

# CALIFORNIA MECHANIC LIEN LAWS

## Change Is Upon Us

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Back in 1999, a committee of the California Senate asked the California Law Revision Commission to review the state's byzantine mechanics lien law. After an attempt to make specific revisions, the CLRC decided that what was necessary was a wholesale general revision of the mechanic's lien laws. The CLRC tried to draft a "nonsubstantive reorganization of the existing mechanic's lien statute that would modernize and clarify existing law." Whether they succeeded remains to be seen, but material changes are now upon us in the form Assembly Bill 457 and Senate Bill 189 signed by the governor in 2010. Contractors, owners and lenders should be aware that these changes to California's mechanic's lien law take effect in two waves. Several of the changes went into effect as of January 1, 2011, while the bulk of the changes will become effective July 1, 2012. This article highlights some of the most important changes, but readers are encouraged to carefully study the new law for themselves.

### CHANGES EFFECTIVE JANUARY 1, 2011

These changes represent a legislative attempt to reduce surprise to, and misunderstanding by, property owners and to provide better information to prospective property purchasers and lenders. The legislature was responding to widespread complaints that (i) property owners did not understand the possible consequences of the filing of mechanic's liens against their properties, (ii) liens were being filed without notice to the property owners, and (iii) notices were not being recorded with respect to pending lien

enforcement (foreclosure) thereby denying important information to potential purchasers of, and lenders on, the affected properties. The result was a number of changes to the Civil Code, including the following.

- Section 3084 (defining mechanic's liens) was amended to add a new requirement that prior to recording a mechanic's lien, the lien claimant must serve a "Notice of Mechanic's Lien" on the owner or reputed owner of the property. The exact form and language of the required Notice of Mechanic's Lien is set forth in the statute. A copy of the mechanic's lien must be enclosed with the Notice of Mechanic's Lien. The notice advises the property owner of the possible consequences of the mechanic's lien and advises the property owner to contact its contractor or attorney. Service of the notice must be made by mail and evidenced by a certificate of mailing.
- Section 3084 was amended to change the form of the mechanic's lien itself to require a "proof of service affidavit" from the person serving the Notice of Mechanic's Lien as well as the text of the Notice of Mechanic's Lien. The proof of service affidavit must contain the date, place and manner of service of the Notice of Mechanics Lien.
- Section 3084 was amended to expressly provide that failure to serve the mechanic's lien, together with the Notice of Mechanic's Lien, shall cause the mechanic's lien to be unenforceable as a matter of law.
- Section 3146 was amended to require that, within 20 days following the filing of an action to foreclose a mechanic's lien, a notice of pendency of action (a "lis pendens") be recorded in the real estate records to impart constructive notice of the lien foreclosure action. Under prior law, a lis pendens was permitted to be recorded but not required. Unstated and unclear is the effect of failure to timely file the lis

pendens. The most likely effect is that failure to file the required lis pendens will invalidate the lien foreclosure action but not preclude refiling the action if still within the statutory enforcement period.

### CHANGES EFFECTIVE JULY 1, 2012

The bulk of changes arising from the recodification of entire mechanics lien law will take effect on July 21, 2012. While detailed analyses will be become available closer to the time these changes become effective, the following will highlight some of the more significant of the forthcoming changes:

- To start with, some of the longstanding terminology of the mechanics lien law has changed. A "stop notice" will be called a "stop payment notice." An "original contractor" will be called a "direct contractor." A "materialman" will be called a "material supplier." There are other substantive and non-substantive changes to definitions which will require review and mastery.
- The contents of, procedures for, and time periods governing various notice periods have been standardized.
- The legislation provides new mechanic's lien forms, including new mandatory conditional and unconditional waiver and release forms.
- Acceptance by the owner will no longer be deemed "completion" for the purposes of the mechanic's lien law. The deadline for an owner to record a notice of completion has been extended from 10 days to 15 days.
- If a private work is governed by separate direct contracts, an owner may record separate notices of completion for each scope of work set forth in a direct contract.
- Construction lenders are given more protections under the new law. On private works, a lien claimant has to give a 20-day preliminary no-

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tice to the construction lender. Also, construction lenders must be identified on direct contracts. If a construction loan is obtained after commencement of work, the owner has to give notice of the construction lender to any party that has given the owner a preliminary notice.

- Lien release bonds may now be more affordable, as the amount of the bond is reduced from 150 percent to 125 percent of the lien amount.
- Existing design professional lien laws have been repealed, and design professional liens are now part of the mechanic's lien laws. Also, landscape architects have been added to the law as protected design professionals.
- If an owner has to file suit to foreclose a lien that has not been timely acted upon by a lien claimant, the attorneys' fees that the owner can collect are no longer capped at \$2,000.

## CONCLUSION

Although the recent and forthcoming changes to the California mechanics lien law are not intended to be overly substantive, contractors, owners and lenders will need to become conversant with these changes to avoid pitfalls which could be significant and costly. Participants in the construction industry will need

to un-learn old habits and adapt to the new forms, definitions and procedures. Notwithstanding the state legislature's stated goal of making the mechanics lien law clearer and more user friendly, the mechanics lien law remains dense, challenging and sometimes counter-intuitive.

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by the terms of their loan documents lenders have the contractual right for an order appointing a receiver on a defaulted loan.

The prognosis is clear when the ill enter hospice. We are ready; we accept it. There are telltale symptoms surrounding most cases ripe for receiverships. We know them too. Yet deniability by borrowers – and sometimes courts – exists. Borrowers and their counsel try to create new meanings as to whether a particular commercial property may be given new life, and whether a defaulted loan can be revived or brought current, when the facts suggest otherwise. The following should be the surest examples for when a receivership order should be granted:

- Borrower has not made a mortgage payment in three months in the arrears.
- Property is more than 25% vacant.
- Borrower does not have adequate capital to pay leasing commissions or tenant improvements for the vacancies.
- Borrower is more than 60 days behind on vendor payments.
- Utility shut off notices have been sent.
- Property Taxes are delinquent.
- Tenant's not renewing leases and/or vacating.

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