

Construction Law for California Contractors

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Knowledge is Power Ignorance isn't Bliss

What you don't know, will hurt you.
Unless you think ignorance is bliss and like to lose money,
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The attorneys at **The Green Law Group, LLP** practice
primarily in the areas of construction, business,
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FAIR WARNING

The information contained in this presentation is not legal advice.

The law changes constantly with new statutes and court rulings, for up to date legal advice regarding California's complex construction laws consult with an experienced construction law attorney.



Lien Laws Standardized, Updated and Reshuffled

In 2012 California revised the mechanics lien laws to standardize the notice requirements and update some of the language in the statutes. For instance:

- ❑ The terms general, prime and original contractor were replaced by the term direct contractor. A direct contractor is a contractor with a direct contractual relationship with an owner. See Civil Code §8016
- ❑ Materialman was replaced with Material Supplier
- ❑ Stop Notice became Stop Payment Notice
- ❑ 20-Day Preliminary Notice was changed to Preliminary Notice



Mechanics Lien Statutes Reshuffled

In addition to revising some of the mechanics lien statutes, several sections of the Civil Code have been renumbered:

- General Provisions - Civil Code §§ 8000 to 8154
- Private Works - Civil Code §§ 8160 to 8188
- Public Works - Civil Code §§ 9000 to 9566



Contractors' License Law

Rule Number One

No License – No Compensation

A contractor must be “duly licensed” at all times during the performance of the work.

Business & Professions Code 7031

“Duly licensed” DOES NOT simply mean having the proper license for the type of work you are performing; e.g., you can be considered “unlicensed” if you fail to obtain or maintain workers’ compensation insurance.



CSLB License Requirements for Business Entities

Corporations – Partnerships – Joint Ventures

If you contract under a corporation, a partnership or a joint venture, each entity needs a license of its own and an individual to qualify for the license.

1. RME- Responsible Managing Employee

Must be a full time employee

2. RMO- Responsible Managing Officer

Must own stock in the corporation

An individual can qualify up to 3 entities as an RMO

All your letterhead, business cards, invoices, marketing materials and contract documents should be in the name shown on your contractor's license record with the Contractors State License Board and include your contractor's license number.



Disassociation of a License Qualifier

Contractors who obtain a license using a Responsible Managing Officer (RMO) or Responsible Managing Employee (RME) as a qualifier for a license have 90 days after the date of disassociation of the qualifier to replace the qualifier. Upon failure to replace the qualifier within 90 days after the date of disassociation, the license shall be automatically suspended or the classification removed. The statute provides limited exceptions for an additional 90 day Extension, see B&P §7068.2 for details.



CSLB License Records For a DBA

- ❑ A Mechanics Lien recorded using the contractor's DBA (fictitious name) was not invalid even though the licensed contractor did not list his DBA with the CSLB. **Ball vs. Steadfast-BLK 196 Cal.App.4th 694**
- ❑ Best practice is to ensure that all construction related documents, including advertising materials reference the business name and the license number listed on the CSLB's license records.



Licensing for LLCs

- ❑ Limited Liability Companies can apply for contractor licenses in California. License applications for LLCs are available on the CSLB's website.
- ❑ The license requirements for an LLC are more onerous than they are for corporations and include a \$100,000 surety bond, which is in addition to the license bond for \$12,500 and a minimum of \$1,000,000 in general liability insurance. See Business and Professions Code §7065.



Contractors Must Be Properly Licensed At All Times During Performance

MW Erectors, Inc. v. Niederhauser Ornamental
and Metal Works Co., Inc. (2005) 36 Cal.4th
412, 425

A subcontractor in this case was barred from collecting construction funds owed to it, despite the fact it was only improperly licensed for a short time during its performance of its work on the project at issue.



Shop Drawings Require a License

- ❑ *Great West Contractors, Inc. v. WSS Industrial Construction, Inc.*, 162 Cal.App.4th 581, 76 Cal.Rptr.3d 8 (2008)
- ❑ The court barred the corporation, WSS Industrial Construction, Inc. from recovering payment on a project because it completed shop drawings before it was properly licensed.
- ❑ This was notwithstanding the fact that the corporation's president and RMO held an individual license, and that it had not installed any work on the project before it received its license.

Shop Drawings (Cont.)

- ❑ WSS submitted an application for a contractor's license before it submitted a bid for steel construction work on August 28, 2001, to the general contractor, Great West Contractors, Inc., on a school construction project. WSS executed the parties' subcontract on December 1, 2001, **but the license was not issued until December 21, 2001**. Prior to the issuance of its license, WSS had only prepared shop drawings, bought and delivered anchor bolts, and submitted a progress payment request.
- ❑ Contractor's License Law required the corporation itself, not the President, to be licensed at all times WSS performed services under the contract.



Consequences of Being Improperly Licensed or Unlicensed

Summary of Important Laws

- Not entitled to compensation, which means you cannot lien or sue to collect for unpaid work. *Business & Professions Code 7031(a)*;
- Anyone who uses an unlicensed contractor may sue to recover all compensation paid to an unlicensed contractor. *Business & Professions Code 7031(b)*;
- Potential criminal charges (misdemeanor plus fine of 20% of contract price or \$4,500, whichever is **greater** and 90 days in jail for repeat offenders) and Administrative Penalties. *Business & Professions Code 7028*;
- Rejection of bid for public works project – a bid submitted by an unlicensed contractor is considered nonresponsive and must be rejected by the public agency. *Business & Professions Code 7028.15(e)*;
- An unlicensed contractor is exposed to treble damages up to \$10,000 plus attorneys' fees and costs. *Code of Civil Procedure 1029.8*.



Cal. Bus. & Prof. Code § 7031(b)

Disgorge Amounts Previously Paid

- ❑ An unlicensed contractor is not merely barred from recovering any outstanding contract balance or damages, but it can be forced to “**disgorge**” all amounts previously paid.
- ❑ A contractor must be licensed at all times, even if the nature of the acts performed while unlicensed may not, in and of themselves, require a license.
- ❑ So long as the scope of work in a contract requires a license, any act under that contract performed while unlicensed may require the contractor to reimburse all amounts paid -- not just those acts performed while unlicensed.



Substantial Compliance

(The Expired License Bond Exception)

Business & Professions Code 7031(e) provides for a very limited “substantial compliance” exception as a defense to contracting without a license. To invoke this exception, all of the following must apply:

- ❑ Duly licensed as a contractor in California prior to the performance of the act or contract;
- ❑ Acted reasonably and in good faith to maintain proper licensure;
- ❑ Did not know or reasonably should not have known that you were not duly licensed when performance of the act or contract commenced; and
- ❑ Acted promptly and in good faith to reinstate his or her license upon learning it was invalid.



Automatic License Suspension

- ❑ CA B&P 7152.2: Failing to maintain or obtain work comp insurance, if required, results in automatic suspension of license
- ❑ *Business & Professions Code § 7125*: if you have workers, you must have workers' compensation insurance
- ❑ Even if the CSLB doesn't catch the problem, the Court can deem you to be suspended at the time of non-compliance and, thus, unlicensed at time work was performed

Stricter Requirements for Workers' Compensation Insurance

- ❑ In accordance with Business and Professions Code § 7125.5, contractors who claim an exemption from workers' compensation insurance must either recertify the exemption, provide a current and valid Certificate of Workers' Compensation Insurance, or a Certificate of Self-Insurance when they renew their license.
- ❑ Incomplete applications will be rejected, however suspended licenses can be reactivated retroactively if the licensee provides the required documentation within 30 days after notification by the CSLB that their application has been rejected.



Tighter Work Comp Insurance Requirement for Roofing Contractors

- ❑ C-39 Roofing contractors must still purchase workers' compensation insurance coverage even if they certify they have no employees. See Business and Professions Code § 7125.
- ❑ Workers' compensation insurers are required to report to CSLB if a licensee's policy is cancelled as the result of a premium audit or investigation, or a misrepresentation that results in harm to the insurer without reimbursement being made.



Wright v. Issak

(6th App. Dist., 2007) 149 Cal.App.4th 1116

- In 2007 Wright v. Issak shocked the construction industry by ruling that a licensed contractor who underreported payroll to its workers' compensation insurer was subject to an automatic retroactive suspension of its contractor's license, barred from suing to recover for work performed while unlicensed and could be compelled to return all compensation received from its customers while conducting business as an unlicensed contractor. (Ref., Business & Professions ("B&P") Code sections 7125.2, 7031(a) and (b).)



Loranger v. Jones

(C.A. 3rd, April 23, 2010)

- In May, 2010, Wright's impact was refined under Loranger v. Jones. Loranger concludes that automatic license suspension will not apply under circumstances where (a) the contractor can show it otherwise obtained and maintained workers' compensation insurance for its actual employees, and (b) there is no evidence to suggest that either unreported *de facto* employees or actual employees would not be covered. Loranger recognizes that sometimes, when a discrepancy is revealed or a mistake occurs in payroll reporting to workers' compensation insurance, the contractor should not be subject to strict liability and the impact of Wright.



Workers' Comp Fraud 10-Year Prison Sentence

- ❑ **SACRAMENTO** – One of the largest-ever premium insurance fraud cases in California has ended with a sentence of 10 years in state prison and \$500,000 in restitution for southern California roofing and general contractor Michael Vincent Petronella. Petronella was convicted on 33 counts of insurance fraud, with an enhancement for aggravated white collar crime over \$500,000. A trial is pending for his wife, Devon Lynn Kyle, who was also arrested in the case.
- ❑ The Contractors State License Board (CSLB) assisted the Orange County District Attorney's Office with the investigation that led to the 2009 arrest of the Petronellas. The couple operated the Petronella Corporation, Reroofing Specialists, and Western Cleanoff, Inc. throughout southern California.



Workers' Comp Fraud (Cont.)

The Petronellas obtained insurance for their businesses through the State Compensation Insurance Fund (SCIF) in 2000. SCIF discovered fraud in 2006 after an employee fell from a roof and submitted a claim that listed the employer as Western Cleanoff, Inc., which had no CSLB license and was not insured by SCIF. SCIF reported the fraud, initiating the investigation, which discovered that between 2000 and 2008, the couple submitted fraudulent insurance claims and underreported millions in payroll. That led to Petronella's criminal conviction, as well as license suspension for failure to carry workers' compensation, and pending disciplinary action to revoke his contractor licenses.



Workers' Comp Fraud (Cont.)

CSLB and its partners in state and local government, law enforcement, and the construction industry have intensified efforts to combat premium insurance fraud, including conducting hundreds of stings and sweeps year-round throughout the state. Governor Arnold Schwarzenegger signed a CSLB-sponsored bill into law that gave the CSLB unprecedented authority to immediately issue a “stop work order” to any licensed or unlicensed contractor that has not secured workers’ compensation insurance for employees. Failure to comply with the stop work order will result in misdemeanor charges, punishable by up to \$10,000 and/or up to 60 days in jail.



“Obtain and Maintain” Workers’ Compensation Insurance

To avoid the harsh consequences of the Wright case, criminal prosecution, fines and the loss of your license, contractors with employees must (1) obtain and maintain workers’ compensation for their employees and those deemed to be employees as a matter of law, (2) accurately report their payroll to their workers’ compensation carriers, (3) take immediate action to correct any reporting mistakes, (4) obtain certificates of workers’ compensation insurance from subcontractors, (5) routinely verify license status and insurance status for subcontractors, and (6) verify that a subcontractor who reports “exempt” from workers’ compensation insurance with the Contractors’ State License Board isn’t merely trying to duck the requirement for workers’ compensation insurance to avoid covering its workers.



Unlicensed “Independent” Contractors are Employees

Unlicensed subcontractors are deemed to be the employees of the person or company retaining them (Heiman v. Workers' Compensation Appeals Board (2007) 149 Cal.App.4th 724, 733-38).

A contractor's failure to pay workers' compensation premiums for “deemed” employees may also result in the automatic and retroactive suspension of the contractor's license.

There is also a companion Labor Code statute, section 2750.5, which establishes a rebuttable presumption that a construction worker performing services for which a license is required or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.



Preliminary Notices

(Not payment insurance, but the next best thing)

A. WHEN THE JOB EXCEEDS \$400- IT'S THE LAW

B. WHO-WHEN-HOW-WHY

1. ANYONE WITHOUT A DIRECT CONTRACT
WITH THE OWNER

a. **WHO-** Subs, Suppliers, Equipment Renters, etc.

b. **WHEN-** Within 20 days of starting work, but better late than never

c. **HOW-** Certified Mail to the owner, G.C., and
construction lender

d. **WHY-** So you can “Secure and Collect What you Earn” with
mechanics liens, stop payment notices and/or payment bond claims

**C. OWNER MUST PROVIDE A COPY OF A NOTICE OF
COMPLETION BY CERTIFIED MAIL TO ANYONE WHO
SERVED A PRELIMINARY NOTICE**



Preliminary Notices (Cont.)

- **Civil Code §8100** - In addition to any other information required by statute all notices must include all of the following information to the extent known to the person giving the notice: (1) The name and address of the owner or reputed owner. (2) The name and address of the direct contractor. (3) The name and address of the construction lender, if any. (4) A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted. (5) The name, address, and relationship to the parties of the person giving the notice. (6) If the person giving the notice is a claimant: (A) A general statement of the work provided. (B) The name of the person to or for whom the work is provided. (C) A statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets. (b) Notice is not invalid by reason of any variance from the requirements of this section if the notice is sufficient to substantially inform the person given notice of the information required by this section and other information required in the notice.



Preliminary Notices (Cont.)

- ❑ Civil Code § 8200(e)(2) requires direct contractors to serve construction lenders with a preliminary notice.
- ❑ Preliminary notices are also required for payment bond claimants. See Civil Code §8612 and Civil Code § 9560 for the exception to the rule.
- ❑ Preliminary notices can be served (mailed) by express mail services like Federal Express, or UPS. * Recommended practice is to use USPS certified mail with a return receipt.
- ❑ Direct and subcontracts must include the preliminary notice information for construction lenders.



Preliminary Notices (Cont.)

Reputed Construction Lender

Under *Force Framing, Inc. v. Chinatrust Bank (U.S.A)* the court ruled that a subcontractor who served a 20-day preliminary notice relying upon inaccurate information in the "preliminary information" sheet furnished by the owner could still enforce a stop payment notice against the construction lender. The court ruled that a mechanics lien claimant acting in good faith is not required to search county records for construction lenders when it relies in good faith upon the preliminary notice information furnished by the owner.



Preliminary Notices (Cont.)

Reputed Property Owner

In *Brown Co. v Appellate Dept* (1983) 148 CA3d 891, the court allowed the claimant to enforce a lien even though the preliminary notice was not sent to the owner but was instead sent to the prime contractor as the “reputed owner” in reliance on a statement by the prime contractor to the claimant.



Significant Change

California's Mechanics Lien Law

Warning - Failure to comply with the new notice requirement means that your lien will be unenforceable as a matter of law.

On January 1, 2011 California Civil Code § 3084 was amended to require mechanics lien claimants to serve the property owner or reputed owner with a document entitled **Notice of Mechanics Lien** and record the Notice and an affidavit with the county recorder where the property is located as evidence that the Notice was properly served.

Failure to properly serve and record the **Notice of Mechanics Lien** will cause the mechanics lien to be unenforceable.



Notice to Property Owner

Civil Code §3084

NOTICE OF MECHANICS LIEN ATTENTION! Upon the recording of the enclosed MECHANICS LIEN with the county recorder's office of the county where the property is located, your property is subject to the filing of a legal action seeking a court-ordered foreclosure sale of the real property on which the lien has been recorded. That legal action must be filed with the court no later than 90 days after the date the mechanics lien is recorded. The party identified in the mechanics lien may have provided labor or materials for improvements to your property and may not have been paid for these items. You are receiving this notice because it is a required step in filing a mechanics lien foreclosure action against your property. The foreclosure action will seek a sale of your property in order to pay for unpaid labor, materials, or improvements provided to your property. This may affect your ability to borrow against, refinance, or sell the property until the mechanics lien is released. **BECAUSE THE LIEN AFFECTS YOUR PROPERTY, YOU MAY WISH TO SPEAK WITH YOUR CONTRACTOR IMMEDIATELY, OR CONTACT AN ATTORNEY, OR FOR MORE INFORMATION ON MECHANICS LIENS GO TO THE CONTRACTORS' STATE LICENSE BOARD WEB SITE AT www.cslb.ca.gov.**



Mechanics Lien

Civil Code § 3084

"Claim of lien" or "mechanics 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.



Proof of Service

Civil Code §3084

A Mechanics Lien must have a proof of service affidavit completed and signed by the person serving the Notice of Mechanics Lien.

A "proof of service affidavit" is a sworn statement by the person making the service, showing the date, place, and manner of service and facts showing that the service was made in accordance with Civil Code §3084. The affidavit shall show the name and address of the person or persons upon whom a copy of the mechanics lien and the Notice of Mechanics Lien was served, and, if appropriate, the title or capacity in which he or she was served.



A Failure to Comply Invalidates the Lien

Civil Code §8416

The mechanics lien and the Notice of Mechanics Lien described in this section shall be served on the owner or reputed owner. Service shall be made as follows:

(A) For an owner or reputed owner to be notified who resides in or outside this state, by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage prepaid, addressed to the owner or reputed owner at the owner's or reputed owner's 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 as otherwise provided in subdivision (j) of Civil Code Section 3097.

(B) If the owner or reputed owner cannot be served by this method, then the notice may be given by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage prepaid, addressed to the construction lender or to the original contractor. Service by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing, postage prepaid, is complete at the time of the deposit of that first-class certified or registered mail.

Failure to serve the mechanics lien, including the Notice of Mechanics Lien, as prescribed by this section, shall cause the mechanics lien to be unenforceable as a matter of law.



Mechanics Lien Basics

- A. SECURES YOUR CLAIM AGAINST THE PROPERTY**
- B. MAY BE WIPED OUT IF LENDER FORECLOSSES**
- C. NOTICE OF COMPLETION OR CESSATION**
 - 1. Must be recorded within ten days of actual completion or cessation
 - 2. Reduces the time to record lien and/or serve a stop payment notice from 90 days down to 60 for GC's and 30 days for everyone else
- D. NOTICE OF NON-RESPONSIBILITY**
 - 1. Must be posted and recorded within ten days of the owner's actual notice of the construction. Used by landlords on tenant improvement projects in an attempt to avoid liability for mechanics liens. However, a landlord who is "participating" in the construction by, for example, contributing to the cost of construction and/or by approving the construction plans may not be able to avoid liability for mechanics liens through the use of a Notice of Non-Responsibility



Mechanics Liens (Cont.)

E. NINETY DAY STATUTE OF LIMITATIONS

1. Mechanics liens are automatically null and void unless a suit is filed to foreclose the lien, or the lien is extended by a written and recorded agreement with the property owner within 90 days of the date the lien was recorded
 - a. Liens can be recorded for up to 90 days after the completion of the entire project
 - b. The scope of the entire project may be determined by reference to the scope of work in the owner/direct contract
 - c. Mechanics lien release bonds have been reduced from 150 to 125% of the claim amount. See Civil Code § 8424
 - d. Civil Code §§ 8480-8488 changes the procedures used to petition for the removal of a stale Mechanics lien and removes the cap on recovery of attorneys' fees. Included in these new procedures is a requirement that at least 10 days before petitioning for a release of a lien the owner gives the claimant notice and a demand that the lien be released



Design Professional Lien

No later than 90 days after a design professional knows or has reason to believe that the property owner is not going to commence with the project, the design professional may record a *design professional lien* even though construction on a project has not commenced if (1) a building permit has been pulled, (2) the design professional has a written contract with the property owner and (3) 10 days prior to recording a lien the design professional sends a written payment demand letter to the property owner via certified mail. A *design professional lien* expires once construction starts.

Civil Code § 8319 provides that a *design professional* may convert a recorded *design professional lien* to a mechanics *lien* if all of the following requirements are met:

- ❑ (1) The *design professional lien* expires;
- ❑ (2) The *design professional lien* remains fully or partially unpaid;
- ❑ (3) Within 30 days of the expiration of the *design professional lien*, the *design professional* records a mechanics *lien* for the amount of the unpaid *design professional lien*;
- ❑ (4) The recorded mechanics *lien* states that it is a converted *design professional lien* but shall be recorded and enforced as a mechanics *lien*, except the *design professional* need not provide a preliminary notice to enforce this mechanics *lien*.
- ❑ This mechanics *lien* shall be effective as of the date of recordation of this mechanics *lien* and shall be given priority pursuant to the provisions of [Section 8450](#).
- ❑ See Civil Code § 8319 for details.



Stop Payment Notice

A. RECORD A LIEN & SERVE A BONDED STOP PAYMENT NOTICE

1. A construction lender's foreclosure will generally wipe out mechanics lien claim, however it will not defeat a bonded stop payment notice
2. Stop payment notices attach to the undisbursed funds in the construction loan account
3. If the stop payment notice is bonded the lender will set aside 125% of stop payment notice amount from the construction loan to secure the claim



Stop Payment Notices (Cont.)

- B. FOR PRIVATE PROJECTS WITH A CONSTRUCTION LENDER YOU NEED A BONDED STOP PAYMENT NOTICE**
 1. Bonding companies require financial information and collateral for bonds.
 2. In the event a lawsuit is filed to enforce a bonded stop payment notice, the prevailing party is entitled to an award of attorneys' fees.
 3. Owner financed projects do not require stop payment notice bonds.
- C. PUBLIC PROJECTS DO NOT REQUIRE A BOND FOR A STOP PAYMENT NOTICE**
- D. CONSIDER A PAYMENT BOND CLAIM ON PUBLIC PROJECTS WHENEVER YOU SERVE A STOP PAYMENT NOTICE**



Bond Claims

A. PAYMENT BONDS

1. Benefits subcontractors, suppliers and other potential claimants who would otherwise qualify to record a mechanics lien

B. PERFORMANCE BONDS

1. Requires the bonding company to hire another contractor to finish the project in the event the prime contractor defaults on or breaches the owner/prime contract

C. LICENSE BONDS

1. Claims generally require a “willful” or intentional violation of the contractors’ license law which is difficult to prove
2. Small claims limit against license bonds - \$2,500.00
3. Unpaid license bond claims may result in contractor license suspension by the CSLB



Payment Bond Claim Notice Requirements

In accordance with Civil Code § 9560, if the *preliminary notice* was required to be given, see Civil Code §8612, by a person who has no direct contractual relationship with the contractor, and who has not served a preliminary notice, that person may enforce a claim by giving written *notice* to the surety and the *bond* principal within 15 days after recordation of a *notice* of completion. If no *notice* of completion has been recorded, the time for giving written *notice* to the surety and the *bond* principal is extended to 75 days after completion of the work of improvement.

The Payment Bond Notice will not apply in either of the following circumstances:

- ❑ (1) All progress payments, except for those disputed in good faith, have been made to a subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services.
- ❑ (2) The subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services has been terminated from the project pursuant to the contract, and all progress payments, except those disputed in good faith, have been made as of the termination date.



Payment Bond Claims (Cont.)

- ❑ Cannot record a mechanics lien against a public project
- ❑ Prime contractors on state and local public works projects over \$25,000 must post payment bonds to protect subcontractors, materials suppliers, equipment renters and other potential unpaid claimants who provided labor, materials and/or services to the project



Public Project Payment Claims

- A. CANNOT RECORD A MECHANICS LIEN AGAINST PUBLIC PROPERTY**
- B. PRELIMINARY NOTICES**
 - 1. Preliminary notices are not required by claimants on Public projects with a contract with the Direct Contractor
 - 2. Use the “Keep it Simple” rule and reduce the chance of inadvertently losing your rights to secure payment and mail preliminary notices at the outset of every project, public or private via certified mail return receipt requested



Public Projects (Cont.)

C. NO BONDS FOR STOP PAYMENT NOTICES ON PUBLIC PROJECTS

D. PAYMENT BOND CLAIMS

Preliminary Notice required unless claimant contracted with direct contractor. If you failed to serve a preliminary notice, you may qualify for an exception if you serve a payment bond claim within 15 days of a Notice of Acceptance or Completion, or if no Notice within 75 days of the actual completion of the project, to the general contractor by certified mail.

However, this exception will not apply if: (1) all progress payments, except for those disputed in good faith, have been made to a subcontractor to whom the claimant has provided materials or services; (2) the subcontractor the claimant has provided materials or services to has been terminated from the project and all progress payments, except those disputed in good faith, have been made as of the termination date.

E. CONTRACTOR LISTING LAW- LISTED SUB CANNOT BE REMOVED WITHOUT NOTICE AND HEARING

1. Hearing is a “mini” trial and binding if not appealed.



Public Projects (Cont.)

F. FEDERAL PROJECTS - MILLER ACT BOND CLAIMS

Requires a Ninety-Day-Preliminary Notice to the direct contractor mailed via certified mail within 90 days of the last delivery of service, materials and/or equipment to the project by the claimant

No Stop Payment Notices or Mechanics Liens on Federal Projects



Public Projects (Cont.)

□ **Prompt Payment Statutes**

- Notwithstanding any other law, a prime contractor or subcontractor shall pay to any subcontractor, not later than **seven days** after receipt of each progress payment, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. In the event that there is a good faith dispute over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, then the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.
- Any contractor who violates this section shall pay to the subcontractor a penalty of 2 percent of the 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 subcontract performance or nonperformance by a subcontractor.
- See Public Contract Code §10262.5 for details.
- See Business and Professions Code §7108.5 for private projects.



Public Projects (Cont.)

❑ Prevailing Wages

- ❑ A new program has been established to monitor and enforce prevailing wage requirements on public works projects that receive state bond funding. This program will have a special role in ensuring public works construction workers are promptly paid the proper prevailing wage rates to help maintain a level playing field for contractors who comply with the law. Information about this program can be found at www.dir.ca.gov/cmu.
- ❑ The definition of “public works” has been expanded by statute and case law so more projects require prevailing wages.



Public Projects (Cont.)

5% Retention

Applies to all *contracts* entered into on or after January 1, 2012, between a *public* entity and an direct contractor, between direct contractor and a subcontractor, and between all subcontractors, relating to the construction of any *public* work of improvement.

“*Public* entity” means the state, including every state agency, office, department, division, bureau, board, or commission, the California State University, the University of California, a city, county, city and county, including charter cities and charter counties, district, special district, *public* authority, political subdivision, *public* corporation, or nonprofit transit corporation wholly owned by a *public* agency and formed to carry out the purposes of the *public* agency.

The retention proceeds withheld from any payment by a *public* entity from the direct contractor, by the direct contractor from any subcontractor, and by a subcontractor from any subcontractor shall not exceed 5 percent of the payment.

The statute contains exceptions that allow for increased retention, see Public Contract Code §7201 for details.



Public Projects (Cont.)

- Subletting and Subcontracting Fair Practices Act
- Beginning on July 1, 2014 direct contractors must include the CSLB license numbers of the subcontractors listed in their bids for public works projects.



New Definitions for Project Completion Dates

- ❑ Completion for Private Works as defined in Civil Code §8180 occurs upon (1) a continuous cessation of labor for 60 days, or (2) a Notice of Cessation is recorded anytime after a continuous 30 day cessation of labor, or (3) actual completion of the work of improvement, or (4) the project is occupied and used by the owner.
- ❑ Completion for Public Works as defined in Civil Code §9200 occurs at the earliest of the following times: (1) acceptance by the public agency, or (2) continuous cessation of labor for 60 days.



Update Notice and Statutory Release Forms

- ❑ Some of the notice requirements for Preliminary Notices, Mechanics Liens, Stop Payment Notices, Bond Claims, Notices of Completion and Cessation have been standardized and relocated to Civil Code §§ 8100 – 8118. These statutes outline who needs to get notice, when and how.
- ❑ The Statutory Waiver and Release forms have been modified. The new requirements are listed in Civil Code §§ 8120 – 8138.
- ❑ The requirements for Notices of Completion will be different. See Civil Code § 8180. Owners will have 15 days instead of 10 to record a Notice of Completion and can record separate notices for work performed by multiple direct contractors. See Civil Code § 8186. On public projects, completion occurs on acceptance, so if a public agency delays “acceptance” the time for serving a Stop Payment Notice and/or a Payment Bond Claim will be extended.



Statutory Releases

- A. CONDITIONAL PROGRESS RELEASE –Civil Code §8132**
 - 1. Releases all stop payment notice, lien rights, and bond claim rights through the date of the release
 - 2. Pending change orders and retention are not released
- B. UNCONDITIONAL PROGRESS RELEASE - Civil Code §8134**
 - 1. Releases rights unconditionally even if not paid
- C. CONDITIONAL FINAL RELEASE - Civil Code §8136**
 - 1. Evidence of payment combined with a conditional release creates an unconditional release
- D. UNCONDITIONAL FINAL RELEASE - Civil Code §8138**
 - 1. Don't sign if you haven't been paid in full

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 WAIVER FORM.



Conditional Progress Payment Releases (The Wrong Date Can Cost You)

- ❑ Tesco Controls, Inc. v. Monterey Mechanical Co.
(2004) 124 CA4th 780
- ❑ A claimant who executes a conditional waiver and release on a progress payment waives all lien, stop payment notice, or bond claim rights for labor, services, equipment, or materials furnished before the “through” date stated in the waiver if the claimant is paid the amount specified in the waiver



Tesco Example

The date you use on a Conditional or Unconditional Progress Payment Release **must** match the date on which the amount being paid was earned so that you don't inadvertently provide someone with a release for more than what is being paid. For example, if you give your client a Progress Payment Release for work performed and/or materials delivered through March 15 in the amount of \$100,000 and your client can only pay you \$50,000 and asks you to provide them with a new release reflecting the partial payment, you must backdate the release to when your billing or job records reflect that \$50,000 was due instead of \$100,000. If you don't backdate the release for the lesser amount then the release will operate to release your lien, stop payment notice and bond rights **through the date** on the release even if you have not been paid in full for the work performed through that date.

Tesco (Cont.)

Tesco Controls, Inc. filed suit to enforce a stop payment notice and payment bond claim on a public project for \$194,762.00 and lost because it submitted a conditional progress payment release for \$50,000.00 when, based upon the materials it had supplied to the project through the date on the release, it was owed \$244,762.00. The court ruled that the \$50,000 payment wiped out Tesco's stop payment notice and bond claim rights through the date on the release.



What to Do and When to Do It To Secure your Right to Payment

Protect Your Right To Secure and Collect What you Earn with a Preliminary Notice

**Reference:
(Civil Code §8200)**

Note:

Licensed contractors are subject to possible disciplinary action by the Contractors License Board if they fail to provide Preliminary Notice information to potential claimants or fail to give Preliminary Notices on all projects where the amount of their contract is \$400 or more.

Procedures and Time Limits:

Give Preliminary Notice to the property owner or public agency, the direct contractor, and the construction lender (if applicable) no later than 20 days after the first day you supply labor and/or materials to the project.

Better Late than Never:

A late Preliminary Notice may still be effective and is better than no Preliminary Notice.

Better be Safe than Sorry:

Make it your standard practice to mail your Preliminary Notices via certified mail return receipt requested on the same day you enter into a new contract.



Claimants' Time Chart

Mechanics Liens – Secure the Right to Payment

Claimants other than Direct Contractors

Reference:

(Civil Code §8414)

Note:

A claimant other than a direct contractor may not enforce a lien unless the claimant records a claim of lien within the following times: (a) After the claimant ceases to provide work. (b) Before the earlier of the following times: (1) Ninety days after completion of the work of improvement. (2) Thirty days after the owner records a notice of completion or cessation.

Procedures and Time Limits:

Record Mechanics Liens with the County Recorder in the county where the project is located within 30 days after recordation of Notice of Cessation or Completion, or if a Notice of Completion or Cessation has not been recorded, within 90 days after project completion.

Best Practice:

Don't wait until the last day to record your Mechanics Lien, or take any other action to secure your right to payment.



Claimants' Time Chart

Mechanics Liens for Direct Contractors

Direct Contractor

Reference:

(Civil Code §8412)

Note: A Direct Contractor may not enforce a lien unless the contractor records a claim of lien after the contractor completes the direct contract, and before the earlier of the following times: (a) 90 days after completion of the work of improvement; or (b) 60 days after the owner records a notice of completion or cessation.

Procedures and Time Limits:

Record Mechanics Liens with the County Recorder in the county where the project is located within 60 days after the date a Notice of Completion or Cessation is recorded or, if a Notice of Completion or Cessation has not been recorded, within 90 days after the completion of the project.

Best Practice: Don't wait until the last day to record your Mechanics Lien or take any other action to secure your right to payment.



Claimants' Time Chart

Enforcing Mechanics Liens

Filing Suit to Foreclose on a Mechanics Lien

Reference:

(Civil Code §8460)

Note: The property owner and the claimant can enter into an agreement to extend the time to file suit to enforce a lien past the 90 day deadline, but in no event greater than 1 year from completion of the work of improvement.

Procedures and Time Limits:

File suit to foreclose lien within 90 days of recording the lien, otherwise the lien will automatically become null and void and unenforceable.

Best Practice:

Consider the cost of litigation and attempt to work out a compromise even if it includes discounting your claim in order to avoid having to file suit. If you file suit, include all the claims you have, including breach of contract against your customer and determine in advance if you have the ability to recover your attorneys if you win.



Claimants' Time Chart

Lis Pendens – Litigation Pending

After Filing Suit to Foreclose on a Mechanics Lien

Reference:

(Civil Code §8461) and
(Code of Civil Procedure §409)

Note: Without a recorded Lis Pendens subsequent purchasers of the property against which a Mechanics Lien is recorded may not be subject to a judgment foreclosing the Lien. The Lis Pendens encumbers the property whereas a Mechanics Lien alone does not.

Procedures and Time Limits:

Record a Lis Pendens with the County Recorder immediately after filing a lawsuit to foreclose a lien.

Best Practice:

While the statute allows the Lis Pendens to be recorded up to 20 days after filing suit, the best practice is to record the Lis Pendens immediately after the suit is filed.



Claimants' Time Chart

Payment Bond Claims

Making Payment Bond Claims on Public Projects

Reference:

(Civil Code §8612)

Note:

The winning party in a lawsuit to enforce a Payment Bond Claim is entitled to recover their attorneys' fees from the losing party. Payment Bonds are not common on private projects.

Procedures and Time Limits:

If a Preliminary Notice was required, but not provided, give written notice to the payment bond surety and the bond principal within 15 days after recordation of a Notice of Completion. If a Notice of Completion has not been recorded, the time for giving written notice is extended to 75 days after completion of the project.

This exception will not apply if: (1) all progress payments, except for those disputed in good faith, have been made to a subcontractor to whom the claimant has provided materials or services; (2) the subcontractor the claimant has provided materials or services to has been terminated from the project and all progress payments, except those disputed in good faith, have been made as of the termination date.

Best Practice: Give Preliminary Notice on every project as soon as you enter into a new contract.



Claimants' Time Chart

Enforcing Payment Bond Claims

Enforcing Payment Bond Claims on Public Projects

Reference:

(Civil Code §9558)

Procedures and Time Limits:

On public projects file suit within 6 months after the period within which Stop Payment Notices must be filed.

Note:

If you miss the cut off to file suit to enforce a Payment Bond claim, you may still have time to file suit for Breach of Contract. The statute of limitations to file suit for breach of a written contract is four years from the date of breach and two years from the date of breach of an oral contract.



Claimants' Time Chart

Stop Payment Notice – Private Project

Making a Private Project Stop Payment Notice Claim

Reference:

(Civil Code §8508)

Note: A Stop Payment Notice to a construction lender must be bonded. A Stop Payment Notice on an owner financed project does not require a bond.

Procedures and Time Limits:

Send Bonded Stop Payment Notice by certified mail to the construction lender prior to expiration of lien recording period.

Best Practice:

The Stop Payment Notice is a claim on “undisbursed” funds in the construction loan account. If you wait too long to make your claim, the funds may be gone.



Claimants' Time Chart

Stop Payment Notice – Private Project

Enforcing a Private Works Stop Payment Notice Claim

Reference:

(Civil Code §8550)

Note: If a claimant does not file suit to enforce a Stop Payment Notice, the Notice ceases to be effective and the funds will be released.

Procedures and Time Limits:

File lawsuit no sooner than 10 days from service of Stop Payment Notice and no later than 90 days after the expiration of the time a Stop Payment Notice may be served.

Best Practice:

Within five days after filing a lawsuit to enforce payment of the claim, the claimant must give written notice of the lawsuit to the persons to whom the stop payment notice was given.



Claimants' Time Chart

Stop Payment Notice – Public Project

Making a Public Project Stop Payment Notice Claim

Reference:

(Civil Code §9356)

Note: Include \$10.00 with your request and the public agency will send you a copy of the Notice of Completion, Cessation or Acceptance.

Procedures and Time Limits:

Send a Stop Payment Notice by certified mail to the public agency, addressed to the person responsible for disbursing funds for the project within 30 days of recordation of Notice of Completion, Acceptance or Cessation. If a Notice of Completion or Cessation has not been recorded, serve the Stop Payment Notice within 90 days after Completion or Cessation.

Best Practice: Also secure your right to payment with a Payment Bond Claim.



Claimants' Time Chart

Stop Payment Notice – Public Project

Enforcing a Public Works Stop Payment Notice

Reference:

(Civil Code §9502)

Procedures and Time Limits:

File lawsuit no sooner than 10 days after service of Stop Payment Notice and no later than 90 days from expiration of period within which Stop Payment Notices must be filed.

Best Practice:

Combine Stop Payment Notice and Payment Bond claims with a claim for breach of contract in the same lawsuit.

Keep in mind that the prevailing party in a lawsuit to enforce a Payment Bond claim is entitled to recovery their attorneys' fees. This is great if you win, and not so good if you lose.



Claimants' Time Chart

After Filing Suit - Notice of Proceedings

Stop Payment Notice Claimants

Reference:

(Civil Code §8550) and
(Civil Code § 9504)

Procedures and Time Limits:

Serve Notice of Proceedings within 5 days after filing lawsuit on the same people and in same manner as you served the Stop Payment Notice.

Note: The Notice of Proceedings is meant to give prompt notice to the holder of the construction funds to prevent disbursement after a lawsuit is filed until a judgment is rendered.



Claimants' Time Chart

Federal Projects – Miller Act Claims

Making a Claim on a Federal Works Project

Reference:

(Miller Act, 40 U.S.C. 270b)

Note:

A supplier to a supplier cannot make a Miller Act Bond Claim.

Procedures and Time Limits:

Send a Miller Act Notice by certified mail to the direct contractor and the contractor you contracted with within 90 days from your last delivery of labor or materials to the project.

Best Practice: Second tier claimants should send a generic pre-lien notice to the direct contractor at the outset of their participation and request joint checks.



Claimants' Time Chart

Enforcing Miller Act Bond Claims

Enforcing a Claim On a Federal Works Project

Reference:

(Miller Act 40 U.S.C. 270b
Capehart Act 42 U.S.C.1594)

Note:

Federal projects include military bases, post offices, and other federally owned property.

Procedures and Time Limits:

File suit no sooner than 90 days from claimant's last labor or materials and no later than 1 year from the claimant's last day of work.

Best Practice: Before filing suit to enforce your claim make sure that you have created a strong paper trail (contract documents, invoices, statements, collection letters) to support your claim and consider offering a discount in exchange for a prompt payment to avoid the need for litigation.



Claimants' Time Chart

Contractor License Bond Claims

License Bonds

Reference:

(Business and Professions Code §7071.11)

Note: Before filing suit to enforce a license bond claim, send a demand letter to the license bond surety with support for your claim. Sureties are required to investigate all claims in good faith and will give notice to the contractor.

Procedures and Time Limits:

File suit within 2 years after expiration of license period.

Best Practice:

Successful license bond claims require proof that the licensee willfully violated some provision of contractor's license law. The failure to pay contractual obligations when due does not generally support a successful license bond claim.



Small Claims Court

Attorneys Not Allowed

- A. Create a “paper trail” in support of your position with a reasonable payment demand letter before filing your claim laying out the facts in support of your position.
- B. Consumers and businesses owned by individuals can file claims for up to \$10,000 twice per year, thereafter the maximum amount is \$2,500.
- C. Corporations, Limited Liability Companies and other entities cannot ask for more than \$5,000 twice per year, thereafter the maximum amount is \$2,500.
- D. Only defendants can appeal and many of them do. Attorneys are allowed for the hearing on the appeal.
- E. www.courtinfo.ca.gov/selfhelp/smallclaims



Construction Contracts

The Good, The Bad, The Ugly

Contracts allocate Responsibility and Risk

1. Oral Agreements = Disputes = Lawyers = \$\$\$
2. Read and understand every contract before signing
3. When you review a proposed contract circle what you don't understand or agree with and start your negotiations by asking the drafter to explain or delete any provisions you question
4. If an agreement is not in writing, it may be difficult or impossible to enforce
5. Look for and avoid "DEAL KILLER" provisions in proposed contracts. A DEAL KILLER is a provision that should cause you to pass on the agreement unless the provision is deleted or modified



Consensus Docs

- ❑ These contracts and forms are designed to meet a wide range of project delivery mechanisms as well as address electronic communications to building information modeling (BIM).
- ❑ The Associated General Contractors of America (AGC) and the Construction Owners Association of America (COAA) combined their contract document programs into ConsensusDOCS.
- ❑ Other partners in the collaborative drafting include Construction Users Round Table (CURT), National Association of State Facilities Administrators (NASFA), Mechanical Contractors Association of America (MCAA) and more than a dozen others.
- ❑ Jury is still out on whether these forms will gain widespread industry acceptance.



Contracts Should be Custom Tailored for each Project

BNI Forms- Building News Industry

www.bnibooks.com

Builder's Book Store in Canoga Park

www.buildersbook.com

AIA (American Institute of Architects)

www.aia.org

Associated General Contractors of California

www.agc-ca.org

Construction Owner Association of America

www.coas.org

Custom Drafted Contracts

www.thegreenlawgroup.com



Contract

Terms and Conditions

COMMON CONTRACT PROVISIONS

1. **PAY WHEN PAID-** (Means paid within a reasonable time)
PAY IF PAID – (Void and Unenforceable)

2. **ARBITRATION PROVISIONS**
 - a. Usually no discovery, jury or appeal - depends on the terms included in the arbitration clause in contract
 - b. In addition to filing a demand for arbitration, to foreclose a mechanics lien claimants must file a lawsuit to prevent the 90 day statute of limitations from expiring and request a stay of litigation in order to proceed to arbitration
 - c. After an arbitration award is rendered, the prevailing party has to petition the court to confirm the award in order to obtain an enforceable judgment

Contract Terms (Cont.)

3. NO DAMAGES FOR DELAY-TIME EXTENSIONS ONLY

- a. May be able to argue for disruption, interference or hindrance damages based on the following:
 1. Job was bid as a “production” job but was scheduled in stages and out of production sequence;
 2. Owner and/or general contractor changed the sequence of construction;
 3. Parties have an “implied duty of cooperation” meaning that neither party should act or fail to act so as to prevent the other party from exercising its rights and/or performing its contractual obligations; and
 4. Result of disruption increased costs.



Contract Terms (Cont.)

4. CONTINUING WORK IN THE FACE OF DISPUTE

- a. An example of a “deal killer” contract provision is one which requires a contracting party to continue performance even if required progress payments are not made

5. ATTORNEYS’ FEES PAID TO PREVAILING PARTY

- a. Estimated range for attorneys’ fees and court costs to take a case to trial \$25,000 to \$250,000
- b. Before you file suit, ask your attorney for an estimated litigation budget and an evaluation of your downside risks if you lose – litigation doesn’t come with a guarantee



Contract Terms (Cont.)

6. CHANGES MUST BE APPROVED IN WRITING

- a. DO NOT FORGET REQUESTS FOR TIME EXTENSIONS IN YOUR CHANGE ORDERS

7. NOTICE REQUIREMENTS

- a. YOU MAY LOSE YOUR CLAIM IF YOU DO NOT GIVE NOTICE AND CREATE A PAPER TRAIL FOR:
 - 1. Owner or contractor caused delay
 - 2. Disruption
 - 3. Acceleration
 - 4. Constructive change orders
 - 5. Create a “paper trail” to support your position

Contract Terms (Cont.)

□ Termination for Convenience

Doesn't require a reason to terminate contract. Generally provides for payment for work and materials completed to date and in the pipeline

□ Termination for Cause

Specific notice and an opportunity to cure before termination is justified



Contract Terms (Cont.)

Get Copies of Incorporated Documents

Subcontracts often incorporate by reference the general conditions, plans, specifications, addenda, and modifications in the owner/prime contract. Before you sign a contract with an “incorporated contract documents” provision get copies of the incorporated documents and review them to make sure that they don’t adversely impact your contract obligations because the terms and conditions in the incorporated documents will become an enforceable part of your contract agreement when you sign the contract.



Common Breach of Contract Allegations

1. Failure to make payment
2. Negligent performance
3. Change order disputes
4. Delay
5. Defective plans and specifications
6. Failure to grant job site access
7. Acceleration
8. Interference with the contractor's performance
9. Failure to approve shop drawings
10. Failure to approve and process change orders
11. Failure to inspect and approve work on the critical path
12. Failure to deliver owner-furnished equipment
13. Wrongful Termination



Breach of Contract (Cont.)

Walking off a job in a payment dispute may get you sued for abandoning the project

Your customer may also file a complaint with the Contractors State License Board for abandonment which could result in disciplinary action and an order to pay compensation.

Damages for walking off without justification

Could be based upon the cost for another firm to complete the balance of your contract on a time and material basis.



Contracting Tips

- A. Read your contracts, including any “incorporated” documents, and do not sign unless you understand and agree with the proposed terms
- B. Begin each job with the realization that it might end up in court or arbitration and document significant events with confirming letters, photos and videos to create a “paper trail” to support your project performance
- C. Serve preliminary notices on every job as soon as you sign the contract
- D. Consider the use of project management software



Contracting Tips (Cont.)

- E. Get signed change order approvals that include payment terms and time extensions before you perform any extra work outside the scope of your contract
- F. Secure payment claims with mechanics liens, stop payment notices and/or bond claims
- G. In the event of a dispute keep in mind that a compromise settlement is almost always better than a lawsuit
- H. File suit only as a last resort and only if you have the resources to take the case through trial or arbitration if necessary
- I. Keep in mind that the parties who resolve their lawsuits favorably without having to go to trial are the ones who are the best prepared to win at trial



Home Improvement Contracts

Business and Professions Code 7159

In an effort to protect homeowners from unscrupulous contractors the California legislature drafted B&P § 7159 with strict consumer protection provisions that apply to residential remodeling projects from single family homes to quadruplexes. Among the many provisions in B&P 7159 are requirements for written contracts, down payment restrictions, start and finish dates, written change orders, specific achievement benchmarks for progress payments, a three day right of cancellation and a warning notice regarding mechanics liens.



Home Improvement Contracts (This Contractor Got Lucky)

In *Hinerfeld-Ward, Inc. v. Lipian*, the court carved out a stunning exception to the requirement for written Home Improvement Contracts and allowed a general contractor to **enforce an oral Home Improvement Contract**. The court reasoned that the homeowners in the case were not the type of persons entitled to the consumer protections in B&P § 7159 because the project was: (1) a complex, high-end remodel on which the design continued to evolve over years of planning and construction; (2) the owners' architect and designer had extensive involvement in the project as their representative; and (3) the owners would be unjustly enriched if the contractor was denied recovery. The court also ruled that the contractor was entitled to an award of attorneys' fees and prompt pay penalties under Civil Code § 3260.1.



Home Improvement Contracts (Consumer Protection in Action)

Business and Professions Code §7159 – the Home Improvement Contract Statute requires Home Improvement Contracts to include **28** separate notices/provisions in each contract.

Samples of the required notices and provisions are on the following 13 slides.



Home Improvement Contract

This Home Improvement Construction Contract (“CONTRACT”) is dated _____, 2011, as between _____ (“CONTRACTOR”) CSLB License _____, and _____ (“OWNER”).

The work will be performed by CONTRACTOR at:

 (“PROJECT”).

(Street Address) (City) (State) (Zip Code)

Any Notices of Cancellation may be sent to CONTRACTOR addressed as follows:

Contractor

Attn

Contractor’s address

Description of the Project and Description of the Significant Materials to be Used and Equipment to be Installed (“WORK”)

(For additional space attached Addendum)



Required Home Improvement Contract Notice

NOTICE TO OWNER TO FILE A COMPLAINT

Contractors are required by law to be licensed and regulated by the Contractors State License Board, which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within 10 years of the date of the alleged violation. Any questions concerning the CONTRACTOR may be referred to the Registrar, Contractors State License Board, Post Office Box 26000, Sacramento, California 95826.



Required Home Improvement Contract Notices

- ❑ You have the right to require CONTRACTOR to have a payment and performance bond.
- ❑ You are entitled to a completely filled in copy of this CONTRACT, signed by both you and CONTRACTOR, before any work may be started.

OWNER(S)

- ❑ Dated: _____
- ❑ Signed: _____
- ❑ Dated: _____
- ❑ Signed: _____

Contractor

- ❑ Dated: _____
- ❑ Signed: _____
- ❑ Title: _____



Required Home Improvement Contract Notices

- ❑ **TERMS AND CONDITIONS***
- ❑ **QUALITY AND SCOPE OF WORK.** CONTRACTOR will furnish labor, materials, and equipment in accordance with the terms and conditions of this CONTRACT to construct and complete the WORK in a workmanlike manner.
- ❑ **PAYMENT TERMS.** Owner agrees to pay CONTRACTOR the CONTRACT PRICE in progress and retention payments as detailed herein. All payments are due within 7 days of billing and will bear interest at the rate of 1.75% per month from the date on which payment is due.
- ❑ **CONTRACT PRICE:** _____ \$
- ❑ **FINANCE CHARGE:** _____ \$
- ❑ **DOWN PAYMENT:** _____ \$
- ❑ **THE DOWN PAYMENT MAY NOT EXCEED \$1,000 OR 10 PERCENT OF THE CONTRACT PRICE, WHICHEVER IS LESS.**
- ❑ **SCHEDULE OF PROGRESS AND RETENTION PAYMENTS.**
- ❑ **AMOUNT LABOR AND/OR SERVICES TO BE PERFORMED AND/OR MATERIALS AND/OR EQUIPMENT TO BE SUPPLIED** (For additional space attached Addendum)
- ❑ **The schedule of progress payments must specifically describe each phase of work, including the type and amount of work or services scheduled to be supplied in each phase, along with the amount of each proposed progress payment. IT IS AGAINST THE LAW FOR A CONTRACTOR TO COLLECT PAYMENT FOR WORK NOT YET COMPLETED, OR FOR MATERIALS NOT YET DELIVERED. HOWEVER, A CONTRACTOR MAY REQUIRE A DOWN PAYMENT.**
- ❑ **RELEASE OF MECHANICS' LIENS.** Unless CONTRACTOR is required by OWNER to furnish a performance and payment bond, lien and completion bond, bond equivalent, or joint control approved by the Registrar of Contractors covering full performance and completion of the CONTRACT and the bonds or joint control is furnished by the CONTRACTOR, or when the parties agree for full payment to be made upon or for a schedule of payments to commence after satisfactory completion of the PROJECT, CONTRACTOR shall, upon satisfactory payment being made for any portion of the WORK performed, prior to any further payment being made, furnish to OWNER a full and unconditional release from any claim or mechanics' lien pursuant to Section 3114 of the Civil Code, for that portion of the WORK for which payment has been made



Required Home Improvement Contract Notices

APPROXIMATE START DATE. CONTRACTOR shall substantially commence WORK on approximately _____, _____, subject to permissible delays as defined in this CONTRACT. Demolition, removal, or delivery of materials or equipment to the job site constitutes substantial commencement of the WORK. Failure by CONTRACTOR without lawful excuse to substantially commence WORK within 20 days from the approximate date specified in this CONTRACT when WORK will commence is a violation of the Contractors State License Law.

APPROXIMATE COMPLETION DATE. CONTRACTOR shall substantially complete WORK on approximately _____, _____. Substantial completion means the completion of the PROJECT where the OWNER can occupy all or designated portions of the WORK for the purpose for which it was intended.

CANCELLATION NOTICES. The law requires that the contractor give you a notice explaining your right to cancel. Initial the checkbox if the contractor has given you a “Notice of the Three-Day Right to Cancel.” (_____)

CHANGE ORDERS. No extra WORK or change order WORK shall be required to be performed without prior written authorization of the OWNER. Any Change Order forms for changes or extra WORK shall be incorporated in, and become a part of, the CONTRACT. OWNER is entitled to a CONTRACT price reduction equal to CONTRACTOR'S actual cost savings for Change Orders that result in credits, but is not entitled to a reduction in overhead and profit because of a credit Change Order. Expenses incurred by CONTRACTOR because of unusual or unanticipated subsurface ground conditions or because of other unanticipated and unknown conditions (including, but not limited to, removal of mold, toxic waste, asbestos, or material containing asbestos or toxic waste) shall be paid for by OWNER as extra WORK. CONTRACTOR shall promptly notify OWNER of latent or concealed physical conditions at the site differing materially from those ordinarily encountered and generally recognized as inherent in WORK of the character provided for in this CONTRACT. Any expense incurred due to such conditions shall be paid for by OWNER as extra WORK. OWNER agrees to extend the time to complete the PROJECT in the event that extra WORK is required to a date reasonably sufficient to permit CONTRACTOR to perform such extra WORK.



Required Home Improvement Contract Notices

NOTE ABOUT EXTRA WORK AND CHANGE ORDERS. Extra WORK and Change Orders become part of the CONTRACT once the order is prepared in writing and signed by the parties prior to the commencement of any work covered by the new Change Order. The order must describe the scope of the extra work or change, the cost to be added or subtracted from the CONTRACT, the impact on the schedule for completion of the work and the effect the order will have on the Schedule of Progress Payments. *The failure of the contractor to comply with this paragraph does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.*

JOINT CONTROL. If CONTRACTOR is required to furnish joint control, CONTRACTOR shall not have any financial or other interest in the joint control.

INSURANCE NOTICES. A notice concerning commercial general liability insurance is attached to this CONTRACT. A notice concerning workers' compensation insurance is attached to this CONTRACT.

LIST OF DOCUMENTS TO BE INCORPORATED INTO THE CONTRACT.



Required Home Improvement Contract Notices

Commercial General Liability Insurance (CGL) (*Carries, doesn't carry, or is self-insured*)

<Contractor's name here> carries commercial general liability insurance written by: _____ . You may call _____ at _____ - _____ to check CONTRACTOR's insurance coverage.

Workers' Compensation Insurance (*Carries or doesn't have employees*)

<CONTRACTOR's name here> carries workers' compensation insurance for all employees.



Required Home Improvement Contract Notices

Notice Regarding Change Orders

You, the buyer, may not require CONTRACTOR to perform extra or Change Order WORK without providing written authorization prior to the commencement of any WORK covered by the new Change Order. An extra WORK or a Change Order is not enforceable against you, as buyer, unless the Change Order also identifies all of the following in writing prior to the commencement of any WORK covered by the new Change Order: (i) the scope of WORK encompassed by the order; (ii) the amount to be added or subtracted from the CONTRACT; and (iii) the effect the order will make in the progress payments or the completion date. CONTRACTOR's failure to comply with the requirements of the foregoing does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.



Required Home Improvement Contract Notices

Information about the Contractors' State License Board (CSLB):

The CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact the CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to the CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), the CSLB has authority to investigate the complaint. If you use an unlicensed contractor, the CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov

Call CSLB at 800-321-CSLB (2752)

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.



Required Home Improvement Contract Notices

MECHANICS LIEN WARNING:

Anyone who helps improve your property, but who is not paid, may record what is called a mechanics' lien on your property. A mechanics' lien is a claim, like a mortgage or home equity loan, made against your property and recorded with the county recorder. Even if you pay your contractor in full, unpaid subcontractors, suppliers, and laborers who helped to improve your property may record mechanics' liens and sue you in court to foreclose the lien. If a court finds the lien is valid, you could be forced to pay twice or have a court officer sell your home to pay the lien. Liens can also affect your credit.

To preserve their right to record a lien, each subcontractor and material supplier must provide you with a document called a '20-day Preliminary Notice.' This notice is not a lien. The purpose of the notice is to let you know that the person who sends you the notice has the right to record a lien on your property if he or she is not paid. **BE CAREFUL.** The Preliminary Notice can be sent up to 20 days after the subcontractor starts work or the supplier provides material. This can be a big problem if you pay your contractor before you have received the Preliminary Notices. You will not get Preliminary Notices from your prime contractor or from laborers who work on your project. The law assumes that you already know they are improving your property. **PROTECT YOURSELF FROM LIENS.** You can protect yourself from liens by getting a list from your contractor of all the subcontractors and material suppliers that work on your project. Find out from your contractor when these subcontractors started work and when these suppliers delivered goods or materials. Then wait 20 days, paying attention to the Preliminary Notices you receive.

PAY WITH JOINT CHECKS. One way to protect yourself is to pay with a joint check. When your contractor tells you it is time to pay for the work of a subcontractor or supplier who has provided you with a Preliminary Notice, write a joint check payable to both the contractor and the subcontractor or material supplier. For other ways to prevent liens, visit the CSLB's Web site at www.cslb.ca.gov or call the CSLB at 800-321-CSLB (2752). **REMEMBER, IF YOU DO NOTHING, YOU RISK HAVING A LIEN PLACED ON YOUR HOME.** This can mean that you may have to pay twice, or face the forced sale of your home to pay what you owe.



Required Home Improvement Contract Notices

Notice of Three-Day Right to Cancel (*three day or seven day*)

You, the buyer, have the right to cancel this contract within three business days. You may cancel by e-mailing, mailing, faxing, or delivering a written notice to the contractor at the contractor's place of business by midnight of the third business day after you received a signed and dated copy of the contract that includes this notice. Include your name, your address, and the date you received the signed copy of the contract and this notice.

If you cancel, the contractor must return to you anything you paid within 10 days of receiving the notice of cancellation. For your part, you must make available to the contractor at your residence, in substantially as good condition as you received it, any goods delivered to you under this contract or sale. Or, you may, if you wish, comply with the contractor's instructions on how to return the goods at the contractor's expense and risk. If you do make the goods available to the contractor and the contractor does not pick them up within 20 days of the date of your notice of cancellation, you may keep them without any further obligation. If you fail to make the goods available to the contractor, or if you agree to return the goods to the contractor and fail to do so, then you remain liable for performance of all obligations under the contract.

I acknowledge receipt of this Notice of Three Day Right to Cancel

OWNER

Signed: _____

Dated: _____



Required Home Improvement Contract Notices

Notice of Cancellation

_____ Agreement Date

You may cancel this transaction, without any penalty or obligation, within three business days from the above date. If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled. If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to _____ at _____

_____ Attn: _____
_____ by **not later than midnight of (date)** _____ to:

I hereby cancel this transaction.

OWNER:

Signed: _____

Dated: _____



Required HIC Change Order Form

PROJECT Address: _____
(Street) (City) (State) (Zip)

PROJECT Description: _____

The contract for the aforementioned project is hereby modified and amended as follows: (DESCRIBE CHANGES REQUESTED) _____

It is mutually agreed that the contract price is INCREASED/DECREASED (circle one) by \$_____, as a PAYABLE/DEDUCTIBLE (circle one) in accordance with the terms of our contract.

As a result of this change order, the time for completion of the aforementioned contract is hereby extended by an additional _____ days.

This change order is incorporated into and governed by the aforementioned contract and is incorporated therein Dated: _____

Submitted by Contractor:

By: _____



10-Day Stop Work Order

Civil Code Section 3260.2

- ❑ A Stop Work Order allows a general contractor on a private works project to stop working without liability for delays.
- ❑ Applies when the payment is “undisputed” and is more than 35 days late.
- ❑ Contractor provides the owner with a notice via certified mail and by posting a copy on the job.
- ❑ Notice states that unless the payment is made within 10 days work will be suspended.
- ❑ A Stop Work Order provides a prime contractor with some protection against delay damage claims from the owner and subcontractors.



Prompt Pay Laws for Contractors

Failure to pay undisputed progress payments and/or retention amounts within 30 days of receipt of payment or in accordance with the terms of the contract may subject an owner or general contractor to a penalty of 2% per month for the wrongfully withheld amounts and attorneys' fees. The safe harbor provision allows an owner and/or general contractor to hold 150% of amounts disputed in good faith.

The Prompt Payment Statutes are:

California Civil Code §3260 (retention)

Civil Code §3260.1 (progress payments)

Business and Professions Code §7108.5 (private and public works projects)

See Taylor v. Van-Catlin Construction (2005) 130 Cal.App.4th 1061 for definition of prevailing party on the issue of “good faith” and the award of attorneys fees.



Wage and Hour Laws

Basic Concepts for Contractors

- ❑ An “exempt” employee is someone who is not subject to state or federal labor code requirements for overtime pay or for required lunch and rest breaks.
- ❑ A “non exempt” employee is someone who is subject to overtime, lunch and break rules. Most employees are non-exempt.
- ❑ An employee may be exempt if he or she falls within a recognized exception for either an executive, professional, or creative employee. A project manager and/or construction superintendent may fall within the exception for executive employees.
- ❑ A “bona fide executive” employee is an employee whose compensation is at least two times the minimum wage level and whose primary duty is management.
- ❑ The regulations define “primary duty” as the principal, main, major or most important duty that the employee performs, “with the major emphasis on the character of the employee’s job as a whole.”



Project Managers may be Exempt Employees

- ❑ Factors considered in determining an employee’s “primary duty” include, but are not limited to: The relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.
- ❑ The amount of time spent performing exempt work is helpful, but not definitive, in determining an employee’s primary duty. Under California law, the time spent is a critical factor; an employee is “primarily” engaged in exempt duties only if they occupy more than half the employee’s work time.



Management Duties

That May Qualify for Exempt Status

- ❑ The “primary duties” of “management” of a business include but are not limited to:
 - ❑ interviewing, selecting and training employees;
 - ❑ setting and adjusting their rates of pay and hours of work;
 - ❑ planning and directing their work, determining the techniques they use and apportioning work among them;
 - ❑ controlling the flow and distribution of materials or merchandise and supplies;
 - ❑ maintaining production or sales records for use in supervision or control;
 - ❑ appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
 - ❑ handling employee complaints and grievances;
 - ❑ disciplining employees;
 - ❑ providing for the safety and security of the employees or the property;
 - ❑ planning and controlling the budget; and
 - ❑ monitoring or implementing legal compliance measures.



Non-Exempt Employees

- ❑ “Non-Exempt” employees are subject to state and federal overtime requirements and mandated lunch and break rules
- ❑ Non-Exempt employees must be paid overtime for any time over 8 hours in a day or 40 hours in a week
- ❑ Employers are subject to penalties for non-compliance
- ❑ Employers have the burden of proving compliance with the labor laws
- ❑ Labor Code provides for attorneys’ fees to prevailing party in the event of litigation



Human Resource Policies

The California Chamber of Commerce is an excellent source for employment forms, policies, manuals, notices and procedure guides. See their website at

www.calchamber.com



CAL OSHA

(Illness Injury and Prevention Plans)

DO YOU HAVE AN UP TO DATE ILLNESS INJURY PREVENTION PLAN? DO YOU ENFORCE IT?

IF NOT, YOU ARE IN VIOLATION OF THE LAW AND YOU WILL BE FINED WHEN OSHA SHOWS UP FOR AN INSPECTION OR SUBJECT TO CRIMINAL PROSECUTION IF AN EMPLOYEE IS SERIOUSLY HURT OR KILLED.

THE CITY OF LOS ANGELES FILES CRIMINAL PROSECUTIONS WHEN A JOB SITE INJURY RESULTS IN DEATH OR SERIOUS INJURY.

FOR MORE INFORMATION – WWW.OSHADEFENSELEAGUE.COM



Bankruptcy Basics for Contractors

- ❑ A Chapter 7 bankruptcy can be filed by an individual or a business and results in the sale of all non-exempt assets for the benefit of creditors.
- ❑ Individuals can protect certain “exempt” assets from sale.
- ❑ A Chapter 13 bankruptcy is available to individuals who want to pay their debts over a 3 to 5 year period in accordance with a court approved payment plan.
- ❑ A Chapter 11 bankruptcy is designed for high worth individuals and businesses who need to reorganize and restructure their debts.



Bankruptcy Proof of Claim

A bankruptcy begins when a debtor files a “Petition in Bankruptcy” in the Bankruptcy Court. Those to whom the bankrupt party owes money (“creditors”) will usually be listed as creditors of the bankrupt party on the schedules filed with the Petition in Bankruptcy. The Bankruptcy Court will generally send a “Proof of Claim” form to each of the creditors listed in the bankruptcy schedules filed by the debtor.

Each of the creditors must then fill out and sign the Proof of Claim form and attach to the form appropriate documentary proof of the claim (contract, final unpaid invoices, mechanics liens, etc.).



Bankruptcy Stay Effect on Mechanics Lien Foreclosure Suits

U.S. Bankruptcy Code section 362 “automatic stay” provides that no state court lawsuit may be filed against a bankrupt party without first obtaining permission from the Bankruptcy Court. The *automatic stay* automatically prohibits the filing of a state court lawsuit to foreclose on the mechanics lien without first obtaining Bankruptcy Court approval. In addition, any state court lawsuit already on file against the bankrupt party would be “*automatically stayed*” or put on hold.



Notice of Perfection of Mechanics Lien Bankruptcy Code §546(b)

U.S. Bankruptcy Code section 362’s automatic stay prevents the filing of a state court suit to foreclose a mechanics lien after the filing of a bankruptcy petition. However, unless a lawsuit is filed within 90 days of its recording, a mechanics lien is automatically void and unenforceable. Fortunately, the Bankruptcy Code provides a method to protect mechanics liens rights without the need to file a state court foreclosure suit. Bankruptcy Code section 546(b) allows a creditor/claimant to file a “notice of perfection of lien” as an alternative to filing a state court foreclosure lawsuit provided that the notice is filed within 90 days of the recording date of the lien.



Re-Activate Your Suspended Contractor's License

One of the ways to re-activate a license which was suspended as a result of an unsatisfied civil judgment is to file a bankruptcy petition. If an individual or corporate licensee files a bankruptcy petition, federal bankruptcy laws require the CSLB and your creditors to immediately stop all collection efforts. When the CSLB is notified that you or your business has filed a bankruptcy petition, it must lift the license suspension and re-activate your license.



Chapter 11 Could Save Your Business

Chapter 11 is used to reorganize or liquidate a business, which may be a corporation, sole proprietorship, or partnership. Allowing a business to reorganize as opposed to closing it down preserves jobs, protects creditors and gives owners an opportunity to earn a return on their investments. A Chapter 11 Bankruptcy gives debtors:

- (1) the ability to continue operating their business;
- (2) protection from litigation;
- (3) an opportunity to reorganize the business;
- (4) the ability to restructure debts and repayment terms;
- (5) a chance to assume, assign or reject “executory” contracts and unexpired leases; and
- (6) the power to avoid and set aside pre-petition transactions.



Green Building Code

- Having a mandatory code allows California's builders to build to a certifiable green standard without having to pay costly fees for third-party programs

- The CalGreen Code may ultimately lead to the demise of LEED certification

Green Building (Cont.)

As of January 1, 2011, the nation's first mandatory green building code – dubbed “CalGreen” – laid out specific constraints for newly constructed buildings. Among other things, it requires builders to install plumbing that cuts indoor water use by as much as 20 percent, to divert 50 percent of construction waste from landfills to recycling, and to use low-pollutant paints, carpets, and floors. It also mandates inspection of energy systems to ensure that heaters, air conditioners, and other mechanical equipment are working efficiently. And for non-residential buildings, it requires the installation of water meters for different uses.



Green Building (Cont.)

The new green building code also allows local jurisdictions to retain stricter green building standards, if they already exist, or to adopt stricter versions of the state code if they choose.



Green Building (Cont.)

- ❑ **The 2010 Green Building Standards Code require:**
- ❑ 20 percent mandatory reduction in indoor water use, with voluntary goal standards for 30, 35 and 40 percent reductions;
- ❑ Separate water meters for nonresidential buildings' indoor and outdoor water use, with a requirement for moisture-sensing irrigation systems for larger landscape projects;
- ❑ Requiring diversion of 50 percent of construction waste from landfills, increasing voluntarily to 65 and 75 percent for new homes and 80 percent for commercial projects;
- ❑ Mandatory inspections of energy systems (i.e. heat furnace, air conditioner, mechanical equipment) for nonresidential buildings over 10,000 square feet to ensure that all are working at their maximum capacity according to their design efficiencies;
- ❑ Requiring low-pollutant emitting interior finish materials such as paints, carpet, vinyl flooring and particle board.

Green Building (Cont.)

- ❑ The CALGREEN Code is a comprehensive and uniform regulatory code for all residential, commercial, hospital and school buildings, ensuring that every new building in California is built using environmentally advanced construction practices.
- ❑ California's property owners can simply build according to the state's CALGREEN Code, at no cost for certification.



Green Building (Cont.)

- ❑ Some environmental groups have criticized the two-tier “CalGreen” voluntary rating system suggested by the new code because it may cause confusion among builders.
- ❑ Their concern is that a two-tier labeling system would be open to conflicting interpretations and be unenforceable by local building inspectors.
- ❑ Supporters argue that CalGreen will define what a green building is and reduce confusion.



Easy Law Construction Notices

Easy Law Construction Notices was established in 1985 by Scott Green the managing partner for The Green Law Group, LLP to help contractors and others in the construction industry “**Secure and Collect what they Earn**” with professionally prepared preliminary notices, mechanics liens, stop payment notices, bond claims and collection letters.

Sign up for Free at www.easylawinc.com