinished, abandoned project, not a 30-day lull in activity.

The dilemma for general contractors, in trying to close out public projects, is largely driven by public agency delay in scheduling hearings of the public agency to accept the work. This quandary can best be addressed by more timely public hearings on acceptance, closer to the time of actual completion.

On private projects, owners can control the payment process by insisting that prime contractors are paid retention only after 35 days after notice of completion is recorded, and only after proof of payment to subcontractors and suppliers by unconditional lien releases upon final payment. That way, the owner

only pays in full once assured the project is lien free, except as to the prime contractor.

However, in practice, on smaller projects, undercapitalized contractors will typically want to receive owner payment before paying subcontractors and suppliers in full. Owners may not realize that in that case, they face lien claims if they pay the prime contractor and the prime contractor does not in turn pay subcontractors and suppliers. An alternative protection is joint checks so long as the owner knows who the potential claimants are from receipt of 20-day notices.

Unfortunately, the current statutory "Notice to Owner" proscribed in B&P 7059 spells out the dangers, but not any real "how to" on avoiding the danger of paying twice. A better approach would be for the Notice to Owner to attach a statutory "joint check" agreement and/or lien release forms, with instruction on how to use them printed on those forms and summarized on the Notice to Owner.

The current advice on the Notice to Owner, of the right to ask for a payment bond, is ineffectual for most small homeowner projects. Payment bonds require surety credit, which usually means an average daily bank balance of at least $100,000, a strong personal financial statement, a broad guarantee from contractor to surety, and an audited financial statement. Most small remodel and home-building contractors do not have the ability to obtain such bonds. Even if they did have bonding capacity, most homebuilders will refuse to provide such bonds unless the project is very large and lucrative (at least over $1 million), and hence perceive the benefits outweigh the costs.

AGC endorses new B&P Section 7152(b) requirement that owners mail notices of completion to all claimants who furnished a 20-day preliminary notice. This proposal makes sense.

It should be noted that contractors used to subscribe to daily trade journals that tracked notices of completion, and had a staff member review notices of completion for this purpose. With the advent of the Internet and other means of obtaining bid solicitation information, such trade journals are not used as frequently. Hence, the obligation to forward the notice of completion satisfies a "fair warning" concept, and avoids unfair surprise, especially to distant suppliers who may not be able to visit a job site every 30 days to see project status.

AGC endorses increasing the time frame to record a notice of completion to 15 days. Sec. 7152.

AGC endorses Section 7154's provision for recording a notice of completion as to a portion of the work of improvement, when broken up into more than one prime contract.

WAIVER AND RELEASE FORMS

AGC supports Section 7168, Partial Stop Notice Release. AGC would like to see better forms and guidelines on stop notices and what occurs to accrued interest on a partially released stop notice. That is, if on January 1, 2006 a $100,000 stop notice is served, and states a claim for 10% interest plus principal, if the owner pays $50,000 one year later, is the partial release amount $50,000 – the payment amount – or $40,000 (since the stop notice is now $110,000 with one year's interest)? The statute could resolve this issue.

AGC supports improving the Waiver and Release Forms. AGC believes the changes to the form are positive. Now, it is clear not only how payment is being made – by joint check or otherwise – but the claimant identified if the last progress payment was paid or not. This will help owners and general contractors track payments, and serve as a "red flag." Currently, to track payments, an owner must have a full list of potential claimants, gleaned from received 20-day notices, and then double check the unconditional releases on progress payment received this pay period, from the conditional releases on progress payment received in the prior pay period. This double-checking process still should be done, but having a place for claimants to call out, on the form, "I have not been paid for last month!", makes great sense. After all, that is one of the purposes of the form *as a process, to let an owner know if payments the owner makes, are in turn resulting in payment downstream.*

AGC opposes any effort to require specification of the exact amount or nature of extra work in a conditional release. The current language, excepting out retentions and extra work, works fine for the most part. Good contracts require timely notice of claim events and are a better place to address claims negotiations. Also, getting paid for progress payments, requires a fairly intensive paperwork shuffle from many subcontractors and suppliers upstream to the general contractor, in the form of invoices and lien releases. It will slow down this process to require subcontractors and suppliers to evaluate exact dollars the claim on extra's. Often, a disputed extra is ongoing and its costs are not determined in full until after the fact. Requiring precision midstream will simply make progress payments and lien release exchange more cumbersome and prone to dispute.

OWNERSHIP ISSUES.

AGC approves of the Commission's effort to better define owner, reputed owner, and agent. Extending the concept of owner to vendees under purchase contract makes sense. Section 7028.

Section 7058 (b) is phrased awkwardly. The goal is to state that, "except where a lessee is deemed by statute or otherwise as an authorized agent for owner, notice to the lessee is not notice to the owner." However, the language is cumbersome: Notice to an owner of a leasehold or other interest in property that is less than a fee is not notice to an owner of the fee. Nothing in this subdivision

limits the effect of knowledge of an owner, or of notice to a reputed owner where that notice is authorized by statute." This can be stated in a better way.

The agency definitions should also be helpful. Adopting the case law definition of a reputed owner also is positive.

MISCELLANEOUS

AGC endorses improvement to Section 3104's definition of a subcontractor to include second tier subcontractors expressly.

AGC endorses the proposed sections over Contract Changes. The current statute, CC 3123, defines the amount of the lien as the reasonable value or unpaid contract price, whichever is *less.* In practice, there is no real difference; what is contractually owed, is the value.

AGC endorses eliminating the statute requiring notification by an owner to its lender and prime contractor of changes greater than 5% of the contract. This provision never made any sense, and the issue is dealt with in loan documents.

AGC endorses the changes to the Preliminary Notice provisions.

AGC believes the private and public work statutes over subcontractor disciplinary action for failure to serve a 20-day notice should be the same. While the Commission proposes eliminating CC 3097(h), making it a disciplinary violation for a subcontractor to fail to serve a 20-day notice, the Commission in the public works statutes proposes retaining the disciplinary violation where the subcontractor also has not paid his wage earners and they suffer as a result. That approach makes sense and should be adopted across the board.

AGC endorses the elimination of recording of a preliminary notice.

AGC endorses making mechanics lien release bonds 125% of the lien amount, to harmonize with stop notice release bond amounts.

AGC does <u>not</u> support eliminating the additional required information for a stop notice, of the value of the work as a whole, and the amount performed to date, and paid to date. A stop notice is different than a lien in that a stop notice can be served at any time, even before the claimant completes its own work. In contrast, a lien cannot be recorded until the claimant has completed his work. This difference largely accounts for the different levels of information needed. Here, the Commissions effort to harmonize the statute is incorrect.

Since a lien claimant is done with all work at time of recording a lien, all that the owner needs to know is the amount of the lien claim – the unpaid sum. The lien amount will not grow. If the stop notice claimant waits to serve a stop notice after all its work is done, the same would hold true. However, a midstream stop notice imparts additional, key information to the owner or lender. A midproject stop notice is a "snapshot" of the progress payment status to a claimant. The stop notice exposure has a potential to increase. Therefore, the owner needs to know not only the amount performed and unpaid to date, but also the total contract amount. The reason for the phrasing, "the amount in value, as near as may be, of that already done or furnished and of the whole agreed to be done or furnished" has to do with two imprecise calculations – one the exact amount performed at any point in time is difficult to ascertain to the penny but can be approximated. Two, the whole of the agreed value may change in the future. So, the Commission's assumption, that the language of CC 3103 (c) refers to "reasonable value" is not correct. This statutory language has to do with the nature of a stop notice as a midproject remedy, to withhold payment in an ongoing subcontract or supply situation.

The Commission should not change the information imparted by a Stop Notice. If anything, it might make sense to require an equal level of detail on a mechanics lien. The stop notice information is valuable for an owner to ascertain how much bigger the stop notice exposure will grow, as the claimant continues to perform work and is unpaid future progress payments.

AGC endorses changing the name of a stop notice to a "stop payment notice".

AGC endorses the improvements to the extension of credit statute, requiring owner agreement and cutting off the lien against a good faith purchaser.

AGC endorses Section's 7522 precluding of double withholding by an owner from a contractor, once for stop notice, once for lien, from the same claimant.

AGC supports the clarification that an owner demanding a stop notice may only require an unbonded stop notice. Section 7250.

AGC believes Section 7250(b)'s lien forfeiture provisions needs to be clarified. This section provides that a lien is forfeited if a claimant does not comply with an owner's demand to serve a stop notice. The purpose of this procedure is so that the owner can withhold funds from the prime contractor, to satisfy the lien claims. The statute does not clearly state the owner demand before forfeiture. It should read, "if within 30 days after such notice the person fails to serve the owner with a bonded or unbonded stop payment notice, the person forfeits the right to alien under Chapter 4..."

AGC endorses the ability to provide a stop notice release bond without a need to dispute its validity.

AGC endorses a 15-day notice of commencement for Stop Payment Notice Actions. The "Notice of Commencement" is intended to serve much like a lis pendens acts for a lien foreclosure action – to give record notice that the stop notice has been timely perfected by a lawsuit. In practice, the stop notice lawsuit is simply filed and served, though many attorneys follow the Notice of Commencement procedure. Adding 5 more days makes sense, and court papers that are filed and returned by regular mail, will take 10 days on occasion. The notice serves a useful function so long as directory rather than mandatory.

The *Sunlight Electric Supply Co. v. McKee* (1964) states a "no harm no foul" rule, which is its stronger rationale for treating this statute as directory, over the subsidiary case rationale cited by the Commission (that a stop notice is a substitute for a lien in the public works context and should not be interpreted in an unduly technical way). Either way, the result is correct – the notice of commencement is a useful device but its failure does not invalidate an otherwise proper stop notice.

AGC endorses Section 7064 permitting a lender to question a bond whether or not the surety is admitted and licensed by the Department of Insurance.

PAYMENT BOND CLAIMS

AGC endorses Section 7601 to provide that the six-month statute of limitation for payment bond claims applies to both the bond principal and surety.

AGC strongly believes that subdivision b of Section 7612 should not go into law. This section corresponds to current CC 3252(b). This section permits a claimant who needed to serve a 20-day preliminary notice but did not, a "second bite at the apple" and secures bond rights by serving a "preliminary bond notice". This provision does not fit with the rest of lien law, which operates with a "checks and balances" approach. Specifically, preliminary notice is required on public projects from subcontractors and suppliers not in direct contract with the prime contractor, in order to perfect a stop notice. There is no logical reason that persons losing stop notice rights by a failure to serve a 20-day notice, can make a bond claim by serving an end of the project preliminary bond notice.

The concept in lien law is, "notice = lien right, no notice =no lien right." Here, sureties, and prime contractors cannot fairly protect themselves upon receiving an end of project preliminary bond claim. By then, most of the money has been paid downstream, other than retention sums. As a result, payment bond sureties and their bond principals – public works prime contractors – end of with

bond exposure that they cannot predict, cannot protect against, and cannot recapture by withholding funds. It is an anomaly.

AGC recognizes the legislative reality associated with repealing a law that has been on the books only since 1995. Subdivision (a) of CC 3252 was a great improvement over the former bond notice statute, which was akin to the Federal Miller Act statute, and required a bond notice to the general contractor within 90 days of the claimant's last work. Now, satisfying the preliminary 20-day notice requirements automatically serves as a preliminary bond notice. A second bite at the apple, after failure to timely serve a 20-day notice, is unnecessary and invites claims that cannot be predicted or protected against.

AGC endorses the proposed statute requiring a potential lien claimant be provided a copy of the payment bond upon request. The consequence of non-provision after written request can be a brief tolling of the statute, say 60 days.

OTHER PRIVATE WORK REMEDIES

AGC endorses the "Stop Work Notice" Changes. This statute is underutilized, and unduly complex. A simpler statute may result in more use.

AGC endorses the simpler language of the large project bond requirements upon owner (CC 3110.5). This statute is not well advertised, and it is believed, not frequently followed. The consequence upon an owner not obtaining a required bond, is not set forth, and perhaps should be. The statute is silent on who are the beneficiaries of the bond, and who can sue the bond, or the owner who should obtain the required bond but fails to (i.e. prime contractors only, or also subcontractors and suppliers?) Also, there is no set statute of limitation. The statute of limitation should be made 6 months after the lien period to mirror payment bonds.

PUBLIC WORKS

AGC endorses harmonizing the public and private Preliminary Notice forms.

Requiring a small change in the forms, for public works Preliminary Notices, to also have the address of the claimant and a description of the site makes sense. This is an area where the forms publishers have "corrected" the statutory asymmetry already.

AGC strongly advocates elimination and repeal of CC 3252(b) which provides an unnatural "second bite at the apple" to a bond claimant who never provided Preliminary Notice

As noted above, under the Private Bond preliminary notice statute, there is no reason to reward the failure to provide a Preliminary Notice where required. The whole premise of the lien law is notice before work, and before a lien or bond claim right, so an owner, prime contractor, surety or prime contractor can track payments via lien releases during progress payment applications. This premise is utterly frustrated by 3252(b)'s allowance of a claimant to serve a Payment bond notice after the project is done, after failing to ever deliver a Preliminary notice during the project. It creates exposure to prime contractors, owners, and sureties from which they cannot protect themselves.

Section 3252(b) should be repealed. It is bad law, borne out of last minute compromises, and has caused nothing but mischief. It rewards the unvigilant, and punishes those seeking to track payments with surprise, last minute claims. The lien law to be fair must provide a mechanism to prevent, surprise, last minute claims. The Preliminary notice serves that purpose, and 3252(a) without more should encompass the statute.

AGC is unclear why a disciplinary sanction for subcontractor's failure to deliver a Preliminary Notice is needed, or why the failure to serve the notice would cause to laborers

Laborers and laborer compensation funds are not required to provide Preliminary Notices. However, the public works Preliminary Notice forms do require identification of any labor compensation fund, to allow the owner, prime contractor and surety to track payment of fringe payments. Such insures the prevailing wage law is complied with, and that labor is paid. Conceivably, when a subcontractor does not serve a 20-day notice, the owner and prime contractor now lack such information to track payments to laborer's funds. A subcontractor could divert payment, and laborers would fail to exercise their payment bond and stop notice rights, and the subcontractor may have no recourse to collect from the project payment bond or by stop notice.

AGC wonders if the underlying diversion and non-payment of labor is a sufficient basis for disciplinary action. Also, AGC members recognize that CSLB staff is already under-resourced to address the number of complaints it receives, and this fact is known in the industry. It is likely the additional disciplinary action risk is slight due to the lack of adequate enforcement resources.

If the Commission desires to make it a disciplinary matter on public works, similar language should be adopted for private works.

AGC endorses elimination of section 3098(e), the transitional provision for preliminary notice of public works as no longer applicable

PUBLIC WORKS – STOP PAYMENT NOTICE

AGC endorses the change in terminology. AGC endorses the non-substantive changes making the statute more understandable.

AGC endorses the increase in the $2 fee to $10 for the public agency to be required to give notice to a stop payment notice claimant of the date of expiration of the period in which to enforce the claim. Note however, that this statute uses the term "completion" and not "notice of acceptance", again invoking the tension in practice and statute between these two terms. Also, the forms should identify to public owners the duty to provide the notice of completion to such claimants. This is a little used procedure.

AGC endorses the summary release procedure for stop notices

The summary release procedure permits a speedy remedy to remove invalid or untimely stop notices and ensure that the cash flow on the project is disbursed.

AGC agrees that a jury trial right would defeat the purpose of the summary remedy and is not a remedy for which a jury trial right exists. Mechanics liens are equitable foreclosure actions, tried by court after a jury verdict on a contract balance due. Stop notices by analogy are foreclosures on funds, and hence equitable type actions.

AGC endorses the standardization of "extra's" under the term "contract change"

It is believed that the Assignment provision relates to assignment to a surety from a bond principal (prime contractor) facing a default, over the stop notice. Former section 3193 made it clear that the Assignee, usually the lender or surety, does not sit in parity or equal priority with stop notice claimants. The surety can pay off stop notice claimants due money on the bond, and individually obtain releases or assignments of stop notice rights from claimants.

PUBLIC WORK PAYMENT BOND – Definition of a public works needs work

The existence of hybrid projects in California, or novel financing approaches involving public funds, or private or charitable funds on public lands, is challenging some of the assumption in the lien law language. Take for example, CC 3247 which requires a payment bond in every contract over $25,000 *"awarded...by a public agency."* The payment bond remedy was created as a substitute for the mechanics lien, which due to sovereign immunity is unavailable on public land.

As drafted, CC 3247 and its precursors did not contemplate an instance where the work takes place on, and improves, public land but is not based on a prime contract *awarded by the public agency.* That is, it is believed that the legislative history will show that CC 3247's definition of a public works as any project contracted for by a public agency, was intended to be expansive, not restrictive. It was assumed that all public land projects would have public agency issued prime contracts, as a matter of logical necessity. This was before the current era of "creative government financing" and public-private partnership funding, and non-profit corporations created by public agencies to secure charitable donations for land projects. That is, the bond requirement was assumed to

always include public land projects, since there can be no mechanics lien on public land, but also, projects on private land *contracted by a public agency.*

Since a mechanics lien is never available on public land, the Commission should consider whether the unintended "loophole" of Section 3247 by closed, by language such as:

" Every original contractor to whom is awarded a contract by a public agency, or, who contracts with any person for a work of improvement on publicly owned land whose improvements and land are immune from a claim of lien by sovereign immunity where the contract exceeds $25,000, shall before entering into the performance of the work, file a payment bond with the person awarding the contract."

The AGC agrees that, in light of the voluntary practices of the University of California and the judicial branch to require a bond on their public works, there is little practical need to harmonize the various exceptions to Public Contract Code section 3247.

AGC'S OTHER PROPOSED CHANGES TO EXISTING LIEN LAW

AGC members have identified several other areas where some changes are in order to lien law. These concerns often percolate from client experiences in applying lien procedures, unclear language, or repetitive legal skirmishes in trial court litigation over certain narrow issues. Below are a non-exclusive list of these issues and some suggestions for improvement.

LIS PENDENS STATUTE REMAINS DIFFICULT TO APPLY IN TERMS OF SERVICE, RECORDING AND FILING

A lis pendens gives record notice of a legal action concerning real property. It is a device to preclude a later purchaser or lender from claiming to take free of the lien or adverse property claim, as a good faith purchaser without notice.

Lis pendens have been abused for other uses, such as constructive trusts and tangential property claims, due to the tremendous leverage the cloud on title provides. The lis pendens statutes have been amended recently on several occasions, to provide courts with prompt remedies to curb these abuses. These remedies are similar to the lien removal remedy. See CCP405.30 et seq. These curative provisions have largely curbed the abuse.

The Service of Notice statute, CCP 405.22, is itself an unworkable, unruly beast in need of change. The problem with it, is that it is almost impossible to meet in practice, if applied literally. Since lis pendens are not discretionary not mandatory under CCP 405.20 (the term "must" was changed to "may" in 2004), there seems little reason to require "threading the needle" as CCP 405.22 currently mandates. There is no statement of the consequence of substantial compliance, and it is assumed, this would another "no harm no foul" situation – technical noncompliance would not preclude lien enforcement against a BFP, so long as the BFP received constructive or actual notice of the lien and lien action.

The tortured language and tango-like steps of CCP 405.20 are best shown by example.

Under CCP 405.20, the Notice of Action Pending – Lis Pendens – must be served before being recorded, and served after the suit is filed. Then, the statute states, "Immediately following recordation, a copy of the notice shall also be filed with the court in which the action is pending." In practice, an attorney could never used the mails or express mails to accomplish this statute, due to the term "immediate" and the sequence of events. The attorney would have to always use a messenger, and always start in the morning to be sure to get it all done before the end of the day. Here would be the steps:

Step One: Attorney signs two duplicate original lis pendens in office, to take to court with the complaint to be filed, along with two copies The proof of service is already attached, showing it will be sent by registered or certified mail to the record owner shown on the latest assessor's rolls.

Step Two: Attorney handwrites in the case number on both original lis pendens, and both copies. The attorney promptly places one copy in a certified or registered mail envelope, finds the nearest mailbox or post office, and serves the lis pendens on owner.

Step Three: Still on the move, the Attorney heads to the recorder's office with one of the two originals, and records it. Since most recorder's offices now no longer stamp copies, the Attorney handwrites on the second lis pendens original, and remaining copy, the recorder's serial number. If the attorney does not bring a copy, and waits for the recorder to mail a copy, it may take two weeks to receive that copy, until after the recorder has scanned and indexed the original. The attorney signs the proof of service on the recorded lis pendens before recording, and preferably, before actual service.

Step Four: Attorney, "immediately" heads back to the Court clerk's office to file a copy of the recorded lis pendens, and obtains a conformed copy for attorney's own file.

Needless to say, this is a very cumbersome process if applied literally. It precludes by the "immediate" term, use of mails, or even express delivery. It would cause attorneys to either do this themselves, a two-hour proposition in busy counties, or hire messengers to absorb that expense. There has to be a better way.

The real rub comes in Section 405.23 which states that "any notice of pendency of action shall be void and invalid as to any adverse party of record unless the requirements of Section 405.22 are met for that party..." In other words, the statute lends itself to an argument that constructive notice only occurs if the statute's convoluted steps are complied with exactly, and not substantially.

Two simple changes can ameliorate these provisions, and avoid unduly technical arguments of form over substance, and make the practice of recording, serving and filing lis pendens more cost effective and manageable. One, the words "are met" quoted above

from 405.23 should be replaced with, "are substantially complied with". Secondly, Section 405.22 should replace "immediately" with "promptly".

The filing of the lis pendens in the court case is a redundancy. The court knows it has the case. The court does not need notice that the action has a lis pendens, though it is helpful as a cross-reference. It would seem mailing, within 30 days of recording, would be sufficient. The constructive notice occurs on the recording, not the later filing of the lis pendens in the court file. The court file with or without a lis pendens gives notice it involves real property by its allegations.

Also, the Lis Pendens statute under 405.23 would be better to mimic the more forgiving language of the lien forgiveness statute, CC 3261, providing that innocent good faith errors do not invalidate a lien absent an intent to defraud or where an innocent third party takes without actual or constructive notice of the underlying real property claim or suit.

CURBING OWNER ABUSE OF THE 150% WITHHOLD RULE UNDER THE PROMPT PAY STATUTES FOR POTENTIAL BACKCHARGES

In various places, the Legislature adopted "prompt payment statutes" that imposed legal duties upon owners and prime contractors to pay over, progress funds and retention downstream to those who provided the work. These include civil penalties of 2% per month, plus attorneys fees; and a 10-day duty to pay over funds paid on account of a subcontractors work, or to account for any amounts paid to the prime, that the prime is withholding from the subcontractor. B&P 7108.5; Public Contract Code 10262.5; Civil Code 3260, 3260.1

In an effort to "balance" the statute, the legislature provided that the owner or contractor could withhold from payment, up to 150% of the disputed amount. Usually, the dispute would be, a backcharge for potential delay or liquidated damages exposure, defective work, etc. Unfortunately, what the legislature intended as a "cap" has, for some owners and contractors, been viewed as a "safe harbor" to withhold well in excess of what is truly needed to cover a prospective loss or disputed work item.

Some owners have taken the 150% rule one step farther. Several AGC members have experienced that some owners who dispute a change order request made in a pay application, rather than simply reject it, withhold 150% of the rejected amount from the approved portion of the pay application. AGC members have successfully argued in court that the statutory language, "any progress payment due thereunder" means the contract, and since the proposed change order is not due until approved, there is no right to withhold any disputed amounts under CC 3260.1

CC 3260.1 addresses prompt payment of progress payments. However, CC 3260, which addresses retention or final payments, does not adopt the same language as CC 3260.1, that the withhold can only be for amounts due under the contract, not amounts sought and not approved. CC 3260(c) simply states that if there is a dispute over the amount of retention due, then the original contractor may withhold up to 150% "of the disputed

amount." Conceivably, a prime contractor could argue, the unapproved change order is disputed, and therefore, 150% of the amount can be withheld.

These statutes will need to be revised anyway, because the use the phrase "original contractor" which the new lien law is replacing with "direct contractor". So, effort should also be made to avoid twisting of the intent of the statute.

The withhold amount should be limited to 125%, to harmonize with stop notice and mechanics lien release bonds. 50% increase is simply too much leverage in many cases.

Secondly, the nature of what is withheld should be clear. Perhaps CC 3260.1 should read, "In the event of a good faith dispute of the parties over a disputed claim asserted by the owner against the contractor as a deduct against an approved progress payment amount, such withhold from the approved progress payment amount shall be limited to 150% of the disputed claim amount asserted back by the owner against the contractor."

Liens and Preliminary Notices on Condominium projects deserve special treatment due to the complex ownership situation and difficulties for lien claimants

On Condominiums, there are roughly four types of projects: new construction; renovation by the homeowners association of common areas and exteriors; repairs post litigation for construction defect litigation, usually funded by insurance and court settlement; and interior improvements by condominium owners, usually approved by the homeowners association.

Where the work is sought by the individual condominium owner, the lien is limited to the condominium unit. Any Preliminary Notice would need to only go to that owner, and not the Association.

Where the association hires the contractor, does the lien extend to the entire complex, or just the common areas? The law is not very precise here. And, are claimants who need to serve a Preliminary Notice, required to serve one upon each owner in the complex, or just the homeowner's association? Again, the law, including the new definitions of co-ownership, does not provide adequate guidance.

Suppliers and contractors often complain that that they cannot tell what the lien law requires in terms of notice in these instances. Some suppliers risk alienating all the condominium owners by serving 20 or 30 preliminary notices (and at considerable expense) to perfect lien rights against all condominium owners and avoid later notice arguments. Others take a low-key approach, notify the homeowner's association or property manager, and assume that covers their obligation on a theory of agency or joint ownership.

The new definition of Owner, and notice to owner, does not neatly address the condominium setting.

Perhaps notice to the Association's agent for service of process, would be sufficient as to each owner affected.

When the "notice of Non-responsibility" concept was developed, tenancy was a known form of ownership less than a fee. The condominium form of ownership was not yet utilized. The Commission should consider developing a specific set of sub-rules relating to notice and scope of lien on condominium projects, that are analogous to the tenant/fee owner arrangement and notices of non-responsibility.

For work done for the condominium association as a whole, each unit benefits and the units are more marketable than the common areas at a foreclosure action. Notice should only need to go to the Association for any common area work, or combined common area and unit work (typically, work during a defect retrofit).

Also, the Commission should consider whether if there is a Construction Loan, designated insurance loan fund equal to 100% of the prime contract, or a payment bond, that on a condominium project there is a lien right limited to the common area worked on, and not extend to individual units.

Finally, repair projects post litigation often involve, construction funds held either by an insurance carrier, in the home owner association attorney's trust account, or even in the account of a court appointed special master. These persons do not necessarily view themselves as "gents of owners" or construction lenders holding construction funds, yet, they may in fact fit those descriptions. Seldom do the contractors below the direct contractor have much insight into who holds the project money in those post litigation projects. Consideration should be given to whether these persons holding post litigation funds need to be exempted or included in the definition of holders of construction funds, to clarify this narrow construction field.

CONCLUSION

AGC applauds the Commission's efforts in the Tentative Recommendations. In large part, the Commission has been successful in its effort to streamline and simplify the procedures, and ensure clarity and fairness in the lien law. AGC's comments have focused on areas where the Commission has expressly sought public comment, or where a current or proposed statute is viewed as pivotal, or problematic.

As noted, AGC believes that in large measure, good case law and responsible legal practice by most lien law practitioners has "tamed' the "unruly beast" of the lien law. Therefore, changes should be implemented with great caution to avoid re-opening long settled law and practice. Increased uncertainty in lien law will invite litigation, drive up the cost of lien litigation. Such uncertainty would thwart prompt efficient compromise settlements, and have the opposite effect from that intended by the efforts to standardize lien law terms.

More importantly, the Commission should direct its focus to the homeowner complaint issue, with more empirical study and through a collective legislative process that includes the CSLB, and improvements to the "Notice to Owner" requirements under B&P Codes section 7059. AGC fears that the remedies now proposed, of cross complaints and loss of litigation privilege, will not solve the problem for homeowners, and at the same time will radically alter the negotiating landscape over liens. Efficient settlements will be more difficult if subjective elements are introduced, or aggressive, well financed institutional owners choose to use the new counterclaim remedy as a sword to put lien claimants on the defensive, when seeking to employ the constitutional lien remedy.

This concern is borne out of practical experience in how liens are typically settled, and the belief based on experience that it is *not* the false liens, but the *legitimate* ones that homeowners are largely complaining of. It is surmised that many homeowners are upset to learn they have an expired lien of record when the refinance, that never resulted in suit. That lien is most likely a valid lien by an unpaid claimant who never got paid, but never filed suit, or a valid lien by a claimant who did get paid and failed to release the lien. Either way, that problem can be solved by less dramatic changes in the lien law. What is needed is more guidance to homeowners to ensure they pay only once. The best tool would be better "how to" information in the "Notice of Owner" required in all home improvement contracts under B& P Code section 7059.

As stated above, the AGC and its Legal Advisory Committee are willing to supplement these initial comments with further detail on specific statutes, concepts, or with legal-type briefing on applicable case law. AGC also recognizes that the Commission has not completed its comments on the public works side of the new lien law. AGC members and its Legal Advisory Committee also wish to be considered for testimony before Assembly and Senate Committees that will be evaluating the proposed legislation.

Respectively submitted,

Mark J. Rice, Designated Comment Provider,

AGC Legal Advisory Committee

For the Associated General Contractors of California (AGC)

Cc: John Hakel, AGC
Aaron Silberman, Esq. President, AGC Legal Advisory Committee

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My file No. 3066

December 20, 2006

Via: e-mail attachment
Scohen@clrc.ca.gov

STEVE COHEN
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA. 94303–4739

Dear Steve:

I apologize for leaving the last meeting of the commission early but I was trying to leave in time so as to get on the road before the sun went down since I dislike driving in the dark. As sit turned out, it did me no good because I got stuck in the parking lot at the hotel for almost 25 minutes.

This letter addressees only the provisions of revised code sections concerning the Petition for Release Order, proposed section 7480 on page 76 of the Memorandum 2006-48 dated November 29, 2006, and subsequent modifications.

I have read and reread the provisions and concluded that generally they are acceptable. I will have one minor recommendation, but other than that, I consider that the incorporation of the Petition to Release a lien on private projects has vastly improved the lien laws. The existing provision, Civil Code section 3154 was too limited. The similar provision relating to public works, Civil Code section 3197, were more practical and useful and the incorporation of similar provisions for use on private projects commendable.

Although I did express some reservations concerning the provisions, I believe, upon considerable reflection that the various changes in the above referenced Memorandum will resolve almost all of my concerns. The sections are intended to and do only concern and adjudicate the validity of the pending mechanics lien and no other actions. It does not bar the owner from re-litigating the lien and raising other issues against the claimant in any subsequent action such as breach of contract. Further, if the claimant loses on its lien claim, it still may proceed with a claim for compensation assuming, of course, the licensure issue or other issues directly terminating the lien claim had not been decided against it.

My only suggestion relates to what is obvious but not presently a requirement. I find no provision requiring that the petition be filed in the same district where the lien was recorded, except inferentially in section 7480(c) allowing the joinder of such petition with a pending foreclosure action, which, of course, must be filed in the district where the lien was recorded. I believe that the code should specifically require (1) the filing of an original petition in the district where the lien was recorded and (2) section 7492 should provide that the court order should be recorded in the county

where the lien was recorded. Absent such a provision, the court order, as the statute now reads, may be recorded in any county.

It was a real pleasure working with you and the others. I appreciate being kept abreast of any further developments or memos. I do not anticipate being at the Sacramento hearings but if there is any way I may be of service, please do not hesitate to call upon me.

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Sincerely,

HOWARD B. BROWN

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

COMMENTS OF LORI NORD

From: Lori Nord <lnord@mjmlaw.us>
Date: December 26, 2006
To: bhebert@clrc.ca.gov
Subject: Mechanics' Lien Law Message

As you may recall I have represented construction industry trust funds for 27 years and a significant part of my practice has been in the area of mechanics' liens, stop notices and payment bond remedies. I have the following additional comments:

….

3) I agree with you that section 7474 (a) (3) (b) should be left to judicial interpretation rather than to force a statutory crediting rule. I frequently have cases against a delinquent contractor for the full amount it owes my clients and several lien claims against third parties. If I collect some money from the contractor before I collect on one of the liens, I would argue that the money should first be applied to amounts that the contractor owes, but for which we have no claim against the third party. Then it may be appropriate to pro-rate among the remaining liens or it might be appropriate to apply to the earliest period first, depending on the particular case. Because facts vary, I believe that a general statutory rule is inappropriate.

4) I believe that section 7420 notice requirement would be better served and less ambiguous and less invasive to the mechanics lien right by stating that the lien claimant should attach a proof of service by mail to the claim of lien recorded in the County Recorder's office showing that the claim has been mailed to the owner on or before the date of recording. I am concerned that a County Recorder could otherwise refuse to record a valid lien. For instance, what is a "notice of intended recording"? Should a ministerial clerk be allowed to determine what that is?

Thank you for your consideration of these comments.

Lori A. Nord
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