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CALIFORNIA MECHANICS’ LIEN LAW: NEED FOR IMPROVEMENT

Gordon Hunt*

INTRODUCTION

The right to a mechanic’s lien is found in Article XX of the California Constitution,1 which mandates the legislature to provide for the “speedy and efficient enforcement”2 of the right. The courts of California have interpreted this mandate to mean that the legislature is not vested with arbitrary power or discretion in enforcing the constitutional right of lien.3 The constitutional mandate requires that the legislature establish a reasonably framed system for enforcing the right—not a system that is so cumbersome and ultra-technical that it impairs the right or unduly hampers its exercise.

Despite the constitutional mandate to provide for the speedy and efficient enforcement of the lien right and the admonition of the courts not to create a burdensome and ultra-technical scheme, the legislature has continually changed the law.4 The result is the complex and confusing statutes which are in effect today.5

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1 CAL. CONST. art. XX, § 15 grants a lien to mechanics, materialmen, artisans, and laborers of every class. CAL. CODE CIV. PROC. § 1181 (West 1955) has expanded the right to contractors, subcontractors, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters and draymen, and all persons performing labor upon or bestowing skill or other necessary services in a building, structure or other work of improvement. CAL. CODE CIV. PROC. § 1184.1 (West Supp. 1967) also confers a lien upon persons who perform the following services: demolish or remove improvements, trees or other vegetation; drill test holes; grade; fill; install sewers; public utilities; construct areas, vaults or cellars or rooms under sidewalks.

2 CAL. CONST. art. XX, § 15.

3 Hammond Lumber Co. v. Moore, 104 Cal. App. 528, 532, 286 P. 504, 505 (1930). Justice Henshaw, in his concurring opinion in the famous case of Roystone Co. v. Darling, 171 Cal. 526, 544, 154 P. 15, 22-23 (1915), recognized that it is beyond the power of the legislature to impair or destroy the lien right when he stated: “It would seem when the constitution of this state declares, as it does, that ‘mechanics, material-men, artisans, and laborers of every class shall have a lien upon the property . . . for the value of such labor done and material furnished,’ that it was wholly beyond the power of the legislature to destroy or even to impair this lien.”

4 The constantly changing law is a result of the sustained pressure on the legislature by various competing interests within the construction industry, such as owners, prime contractors, sub-contractors, material suppliers, laborers, bonding companies, title companies, banks, and savings and loan associations.

5 The complexity of the mechanics’ lien law has been recognized by courts and commentators alike. As early as 1915, Justice Henshaw in Roystone Co. v. Darling, 171 Cal. 526, 546, 154 P. 15, 23 (1915), referred to the mechanics’ lien law as “. . . this
There is pending currently before the California Legislature a bill to recodify the entire Mechanics' Lien Law. The proposed recodification does not solve the existing problems because it merely attempts to clarify the existing law by restating it in a more orderly and logical sequence. It is hoped that the suggestions and comments made in this article will ultimately result in more significant substantive changes in the Mechanics' Lien Law.

PRESENT PROBLEMS AND PROPOSED SOLUTIONS

Priority

The present law has several provisions that provide, in many cases, for the speedy and efficient obliteration of lien rights. These provisions are so cumbersome and ultra-technical that they impair that right and unduly hamper its exercise. The section dealing with priority is the primary section destroying the right to a lien. From the standpoint of the title companies and lending institutions, priority must be maintained in order to insure proper financing of construction projects. However, since the priority rule results in the complete destruction of liens in many instances, alternatives should be enacted by the legislature to grant priority to the lenders and title companies, and, at the same time, protect the constitutionally guaranteed right of lien.

The fundamental rule established by the priority section is that if the work of improvement is commenced subsequent to the recordation of the mortgage or deed of trust, then said mortgage or deed of trust shall have priority over mechanics' liens. The exceptions to this fundamental rule of priority are:

(1) If the advances made by the lender are non-obligatory and are not made to pay for the costs of the improve-

confused and confusing statute.” Because the law has been amended at almost every session of the legislature since then, the result is truly confusion compounded.

See also, Hopkins, Selected Mechanics' Lien Priority Problems, 16 HAST. L.J. 155 (1964): “The law of mechanics' liens is confusing. Even counsel for construction lenders, builders, materialmen, title insurers, and others who are confronted daily with problems in this area frequently battle the uncertainties and ambiguities in the law.” Accord, Comment, California Mechanics' Liens, 51 CALIF. L. REV. 331 (1963).

6 Senate Bill 805, introduced in 1968 and referred to committee for interim study. It is anticipated that a revised version will be introduced in 1969.

7 One group which might help bring about some changes is the Citizens Advisory Committee to the Joint Judiciary Committees of the Assembly and Senate for the Revision of the Mechanics' Lien Law.

8 The basic priority section is CAL. CODE CIV. PROC. § 1188.1 (West Supp. 1967); sections 1188.2, 1189.1 and 1184.1 also deal with the questions of priority.

9 This is the basic meaning of CAL. CODE CIV. PROC. § 1188.1 (West Supp. 1967). All liens relate back to the commencement of the work of improvement as a whole.
ment, then said non-obligatory advances lose their priority as to subsequently attaching mechanic's liens.\(^\text{10}\)

(2) If the work is of the type referred to in Code of Civil Procedure section 1184.1 (often referred to in the industry as "off site" improvements\(^\text{11}\)) and is done under a separate contract with the owner, then commencement of that work does not constitute commencement of the structures.\(^\text{12}\)

(3) If the claimant does the type of work referred to in Code of Civil Procedure section 1184.1 and even if this type of work is done after the mortgage or deed of trust has been recorded, the claimant will have priority over the mortgage or deed of trust if the mortgage or deed of trust was given for the sole or primary purpose of financing the work of improvement.\(^\text{13}\)

\(^{10}\) See Fickling v. Jackman, 203 Cal. 657, 662, 265 P. 810, 812 (1928); Smith v. Anglo-California Trust Co., 205 Cal. 496, 500-501, 271 P. 898, 900 (1928). See also Yost-Linn Lumber Co. v. Williams, 121 Cal. App. 571, 9 P.2d 324 (1932); Marsh, California Mechanics' Lien Law Handbook 86 (1965). It has been stated indirectly in appellate courts that advances made for non-construction purposes (i.e., land draw, points, prepaid interest, etc.) are improper as against an equitable lien claimant. Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 48 Cal. Rptr. 278 (1965); Hunt, The Miller Case: Claimants' Delight, Lenders' Fright, 41 Los Angeles Bar Bull. 262 (1966). They could be considered optional advances and therefore lose their priority as against lien claimants and stop notice claimants. At least one trial court has so held. Soule Steele Co. v. Brewer, Civil No. 126717 (San Bernadino Super. Ct., 1967). It is submitted that by virtue of the building loan agreements in use today in the construction industry, the lender retains such great control over the building loan funds that any advance made by the lender could be considered an optional advance especially where the borrower had violated or breached one or more of the clauses in the building loan agreement and the lender continued to advance funds, thereby waiving the breach. See J. Acret, California Construction Law Manual 207-08 (1967).

\(^{11}\) What is an "off site" improvement has been the subject of many problems and much controversy in the construction industry. The primary example is where the owner hires a grading contractor to cut, fill, grade and compact the land. In doing this work the grading contractor not only works on the streets in the subdivision, but also on the building pad sites. The street work is clearly "off site," but what about the work done on the building pads? If that is done under a separate contract with the owner, will the lien claimants be able to look to that work for priority purposes? There is no satisfactory answer to the question. However, it seems that such work should constitute commencement of the structures for priority purposes. For further discussion of this "Off Site—On Site" problem see Hopkins, supra note 5 at 159, 160.


\(^{13}\) This result may be avoided if the loan proceeds are, in good faith, placed in the control of the lender who has a binding agreement with the borrower to the effect that such proceeds are to be applied to the payment of claims for labor and materials used in the work of improvement and that no portion of the proceeds will be paid to the borrower in the absence of satisfactory evidence that all claims for such labor and materials have been paid or that the time for filing liens has expired and no such liens have been filed. Cal. Code Civ. Proc. § 1189.1(b) (3) (West Supp. 1967). The language of this section has never been interpreted by the courts.
The practical effect of this statute is that many mechanic's liens are not worth the paper on which they are written. The problem is most prevalent in tract work, apartment buildings and other speculative works of improvement. The usual problem is that the borrower of the construction funds defaults and the lender forecloses its prior deed of trust. The mechanic's liens are thereby wiped out. The net effect is that the constitutional right to a lien, which the legislature has been commanded to speedily and efficiently enforce, has been effectively destroyed by legislative enactment. Such a result certainly was not envisioned or contemplated by the framers of the constitution.

There are several approaches to the solution of the problems involving priorities. First, the owner could be made personally liable for any liens on his property, thereby shifting the risk of loss to the very person who ultimately receives the benefit of the claimant's labor or materials. This would not be an unreasonable burden since the owner could take the many steps available to him to protect himself from liens. A statute imposing personal liability

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14 This result was the reason for the 1951 amendment to Cal. Code Civ. Proc. § 1190.1 (West Supp. 1967), giving claimants the right to file bonded stop notices. But even that remedy has proven inadequate in many cases. When the job is in such condition that stop notices are necessary, there are usually more stop notices than funds available and the claimants usually end up with something far less than 100% of their claim. The fact that so many liens were wiped out by foreclosure of prior deeds of trust was also one of the underlying reasons for the equitable lien cases. See also Burden, Stop Notices and Equitable Liens: A Revolution in Private Construction Work Remedies, 1 U.S.F. L. Rev. 225 (1967). An attempt was made to abolish the equitable lien by Cal. Code Civ. Proc. § 1190.1(n) (West Supp. 1967), amending Cal. Code Civ. Proc. § 1190.1 (West 1955).

15 See statute proposed infra. One writer has suggested that imposing personal liability on the owner might be unconstitutional. Comment, The "Forgotten Man" of Mechanics' Lien Laws—The Homeowner, 16 Hastings L.J. 198, 202 n.28 (1964). But see Id. at 203 n.30.

16 He could require his prime contractor, or his segregated subcontractors if he is an owner-builder, to furnish him with a labor and material bond under Cal. Code Civ. Proc. § 1185.1(c) (West Supp. 1967). See Burden, supra note 14 at 236-38, where the author suggested other protective devices to be utilized by the owner (demand by the owner for services of stop notice; false notice of claim invalid; tight building control system; and interpleader and declaratory relief).

The contrary argument here is that the owner is ignorant of Cal. Code Civ. Proc. § 1185.1 (West Supp. 1967). The problem of advising an owner of his rights under the law was extensively reviewed in Bernard, Limitations of Owner's Liability for Mechanics' Liens, 16 Hastings L.J. 179 (1964). The article suggests that all construction contracts be required to have a clause in them informing the owner that if a bond is not obtained, the owner's liability is not limited to the contract price. This is an excellent suggestion which could be accomplished by adding the following to Cal. Bus. & Prof. Code § 7018 (West Supp. 1967), dealing with the content of the notice:

You can limit your liability to your contract price with your contractor by requiring him to furnish you with a bond that complies with California Code
on the owner could be accomplished by an amendment to Code of Civil Procedure section 1185.1 adding the following sentence to subdivision (d):

If the owner fails to require the contractor to record the bond provided for herein, then the owner shall be personally liable for all valid liens recorded pursuant to the provisions of Chapter II, Title IV of Part 3 of this Code.

A variation on this theme would be to provide that the priority afforded pursuant to Code of Civil Procedure section 1188.1 would be lost unless a labor and material bond were furnished. Thus, if the construction lender, or any other holder of an encumbrance on property being improved, wanted to retain the priority of his deed of trust, he would require compliance with Code of Civil Procedure section 1185.1. This could be accomplished by adding an additional paragraph to Code of Civil Procedure section 1188.1 as follows:

Notwithstanding anything to the contrary contained herein, the liens provided for in this chapter are preferred to any lien, mortgage, deed of trust, or other encumbrance upon the premises and improvements to which the liens provided for in this chapter attach unless compliance is made with the provisions of Code of Civil Procedure sections 1185.1 (c) or 1188.2.

For those that feel that personal liability of the owner or loss of priority upon failure to bond are remedies too drastic to solve the problem presented (to-wit, loss of constitutionally guaranteed lien rights by foreclosure of prior encumbrances), an alternative compromise approach is suggested. This would be a two step ap-


The courts and the legislature have also noted that a prime contractor on public work can protect himself if he will only take advantage of statutes enacted for his benefit (as an owner can take advantage, on private works, of Cal. Code Civ. Proc. § 1185.1(c) (West Supp. 1967), which has been enacted for his benefit). See, California Elec. Supply Co. v. United Pac. Life Ins. Co., 227 Cal. App. 2d 138, 148-50, 38 Cal. Rptr. 479, 485-86 (1964).

An owner can also protect himself from liens by requiring releases from all subcontractors and suppliers before he pays his prime contractor or he can make payments by joint checks. The owner now enjoys the early twenty day notice under Cal. Code Civ. Proc. § 1193 (West Supp. 1967), and is in a position to know who the subcontractors and suppliers are on the job. Thus, he can require releases from, or make joint checks payable to them. For an excellent discussion and analysis of the joint check cases in California, see Moss, Joint Checks, Practices in the Construction Industry, 43 J. St. B. Calif. 242 (1968).
proach: first, to require bonding on all works of improvement exceeding $5,000.00 (thereby exempting small projects and the small homeowner) and a concomitant increase in the bonding requirement under the Contractors' License Law, making it clear that unpaid suppliers of labor and material are entitled to recover on said bonds. This would be accomplished by amending Code of Civil Procedure sections 1185.1(d) or 1188.1 and Business and Professions Code section 7071.9.

Code of Civil Procedure section 1185.1(d) would be amended by adding an additional sentence reading as follows:

If the total cost of any work of improvement exceeds the sum of five thousand dollars ($5,000.00) and the owner fails to require the contractor to record the bond provided for herein, then the owner shall be personally liable for all valid liens recorded pursuant to the provisions of Chapter II, Title IV of Part 3 of this Code.

In the alternative, Code of Civil Procedure section 1188.1 could be amended by adding the following paragraph:

Where the total cost of the work of improvement exceeds five thousand dollars ($5,000.00) then notwithstanding anything to the contrary contained herein, the liens provided for in this chapter are preferred to any lien, mortgage, deed of trust, or other encumbrance upon the premises and improvements to which the liens provided for in this chapter attach unless compliance is made with the provisions of Code of Civil Procedure sections 1185.1(c) or 1188.2.

Along with the Code of Civil Procedure section 1188.1, Business and Professions Code section 7071.9 would be amended to read:

Except as provided in section 7071.5, the board shall require, on or after _________, as a condition precedent to the issuance, reinstatement, reactivation, or reissuance of a license, and on or after _________, as a condition precedent to the renewal of a license,

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17 It appears that CAL. BUS. & PROF. CODE § 7071.9 (West 1964) as it presently exists is for the benefit of unpaid suppliers of labor and material. The statute states that the bond or cash deposit is for the benefit of "...(a) any person damaged as a result of a violation of this chapter by the licensee. . . ." Certainly, if the legislature wanted to limit this bond to be for the benefit of owners only, they would not have used the language "any person." Consequently, if an unpaid subcontractor or material supplier of a licensed contractor could show that the licensee violated the Business and Professions Code, resulting in loss to the subcontractor or supplier, the subcontractor or supplier should be allowed to recover on the bond. Some examples would be abandonment of the job resulting in nonpayment (CAL. BUS. & PROF. CODE § 7107 (West 1964)), a diversion or misapplication of funds or property (Id. § 7108), avoiding debts by bankruptcy, assignment for benefit of creditors, etc. (Id. § 7113.5), wilful or fraudulent act injuring the claimant (Id. § 7116), and wilful failure to pay money when due (Id. § 7123). See Comment, The "Forgotten Man" of Mechanics' Lien Laws—The Homeowner, 16 HASt. L.J. 198, 203 n.34 (1964).
that the applicant file or have on file with the Registrar a bond issued by an admitted surety in the sum of five thousand dollars ($5,000.00) in favor of the State of California, or in lieu thereof, that such applicant post with the Registrar a cash deposit in the sum of five thousand dollars ($5,000.00). Such bond or cash deposit required by this section shall be for the benefit of (a) any person damaged as a result of a violation of this chapter by the licensee, (b) any person who, after entering into a construction contract with the licensee, is damaged by the failure of the licensee to perform the contract, (c) any person furnishing labor or materials used in the direct performance of a construction contract, and (d) any laborer, contractor, subcontractor or material supplier who the applicant fails to pay for labor and/or material furnished on any work of improvement.

The foregoing proposals are variations on the main theme of mandatory bonding on private works of improvement. Presently, public works projects, both federal and state, must be bonded.\textsuperscript{18} Under the federal statute the labor and material bond must be furnished on all contracts over $2,000.00\textsuperscript{19} and under the state statute the labor and material bond must be furnished on all contracts over $2,500.00.\textsuperscript{20}

Mandatory bonding on private works is not a new concept and has been suggested many times.\textsuperscript{21} The major arguments against mandatory bonding are:

1. It might be unconstitutional.\textsuperscript{22}

2. It would unduly increase the costs of construction to the owner because the contractor would pass the cost of the premium on the bond to the owner.


\textsuperscript{19} 40 U.S.C. § 270a(a).


\textsuperscript{21} See generally Comment, The "Forgotten Man" of Mechanics' Lien Laws—The Homeowner, supra note 15, and Comment, \textit{California Mechanics' Liens}, 51 \textit{Calif. L. Rev.} 331-38 (1963). The authors of these law review articles refer favorably to the bonding plan often suggested by my late law partner, Mr. Glen Behymer, to-wit, mandatory bonding and/or withholding of 25\% of the contract price until the lien period expired. See also Comment, Mechanics' Liens and Surety Bonds in the Building Trades, 68 \textit{Yale L.J.} 138 (1958).

\textsuperscript{22} See \textit{Gibbs v. Tally}, 133 Cal. 373, 65 P. 970 (1901), in which the California Supreme Court held that a statute making the owner personally liable for liens if he failed to obtain a bond in the amount of 25\% of the contract price is unconstitutional because it made the owner liable for a debt he did not owe and therefore violated the constitutional guarantees of the right of acquiring, possessing and protecting property. Impairment or deprivation of the right to contract is also given as a constitutional argument against mandatory bonding.
3. Too many contractors in the construction industry could not obtain bonds, thereby forcing them out of business. In the alternative, said contractors would reach their bonding capacity so quickly that it would seriously affect their ability to expand and take in additional work.

4. It would prevent young men without substantial assets from entering the contracting field.

5. The resultant drop in the number of bondable contractors would result in an overall reduction in private construction thereby creating further economic problems for the already troubled construction industry in California.

6. The present law containing the optional bond for the owner under Code of Civil Procedure section 1185.1 and the right of lien and stop notice afford sufficient protection for lien claimants and owners alike.

The arguments favoring mandatory bonding are as follows:

1. It would not be unconstitutional.\(^2^3\)

2. Mandatory bonding on public works has not prevented the public agencies from finding contractors ready, willing and able to do the work and obtain the necessary bonds.

3. Unbondable contractors would be unable to do business, thereby stabilizing the industry by eliminating marginal elements.\(^2^4\)

4. It would compel the sureties to change their attitudes and standards in order to enable more contractors to obtain bonds.\(^2^5\)

5. Coupled with mandatory bonding would be further amendments to Code of Civil Procedure section 1193

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\(^{23}\) See Roystone Co. v. Darling, 171 Cal. 526, 154 P. 15 (1915), wherein the present CAL. CODE CIV. PROC. \$ 1185.1 (West Supp. 1967), was held constitutional. Since there is no increased liability of the owner over that contracted for, the mandatory bonding concept does not impair the right to contract. Cf. Hartford Acc. & Indem. Co. v. Nelson Mfg. Co., 291 U.S. 352 (1934).

\(^{24}\) During the building slump of the past two years, most of the contractors who would not be bondable have dropped out of the industry by reason of bankruptcy or lack of adequate capital.

\(^{25}\) Since the sureties' risks would be increased, they would have to take a more active part and interest in the business manner of their bonded contractors.
adding the bonding company as a further recipient of
the twenty day notice and the naming of the bonding
company and its address in the notice of improve-
ment which is posted and recorded.26

6. The cost of mandatory bonding, when compared with
the high cost of lien and stop notice litigation, would
not be an unreasonable increased burden on the
owner.27

7. Most importantly, mandatory bonding would com-
pletely protect the homeowner and would insure that
those persons who have been given the constitutional
rights of lien would, indeed, be provided by the legis-
lature with a "speedy and efficient" enforcement of that
right as decreed by the constitution.

It is true that the risk of loss would be shifted to the prime
contractor or owner-builder and their surety, but they are usually
the parties most able to afford that risk. Also, since they hold the
purse strings, they are the parties in the best position to see to it
that losses do not occur. Finally, because they are at the source of
the construction funds and are given notice of potential claimants,
they can direct the flow of the funds to insure that the claimants
are paid.

Upon consideration of the problems and alternative solutions,
it seems that mandatory bonding is truly the appropriate legisla-
tive answer to the problems of the Mechanics' Lien Law. Manda-
tory bonding could be accomplished by amending Code of Civil
Procedure section 1185.1(c) as follows:

Where the cost of a work of improvement to the owner exceeds the
sum of $2,500.0028 then the owner shall, prior to the commencement
of said work of improvement, obtain and record in the office of the
county recorder where the real property is located, a bond written by
a corporate surety licensed to write surety bonds in the State of Cal-
ifornia, in an amount equal to 100% of the contract price or the esti-
mated cost of construction. Said bond shall be conditioned for the
payment in full of the claims of all persons performing labor upon
or furnishing materials to be used in, or furnishing appliances, teams,
or power contributing to, such work, in addition to any conditions for the performance of the contract. Said bond shall be made by its terms to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in or furnish appliances, teams, or power contributing to, the work described in said contract as to give such persons a direct right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit brought on said bond.

It shall be mandatory for the owner to obtain and record the bond as herein provided. If said bond is so obtained and recorded, then the recovery in any action to foreclose a lien provided for in this chapter shall be limited to an aggregate amount equal to the amount to be due from the owner to the contractor. Judgment shall be rendered against the contractor or owner-builder and his sureties on said bond for any deficiency or difference that may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both.

If the owner should fail to obtain and record such a bond, then the liens provided for in this chapter shall be prior to any lien, mortgage, deed of trust, or other encumbrance upon the real property upon which the work of improvement is being erected. However, said owner may, at any time before completion of the work of improvement, obtain and record the aforesaid bond which, when so obtained and recorded, will constitute compliance with this section.

If, at any time during construction, the contract price or estimated cost of construction shall exceed the original contract price or estimated cost of construction by more than 10%, then an additional bond in a penal sum equal to said increase shall be obtained and recorded by the owner.

Code of Civil Procedure section 1185.1(d) should also be amended as follows:

It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive the requirement of subdivision (c) of this section. In the event that a licensed contractor enters into any contract with an owner or owner-builder and the bond provided for in subsection (c) hereof is not obtained, then said contractor's license shall be forthwith revoked by the State Contractors' License Board without possibility of reinstatement.

There can be no question that mandatory bonding would solve most of the problems of the construction industry today. Perhaps the above statutes, if enacted, could go further and provide that whenever a statutory labor and material bond is obtained there shall be no right of lien or stop notice. This would relieve the owner and title companies of having their property tied up with mechanics' liens and would relieve the lenders of the problems

\[29\] This would certainly be in keeping with the statement of the supreme court.
of stop notices. Certainly, claimants would prefer a cause of action against a licensed surety to a questionable lien or stop notice.

Notice

The next major area where the legislature has created an ultra-technical and burdensome scheme for the enforcement of the lien right is the notice requirement under Code of Civil Procedure section 1193, recently amended. The new notice provisions require that for a claimant to preserve his lien and stop notice rights, he must give a written notice to the owner, the original contractor and the construction lender within 20 days after he first furnishes labor or material to the job site, unless he is a laborer for wages or a "contractor" as that term is used in subdivision (b) of Code of Civil Procedure section 1193. Thus, all potential claimants, except those excluded by the statute, must, as soon as they receive a contract, purchase order or other order for a job, ascertain the name and address of three parties.

The financial burden created by this new notice requirement has in some cases adversely affected the construction industry. This new notice provision has made it extremely difficult for potential lien and stop notice claimants to comply with the new law. In many cases it is almost impossible for a potential claimant to get the necessary information to comply with the new notice provisions or the information obtained is incorrect. This new section has not yet been interpreted by the courts, but, because of the problems of compliance, the courts should give it a liberal construction.

in Borchers Bros. v. Buckeye Incubator Co., 59 Cal. 2d 234, 239, 379 P.2d 1, 3 (1963):
"From the point of view of lien claimants, the words 'speedy and efficient' must obviously be interpreted to mean that the Legislature should arrange for them to receive their money as soon as possible after supplying the labor or materials.

On the other hand, the property owner also has an interest which must be protected. From his standpoint, the words 'speedy and efficient' should be interpreted to mean that his title should be cleared as soon as possible, so that it will have some marketability."

30 The amendment was effective November 8, 1967.
31 The word "contractor" as used in subdivision (b) of Cal. Code Civ. Proc. § 1193 (West Supp. 1967), means the traditional definition of prime contractor, that is, a person contracting with the owner to erect the entire work of improvement as a whole. A "contractor" (usually operating as a subcontractor dealing with a prime contractor) dealing directly with an owner-builder, where there is no true prime contractor, must give the notice to the construction lender only. That is the reason for subdivision (b) which, at first blush, appears to conflict with subdivision (a).
32 It should be noted that in addition to the necessity of obtaining the name and address of the reputed owner, contractor and lender, the claimant must also ascertain the information necessary to comply with subdivision (c) of Cal. Code Civ. Proc. § 1193 (West Supp. 1967). One organization in Los Angeles, the Building Materials Dealers' Credit Association, attempts to compile the names and addresses of the owner, lender and prime contractor on all jobs and will make this information available to any person in the industry free of charge.
Many attorneys find the new notice section confusing and have difficulty advising their clients. Thus, the problem is even further compounded when a lather, plasterer, painter or other tradesman attempts to comply with this new and burdensome notice requirement. If a lawyer, trained to read, interpret and understand the law, has difficulty with the law, certainly we cannot expect a layman to do better and we cannot truthfully say that the legislation is not burdensome or ultra-technical. It was not intended that the lien claimant should have to consult legal counsel to enable him to comply with a law supposedly enacted for his benefit, especially when the claimant must give the notice early in the job. On the other hand, there are many potential claimants who hail the new notice provision as an effective new provision in the lien law. They find that with notices going to owners, contractors and lenders there is less chance of diversion of funds. However, these claimants are usually large organizations that are better able financially to hire the personnel and expend the funds necessary to allow them to comply effectively with the new law.

The notice statute was a compromise bill that was agreed upon by the construction industry as a whole, although not enthusiastically in many quarters. Since many people in the industry feel that it is working to the advantage of the overall industry, no attempt should be made to change the basic principle behind the statute (i.e., early notice) but merely to improve upon it. This could be accomplished by a requirement that the owner, contractor, construction lender, title company, surety on any labor and material bond or any person causing a work of improvement to be constructed, be required to post and record a *notice of improvement* which would contain the name and address of the owner, contractor, and construction lender, the street address and legal description of the job site, and the name and address of any bonding company who had furnished a labor and material bond to the job. Such a requirement would not be a difficult burden for the owner, contractor, lender or title company because they are the persons who are possessed of said information and it is to their own interest and benefit that the information furnished to potential lien and stop notice claimants is correct. In this way they will get the preliminary notices and be able to take steps to see to it that said potential lien claimants are paid and thereby avoid liens and stop notices on the job. The burden is no greater than that required in connection with the posting and recording of a notice of non-responsibility.33

The aforesaid changes in the notice requirement could be accomplished by adding subdivision (e) to Code of Civil Procedure section 1193 as follows:

(e) Prior to the commencement of the work of improvement the owner, or any other person causing a work of improvement to be constructed, or the contractor, or the construction lender, or the title company, or the surety on any labor and material bond, shall cause to be posted on the real property in some conspicuous place and recorded in the office of the county recorder of the county where the property is located, on every work of improvement, a notice of improvement.

Said notice of improvement shall contain (1) the name and address of the owner or any other person causing the work of improvement to be erected,34 (2) the name and address of the contractor or contractors on the job,35 (3) the name and address of the construction lender, if any, (4) the street address and legal description of the job site, and (5) the name and address of the surety and type of bond furnished by any surety on the job.

If such a notice of improvement is not so posted and recorded, then compliance with the provisions of sections (a) and (b) shall not be necessary.36 If such a notice of improvement is so posted and recorded then, in addition to the methods of service provided for in subdivision (c) hereof, the notices required under subdivisions (a) and (b) hereof may then be sent to the owner, contractor and lender at the name and address set forth in the notice of improvement and the claimant shall also send the notice to the surety named in said notice of improvement.

A further alternative would be to change the last sentence of the above suggested amendment to read as follows:

If such a notice of improvement is so posted and recorded, then the notices required under subdivisions (a) and (b) hereof must be sent to the owner, contractor, lender and surety at the addresses shown in said notice of improvement in order to be valid.

This would provide a source, to-wit, the job site and the county recorder’s office, where potential claimants could look for the information required by the preliminary notice provisions of the code. It also would insure that the parties who are interested in receiving

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34 This takes into account the situation where the work is being done by somebody other than the owner, such as the lessee.
35 This is to cover the situation where there is no true prime contractor and the owner-builder is contracting directly with the segregated subcontractors (i.e., where an owner-builder contracts directly with the electrician, plumber, painter, framer, cement finisher, roofer, etc.).
36 This sentence would have the effect of eliminating the twenty day notice. This would be the means of compelling compliance with the statute; that is, if the owner, contractor, lender, title company or surety wanted early notice, they would have to post and record the notice of improvement. For those who feel this is too drastic, an alternative is suggested in the article.
such notices actually receive them and thereby accomplish the basic purpose of the statute.

Practical Legal Problems

1. Bringing Suit

The priority problem goes to the very heart of the mechanic's lien right and is a problem of the claimant and attorney alike. The notice problem is primarily one of compliance which the claimant himself faces. There are other problems that confront lawyers practicing in the area of mechanic's liens. One of the most perplexing of these problems is the question of when suit must be brought on a stop notice. The section governing this is Code of Civil Procedure section 1197.1. The basic rule is that suit cannot be brought prior to the expiration of the period of time within which the lien claims can be filed and no later than 90 days thereafter.

The problems that result from the basic rule are many. The major problem is ascertaining the lien period when the notice of completion or notice of cessation of labor has not been recorded. It is almost impossible to ascertain when a job was completed until you indulge in discovery. Calculating the time element becomes even more difficult when there is a cessation of labor, i.e., 60 days cessation, thus a 90 day lien period and then the 90 days for filing suit on the stop notice commences. Sometimes there may even be a cessation of labor which the materialmen are unable to ascertain.

The practical problem for an attorney is that normally he will be filing suit on both a lien and a stop notice. Normally the time to file suit on the lien will expire before the commencement of the period to file suit on the stop notice. Thus, the attorney is forced to file two separate lawsuits; one on the mechanic's lien and a second on the stop notice. This is, of course, a waste of time and money. The better practice is to file on both and then ask the lender to waive the defense of prematurity.

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37 Ninety days from recordation of the lien. CAL. CODE CIV. PROC. § 1198.1 (West Supp. 1967).
38 The double suit problem has been recognized by other writers. See Burden, supra note 14 at 231, 232. One writer has termed it a "trap for the unwary." See Ilyin, Stop Notice!—Construction Loan Officer's Nightmare, 16 HAST. L.J. 187, 190 (1964).
39 The defense is waived if not raised by demurrer or plea in abatement. See Miller v. Mountain View Sav. & Loan Ass'n, 238 Cal. App. 2d 644, 654, 48 Cal. Rptr. 278, 285-86 (1965). It therefore could expressly be waived. This results in no prejudice to the lender, for once the stop notice suits are served on the lender, or once the ninety days following the expiration of the lien period has run and the lender has received no further notices under CAL. CODE CIV. PROC. § 1197.1(b) (West Supp. 1967), he can have the cases consolidated under CAL. CODE CIV. PROC. § 1197.1(c) or (d) (West Supp. 1967). (The only risk that the lender runs is that posed by Sunlight Elec.
The next problem presented by Code of Civil Procedure section 1197.1 is the exception contained therein which states that if the claim of the stop notice claimant arose out of a work of improvement subject to acceptance by a city, county or other local governmental agency, the suit on the stop notice shall be brought not less than 90 and no more than 180 days after the last delivery of materials or performance of work. The problems here are even more complex. The first question presented concerns the types of jobs to which the exception is applicable. Most construction jobs are subject to some kind of acceptance by a city, county or other local governmental agency. It seems that this exception should be applicable only to those cases where some affirmative act is taken by a governmental authority whereby it formally accepts a job.

The next question arises where the delivery of material or labor ceases, more than 180 days pass and then the local city, county or other governmental agency formally accepts the job. Can the claimant rely on this later acceptance? It would seem that he could.40

Finally, does the language “after the last delivery of materials or performance of work” mean the last delivery of materials or performance of work by the claimant or the job as a whole? Cessation of work on the job as a whole would be the better rule. The amendment appears to have been enacted to overcome the effect of the decision of Southwest Paving Co. v. Stone Hill,41 where the court held that the lien period stayed open until the public body accepted the work of improvement.

All the above problems could be solved by amending section 1197.1 to read:

Actions to enforce the payment of any claim, notice of which may be given pursuant to Article 2, shall be commenced against the owner, the State or any public board, commission, or officer thereof, any political subdivision of the state or disbursing officer thereof whose duty it is to make payments under provisions of such contracts and any of the parties described in subdivision (h) of section 1190.1 within 90 days after the service of said claims upon said party or parties, but shall not be brought to trial prior to the expiration of 90 days.

Supply Co. v. McKee, 226 Cal. App. 2d 47, 37 Cal. Rptr. 782 (1964)). Most lenders will try to interplead the construction loan funds and attempt to get out of the case with their attorney fees and court costs. This is improper, and trial courts have ruled differently where the issue has been raised. See Hunt, supra note 10 at 295 n.33, for the trial court decisions bearing on this problem.

40 It is submitted that this is analogous to the estoppel theory raised in Doherty v. Carruthers, 171 Cal. App. 2d 214, 340 P.2d 58 (1959), and the claimant has a right to rely on the action of the local governmental agency. This analysis also seems to fall within subdivision (e) of Cal. Code Civ. Proc. § 1193.1 (West Supp. 1967), which is the basic section governing the time to file liens and stop notices.

after the expiration of the period within which claims of lien must be
filed for record as prescribed by section 1193.1 of this Code.

The purpose of the existing statute is to hold off suits against
the public body or the lender until the lien period has run. This
amendment will conform Code of Civil Procedure section 1197.1(a)
to 1198.1(a) and thereby allow the claimant’s attorney to sue on the
lien and stop notice in one suit, thus eliminating the expense to
all parties of multiplicity of actions. At the same time the amend-
ment will hold off trial until 90 days after the lien period had ex-
pired, thereby allowing the owner and the construction lender to
consolidate under Code of Civil Procedure sections 1197.1(c) and
(d) and 1199.1.

2. Delay in Court

Another problem for claimant’s attorneys is the two year dis-
cretionary dismissal provision of Code of Civil Procedure section
1198.1(a). In large metropolitan areas it is very difficult to get to
trial in two years. The California Supreme Court, in Borchers Bros.
v. Buckeye Incubator Co., 42 has stated that the constitutional man-
date for the “speedy and efficient” enforcement of liens means that
the legislature should arrange for lien claimants to receive their
money as soon as possible after supplying their labor or materials,
and that the owner’s title should be cleared as soon as possible.
Certainly an amendment to the law creating a priority for trial pur-
poses similar to that provided in other portions of the law 43 would be
consistent with the constitutional provision and the suggestion of the
supreme court in the Borchers Bros. case. 44

The problem of getting to trial within two years can be al-
leviated by an amendment to Code of Civil Procedure section
1198.1(a) which would delete the last sentence and replace it with
the following:

Actions brought under the provisions of Chapter II of Title IV of
Part 3 of this Code shall be set for trial at the earliest possible date

42 59 Cal. 2d 234, 239, 379 P.2d 1, 3 (1963).
43 For example: Cal. Code Civ. Proc. § 1291.2 (West Supp. 1967) (arbitration); Id. § 1179(a) (unlawful detainer and forcible entry and retainer); Id. § 660 (mo-
tion for new trial); Id. § 527 (hearing on preliminary injunction).
44 The problem of getting to trial is compounded by the fact that all parties
who have any interest in the real property must be joined as parties defendant or the
judgment will not be binding upon them. See Packard Bell Elec. Corp. v. Theseus,
Inc., 244 Cal. App. 2d 355, 53 Cal. Rptr. 300 (1966). It is often difficult, if not im-
possible, to get a lot book report, preliminary title report or mechanic’s lien fore-
closure guarantee from the title companies when your client’s lien is on a large tract
of homes, shopping center or other large parcel of property with overlapping encum-
brances and multiple recorded leases. Even if one could get such information from the
title companies, the cost is prohibitive in a municipal court matter.
and shall take precedence of all other cases, except other matters of the same character and matters to which special procedure may be given by law.

This would certainly provide for the "speedy and efficient" enforcement of liens. It would also allow lien claimants to receive their money as soon as possible after supplying labor or material and at the same time would clear the title of the owner so that it will have some marketability.

3. Proving Use of Materials

A final problem is that of proving use of materials in the job. The burden is not difficult for a contractor who has himself installed the materials. The problem is difficult for a materialman whose customer (normally the subcontractor) has become insolvent and has disappeared. The materialman then finds it difficult, if not impossible, to find witnesses who actually saw the material being installed in the job.

Trial judges hold lien claimants to varying degrees of proof. Some hold the claimant to a strict burden of proof. Some will draw the inference that all the material was used in the job if you can prove that most of it was actually used. Some judges, in the absence of any evidence that material was taken from the job or diverted from one job to another, will draw the inference that the material was used in the job if the claimant can produce sufficient evidence tracing the material from the claimant's business to the job site. The latter is the better rule. In the normal course of human events and as a practical fact of the construction industry, once materials get to the job site they are installed and therefore, the inference to be logically drawn from the proved fact of delivery to the job site is incorporation into the job. Other states have solved this problem by enacting as a rebuttable presumption that which is logically inferred when evidence of delivery to the job site has been proved.

Of necessity, this is the author's personal reflection based on his practice in the area of construction law.

It should be noted, in passing, that delivery to the job site by the claimant in the first instance is not the law and never has been the law. Many attorneys labor under the misapprehension that unless a materialman can prove that he delivered the material directly to the job site, he is not entitled to a lien. All that the claimant need show is that his materials were furnished for use in the job and in fact used in the job. As a practical matter, there are many industries where the material is delivered first to the premises of the subcontractor and then taken, as needed, during the progress of the job. As long as the lien claimant can trace his materials, he is entitled to a lien. See R. Hoffmann & G. Hunt, Procedural Requirements for Liens and Stop Notices on Private Works of Improvement, Mechanic's Lien Law and California and Federal Public Works Law 27, 28 (1967). Another writer states:

Many contractors have the idea that a material supplier, in order to be entitled to mechanic's lien rights, must have delivered his materials to the jobsite.
The State of California should adopt a similar statute by adding subdivision (e) to Code Civil Procedure section 1182, which would read:

For the purposes of this chapter, upon the trial of any action to enforce any claim pursuant to this chapter, proof of the delivery of materials to the site improvement or proof of the delivery of materials other than to the site improvement but upon the written statement by any agent of the owner, as defined in subdivision (c) of this section, shall create a rebuttable presumption that such materials were incorporated into the work of improvement.

CONCLUSION

The foregoing analysis points up some of the major problems in the Mechanics’ Lien Law. The statutory changes suggested herein will alleviate these problems and go a long way toward truly providing for the payment and the “speedy and efficient enforcement” of the claims of those who have supplied labor and material to a construction project, thereby enhancing its value and the security of the lender thereon.

. . . It is clear that this is not true.

The fact of delivery to the jobsite is a factor which helps to prove two things: 1) That the supplier intended the materials to go into the job; and 2) That they actually went into the job. But so long as those two elements are present, the materialman is entitled to a mechanic’s lien whether or not he delivered the materials to the jobsite. J. ACRET, CALIFORNIA CONSTRUCTION LAW MANUAL 181 (1967).