

2011 AND 2012 BRING IMPORTANT CHANGES TO CALIFORNIA MECHANICS' LIEN LAWS

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If you are a developer, owner, contractor, subcontractor, design professional or material supplier you need to understand Senate Bill 189, signed by the Governor on September 30, 2010. SB 189 introduces significant changes to the California Mechanic's Lien Law over the next 18 months.

Two changes will take effect on January 1, 2011. Civil Code section 3084 will require the lien claimant to serve a "Notice of Mechanic's Lien" on the owner of the property to be liened *before recording the lien*. Amended section 3084 specifies the language and form of the notice, as well as how it is to be served on the owner. The mechanic's lien form has also been modified and now requires a signed "proof of service affidavit," affirming the service of the Notice on the property owner. Without such Notice, the lien is unenforceable.

Also effective January 1, 2011, Civil Code section 3146 has been amended to make mandatory the recording of a Notice of Pendency of Action (*lis pendens*) within 20 days after the filing a mechanic's lien foreclosure lawsuit. Previously, this was optional, and may have resulted in lien foreclosure actions being overlooked in title searches.

These new requirements appear to be a response to the Legislature's 2003 addition of Civil Code section 3259.5 which requires an owner to serve a Notice of Recordation of a Notice of Completion or Notice of Cessation of Work on contractors, subcontractors and material suppliers.

The balance of SB 189 will take effect on July 1, 2012. The new act rephrases, and restructures the lien laws, including the stop notice, payment bond and prompt payment statutes on both private and public works. Highlights of the 2012 changes include:

Preliminary Notice and Construction Loans. A general contractor will be required to give a 20 day preliminary ("Prelien") notice to construction lenders on private works projects

(previously, only subcontractors and material suppliers were required to “prelien”). SB 189 requires contracts between an owner and a contractor and subcontractors to identify construction lenders. Where a construction loan is obtained after commencement of work of improvement, the owner must provide each person who was provided a preliminary notice the identity of the construction lender.

Waivers and Releases. The familiar forms for conditional and unconditional waivers and releases are being revised.

Petitions to Expunge and Removal of Liens. Presently, Civil Code section 3154 permits an owner to obtain an order removing a “stale” lien that has not been foreclosed by the claimant, but the owner’s recovery of attorneys’ fees is limited to \$2,000.00. The cap on attorneys’ fees will be removed in 2012.

Changes in Terminology. SB 189 introduces new lexicon to our construction vocabulary. “Stop Notice” will now be referred to as “stop payment notice.” A 20-day preliminary notice will now be referred to as a “preliminary notice.” an “original contractor” will now to be referred to as a “direct contractor” and “materialmen” will be referred to as a “material supplier.”

Completion and Notice of Completion. Under SB 189 “completion” shall continue to mean occupation or use of the work of improvement by the owner, accompanied by a cessation of labor or the private owner’s recordation of a Notice of Completion. However, “acceptance by the owner” will be deleted from Civil Code section 3086 and will no longer be the equivalent of “completion.” Also of great significance is the fact that, when there are multiple direct contractors on a project, the owner will be able to record a separate Notice of Completion with respect to the scope of work of each direct contract. The owner will have 15 days to record the Notice of Completion after actual completion instead of the previous 10-day period.

A thorough understanding of SB 189 is important because it includes many changes to laws affecting construction activities including mechanic’s liens, design professionals’ liens, payment bonds and retention payments. However, it is important to remember that with the exception of the new Notice of Mechanics’ Lien and *lis pendens* requirements which become effective January 1, 2011, the balance of the SB 189 changes will not take effect until July 1, 2012. Trainor Fairbrook will be offering seminars to its clients in early 2011 to prepare owners, contractors,

subcontractors and material suppliers for compliance with the new legislation. If you are interested in attending one of these seminars, please feel free to contact either Mr. Steinberg or Mr. Funamura.