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Mechanics Liens

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MECHANIC'S AND DESIGN PROFESSIONALS
LIENS IN CALIFORNIA

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MECHANIC AND DESIGN PROFESSIONAL LIENS IN CALIFORNIA

INTRODUCTORY NOTE. The following pages include selected sections from the California Civil code concerning mechanic's liens. However, the selected sections do not include all statutes which govern mechanic's liens, and the statutes which are listed do not constitute a complete treatment of Mechanic's Lien law. Also, the cited cases do not incorporate the California cases which have been decided on the subject, which cases also have the force of law. California law changes periodically, and only current law should be used in connection with any legal matter. Lien claimants should consult competent counsel in connection with any lien claim or any potential lien claim.

The Law Office of Robert B. Jacobs provides legal services in the areas of Construction, Business, and Real Estate Law. It is located in Pleasanton, California and can be reached at (925) 847-8680. The program on mechanic's liens at which these materials are used does not include a complete discussion of the law applicable to mechanic's liens, and competent counsel should be consulted concerning any specific legal situation or issue, including lien claims. © 2007 Robert B. Jacobs. All rights reserved.

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SELECTED SECTIONS OF THE CALIFORNIA CIVIL CODE RELATING TO MECHANIC'S AND DESIGN PROFESSIONAL LIENS

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3081.1. For purposes of this chapter, "design professional" means any certificated architect, registered professional engineer, or licensed land surveyor who furnishes services pursuant to a written contract with a landowner for the design, engineering, or planning of a work of improvement. Except as otherwise expressly provided, the definition in this section does not apply to, or limit or expand the meaning of, provisions of law other than this chapter.

3081.2. A design professional shall, from the date of recordation pursuant to Section 3081.3, have a lien upon the real property for which the work of improvement is planned to be constructed, notwithstanding the absence of commencement of actual construction of the planned work of improvement, if the landowner contracted for the design professional's services and is also the owner of the real property at the time of recordation of the lien. The lien of the design professional shall be for the amount of the design professional's fee for any services rendered prior to commencement of the work of improvement or the reasonable value of those services, whichever is less. The amount of the lien shall be reduced by the amount of any deposit or prior payments, as specified by a written contract entered into by the design professional and by the landowner or his or her agent. However, no lien shall arise pursuant to this chapter, and a design professional may not record a notice of lien pursuant to subdivision (c) of Section 3081.3, unless a building permit or other governmental approval in furtherance of the work of improvement has been obtained in connection with or utilizing the services rendered by the design professional.

3081.3. In order for the design professional to be entitled to a lien pursuant to Section 3081.2, all of the following shall occur: (a) The landowner defaults in any payment required pursuant to the terms of the written contract or refuses to pay upon the demand of the design professional made in accordance with the written contract. (b) Not less than 10 days prior to recordation pursuant to subdivision (c), the design professional mails by first-class registered or certified mail, postage prepaid, addressed to the landowner, a written demand for payment specifying that a default has occurred pursuant to the contract or agreement and the amount of the default. (c) The design professional records, in the office of the county recorder in the county in which the real property or some portion thereof is located, a notice of lien which specifies that a lien is created in favor of the named design professional, specifies the amount thereof, identifies the current owner of record of the real property, provides a legal description of the real property to be improved, and specifies the building permit or other governmental approval for the work of improvement required as a condition of recording the notice of lien by Section 3081.2.

3081.4. (a) Upon recordation of the notice of lien pursuant to subdivision (c) of Section 3081.3, a

lien is created in favor of the named design professional. (b) The lien created pursuant to subdivision (a) shall automatically expire and be null and void and of no further force or effect on the occurrence of either of the following: (1) The commencement of the work of improvement for which the design professional furnished services at the request of the landowner. (2) The expiration of 90 days after recording the notice of lien, unless the design professional files suit to enforce the lien within 90 days of recordation. (c) In the event the landowner partially or fully satisfies the lien of the design professional, the design professional shall execute and record a document which evidences a partial or full satisfaction and release of the lien, as the case may be.

3081.5. Any design professionals' lien perfected pursuant to this chapter shall be enforced pursuant to the provisions contained in Article 7 (commencing with Section 3143) of Chapter 2 of Title 15.

3081.6. This chapter does not affect the ability of a design professional to obtain a mechanic's lien pursuant to Title 15 (commencing with Section 3082) of this part.

3081.7. A design professional shall record a notice of lien pursuant to subdivision (c) of Section 3081.3 no later than 90 days after the design professional knows or has reason to know that the landowner is not commencing the work of improvement.

3081.8. The lien of a design professional perfected pursuant to this chapter shall not affect the ability of the design professional to pursue other remedies.

3081.9. (a) No lien created by this chapter shall affect or take priority over the interest of record of a purchaser, lessee, or encumbrancer, if the interest of the purchaser, lessee, or encumbrancer in the real property was duly recorded before recordation of the design professionals' lien. (b) No lien created by this chapter shall affect or take priority over an encumbrance of a construction lender which funds the loan to commence the work of improvement for which the design professional furnished services at the request of the landowner.

3081.10. The design professionals' lien provided in this chapter shall not apply to a work of improvement relating to a single-family owner occupied residence where the construction costs are less than one hundred thousand dollars (\$100,000) in value.

3084. (a) "Claim of lien" means a written statement, signed and verified by the claimant or by the claimant's agent, containing all of the following: (1) A statement of the claimant's demand after deducting all just credits and offsets. (2) The name of the owner or reputed owner, if known. (3) A general statement of the kind of labor, services, equipment, or materials furnished by the

claimant. (4) The name of the person by whom the claimant was employed or to whom the claimant furnished the labor, services, equipment, or materials. (5) A description of the site sufficient for identification. (b) A claim of lien in otherwise proper form, verified and containing the information required by this section shall be accepted by the recorder for recording and shall be deemed duly recorded without acknowledgment.

3086. "Completion" means, in the case of any work of improvement other than a public work, actual completion of the work of improvement. Any of the following shall be deemed equivalent to a completion: (a) The occupation or use of a work of improvement by the owner, or his agent, accompanied by cessation of labor thereon. (b) The acceptance by the owner, or his agent, of the work of improvement. (c) After the commencement of a work of improvement, a cessation of labor thereon for a continuous period of 60 days, or a cessation of labor thereon for a continuous period of 30 days or more if the owner files for record a notice of cessation. If the work of improvement is subject to acceptance by any public entity, the completion of such work of improvement shall be deemed to be the date of such acceptance; provided, however, that, except as to contracts awarded under the State Contract Act, Chapter 3 (commencing with Section 14250), Part 5, Division 3, Title 2 of the Government Code, a cessation of labor on any public work for a continuous period of 30 days shall be a completion thereof.

3092. "Notice of cessation" means a written notice, signed and verified by the owner or his agent, containing all of the following: (a) The date on or about when the cessation of labor commenced. (b) A statement that such cessation has continued until the recording of the notice of cessation. (c) The name and address of the owner. (d) The nature of the interest or estate of the owner. (e) A description of the site sufficient for identification, containing the street address of the site, if any. If a sufficient legal description of the site is given, the validity of the notice shall not, however, be affected by the fact that the street address is erroneous or is omitted. (f) The name of the original contractor, if any, for the work of improvement as a whole. (g) For the purpose of this section, "owner" means the owner who causes a building, improvement, or structure, to be constructed, altered, or repaired (or his successor in interest at the date of a notice of cessation from labor is filed for record) whether the interest or estate of such owner be in fee, as vendee under a contract of purchase, as lessee, or other interest or estate less than the fee. Where such interest or estate is held by two or more persons as joint tenants or tenants in common, any one or more of the cotenants may be deemed to be the "owner" within the meaning of this section. Any notice of cessation signed by less than all of such cotenants shall recite the names and addresses of all such cotenants. The notice of cessation shall be recorded in the office of the county recorder of the county in which the site is located and shall be effective only if there has been a continuous cessation of labor for at least 30 days prior to such recording.

3093. "Notice of completion" means a written notice, signed and verified by the owner or his

agent, containing all of the following: (a) The date of completion (other than a cessation of labor). The recital of an erroneous date of completion shall not, however, affect the validity of the notice if the true date of completion is within 10 days preceding the date of recording of such notice. (b) The name and address of the owner. (c) The nature of the interest or estate of the owner. (d) A description of the site sufficient for identification, containing the street address of the site, if any. If a sufficient legal description of the site is given, the validity of the notice shall not, however, be affected by the fact that the street address recited is erroneous or that such street address is omitted. (e) The name of the original contractor, if any, or if the notice is given only of completion of a contract for a particular portion of such work of improvement, as provided in Section 3117, then the name of the original contractor under such contract, and a general statement of the kind of work done or materials furnished pursuant to such contract. The notice of completion shall be recorded in the office of the county recorder of the county in which the site is located, within 10 days after such completion. A notice of completion in otherwise proper form, verified and containing the information required by this section shall be accepted by the recorder for recording and shall be deemed duly recorded without acknowledgment. If there is more than one owner, any notice of completion signed by less than all of such co-owners shall recite the names and addresses of all of such co-owners; and provided further, that any notice of completion signed by a successor in interest shall recite the names and addresses of his transferor or transferors. For the purpose of this section, owner is defined as set forth in subdivision (g) of Section 3092.

3097. "Preliminary 20-day notice (private work)" means a written notice from a claimant that is given prior to the recording of a mechanic's lien, prior to the filing of a stop notice, and prior to asserting a claim against a payment bond, and is required to be given under the following circumstances: (a) Except one under direct contract with the owner or one performing actual labor for wages as described in subdivision (a) of Section 3089, or a person or entity to whom a portion of a laborer's compensation is paid as described in subdivision (b) of Section 3089, every person who furnishes labor, service, equipment, or material for which a lien or payment bond otherwise can be claimed under this title, or for which a notice to withhold can otherwise be given under this title, shall, as a necessary prerequisite to the validity of any claim of lien, payment bond, and of a notice to withhold, cause to be given to the owner or reputed owner, to the original contractor, or reputed contractor, and to the construction lender, if any, or to the reputed construction lender, if any, a written preliminary notice as prescribed by this section. (b) Except the contractor, or one performing actual labor for wages as described in subdivision (a) of Section 3089, or a person or entity to whom a portion of a laborer's compensation is paid as described in subdivision (b) of Section 3089, all persons who have a direct contract with the owner and who furnish labor, service, equipment, or material for which a lien or payment bond otherwise can be claimed under this title, or for which a notice to withhold can otherwise be given under this title, shall, as a necessary prerequisite to the validity of any claim of lien, claim

on a payment bond, and of a notice to withhold, cause to be given to the construction lender, if any, or to the reputed construction lender, if any, a written preliminary notice as prescribed by this section. (c) The preliminary notice referred to in subdivisions (a) and (b) shall contain the following information: (1) A general description of the labor, service, equipment, or materials furnished, or to be furnished, and an estimate of the total price thereof. (2) The name and address of the person furnishing that labor, service, equipment, or materials. (3) The name of the person who contracted for purchase of that labor, service, equipment, or materials. (4) A description of the jobsite sufficient for identification. (5) The following statement in boldface type: **NOTICE TO PROPERTY OWNER** If bills are not paid in full for the labor, services, equipment, or materials furnished or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being so improved may be placed against the property even though you have paid your contractor in full. You may wish to protect yourself against this consequence by (1) requiring your contractor to furnish a signed release by the person or firm giving you this notice before making payment to your contractor, or (2) any other method or device that is appropriate under the circumstances. Other than residential homeowners of dwellings containing fewer than five units, private project owners must notify the original contractor and any lien claimant who has provided the owner with a preliminary 20-day lien notice in accordance with Section 3097 of the Civil Code that a notice of completion or notice of cessation has been recorded within 10 days of its recordation. Notice shall be by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing. Failure to notify will extend the deadlines to record a lien. (6) If the notice is given by a subcontractor who has failed to pay all compensation due to his or her laborers on the job, the notice shall also contain the identity and address of any laborer and any express trust fund to whom employer payments are due. If an invoice for materials or certified payroll contains the information required by this section, a copy of the invoice, transmitted in the manner prescribed by this section shall be sufficient notice. A certificated architect, registered engineer, or licensed land surveyor who has furnished services for the design of the work of improvement and who gives a preliminary notice as provided in this section not later than 20 days after the work of improvement has commenced shall be deemed to have complied with subdivisions (a) and (b) with respect to architectural, engineering, or surveying services furnished, or to be furnished. (d) The preliminary notice referred to in subdivisions (a) and (b) shall be given not later than 20 days after the claimant has first furnished labor, service, equipment, or materials to the jobsite. If labor, service, equipment, or materials have been furnished to a jobsite by a claimant who did not give a preliminary notice, that claimant shall not be precluded from giving a preliminary notice at any time thereafter. The claimant shall, however, be entitled to record a lien, file a stop notice, and assert a claim against a payment bond only for labor, service, equipment, or material furnished within 20 days prior to the service of the preliminary notice, and at any time thereafter. (e) Any agreement made or entered into by an owner, whereby the owner agrees to waive the rights or privileges conferred upon the owner by this section shall be void and of no effect. (f) The notice required under this

section may be served as follows: (1) If the person to be notified resides in this state, by delivering the notice personally, or by leaving it at his or her address of residence or place of business with some person in charge, or by first-class registered or certified mail, postage prepaid, addressed to the person to whom notice is to be given at his or her residence or place of business address or at the address shown by the building permit on file with the authority issuing a building permit for the work, or at an address recorded pursuant to subdivision (j). (2) If the person to be notified does not reside in this state, by any method enumerated in paragraph (1) of this subdivision. If the person cannot be served by any of these methods, then notice may be given by first-class certified or registered mail, addressed to the construction lender or to the original contractor. (3) If service is made by first-class certified or registered mail, service is complete at the time of the deposit of that registered or certified mail. (g) A person required by this section to give notice to the owner, to an original contractor, and to a person to whom a notice to withhold may be given, need give only one notice to the owner, to the original contractor, and to the person to whom a notice to withhold may be given with respect to all materials, services, labor, or equipment he or she furnishes for a work of improvement, that means the entire structure or scheme of improvements as a whole, unless the same is furnished under contracts with more than one subcontractor, in which event, the notice requirements shall be met with respect to materials, services, labor, or equipment furnished to each contractor. If a notice contains a general description required by subdivision (a) or (b) of the materials, services, labor, or equipment furnished to the date of notice, it is not defective because, after that date, the person giving notice furnishes materials, services, labor, or equipment not within the scope of this general description. (h) If the contract price to be paid to any subcontractor on a particular work of improvement exceeds four hundred dollars (\$400), the failure of that contractor, licensed under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, to give the notice provided for in this section, constitutes grounds for disciplinary action by the Registrar of Contractors. If the notice is required to contain the information set forth in paragraph (6) of subdivision (c), a failure to give the notice, including that information, that results in the filing of a lien, claim on a payment bond, or the delivery of a stop notice by the express trust fund to which the obligation is owing constitutes grounds for disciplinary action by the Registrar of Contractors against the subcontractor if the amount due the trust fund is not paid. (i) Every city, county, city and county, or other governmental authority issuing building permits shall, in its application form for a building permit, provide space and a designation for the applicant to enter the name, branch, designation, if any, and address of the construction lender and shall keep the information on file open for public inspection during the regular business hours of the authority. If there is no known construction lender, that fact shall be noted in the designated space. Any failure to indicate the name and address of the construction lender on the application, however, shall not relieve any person from the obligation to give to the construction lender the notice required by this section. (j) A mortgage, deed of trust, or other instrument securing a loan, any of the proceeds of which may be used for the purpose of constructing

improvements on real property, shall bear the designation "Construction Trust Deed" prominently on its face and shall state all of the following: (1) the name and address of the lender, and the name and address of the owner of the real property described in the instrument, and (2) a legal description of the real property that secures the loan and, if known, the street address of the property. The failure to be so designated or to state any of the information required by this subdivision shall not affect the validity of the mortgage, deed of trust, or other instrument. Failure to provide this information on this instrument when recorded shall not relieve persons required to give preliminary notice under this section from that duty. The county recorder of the county in which the instrument is recorded shall indicate in the general index of the official records of the county that the instrument secures a construction loan. (k) Every contractor and subcontractor employing laborers as described in subdivision (a) of Section 3089 who has failed to pay those laborers their full compensation when it became due, including any employer payments described in Section 1773.1 of the Labor Code and regulations adopted thereunder shall, without regard to whether the work was performed on a public or private work, cause to be given to those laborers, their bargaining representatives, if any, and to the construction lender, if any, or to the reputed construction lender, if any, not later than the date the compensation became delinquent, a written notice containing all of the following: (1) The name of the owner and the contractor. (2) A description of the jobsite sufficient for identification. (3) The identity and address of any express trust fund described in Section 3111 to which employer payments are due. (4) The total number of straight time and overtime hours on each job. (5) The amount then past due and owing. Failure to give this notice shall constitute grounds for disciplinary action by the Registrar of Contractors. (l) Every written contract entered into between a property owner and an original contractor shall provide space for the owner to enter his or her name, residence address, and place of business if any. The original contractor shall make available the name and address of residence of the owner to any person seeking to serve the notice specified in subdivision (c). (m) Every written contract entered into between a property owner and an original contractor, except home improvement contracts and swimming pool contracts subject to Article 10 (commencing with Section 7150) of Chapter 9 of Division 3 of the Business and Professions Code, shall provide space for the owner to enter the name and address of the construction lender or lenders. The original contractor shall make available the name and address of the construction lender or lenders to any person seeking to serve the notice specified in subdivision (c). Every contract entered into between an original contractor and subcontractor, and between subcontractors, shall provide a space for the name and address of the owner, original contractor, and any construction lender. (n) If one or more construction loans are obtained after commencement of construction, the property owner shall provide the name and address of the construction lender or lenders to each person who has given the property owner the notice specified in subdivision (c). (o) (1) Each person who has served a preliminary 20-day notice pursuant to subdivision (f) may file the preliminary 20-day notice with the county recorder in the county in which any portion of the property is located. A preliminary 20-day notice filed pursuant

to this section shall contain all of the following: (A) The name and address of the person furnishing the labor, service, equipment, or materials. (B) The name of the person who contracted for purchase of the labor, services, equipment, or materials. (C) The common street address of the jobsite. (2) Upon the acceptance for recording of a notice of completion or notice of cessation the county recorder shall mail to those persons who have filed a preliminary 20-day notice, notification that a notice of completion or notice of cessation has been recorded on the property, and shall affix the date that the notice of completion or notice of cessation was recorded with the county recorder. (3) The failure of the county recorder to mail the notification to the person who filed a preliminary 20-day notice, or the failure of those persons to receive the notification or to receive complete notification, shall not affect the period within which a claim of lien is required to be recorded. However, the county recorder shall make a good faith effort to mail notification to those persons who have filed the preliminary 20-day notice under this section and to do so within five days after the recording of a notice of completion or notice of cessation. (4) This new function of the county recorder shall not become operative until July 1, 1988. The county recorder may cause to be destroyed all documents filed pursuant to this section, two years after the date of filing. (5) The preliminary 20-day notice that a person may file pursuant to this subdivision is for the limited purpose of facilitating the mailing of notice by the county recorder of recorded notices of completion and notices of cessation. The notice that is filed is not a recordable document and shall not be entered into those official records of the county which by law impart constructive notice. Notwithstanding any other provision of law, the index maintained by the recorder of filed preliminary 20-day notices shall be separate and distinct from those indexes maintained by the county recorder of those official records of the county which by law impart constructive notice. The filing of a preliminary 20-day notice with the county recorder does not give rise to any actual or constructive notice with respect to any party of the existence or contents of a filed preliminary 20-day notice nor to any duty of inquiry on the part of any party as to the existence or contents of that notice. (p) (1) The change made to the statement described in subdivision (c) by Chapter 974 of the Statutes of 1994 shall have no effect upon the validity of any notice that otherwise meets the requirements of this section. The failure to provide, pursuant to Chapter 974 of the Statutes of 1994, a written preliminary notice to a subcontractor with whom the claimant has contracted shall not affect the validity of any preliminary notice provided pursuant to this section. (2) (A) The inclusion of the language added to paragraph (5) of subdivision (c) by Chapter 795 of the Statutes of 1999, shall not affect the validity of any preliminary notice given on or after January 1, 2000, and prior to the operative date of the amendments to this section enacted at the 2000 portion of the 1999-2000 Regular Session, that otherwise meets the requirements of that subdivision. (B) A preliminary notice given on or after January 1, 2000, and prior to the operative date of the amendments to this section enacted at the 2000 portion of the 1999-2000 Regular Session, shall not be invalid because of the failure to include the language added to paragraph (5) of subdivision (c) by Chapter 795 of the Statutes of 1999, if the notice otherwise complies with that subdivision. (C) The failure to provide an

affidavit form or notice of rights, or both, pursuant to the requirements of Chapter 795 of the Statutes of 1999, shall not affect the validity of any preliminary notice pursuant to this section.

3097.1. Proof that the preliminary 20-day notice required by Section 3097 was served in accordance with subdivision (f) of Section 3097 shall be made as follows: (a) If served by mail, by the proof of service affidavit described in subdivision (c) of this section accompanied either by the return receipt of certified or registered mail, or by a photocopy of the record of delivery and receipt maintained by the post office, showing the date of delivery and to whom delivered, or, in the event of nondelivery, by the returned envelope itself. (b) If served by personally delivering the notice to the person to be notified, or by leaving it at his address or place of business with some person in charge, by the proof of service affidavit described in subdivision (c). (c) A "proof of service affidavit" is an affidavit of the person making the service, showing the time, place and manner of service and facts showing that such service was made in accordance with Section 3097. Such affidavit shall show the name and address of the person upon whom a copy of the preliminary 20-day notice was served, and, if appropriate, the title or capacity in which he was served.

3098. "Preliminary 20-day notice (public work)" means a written notice from a claimant that was given prior to the assertion of a claim against a payment bond, or the filing of a stop notice on public work, and is required to be given under the following circumstances: (a) In any case in which the law of this state affords a right to a person furnishing labor or materials for a public work who has not been paid therefor to assert a claim against a payment bond, or to file a stop notice with the public agency concerned, and thereby cause the withholding of payment from the contractor for the public work, any person that has no direct contractual relationship with the contractor, other than a person who performed actual labor for wages or an express trust fund described in Section 3111, may file the preliminary notice, but no payment shall be withheld from the contractor pursuant to that notice unless the person has caused written notice to be given to the contractor, and the public agency concerned, not later than 20 days after the claimant has first furnished labor, services, equipment, or materials to the jobsite, stating with substantial accuracy a general description of labor, service, equipment, or materials furnished or to be furnished, and the name of the party to whom the same was furnished. This notice shall be served by mailing the same by first-class mail, registered mail, or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business, or his or her residence, or by personal service. In case of any public works constructed by the Department of Public Works or the Department of General Services of the state, such notice shall be served by mailing in the same manner as above, addressed to the office of the disbursing officer of the department constructing the work, or by personal service upon the officer. When service is by registered or certified mail, service is complete at the time of the deposit of the registered or certified mail. (b) Where the contract price to be paid to any

subcontractor on a particular work of improvement exceeds four hundred dollars (\$400), the failure of that contractor, licensed under Chapter 9, (commencing with Section 7000) of Division 3 of the Business and Professions Code, to give the notice provided for in this section, constitutes grounds for disciplinary action by the Registrar of Contractors. (c) The notice requirements of this section shall not apply to a laborer described in Section 3089 or to an express trust fund described in Section 3111. (d) If labor, service, equipment, or materials have been furnished to a jobsite by a claimant who did not give a preliminary notice pursuant to subdivision (a), that claimant shall not be precluded from giving a preliminary notice at any time thereafter. The claimant shall, however, be entitled to assert a claim against a payment bond and file a stop notice only for labor, service, equipment, or material furnished within 20 days prior to the service of the preliminary notice, and at any time thereafter. (e) The failure to provide, pursuant to Chapter 974 of the Statutes of 1994, a written preliminary notice to a subcontractor with whom the claimant has contracted shall not affect the validity of any preliminary notice provided pursuant to this section.

3110. Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement shall have a lien upon the property upon which they have bestowed labor or furnished materials or appliances or leased equipment for the value of such labor done or materials furnished and for the value of the use of such appliances, equipment, teams, or power whether done or furnished at the instance of the owner or of any person acting by his authority or under him as contractor or otherwise. For the purposes of this chapter, every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of a work of improvement or portion thereof shall be held to be the agent of the owner.

3110.5. (a) (1) This section shall apply only to an owner who contracts for a work of improvement for construction, alteration, addition to, or repair upon, property, whether the contracting owner is the owner of a fee simple absolute interest in the property or the owner of any lesser interest in the property. For purposes of this section, a lessee of real property shall be considered to be the owner of a fee simple absolute interest in that real property if and only if: (A) the initial term of the lease is at least 35 years and (B) the lease covers one or more lawful parcels under the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) and any applicable local ordinances adopted pursuant thereto, in their entirety, including, but not limited to, parcels approved pursuant to certificate of compliance proceedings. For purposes of this section, the owner of a fee simple absolute interest shall not be deemed to be the owner of less than a fee simple absolute interest by reason of any mortgages,

deeds of trust, ground leases, or other liens or encumbrances or rights to occupancy that may encumber the fee simple absolute interest. If the owner contracting for the work of improvement is an owner of an interest in the property which is less than a fee simple absolute interest, this section does not require the owner of the fee simple absolute interest who does not contract for the work of improvement to provide any security pursuant to this section or to comply with any of the other obligations of an owner under this section. If the owner contracting for the work of improvement is an owner of the fee simple absolute interest in the property, this section does not require the owner of an interest in the property which is less than a fee simple absolute interest who does not contract for the work of improvement to provide any security pursuant to this section or to comply with any of the other obligations of an owner under this section. (2) An owner contracting for a work of improvement is subject to this section only if one of the following conditions is satisfied: (A) The owner contracting for the work of improvement is the owner of a fee simple absolute interest in the property upon which the work of improvement is to be made, and the value of the contract for the work of improvement is more than five million dollars (\$5,000,000). (B) The owner contracting for the work of improvement is the owner of an interest which is less than a fee simple absolute interest, including a leasehold interest, in the property upon which the work of improvement is to be made, and the value of the contract for the work of improvement is more than one million dollars (\$1,000,000). (b) If an owner of property, whether an owner of a fee simple absolute interest or any lesser interest therein, contracts for any work of improvement for construction, alteration, addition to, or repair upon, the property, and the contracting owner is subject to the requirements of this section, as determined by subdivision (a), the contracting owner shall supply to the original contractor, if a lending institution is providing a construction loan, a copy certified by the county recorder of the recorded construction mortgage or deed of trust that shall disclose the amount of the construction loan. In addition, if the contracting owner is not the majority owner of the original contractor, the contracting owner shall provide security for the contracting owner's payment obligations under the construction contract. The security shall be used only when the contracting owner defaults on his or her contractual obligations to the original contractor. The security for the contracting owner's payment obligations under the construction contract shall be provided by one of the following means: (1) A payment bond, as defined in Section 3096, in the amount of either (A) not less than 25 percent of the total amount of any construction contract that is subject to this section where the construction contract provides that the work of improvement is scheduled to be substantially completed within six months following the commencement thereof, or (B) not less than 15 percent of the total amount of any other construction contract that is subject to this section, which payment bond shall be payable upon default by the contracting owner of any undisputed amount under the contract that has been due and payable for more than 30 days. The payment bond shall be from a California admitted surety which is either listed in the Department of the Treasury's Listing of Approved Sureties (Department Circular 570) or that has an A.M. Best rating of A or better and has an underwriting limitation, pursuant to Section 12090 of the

Insurance Code, greater than the value of the contract amount of the bond. (2) An irrevocable letter of credit from a financial institution, as defined in Section 5107 of the Financial Code, inuring to the benefit of the original contractor in the amount of either (A) not less than 25 percent of the total amount of any construction contract that is subject to this section where the construction contract provides that the work of improvement is scheduled to be substantially completed within six months following the commencement thereof, or (B) not less than 15 percent of the total amount of any other construction contract that is subject to this section. The maturity date of the letter of credit and other terms of the letter of credit shall be determined by agreement between the contracting owner, the original contractor, and the issuer of the letter of credit provided that the contracting owner shall be required to maintain the letter of credit in effect until the contracting owner has satisfied all of its payment obligations to the original contractor. (3) (A) An escrow account, designated as a "construction security escrow account," maintained with an escrow agent licensed under the Escrow Law, as set forth in Division 6 (commencing with Section 17000) of the Financial Code, or with any person exempt from the Escrow Law pursuant to paragraph (1) or (3) of subdivision (a) of Section 17006 of the Financial Code, which construction security escrow account shall be located in California and in which the contracting owner shall deposit funds in the amount provided in subparagraph (B); provided that the original contractor shall not be obligated to accept a construction security escrow account as security unless the contracting owner establishes to the reasonable satisfaction of the original contractor (which may be established by a written opinion of legal counsel for the contracting owner), that the contracting owner has granted the original contractor a perfected, first priority security interest in the construction security escrow account and all funds deposited by the contracting owner therein and the proceeds thereof. The funds on deposit in the construction security escrow account shall be the sole property of the contracting owner, subject to the security interest in favor of the original contractor. The escrowholder shall be instructed by the contracting owner and the original contractor to hold the funds on deposit in the construction security escrow account for the purpose of perfecting the original contractor's security interest therein and to disburse those funds only upon the joint authorization of the contracting owner and the original contractor, or in accordance with an order of any court which is binding on both the owner and the original contractor. This section does not require any construction lender to agree to deposit proceeds of a construction loan in a construction security escrow account. (B) Prior to commencement of the work under the construction contract, the contracting owner shall make an initial deposit to the construction security escrow account in the amount of either (i) not less than 25 percent of the total amount of any construction contract which is subject to this section where the construction contract provides that the work of improvement is scheduled to be substantially completed within six months following the commencement thereof, or (ii) not less than 15 percent of the total amount of any other construction contract which is subject to this section. In addition, if the construction contract provides for a so-called retainage or retention to be withheld from periodic payments to the original contractor, the contracting owner shall deposit all

amounts withheld as retainage or retention in the construction security escrow account at the same time the contracting owner makes the corresponding payment to the original contractor from which the retainage or retention is withheld provided, however, that in no event shall the amount required to be maintained on deposit in the construction security escrow account exceed the total amount of future payments remaining to be due the original contractor under its construction contract (as the same may be adjusted by agreement between the contracting owner and the original contractor). If the amount of funds on deposit in the construction security escrow account equals or exceeds the total amount of future payments remaining to be due the original contractor, the contracting owner and the original contractor shall authorize the disbursement to the original contractor of funds on deposit in the construction security escrow account to pay progress payments then due the original contractor under its construction contract (in whole or in part), but in no event shall either party be obligated to authorize the disbursement of any funds that would cause the amount remaining on deposit in the construction security escrow account following that disbursement to be less than the total amount of future payments remaining to be due the original contractor after application of any funds disbursed to the original contractor. The contracting owner and the original contractor shall authorize the disbursement to the contracting owner of any funds remaining on deposit in the construction security escrow account after the original contractor has been paid all amounts due under its construction contract. The contracting owner and the original contractor shall authorize the disbursement of funds on deposit in the construction security escrow account in accordance with the order of any court which is binding on both of them. The contracting owner and the original contractor may agree in the construction contract upon additional conditions for the disbursement of funds on deposit in the construction security escrow account provided that the conditions shall not cause the amount remaining on deposit in the construction security escrow account to be less than the amount required pursuant to this subparagraph. (c) For the purposes of subdivision (b), if the price under the construction contract is not a fixed price, the amount of security to be provided shall be determined with reference to the guaranteed maximum price, if there is one, or if there is no guaranteed maximum price, the amount of security shall be determined with reference to the contracting owner's and original contractor's good faith estimate as to the total cost anticipated to be incurred under the construction contract. If any contracting owner that is required to provide security under this section with respect to a construction contract fails to provide that security or fails to maintain that security as required, the original contractor may make written demand on the contracting owner to do so, and if the contracting owner fails to provide and maintain that security within 10 days after the original contractor makes written demand on the owner, the original contractor may suspend work until the required security is provided and maintained in accordance with this section. (d) This section does not affect provisions in this code providing for mechanics' liens, stop notices, bond remedies, or prompt payment rights of a subcontractor, including the original contractor's payment responsibilities as set forth in Section 7108.5 of the Business and Professions Code and Section 10262 of the Public Contract Code. (e) This section does not apply

to the construction of single-family residences, including single-family residences located within a subdivision, and any associated fixed works that require the services of a general engineering contractor, as defined in Section 7056 of the Business and Professions Code, any public works projects, or housing developments eligible for a density bonus pursuant to Section 65915 of the Government Code. As used in this section, the term "single-family residence" means a real property improvement used or intended to be used as a dwelling unit for one family. (f) This section does not apply to either of the following: (1) Any contract where the contracting owner is either a qualified publicly traded company or a wholly owned subsidiary of a qualified publicly traded company, provided that the obligations of the subsidiary under the construction contract are guaranteed by the parent which is a qualified publicly traded company. As used in this section, the term "qualified publicly traded company" means any company having a class of equity securities listed for trading on the New York Stock Exchange, the American Stock Exchange or the NASDAQ stock market and the nonsubordinated debt securities thereof which are rated as "investment grade" by either Fitch IBCA, Inc., Moody's Investor Services, Inc., Standard & Poor's Ratings Services or a similar statistical rating organization which is nationally recognized for rating the creditworthiness of publicly traded companies. If at any time prior to final payment of all sums due under the construction contract the nonsubordinated debt securities of the qualified publicly traded company are downgraded to below "investment grade" by one of the referenced rating agencies, the contracting owner of the property will no longer be exempt from the provisions of this section. (2) Any contract where the contracting owner is either a qualified private company or a wholly owned subsidiary of a qualified private company, provided that the obligations of the subsidiary under the construction contract are guaranteed by the parent which is a qualified private company. As used in this section, the term "qualified private company" means any company that has no equity securities listed for trading on the New York Stock Exchange, the American Stock Exchange or the NASDAQ stock market, and that has a net worth determined in accordance with generally accepted accounting principles in excess of fifty million dollars (\$50,000,000). If at any time prior to final payment of all sums due under the construction contract the net worth of the qualified private company is reduced below the level referenced in this section, the owner of the property will no longer be exempt from the provisions of this section. (g) It is against public policy to waive the provisions of this section in any contract for any private work of improvement to which this section applies.

3112. Any claimant who, at the instance or request of the owner (or any other person acting by his authority or under him, as contractor or otherwise) of any lot or tract of land, has made any site improvement has a lien upon such lot or tract of land for work done or materials furnished.

3114. A claimant shall be entitled to enforce a lien only if he has given the preliminary 20-day notice (private work) in accordance with the provisions of Section 3097, if required by that section, and has made proof of service in accordance with the provisions of Section 3097.1.

3115. Each original contractor, in order to enforce a lien, must record his claim of lien after he completes his contract and before the expiration of (a) 90 days after the completion of the work of improvement as defined in Section 3106 if no notice of completion or notice of cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation.

3116. Each claimant other than an original contractor, in order to enforce a lien, must record his claim of lien after he has ceased furnishing labor, services, equipment, or materials, and before the expiration of (a) 90 days after completion of the work of improvement if no notice of completion or cessation has been recorded, or (b) 30 days after recordation of a notice of completion or notice of cessation.

3118. Any person who shall willfully include in his claim of lien labor, services, equipment, or materials not furnished for the property described in such claim shall thereby forfeit his lien.

3123. (a) The liens provided for in this chapter shall be direct liens, and shall be for the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, whichever is less. The lien shall not be limited in amount by the price stated in the contract as defined in Section 3088, except as provided in Sections 3235 and 3236 and in subdivision (c) of this section. (b) This section does not preclude the claimant from including in the lien any amount due for labor, services, equipment, or materials furnished based on a written modification of the contract or as a result of the rescission, abandonment, or breach of the contract. However, in the event of rescission, abandonment, or breach of the contract, the amount of the lien may not exceed the reasonable value of the labor, services, equipment, and materials furnished by the claimant. (c) The owner shall notify the prime contractor and construction lenders of any changes in the contract if the change has the effect of increasing the price stated in the contract by 5 percent or more.

3124. In any case where the claimant was employed by a contractor or subcontractor, his claim of lien shall not extend to any labor, services, equipment, or materials not included in the contract between the owner and original contractor or any modification thereof, if the claimant had actual knowledge or constructive notice of the contract as defined in Section 3088 or any such modification before he furnished such labor, service, equipment, or materials. The filing of a contract for a work of improvement or of a modification of such contract with the county recorder of the county where the property is situated, before the commencement of work, shall be equivalent to the giving of actual notice of the provisions thereof by the owner to all persons performing work or furnishing materials thereunder.

3128. The liens provided for in this chapter shall attach to the work of improvement and the land on which it is situated together with a convenient space about the same or so much as may be required for the convenient use and occupation thereof, if at the commencement of the work or of the furnishing of the materials for the same, the land belonged to the person who caused such work of improvement to be constructed, but if such person owned less than a fee simple estate in such land then only his interest therein is subject to such lien, except as provided in Section 3129.

3129. Every work of improvement constructed upon any land and all work or labor performed or materials furnished in connection therewith with the knowledge of the owner or of any person having or claiming any estate therein shall be held to have been constructed, performed, or furnished at the instance of such owner or person having or claiming any estate therein and such interest shall be subject to any lien recorded under this chapter unless such owner or person having or claiming any estate therein shall give a notice of nonresponsibility pursuant to Section 3094.

3130. In every case in which one claim is filed against two or more buildings or other works of improvement owned or reputed to be owned by the same person or on which the claimant has been employed by the same person to do his work or furnish his materials, whether such works of improvement are owned by one or more owners, the person filing such claim must at the same time designate the amount due to him on each of such works of improvement; otherwise the lien of such claim is postponed to other liens. If such claimant has been employed to furnish labor or materials under a contract providing for a lump sum to be paid to him for his work or materials on such works of improvement as a whole, and such contract does not segregate the amount due for the work done and materials furnished on such works of improvement separately, then such claimant, for the purposes of this section, may estimate an equitable distribution of the sum due him over all of such works of improvement based upon the proportionate amount of work done or materials furnished upon such respective works of improvement. The lien of such claimant does not extend beyond the amount designated as against other creditors having liens, by judgment, mortgage, or otherwise, upon either such works of improvement or upon the land upon which the same are situated. For all purposes of this section, if there is a single structure on more than one parcel of land owned by one or more different owners, it shall not be the duty of the claimant to segregate the proportion of material or labor entering into the structure on any one of such parcels; but upon the trial thereof the court may, when it deems it equitable so to do, distribute the lien equitably as between the several parcels involved.

3131. If a work of improvement consists in the construction of two or more separate residential units, each such unit shall be considered a separate "work of improvement," and the time for filing claims of lien against each such residential unit shall commence to run upon the

completion of each such residential unit. A separate residential unit means one residential structure, including a residential structure containing multiple condominium units, together with any common area, or any garage or other improvements appurtenant thereto. The provisions of this qualification shall not impair any rights conferred under the provisions of Section 3112 and 3130. Materials delivered to or upon any portion of such entire work of improvement or furnished to be used in such entire work of improvement and ultimately used or consumed in one of such separate residential units shall, for all the purposes of this title, be deemed to have been furnished to be used or consumed in the separate residential unit in which the same shall have been actually used or consumed; provided, however, that if the claimant is unable to segregate the amounts used on or consumed in such separate units, he shall be entitled to all the benefits of Section 3130. For purposes of this section and notwithstanding any other provision of this chapter, the completion of a residential structure containing multiple condominium units, together with any common area, or any garage or other improvements appurtenant thereto, and only such residential structure, shall not operate in any manner to impair the rights of a lien claimant entitled to a lien pursuant to Section 3111, if the claim of lien is recorded in the manner prescribed by this chapter within 120 days of the completion of the residential structure.

3134. The liens provided for in this chapter (other than with respect to site improvements) are, subject to the exception in Section 3138, preferred to any lien, mortgage, deed of trust, or other encumbrance upon the work of improvement and the site, which attaches subsequent to the commencement of the work of improvement, and also to any lien, mortgage, deed of trust, or other encumbrance of which the claimant had no notice and which was unrecorded at the time of commencement of the work of improvement.

3143. If the owner of property, or the owner of any interest therein, sought to be charged with a claim of lien, or any original contractor or subcontractor disputes the correctness or validity of any claim of lien, he may record in the office of the county recorder in which such claim of lien was recorded, either before or after the commencement of an action to enforce such claim of lien, a bond executed by a corporation authorized to issue surety bonds in the State of California, in a penal sum equal to 1 1/2 times the amount of the claim or 1 1/2 times the amount allocated in the claim of lien to the parcel or parcels of real property sought to be released, which bond shall be conditioned for the payment of any sum which the claimant may recover on the claim together with his cost of suit in the action, if he recovers therein. Upon the recording of such bond the real property described in such bond is released from the lien and from any action brought to foreclose such lien. The principal upon such bond may be either the owner of the property or the owner of any interest therein, or any original contractor, subcontractor, or sub-subcontractor affected by such claim of lien.

3144. (a) No lien provided for in this chapter binds any property for a longer period of time than

90 days after the recording of the claim of lien, unless within that time an action to foreclose the lien is commenced in a proper court, except that, if credit is given and notice of the fact and terms of such credit is recorded in the office of the county recorder subsequent to the recording of such claim of lien and prior to the expiration of such 90-day period, then such lien continues in force until 90 days after the expiration of such credit, but in no case longer than one year from the time of completion of the work of improvement. (b) If the claimant fails to commence an action to foreclose the lien within the time limitation provided in this section, the lien automatically shall be null and void and of no further force and effect.

3150. In addition to any other costs allowed by law, the court in an action to foreclose a lien must also allow as costs the money paid for verifying and recording the lien, such costs to be allowed each claimant whose lien is established, whether he be plaintiff or defendant.

3151. Whenever on the sale of the property subject to any liens provided for in this chapter, under a judgment of foreclosure of such lien, there is a deficiency of proceeds, judgment for the deficiency may be entered against any party personally liable therefor in like manner and with like effect as in an action for the foreclosure of a mortgage.

3153. In all cases where a claim of lien is recorded for labor, services, equipment, or materials furnished to any contractor, he shall defend any action brought thereon at his own expense, and during the pendency of such action the owner may withhold from the original contractor the amount of money for which the claim of lien is recorded. In case of judgment in such action against the owner or his property upon the lien, the owner shall be entitled to deduct from any amount then or thereafter due from him to the original contractor the amount of such judgment and costs. If the amount of such judgment and costs exceeds the amount due from him to the original contractor, or if he has settled with the original contractor in full, he shall be entitled to recover back from the original contractor, or the sureties on any bond given by him for the faithful performance of his contract, any amount of such judgment and costs in excess of the contract price, and for which the original contractor was originally the party liable.

3154. (a) At any time after the expiration of the time period specified by Section 3144 with regard to the period during which property is bound by a lien after recordation of a claim of lien, where no action has been brought to enforce that lien, the owner of the property or the owner of any interest therein may petition the proper court for a decree to release the property from the lien. (b) The petition shall be verified and shall allege all of the following: (1) The date of recordation of the claim of lien. (2) The legal description of the property affected by the claim of lien. (3) That no action to foreclose the lien is pending, or that no extension of credit has been recorded, and that the time period during which suit can be brought to foreclose the lien has expired. (4) That the lien claimant is unable or unwilling to execute a release of the lien or cannot

with reasonable diligence be found. (5) That the owner of the property or interest in the property has not filed for relief under any law governing bankruptcy, and that there exists no other restraint to prevent the lien claimant from filing to foreclose his or her lien. A certified copy of the claim of lien shall be attached to the petition. The petition shall be deemed controverted by the lien claimant. (c) Upon the filing of the petition, and before any further proceedings are had, the clerk, or if there is no clerk, the judge shall set a date for the hearing not more than 30 days following the filing of the petition. The court may continue the hearing beyond the 30-day period, but good cause shall be shown for any continuance. (d) A copy of the petition and the notice setting the date for the hearing shall be served upon the lien claimant at least 10 days prior to the date set for hearing, in the manner in which a summons is required to be served, or by certified or registered mail, postage prepaid, return receipt requested, addressed to the lien claimant at the claimant's address as shown on any of the following: (1) The preliminary 20-day notice served by the claimant pursuant to Section 3097. (2) In the records of the registrar of contractors. (3) The contract on which the lien is based. (4) The claim of lien itself. (e) When service is made by mail as provided in this section, service is complete on the fifth day following the day of the deposit of the mail. No decree shall issue in favor of the petitioner unless the petitioner proves that service of the petition and the order fixing the date for hearing was made in compliance with this subdivision. The issue of compliance with this subdivision shall be deemed controverted by the lien claimant. (f) In the event judgment is rendered in favor of the petitioner, the decree shall indicate all of the following: (1) The date the lien was recorded. (2) The county and city, if any, in which the lien was recorded. (3) The book and page of the place in the official records where the lien is recorded. (4) The legal description of the property affected. Upon the recordation of a certified copy of the decree, the property described in the decree shall be released from the lien. (g) The prevailing party shall be entitled to attorneys' fees not to exceed two thousand dollars (\$2,000). (h) Nothing in this section shall be construed to bar any other cause of action or claim for relief by the owner of the property or an interest in the property, nor shall a decree canceling a claimant's lien bar the lien claimant from bringing any other cause of action or claim for relief, other than an action foreclosing the lien. However, no other action or claim shall be joined with the claim for relief established by this section. (i) The provisions of Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure do not apply to causes commenced pursuant to this section.

3259.5. (a) The owner of a private work of improvement shall notify the original contractor, and any claimant other than the original contractor who has provided a preliminary 20-day notice in accordance with Section 3097, that a notice of completion or notice of cessation has been recorded. The notice shall be sent within 10 days after recordation of the notice of completion or notice of cessation. Notification shall be sent by registered or certified mail, or by first-class mail, evidenced by a certificate of mailing. Failure to give notice to a contractor or claimant within 10 days of recording the notice of completion or notice of cessation shall extend the period of time

in which that contractor or claimant may file a mechanic's lien or stop notice to 90 days beyond the date that a notice of completion or notice of cessation has been recorded. The sole liability for failing to give notice shall be the extension of the period of time in which that contractor or claimant may file a mechanic's lien or stop notice. (b) For purposes of this section, "owner" means a person who has an interest in real property, or the person's successor in interest on the date a notice of completion or notice of cessation from labor is filed for record, who causes a building, improvement, or structure, to be constructed, altered, or repaired on the property. If the property is owned by two or more persons as joint tenants or tenants in common, any one or more of the cotenants may be deemed to be the "owner" within the meaning of this section. However, "owner" does not include a person who occupies the real property as a personal residence and the dwelling contains not more than four residential units, nor does it include a person who has a security interest in the property or obtains an interest pursuant to a transfer described in subdivision (b), (c), or (d) of Section 1102.2.

3260. (a) This section is applicable with respect to all contracts entered into on or after July 1, 1991, relating to the construction of any private work of improvement. However, the amendments made to this section during the 1992 portion of the 1991-92 Regular Session of the Legislature are applicable only with respect to contracts entered into on or after January 1, 1993, relating to the construction of any private work of improvement. Moreover, the amendments made to this section during the 1993 portion of the 1993-94 Regular Session of the Legislature are applicable only with respect to contracts entered into on or after January 1, 1994, relating to the construction of any private work of improvement. (b) The retention proceeds withheld from any payment by the owner from the original contractor, or by the original contractor from any subcontractor, shall be subject to this section. (c) Within 45 days after the date of completion, the retention withheld by the owner shall be released. "Date of completion," for purposes of this section, means any of the following: (1) The date of issuance of any certificate of occupancy covering the work by the public agency issuing the building permit. (2) The date of completion indicated on a valid notice of completion recorded pursuant to Section 3093. (3) The date of completion as defined in Section 3086. However, release of retentions withheld for any portion of the work of improvement which ultimately will become the property of a public agency, may be conditioned upon the acceptance of the work by the public agency. In the event of a dispute between the owner and the original contractor, the owner may withhold from the final payment an amount not to exceed 150 percent of the disputed amount. (d) Subject to subdivision (e), within 10 days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received. However, if a retention payment received by the original contractor is specifically designated for a particular subcontractor, payment of the retention shall be made to the designated subcontractor, if the payment is consistent with the terms of the subcontract. (e) If a bona fide dispute exists between

a subcontractor and the original contractor, the original contractor may withhold from that subcontractor with whom the dispute exists its portion of the retention proceeds. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount. (f) Within 10 days of receipt of written notice by the owner from the original contractor or by the original contractor from the subcontractor, as the case may be, that any work in dispute has been completed in accordance with the terms of the contract, the owner or original contractor shall advise the notifying party of the acceptance or rejection of the disputed work. Within 10 days of acceptance of the disputed work, the owner or original contractor, as the case may be, shall release the retained portion of the retention proceeds. (g) In the event that retention payments are not made within the time periods required by this section, the owner or original contractor withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs. (h) It shall be against public policy for any party to require any other party to waive any provision of this section. (i) This section shall not be construed to apply to retentions withheld by a lender in accordance with the construction loan agreement.

3260.1. (a) This section is applicable with respect to all contracts entered into on or after January 1, 1992, relating to the construction of any private work of improvement. (b) Except as otherwise agreed in writing, the owner shall pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the contract, any progress payment due thereunder as to which there is no good faith dispute between the parties. In the event of a dispute between the owner and the contractor, the owner may withhold from the progress payment an amount not to exceed 150 percent of the disputed amount. If any amount is wrongfully withheld in violation of this subdivision, the contractor shall be entitled to the penalty specified in subdivision (g) of Section 3260. (c) Nothing in this section shall be deemed to supersede any requirement of Section 3260 respecting the withholding of retention proceeds.

3260.2. (a) If an original contractor is not paid all moneys which are owed pursuant to a written contract for a private work of improvement within 35 days from the date payment is due pursuant to the written contract, and there is no dispute as to the satisfactory performance of that original contractor, the original contractor shall have a right to serve upon the owner a "10-day stop work order" that states that unless all amounts then due the original contractor are paid within 10 days from the date notice is provided under this section, the original contractor will stop work on the project. At least five days before service upon the owner of a "10-day stop work order," the contractor shall post, in a conspicuous location at the job site and at the main office, if one exists, of the job site, a notice that the original contractor intends to file a 10-day stop work order pursuant to this section. A copy of the written notice shall also be served upon all subcontractors

with whom the original contractor has a direct contractual relationship on the project at the same time the notice is served upon the owner. Within five days of receipt of written notice by an original contractor pursuant to this section, the owner shall forward to the construction lender, if any, at the address provided in the construction loan agreement, a copy of the notice by first-class mail. Upon resolution of the dispute or cancellation of the 10-day notice by the original contractor, the original contractor shall post, in a conspicuous location at the job site and at the main office, and serve a notice to inform the subcontractors with whom the original contractor has a direct contractual relationship of this resolution or cancellation. (b) The original contractor's right to stop work pursuant to this section is in addition to any and all other rights the original contractor may have under the law. (c) Notwithstanding any other provision, the original contractor or his or her surety, or subcontractor or his or her surety, shall not be liable for any delays or damages that the owner or contractor of a subcontractor may suffer as a result of the original contractor serving the owner with a 10-day stop work order, and subsequently stopping work for nonpayment if all of the posting and notice requirements described in subdivision (a) are met. An original contractor's or original subcontractor's liability to a subcontractor or material supplier resulting from the cessation of work under this section shall be limited to the amount of monetary damages the subcontractor or material supplier could recover under the mechanic's lien law for goods and services provided up to the date the subcontractor ceases work, provided that (1) liability shall continue for work performed and materials supplied up to and including the 10-day notice period and not beyond, and (2) this provision does not apply to limit monetary damages for custom work, including materials which have been fabricated, manufactured, or ordered to specifications that are unique to the job. (d) If the payment is not made within 10 days from the date the notice was served, the original contractor or his or her surety, may seek a judicial determination of liability for the amount not paid for work performed in an expedited proceeding in the superior court in the county in which the private work improvement is located. (e) It shall be against public policy to waive the provisions of this section in any written contract for private work of improvement. (f) This section shall apply to any contract entered into on or after January 1, 1999. However, nothing in this section shall be construed to apply to retentions withheld by a lender in accordance with the construction loan agreement. (g) The stop work order specified in this section for private works of improvement may be served as follows: (1) If the person to be notified resides in this state, by delivering the stop work order personally, or by leaving it at his or her address of residence or place of business with some person in charge, or by first-class registered or certified mail, postage prepaid, addressed to the person to whom notice is to be given at his or her residence or place of business address or at the address shown by the building permit on file with the authority issuing a building permit for the work, or at an address recorded pursuant to subdivision (j) of Section 3097. (2) If the person to be notified of the stop work order does not reside in this state, by any method enumerated in paragraph (1) of this subdivision. If the person cannot be served by any of these methods, then notice may be given by first-class certified or registered mail, addressed to the construction lender. (3) Service pursuant

to this paragraph by certified mail is effective upon receipt. Service by registered mail is effective five days after mailing.

3262. (a) Neither the owner nor original contractor by any term of a contract, or otherwise, shall waive, affect, or impair the claims and liens of other persons whether with or without notice except by their written consent, and any term of the contract to that effect shall be null and void. Any written consent given by any claimant pursuant to this subdivision shall be null, void, and unenforceable unless and until the claimant executes and delivers a waiver and release. That waiver and release shall be binding and effective to release the owner, construction lender, and surety on a payment bond from claims and liens only if the waiver and release follows substantially one of the forms set forth in this section and is signed by the claimant or his or her authorized agent, and, in the case of a conditional release, there is evidence of payment to the claimant. Evidence of payment may be by the claimant's endorsement on a single or joint payee check that has been paid by the bank upon which it was drawn or by written acknowledgment of payment given by the claimant. (b) (1) No oral or written statement purporting to waive, release, impair, or otherwise adversely affect a claim is enforceable or creates any estoppel or impairment of a claim unless either: (A) It is pursuant to a waiver and release prescribed in this section. (B) The claimant had actually received payment in full for the claim. (2) Nothing in this section precludes a stop notice claimant from reducing the amount of, or releasing in its entirety, a stop notice that has been served upon an owner. The reduction or release of a stop notice, which shall be in writing, may be served in a form other than the forms of release set forth in this section. Any reduction or release of a stop notice: (A) Shall not preclude the service of a subsequent stop notice that is timely and proper. (B) Shall release the owner from any obligation to withhold money on account of the stop notice, to the extent of the reduction or release. (C) Shall be effective to release the claimant's right to enforce the stop notice, to the extent of the reduction or release. (D) Shall not operate as a release of any right that the claimant may have, other than the claimant's right to enforce the stop notice, to the extent of the reduction or release. (c) This section does not affect the enforceability of either an accord and satisfaction regarding a bona fide dispute or any agreement made in settlement of an action pending in any court provided the accord and satisfaction or agreement and settlement make specific reference to the mechanic's lien, stop notice, or bond claims. (d) The waiver and release given by any claimant pursuant to this section shall be null, void, and unenforceable unless it follows substantially the following forms in the following circumstances: (1) If the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall follow substantially the following form: **CONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT** Upon receipt by the undersigned of a check from _____ in the sum of \$ (Maker of Check) (Amount of Check)

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payable to _____ (Payee or Payees of Check) and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice, or bond right the undersigned has on the job of _____ located at _____ (Owner) (Job Description) to the following extent. This release covers a progress payment for labor, services, equipment, or material furnished to

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

_____ (Company Name) By _____ (Title) (2) If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment, the waiver and release shall follow substantially the following form:

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT The undersigned has been paid and has received a progress payment in the sum of \$____ for labor, services, equipment, or material furnished to _____ on the job of _____ (Your Customer) (Owner) located at _____ and (Job Description) does hereby release any mechanic's lien, stop notice, or bond right that the undersigned has on the above referenced job to the following extent. This release covers a progress payment for labor, services, equipment, or materials furnished to _____ through _____ (Your Customer) (Date) only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanic's lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services,

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equipment, or material was not compensated by the progress payment. Dated: _____
_____ (Company Name) By _____ (Title)

Each unconditional waiver in this provision shall contain the following language, in at least as large a type as the largest type otherwise on the document: "NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM." (3) If the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a final payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall follow substantially the following form: **CONDITIONAL WAIVER AND RELEASE UPON FINAL PAYMENT** Upon receipt by the undersigned of a check from _____ in the sum of \$____ payable to _____ and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release any mechanic's lien, stop notice, or bond right the undersigned has on the job of _____ located at _____ (Owner) (Job Description) This release covers the final payment to the undersigned for all labor, services, equipment, or material furnished on the job, except for disputed claims for additional work in the amount of \$____. Before any recipient of this document relies on it, the party should verify evidence of payment to the undersigned. Dated: _____

_____ (Company Name) By _____ (Title)

(4) If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a final payment and the claimant asserts in the waiver it has, in fact, been paid the final payment, the waiver and release shall follow substantially the following form: **UNCONDITIONAL WAIVER AND RELEASE UPON FINAL PAYMENT** The undersigned has been paid in full for all labor, services, equipment, or material furnished to _____ on the job of (Your Customer) (Owner) located at _____ and does (Job Description) hereby waive and release any right to a mechanic's lien, stop notice, or any right against a labor and material bond on the job, except for disputed claims for extra work in the amount of \$ _____.

Dated: _____ (Company Name)

By _____ (Title) Each unconditional waiver in this provision shall contain the following language, in at least as large a type as the largest type otherwise on the document: "NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM."

3262.5. (a) Any person or corporation which has contracted to do business with a public utility, hereafter referred to in this section as a contractor, shall pay any subcontractors within 15 working days of receipt of each progress payment from the public utility, unless otherwise agreed in writing by the parties, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each of the subcontractors' interest in that work. In the event that there is a good faith dispute over all or any portion of the amount due on a progress payment from a contractor to a subcontractor, then the contractor may withhold no more than 150 percent of the disputed amount. (b) Any contractor who violates this section shall pay to the subcontractor a penalty of 2 percent of the disputed amount due per month for every month that payment is not made. In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs. ©) This section shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a contractor, or deficient performance or nonperformance by a subcontractor.

LITIGATION MUST BE CAREFULLY PLANNED

What do 19 homeowners in Mission Viejo, California have in common with respect to their concrete? They each get to each pay \$26,770 in costs to the concrete supplier they sued. The case was Castron v. National Ready Mixed Services Co. G037165 (Cal. App. 4th Dist. Filed May 26, 2006).

These 19 homeowners claimed that the cement-to-water ratio was inadequate in the concrete supplied to their homes, with the result that sulfates, or salt compounds, in the soil and groundwater either had caused or would cause their concrete to decay, thereby damaging the buildings.

The homeowners sued a developer, several concrete sub-contractors, and two read-mix concrete suppliers. The homeowners failed to succeed with their claims, with the result that the court ordered them to pay \$508,639 in court costs and expert fees to the builders and suppliers.

That's a half-million dollars that somebody wasn't planning to pay.

It's a difficult lesson for the losers. Nobody files a lawsuit expecting to lose. But it happens, and when the costs are big, so are the risks.

Construction projects are complex, and the opportunity for error in construction projects is everywhere. But a construction lawsuit involves much more than a question of who is right or wrong. Lawsuits must be filed within a specific time, or even the most valid claims will be barred by the passage of time. Complex procedural rules must be followed, or if they aren't, then claims can also be lost. Filings must be done in the proper location. For example, a mechanic's lien filed in the wrong county will be entirely useless in an effort to foreclose a mechanic's lien.

What's the lesson to be learned here? Litigation always carries risk. Lawsuits must be chosen with care, and then when they are filed, they must be handled with great care. Litigation can yield impressive results, but it's seldom a casual venture. It's rigorous, and before someone makes a decision to file suit, they must be prepared to see the suit through to conclusion if the other side refuses to settle.

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SUPPLIERS AND OTHERS AT RISK UNDER NEW LAW

By Robert B. Jacobs and Joseph S. May

Because Identity Theft is such a growing concern, in 1999 the California Legislature passed a new law concerning credit card information that affects every business that accepts credit or debit cards. Among other things, the law requires that:

- Any receipt provided to the cardholder not contain the expiration date of the card
- Any receipt provided to the cardholder contain only the last five or less numbers of the credit card number
- Any receipt retained by the merchant not contain the expiration date of the card
- Any receipt retained by the merchant contain only the last five or less numbers of the credit card number

The law only applies to credit card information which is electronically printed at the time of the transaction. It does not apply to cards which are imprinted or photocopied. It also does not apply where the only record or receipt is handwritten.

This California law, which is located at Civil Code §1747.09, does not become effective until January 1, 2009. However, on December 4, 2003 President Bush signed a new federal law that became effective on December 6, 2006 that contains many identical provisions. The first two of the California requirements listed above are therefore now required by Federal Law. The third and fourth requirements listed above will become law when the California statute becomes effective on January 1, 2009.

It's possible that some business owners may think that this law is overly heavy-handed, or that the likelihood of a problem for non-compliance is remote. But California legal newspapers are starting to report large numbers of lawsuits being filed by plaintiff law firms, with many seeking class-action status, and newspapers reports are being circulated that over fifty new suits have been filed for violations of this law.

Lack of knowledge about the law, or unintentional violation, is likely not a valid defense. For negligent noncompliance, a business is subject to the following penalties pursuant to 15 U.S.C.A. §1681o(a):

- Actual Damages sustained by the consumer as a result of the failure
- Attorneys fees plus costs of suit

For willful non-compliance, a business is subject to the following penalties pursuant to 15 U.S.C.A. §1681n(a):

- Actual Damages sustained by the consumer of not less than \$100 and not more than \$1,000
- Punitive Damages as determined by the Court
- Attorneys fees plus costs of suit

These penalties may not seem significant. However, each customer transaction is potentially a separate violation. If a business generates 100 debit/credit card transactions a day, then at minimum damages of \$100 per transaction, the business could be liable for \$10,000 per day, or \$70,000 per week. Given the large potential risk, business owners should confirm that their credit-card processing complies with the new law.

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Clear Records are Necessary for an Effective Mechanic's Liens

By Robert B. Jacobs

The only reason a contractor or supplier records a Mechanic's Lien is because of non-payment. In some situations, the sole act of recording the lien can be effective in getting the owner to pay. This is sometimes the case in shopping malls or in other lease situations where the owner is a tenant and the lease requires the owner to keep the property free of liens. However, if the owner won't promptly pay upon the recording of the lien, then the contractor or supplier will need to file a lawsuit to foreclose the lien.

The lien only extends to labor and materials actually used in the work of improvement. This means that overhead expenses, office expenses, and administrative expenses cannot be properly included in the lien. For example, in one court case, the contractor included in its lien the cost of forklift tires because a set of tires had been used up during the project. The Court found that even though the tires were worn out in moving materials to the project, the tires themselves weren't actually incorporated into the project, and therefore they could not be properly included in the lien.

Many contractors keep a generalized set of records relating to their private projects. But if a contractor is going to rely on a mechanic's lien for payment, then that contractor will have to show exactly how much material and labor was used on the project. Daily job logs can be an excellent record to show how much time was spent on the project. If the daily log lists the name of each employee and the number of hours worked on the project, then the daily log can be supported with payroll information to show the amounts actually paid to the employee and the contractor's records will be complete for purposes of labor. If the daily job log doesn't list all materials used in the project, then separate receipts or invoices will be necessary for demonstrating all of the materials used in the project.

It may seem obvious, but this kind of record keeping can only really be effective if it is done before a problem arises. Once a problem arises and a mechanic's lien must be used, then it's too late to capture all of the information in the daily job logs, and the contractor is then presented with a substantial accounting and paperwork burden to try to re-create the project on paper. The best course of action is for the contractor to document each day the number of hours worked by each employee, and to keep a separate file with receipts documenting all of the materials used in the project. Delivery to the jobsite isn't enough; the materials must actually be incorporated into the project. If these kinds of records are routinely kept, then the contractor will be in an excellent position to prove his damages. If these kinds of records aren't kept, then the lien claim may be compromised or reduced in the event of a problem.

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Liquidated Damages in Construction Contracts

It happens to every contractor. At some point or another, a contractor will be asked to sign a contract prepared by an owner or another contractor. The easy part of such a contract is the amount of money that's going to be paid. More difficult is the question as to when the money is going to be paid. And sometimes the biggest difficulties occur over those terms commonly referred to as "boilerplate."

If you look up the word "boilerplate" in the dictionary, you'll see that the word actually refers to a steel plate used to fabricate boilers. Somehow the use of the word "boilerplate" seems to put minds at ease, in the same way the phrase "standard contract terms" might.

But there really are no such things as "standard contract terms." There are terms required by law, such as a notice in a construction contract about mechanic's lien rights. And there are terms that might be common in a particular industry. But there really are no "standard terms." The section of the construction contract that might be referred to as "standard terms" is often nothing less than a contract section that is intended to shift risk from one party to another. Except for those terms that are required by law to be incorporated into a contract (such as a contractor's license number and other provisions) all other contract terms are open to negotiation.

If a job goes smoothly, then the best contract in the world is of no help because it's never needed. And if the job goes smoothly, the worst contract in the world may be of no effect because nobody ever looks at it or has to rely on it. If all jobs went smoothly, construction contracts could be very, very short and all they would need to contain would be the scope of work, the price, the payment timing and those provisions required by law to be included.

But the reality is that many jobs don't go smoothly. And when they don't, it's often the language in the contract that will help determine the ultimate outcome.

One of the terms that may often seem mysterious is the phrase "liquidated damages." When a contract is wrongfully breached, or broken, the innocent party who is damaged is entitled to recover the value of their damages from the breaching party. But nobody is entitled to recover damages unless and until such damages can be proven with certainty. Damages cannot be recovered based on speculation – they must be proven. But sometimes it's not easy to assemble the necessary documents and string together the facts to show exactly how much damage has occurred. This is especially true with respect to delay damages.

Because it can be difficult – and costly – to prove delay damages with certainty, parties to a construction contract may resort to the use of "liquidated damages." Liquidated damages aren't proven by one of the contracting parties. Instead, the parties can agree up front that if either side breaches the contract, then the damages due to delay will be calculated according to a pre-determined formula. If the formula is reasonable at the time the contract is made, then California law provides that such damages should be recoverable.

A good example is a construction contract that provides for delay damages of \$500 per day. Such an amount may seem like a lot, and may actually amount to a lot of money if a job has many weeks or months of delay. But if the completed project were to be very, very profitable for the owner, then delay damages of \$500 per day may actually be far less than the profits that would have been earned by the project if it were done on time. If the project would earn profits of \$2,500 per day, then without a liquidated damages clause, a breaching contractor may be liable to an owner for actual damages of \$2,500 per day instead of liquidated damages of \$500 per day. Therefore, the contractor's liability under a liquidated damages clause providing for damages of \$500 per day could be far less than the actual amount of damages suffered by the owner. The potential benefit to the contractor of a liquidated damages clause directly depends, among other things, on the likely profitability of the project, and a contractor must keep this in mind in deciding whether or not to agree to a liquidated damages clause.

Liquidated damages are just one of the contract terms that a contractor should be closely considering when entering into a construction project.

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WHEN BUILDING OR EXPANDING, BEWARE OF PERMIT ISSUES

It's a fact of modern life: many daily activities require a permit or license. A hundred years ago, owners built their homes and business buildings as needed without any governmental involvement. But with modern building codes and zoning laws, an owner must ensure that any improvements comply with all of the applicable codes and zoning ordinances.

Some owners have found out the hard way: It can be difficult (and expensive) to fight city hall, even if it's not your fault. A recent case illustrates this point.

Two property owners in Orange County wanted to demolish a duplex and replace it with a two-story single family home. The local zoning ordinance had a building height restriction of 24 feet. However, the zoning ordinance also provided that a 5x5 elevator shaft structure could exceed the 24 foot height restriction.

The owners wanted some additional space to be built at the top of their new house. They asked their contractor if it were possible for them to build something larger than the 5x5 elevator shaft allowed by the zoning ordinance. Together with their contractor, they planned for a substantial top-story to be added to their two-story home, which included a bathroom, a storage area, a foyer and a fireplace. However, the owners told their contractor they only wanted these improvements built if the city approved it. Their contractor told them he would get all of the necessary permissions and that they shouldn't worry about it.

The rooftop additions were made, and during the process the city made several inspections of the construction. After much of the construction was complete, one of the inspectors ordered the owners to obtain approval for all of the revisions to the top story.

The owners applied for a variance, but the city planning commission refused to grant one. The owners complained that they were innocent because they had instructed their contractor not to build the improvements unless all of the permits were first obtained. The contractor, however, apparently built the top story without getting the necessary permits, hoping that the planning commission would approve the improvements after they were constructed.

The city council sided with the planning commission and refused to grant a variance. The owners filed suit in the Superior Court and claimed that because the non-conforming construction had passed several inspections, the city should be required to grant a variance.

The Superior Court rejected the claims of the owners. The Court found that the Contractor was the agent of the owners, and that even though the owners told the contractor not to proceed without the necessary permits, and even though the contractor said he would get the

necessary permits, the owners were still bound by the contractor's failure to get them. Even though the construction had passed several inspections by city inspectors, the city was not liable for the construction that had been done and the city was not obligated to grant the owners a variance. The end result was that the owners ended up with a building that violated the local zoning ordinance, and their only recourse was against their contractor. The reported case is Ciraulo v. City of Newport Beach (2007) DJDAR 2172.

What's the upshot? If you're a contractor, then it's good to remember that it's not necessarily easier to get forgiveness than permission: sometimes both are impossible. Contractors who proceed without necessary permits run the very real risk of being liable for the cost of construction that must be removed or modified to comply with permit requirements or zoning ordinances.

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To Be Effective, a Mechanic's Lien Requires Followup

By Robert B. Jacobs

I've had more than one contractor client say "If he doesn't pay, we'll just lien his property." These clients have been under the impression that once a mechanic's lien is recorded, it just stays there until the owner pays.

Such a belief is partly right, and mostly wrong. True, California law does provide contractors and suppliers with a right to record a mechanic's lien on private projects. However, once the lien is recorded, it doesn't just stay there forever. Many contractors are surprised to learn that a mechanic's lien automatically expires after 90 days unless the contractor files a lawsuit to foreclose the lien. What's more, the suit must be filed in the proper court.

There's been more than one contractor who recorded a mechanic's lien in the wrong county. Remember – the lien must be recorded in the county where the project is located. A lien recorded in any other county is entirely invalid, and is good for nothing. But recording the lien in the proper county is only the first step. If suit is not filed in the county where the lien was recorded, then under California Civil Code section 3144, the lien will automatically become void 90 days after it is recorded. This means that effectively using a lien includes two essential steps: recording the lien in the correct county, and then filing a lawsuit to foreclose on the lien.

But if the contractor doesn't record a release of lien, what happens to the lien that was actually recorded? It remains in the records of the County Recorder's office, and such a lien can effectively cloud title to real property even though by law it's no longer valid. As a result, owners have the right to have the lien "expunged" if no suit is filed within 90 days. After 90 days, an owner is entitled to file a petition with the Superior Court to have a mechanic's lien "expunged," which is the equivalent of having it erased. Some contractors may be tempted to leave a lien in place and not release it after 90 days. But if the owner's petition to expunge is granted, then the contractor can be ordered to pay the owner's attorneys fees of up to \$2,000.00! This can be a frustrating result. If a contractor isn't paid on a job and records a mechanic's lien, then the contractor has already been damaged by the owner's non-payment. But if the contractor has to pay the owner's attorneys fees on top of that, then that contractor is going to find out what real frustration is like.

What's the answer? Contractors should use the lien process wisely. They need to recognize that a lien only secures payment in the event of a foreclosure sale of real property following a lawsuit. If the contractor isn't prepared to file a lawsuit to foreclose the lien, then recording a mechanic's lien only adds to his or her paperwork burden. Liens are tricky, and if contractors are going to use one, then they should be prepared to do it right.

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USE YOUR CONTRACT TO MAKE IT EASY ON YOURSELF

The best way to run a job is to do the work well and get paid for it. But anybody who has been in business for any length of time knows it's not always easy to get paid. Some people just don't like to pay – so they don't pay. Others would like to pay, but don't find it convenient to pay and so they don't. Others may intend to pay when they sign the contract or when they receive services, but due to poor management, just don't have the money when it's due – and so they don't pay.

Regardless of the reason, non-payment for services can be an ongoing problem for even the most successful business.

If gentle or firm persuasion isn't successful in getting paid, then the final resort is litigation. Litigation is seldom the first choice for most people, but when other options fail, it's sometimes the only method of getting paid.

The goal of most successful business people is to get paid without litigation. But the followup to that is that if litigation is necessary, then the goal is to arrange things so that you maximize your likelihood of recovery, with as little expense and difficulty as possible.

A construction contract can be a problem, or it can be your friend. If your contract is well-drafted in your favor, it can make the litigation process easier and less expensive, and can increase your chances for success.

A good example of making your life easier can be seen with respect to venue. "Venue" is a legal word that describes the location where a lawsuit is to be filed and where the trial is to be held. Because contractors often do work in many different counties, they should think about where they want to file suit if a problem develops. For example, a contractor in Alameda County might do work for an owner in Los Angeles County. But if a problem arises and the contractor doesn't get paid, then the contractor may need to file suit against the owner. If there is to be a three week trial, then it could be considerably easier for the contractor to attend trial in Alameda County instead of attending trial for three weeks in Los Angeles County.

There are generally three proper places for the filing of a lawsuit: 1) the county where the defendant resides or has its principal place of business, 2) the county where the contract was to be performed, and 3) the county where the contract was entered into.

The parties can include specific terms in their contract that can help the contractor successfully file suit in Alameda County instead of Los Angeles County. These specific terms should include the following: 1) that the parties agree that the contract was entered into in Alameda County, and 2) that payment by the owner is to be made in person or by mail at the contractor's office (and the contractor's office address should be specifically listed at this point in the contract), and 3) payment will be deemed to be made when received by the contractor at its office.

These contract terms will not by themselves guarantee that suit can be filed where the contractor has his or her office, but in the event of suit the terms may allow the contractor to have the suit filed in his or her own county instead of in a different part of the state. As with all contract provisions, these specific provisions should be reviewed by counsel to ensure they fit properly with all of the other contractual provisions and to ensure they are drafted correctly.

The Law Office of Robert B. Jacobs provides legal services in the areas of Construction, Business, and Real Estate Law. The office is located in Pleasanton, California and can be reached at (925) 847-8680. The foregoing article is not a complete discussion of the applicable law, and competent counsel should be consulted concerning any specific situation or issue. © 2007 Robert B. Jacobs. All rights reserved.

NOAH'S WAY

And the Lord said unto Noah: "Where is the ark which I have commanded thee to build?"

And Noah said unto the Lord: "Verily, I have had three carpenters off ill, the gopherwood supplier hath let me down - even though the gopher wood hath been on order for nigh upon twelve months. What can I do, O Lord?"

And God said unto Noah" "I want that ark finished even after seven days and seven nights."

And Noah said: "It will be so."

And it was not so. And the Lord said unto Noah: "What seemeth to be the trouble this time?"

And Noah said unto the Lord: "Mine sub-contractor hath gone bankrupt. The pitch which Thou commandest me to put on the outside and the inside of the ark hath not arrived. The plumber hath gone on strike. Shem, my son who helpeth me on the ark side of the business, hath formed a pop group with his brothers Ham and Japheth. Lord, I am undone."

And the Lord grew angry and said: "And what about the animals, the male and the female of every sort that I ordered to come unto thee to keep their seed alive upon the face of the earth?"

And Noah said: "They have been delivered unto the wrong address but shouldest arrive on Friday."

And the Lord said: "How about the unicorns, and the fowls of the air by sevens?"

And Noah wrung his hands and wept, saying, "Lord, unicorns are a discontinued line; thou canst not get them for love nor money. And fowls of the air are sold only in half-dozens. Lord, Lord, Thou knowest how it is."

And the Lord in His wisdom said: "Noah, my son, I knowest. Why else dost thou think I have caused a flood to descend upon the earth?"

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