



Construction Law for California Contractors

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Introduction

This seminar presentation is general and educational in nature. For advice based upon the facts regarding your particular situation, be sure and consult with an experienced attorney.

For questions regarding this seminar, please send an email to Scott Green at scott@thegreenlawgroup.com.

The attorneys at **The Green Law Group, LLP** practice primarily in the areas of construction, business, real estate, and bankruptcy law.

Table of Contents

○ Moderator - Scott Green, Esq.	4
○ Speaker - Todd Wolfe, Esq.....	5
○ Speaker - Glenn Kelble, Esq.....	6
○ Speaker - Vicki Hillyer Attorney and Architect	7
○ Overview of Contractors' License Law	8 to 23
○ Construction Contracts	25 to 38
○ 10-Day Stop Work Order Civil Code Section 3260.2.....	39
○ Preliminary Notices.....	41 to 43
○ Mechanics' Liens.....	44 to 50
○ Stop Notices.....	51 to 52
○ Payment Bond Claims.....	53 to 57
○ Statutory Release Forms.....	58 to 61
○ Prompt Pay Statutes.....	59
○ Cal-Green Building Code.....	64 to 69
○ Wage and Hour Laws.....	71 to 75
○ CAL OSHA – Illness Injury and Prevention Plans.....	76
○ Bankruptcy Basics.....	79 to 84
○ Claimant's Time Chart and Checklist.....	86 to 100
○ Small Claims Court.....	101
○ Easy Law Construction Notices – www.easylawinc.com	102

Moderator

Scott Green, Esq.

- Scott Green graduated with honors from California State University at Pomona in 1974 and received his Juris Doctorate degree in 1978 from the University of San Diego School of Law after attending four years of night classes and working during the day in construction. In 1979, Mr. Green formed Hared Construction Company, Inc., a general contracting and painting company with his father and worked there until 1988 as a field superintendent, office manager, corporate officer, and in-house counsel.
- In 1985, Mr. Green formed Easy Law, Inc. doing business as Easy Law Construction Notices to help contractors and others in the construction industry *secure and collect what they earn*. Today, Easy Law is a national construction notice document preparation firm, www.easylawinc.com, providing preliminary notices, mechanics' liens, stop notices and other construction collection services to thousands of contractors, material suppliers, and other construction professionals throughout the U.S.
- For the last 30 years Mr. Green has concentrated his practice in the areas of construction, business, real estate law and litigation and has published numerous articles on various construction law topics. He is a member in good standing of the California and Federal Bars and has tried and arbitrated more than 200 cases to judgment. Mr. Green is a past president of the Moorpark Chamber of Commerce, currently serves as a member of the board of directors for the Boys and Girls Club of Moorpark and is a member in good standing with the Los Angeles and Ventura County Bar Associations.
- Mr. Green is the founding and managing partner for The Green Law Group, LLP and can be reached by phone at (805) 306-1100, extension 14 or via email at scott@thegreenlawgroup.com.



Speaker

Todd Wolfe, Esq.

Todd M. Wolfe was admitted to practice law in California in 1999. Mr. Wolfe has practiced in a wide variety of litigation fields, representing plaintiffs and defendants primarily in the areas of construction, asbestos liability and general liability/personal injury, from inception through mediation, arbitration and trial. Mr. Wolfe has represented individuals and businesses of all sizes, from sole proprietorships to Fortune 50 corporations. Mr. Wolfe is admitted to practice in all California State Courts, the United States District Courts for the Central and Eastern Districts of California and before the United States Supreme Court. Mr. Wolfe graduated from the University of California, San Diego in 1992 with a Bachelor of Arts degree in History and received his Juris Doctorate in 1998 from Loyola Law School, Los Angeles. He has served as judge pro tempore for the Los Angeles County Superior Court and is a member of the Los Angeles and Ventura County Bar Associations.

Mr. Wolfe is an equity partner with The Green Law Group, LLP and can be reached by phone at (805) 306-1100 extension 16 or via email at todd@thegreenlawgroup.com.



Speaker

Glenn Kelble, Esq.

Glenn Kelble was admitted to practice law in California in 1992.

Mr. Kelble's practice includes general litigation, business, construction, bankruptcy, labor and employment, real estate, personal injury, landlord and tenant, collections and enforcement of judgments and debts, homeowners' association, civil rights litigation, and appellate law. Mr. Kelble has extensive experience in all aspects of litigation, from case inception through trial. He has successfully tried cases on behalf of both private and public entity defendants. He is admitted to practice in California and before the Court of Appeals for the Ninth Circuit and the U.S. District Court for the Central District of California. Mr. Kelble received his Juris Doctorate from the UCLA School of Law in 1992. While at the UCLA School of Law, Mr. Kelble served as Chief Articles Editor for the UCLA Journal of Environmental Law and Policy and was a member of the UCLA Environmental Law Society. Mr. Kelble was also a member of Phi Alpha Delta. Mr. Kelble received his Bachelor of Arts degree in Geography/Ecosystems from the University of California, Los Angeles (UCLA) in 1988, graduating Magna Cum Laude with departmental honors. He received a minor in Business Administration. He earned membership in Phi Beta Kappa in 1988. Mr. Kelble is an equity partner with The Green Law Group, LLP and can be reached by phone at (805) 306-1100, extension 18 or via email at glenn@thegreenlawgroup.com.



Speaker

Vicki Hillyer, Esq. and Architect

- Vicki Hillyer was admitted to practice law in California in 1996 and became a California registered architect in 1988.
- Ms. Hillyer's practice includes construction law representing plaintiffs and defendants in all phases of the design and construction process and throughout all forms of dispute resolution and litigation.
- Ms. Hillyer practiced architecture until forming a construction and program management firm in 1993, contracting, as well as representing owners on complex capital construction and renewal projects. Her design, construction, general contracting, subcontracting, and management experience runs from bio-tech and bio-med research facilities, to healthcare, product distribution, athletic, educational and performance venues, as well as residential facilities. Her varied design, construction, and legal experience provides the ability to thoroughly understand the entire design, construction, and contracting process from all viewpoints.
- Ms. Hillyer's Bachelor of Science degree in Architecture is from the University of Texas, Austin. Her Juris Doctorate is from Thomas Jefferson School of Law, San Diego. Ms. Hillyer is a member of the California State Bar, the American Bar Association Forum on Construction, and the Los Angeles and Ventura County Bar Associations.
- Ms. Hillyer can be contacted by phone at (805) 306-1100, extension 17 or via email at vicki@thegreenlawgroup.com.



Overview of Contractors' License Law

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 properly maintain workers’ compensation insurance.

Shop Drawings May 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.



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 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.

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
- Contractor was barred from recovery of construction funds owed to it, despite the fact it was only improperly licensed for a partial period of its work on the project at issue

No Workers' Comp = 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

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.

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.



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.)

New Law Takes Effect on 1/1/11

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 will give 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. The law becomes effective January 1, 2011. 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.



Stay Out of 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.

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*.

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.

Substantial Compliance

(The Expired License Bond Exception)

Business & Professions Code § 7031(e) provides for a “substantial compliance” exception. 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.



Questions /Notes

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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 will cause you to pass on the agreement unless the provision is deleted or modified



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 family 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.



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 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 on mechanics' liens 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 and Conditions (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 and Conditions (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

Contract Terms and Conditions (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 Termination Provisions

- 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



Incorporated Contract Documents

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



Tips for “Safe Sex” Contracting

- 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. Unless you have contracted directly with the property owner, send out preliminary notices on every job as soon as you sign the contract

“Safe Sex” Contracting (Cont.)

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

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.



Questions/Notes

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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 notices and/or bond claims

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

Reputed Construction Lender for Preliminary Notice

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 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.



Reputed Property Owner for Preliminary Notice

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.

Mechanics' Liens

- A. SECURES YOUR CLAIM AGAINST THE PROPERTY**
- B. MAY BE WIPED OUT IF LENDER FORECLOSES**
- 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 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 prime contract



January 1, 2011 - Significant Change in 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.

Effective 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.

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.



Required Notice

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.**

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 an affidavit of 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 §3084

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.

Stop Notices

A. WHENEVER YOU RECORD A MECHANICS' LIEN ALSO CONSIDER SERVING A BONDED STOP NOTICE

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

Stop Notices (Cont.)

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



Payment Bond Claims

- 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.

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

Public vs. Private Projects

A. CANNOT RECORD A MECHANICS' LIEN AGAINST PUBLIC PROPERTY

B. PRELIMINARY NOTICES

1. Preliminary notices are not required by claimants with a direct contract with the prime
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 via certified mail

Public vs. Private Projects (Cont.)

C. NO BONDS FOR STOP NOTICES ON PUBLIC PROJECTS

D. PAYMENT BONDS

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

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 vs. Private Projects (Cont.)

F. FEDERAL PROJECTS - MILLER ACT BOND CLAIMS

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

No Preliminary Notice or Stop Notices on Federal Projects

Statutory Release Forms

Civil Code Section 3262

A. **CONDITIONAL PROGRESS RELEASE**

1. Releases all stop 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**

1. Releases rights unconditionally even if not paid

C. **CONDITIONAL FINAL RELEASE**

1. Evidence of payment combined with a conditional release creates an unconditional release

D. **UNCONDITIONAL FINAL RELEASE**

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 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 (Cont.)

Tesco Controls, Inc. filed suit to enforce a stop 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 notice and bond claim rights through the date on the release.

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 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.



Prompt Pay Laws for Contractors

Failure to pay undisputed progress payments and/or retention amounts within 10 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. California Civil Code §3260 (retention); Civil Code §3260.1 (progress payments); and Business and Professions Code §7108.5 (private and public works projects).



Questions/Notes

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Green Building Code Takes Effect on January 1, 2011

Taking effect January 1, 2011, the nation's first mandatory green building code – dubbed “CalGreen” – lays out specific constraints for newly constructed buildings. 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 CODE VS. LEEDS CERTIFICATION

- 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.)

- **The 2010 Green Building Standards Code will 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.



Questions/Notes

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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.



Questions/Notes

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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.



Questions/Notes

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Claimant's Time Chart and Checklist

He Who Hesitates is Lost

What Steps to Take:

Preliminary Notice
Requirements
on Private Jobs and
California Public
Works Projects

Procedures, Time Limits and Statutes:

Give notice to the owner or public agency, the general contractor with whom you have contracted, and on private jobs, the construction lender (if applicable) no later than **20 days** after your first day of supplying labor and/or materials. **Mail notices via certified mail.**

*California Civil Code Sections
3097, 3097.1, 3098, 3114, 3183*

Claimant's Time Chart (Cont.)

What Steps to Take:

Lien Claim by anyone
other than a general
contractor

Procedures, Time Limits and Statutes:

Record mechanics' lien 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.

California Civil Code Section 3116

Claimant's Time Chart (Cont.)

What Steps to Take:

Lien Claim by
general contractor

Procedures, Time Limits and Statutes:

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

California Civil Code Section

3115

Claimant's Time Chart (Cont.)

What Steps to Take:

Notice to Surety on
Payment Bond on a
Private Project

Procedures, Time Limits and Statutes:

Send by certified mail to surety and bond principal within 15 days of a Notice of Completion or Cessation being recorded, or within 75 days after completion of the project if a Notice of Completion has not been recorded, or within 60 days of a cessation of labor.

*California Civil Code Sections
3227, 3242, 3252*

Claimant's Time Chart (Cont.)

What Steps to Take:

Federal Public Works
Bond Claim Notice

Procedures, Time Limits and Statutes:

Send by certified mail to the
prime/general contractor and to
the contractor you contracted
with within **90 days** from your
last delivery of labor or
materials to the project.

Miller Act 40 U.S.C. 270b

Claimant's Time Chart (Cont.)

What Steps to Take:

Bonded Stop Notice for
Private Works

Procedures, Time Limits and Statutes:

Send by certified mail to
the construction lender
prior to expiration of lien
recording period.

*California Civil Code
Sections 3083, 3159, 3103*

Claimant's Time Chart (Cont.)

What Steps to Take:

Stop Notice on California
Public Work

Procedures, Time Limits and Statutes:

Send by certified mail to the public agency, addressed to the person responsible for dispersing 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 **within 90** days after completion or cessation. *California Civil Code Sections 3181, 3184, 3103*

Claimant's Time Chart (Cont.)

Steps to Take:

File Lawsuit to Perfect
and Foreclose Mechanics'
Lien

Procedures, Time Limits and Statutes:

File in proper court **within
90 days** of recording date
of the lien.

*California Civil Code
Section 3144*

Claimant's Time Chart (Cont.)

What Steps to Take:

Record Notice of
Pendency of Action

Procedures, Time Limits and Statutes:

File with County
Recorder immediately
following filing of
complaint to foreclose.
Code of Civil Procedure
§405; Civil Code §3146

Claimant's Time Chart (Cont.)

What Steps to Take:

File Lawsuit to Enforce
Bonded Stop Notice

Procedures, Time Limits and Statutes:

File in proper court **after 10 days** from service of stop notice and **within 90 days** from expiration of the time to record a mechanics' lien.

Civil Code Section 3172

Claimant's Time Chart (Cont.)

What Steps to Take:

File Lawsuit to Enforce
Public Works Stop Notice

Procedures, Time Limits and Statutes:

File in proper court **after 10 days** from service of stop notice and **within 90 days** from expiration of period within which stop notices must be filed.

*Civil Code Sections 3172, 3184
3211*

Claimant's Time Chart (Cont.)

What Steps to Take:

Notice of
Proceedings on Stop
Notices for Private or
Public Works

**Procedures, Time Limits
and Statutes:**

Serve **within 5 days** after
filing lawsuit, on same
persons and in same manner
as provided for in the
Stop Notice.

Civil Code Section §3249

Claimant's Time Chart (Cont.)

What Steps to Take:

**Procedures, Time Limits
and Statutes:**

Complaint on Payment
Bond

File in proper court **within 6
months** after the period
within which stop notices
must be filed.

*Civil Code Sections
§3184 and §3249*

Claimant's Time Chart (Cont.)

What Steps to Take:

Complaint on
Federal Works Payment
Bond

Procedures, Time Limits and Statutes:

File in proper court 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.

Miller Act 40 U.S.C. 270b;

Capehart Act 42 U.S.C.

1594

Claimant's Time Chart (Cont.)

What Steps to Take:

Complaint on
Contractor's License
Bond or Deposit

Procedures, Time Limits and Statutes:

File in proper court **within 2
years** after expiration of
license period.

*Business & Professions
Code Section 7071.11*



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 can file claims for up to \$7,500. Corporations, Limited Liability Companies and other entities cannot ask for more than \$5,000.
- C. Business claims are limited to \$5,000 twice a 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



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 notices, bond claims and collection letters.

Discount Offer for Mechanics’ Liens

In order to help mechanics’ lien claimants comply with California’s new mechanics’ lien statute, starting on January 1, 2011 Easy Law is offering all clients a 50% discount off the posted price for their first California mechanics’ lien for 2011. For questions regarding Easy Law please see their website at www.easylawinc.com or call Easy Law’s general manager Cynthia Swaner at 1-800-327-9529.

Free Legal Consultations

Easy Law customers also receive free initial consultations from the attorneys at The Green Law Group, LLP in their practice areas of construction, business, real estate, and bankruptcy law. For information regarding The Green Law Group, LLP please visit our website at www.thegreenlawgroup.com.