

California mechanics' liens

Rob James

Pillsbury Winthrop Shaw Pittman LLP

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Overview

- **Why should I care?**
- **What's a mechanic's lien?**
 - Who can claim one?
 - How do claimants pursue one?
 - What can an owner do?
- **What's a stop payment notice?**
 - How is it different from a lien?
 - How do claimants pursue one?
 - What can an owner or lender do?
- **What other remedies lurk out there?**

Why should I care?

- “[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.”
–Henry Sumner Maine, *Ancient Law* (1861)
- Many different laws used to apply to persons with special classifications—noble or commoner, master or servant, married women, sailors ...
- Most of those status-dependent laws are gone. Laws apply to all, or you can and must strike a bargain to get what you want
- This is one of the holdouts—a *nonconsensual status lien granted to persons improving real property*

Why should I care?

- The California mechanics' lien law is a curious blend of broad equitable principles and strict legal formalities
- California Constitution art. XIV, § 3; Civil Code, §§ 8000-9566
- Rationale: If your property has been improved by someone who wasn't paid, you have been unjustly enriched
- If you paid your contractor, but it didn't pay one of the improvers, as between the innocent owner and the innocent improver, who should absorb the loss?
- Answer (in California): the owner sometimes faces the risk of paying twice or thrice for the same thing

Why should I care?

- California law:
 - Grant the improver lien rights against the property (or undisbursed money) to secure payment, not needing a negotiated security agreement, AND
 - Liberally construe those rights in favor of the improver,

BUT

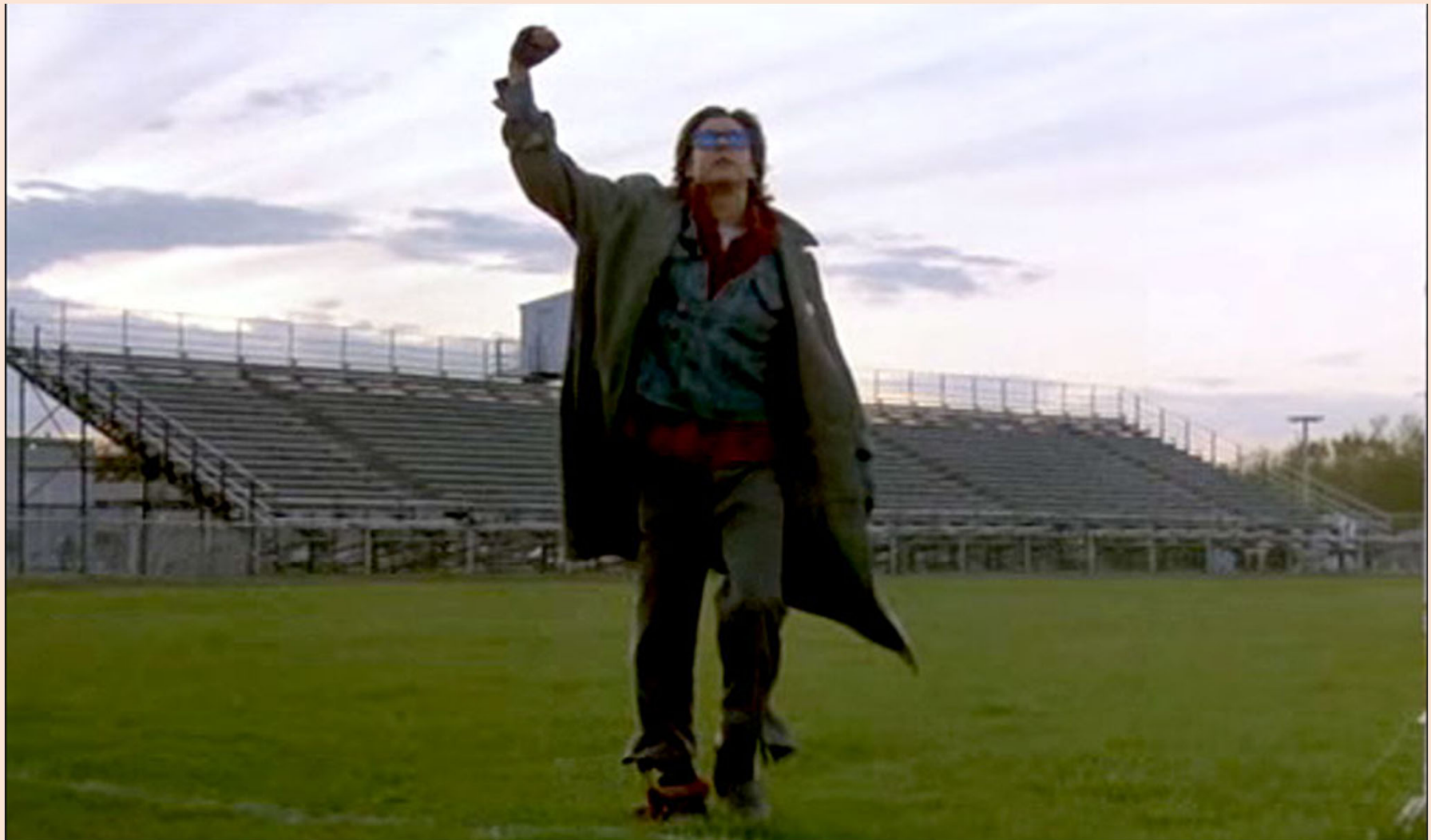
- Create arcane byzantine procedures that the improver must strictly follow or risk losing all its protections AND
- Make it possible for the owner or lender to clear title and facilitate the efficient use, finance and transfer of property

Mechanics' lien: work of improvement

- It's a lien on the real property benefitted by a “work of improvement”
- A “work of improvement” can be construction, repair, demolition, removal, landscaping, or grading (CC 8050)
- More than one contract; or one contract may cover multiple works
- A “site improvement” (demo, grading, street, utilities) can be separate from the vertical improvement (8042)
- As much of the owner's property as required for convenient use and enjoyment of the improvement. More or less than a parcel! (8440)
- *Public interest in property is not subject to mechanics' liens*

Mechanics' lien: claimant

- Furnisher of labor or materials for the work of improvement (8400)
 - Architects and engineers
(the only ones who have rights even if the work is never built, 8302)
 - “Direct contractor” (“DC”; aka prime or general contractor), if licensed
 - Subcontractors (specs, not whether on site) of any tier, if licensed
 - Suppliers to the owner, the DC or subcontractors—but *not* to another supplier
 - Laborers, including those entitled to their compensation (union funds)
 - Must have substantially performed; can’t abandon
- Claim is for lesser of amount due under contract or “reasonable value,” including extra work (8430)



Mechanics' lien: “*Don't You (Forget About Me)*”

- Owner, lender and DC face exposure under these laws to the risk of multiple payment
- They need to know what companies are out there who may have these rights
- When a subcontractor or supplier starts work, it must let them know they are out there and reserve these rights if not paid (8102)
- Preliminary Notice, delivered personally or by fancy mail (8106)
- DC must also serve on lender
- If contracted by lessee, serve on lessor too
- Deliver within 20 days after starting your work, *or suffer* (8204)

Mechanics' lien: enforcement

- Claim of lien (8412-8416)
 - Record in county records and serve by personal delivery or ordinary mail
 - As early as when you've finished your own work
 - As late as *90 days* after *actual* (final) completion of the entire work of improvement (early site grader and final doorknob-polisher have same priority)
- Notice of completion (8180-8182)
 - 90 days is a long time, and owners or lenders will hold money back
 - Plus, how do claimants know the work is complete?
And completion is fuzzy (soap dispensers vs. replaced lock)
 - Owner can record a Notice of Completion within 15 days after actual completion, *and* mail it to DC and preliminary notice filers within 10 days after that
 - Effect: Subcontractors, suppliers and laborers have only 30 days after precise date of recording Notice of Completion [Note: DCs still have 60 days]
- *That's* why our contracts retain funds for “35 days” after “final” completion!
- Not “substantial” completion, used contractually for risk of loss, insurance, warranty, delay liquidated damage exposure, etc.

Mechanics' lien: foreclosure and priority

- Foreclosure suit commenced in court within 90 days after lien filed (8460)
 - Can extend with consent up to 1 year
 - Even if arbitration clause
- Must file *lis pendens* in county land records within 20 days to be prior to bona fide purchasers (8461)
- Priority dates from *on-premises* commencement of work of improvement
- All lien claims have same priority (even the final doorknob-polisher) (8450)
- Earlier deed of trust may wipe out value of mechanics' lien, even for optional advances; later deed of trust subject to all mechanics' liens (8456)
- Relevance of “site improvement”: think old-time vaccination! (8454, 8458)

Mechanics' lien: defendant strategies

- Lessor who didn't require work contracted by lessee:
post and record Notice of Non-Responsibility (8404, 8444)
- Choose DCs and subs carefully
- Obtain express indemnities down the chain of contracting—from owner to lender, from DC to owner, from sub to DC, from sub to sub
- Require surety bonds securing payment as well as performance
 - From DC? From DC and subs? From key subs or selected subs?
 - For full contract price or portions?
- Procure Subcontractor Default Insurance (Zurich *Subguard*®)
- Retain part of the contract price until lien exposure ends

Mechanics' lien: defendant strategies

- Don't pay DC without evidence that lien claimants are paid
- In some cases, joint checks or escrowed payments
- Confirm prelim notices, evidence of licensure and performance
- Require progress payment lien waivers (mandatory forms 8132-8138)
 - From DC, from all subs or from key subs? Monthly or at intervals?
 - Conditional for current application for payment
 - Unconditional for payments before that
 - Look at exceptions—date, extras, contract remedies, listed disputes. Plug holes?
- Require final payment lien waivers, retain \$ beyond the [30/90] days
- Require surety bond 125% of filed lien claim;
presto, the lien attaches to the bond, not the property (8424)
- If no foreclosure suit, file bond, bring declaratory or injunctive action to release property from the lien, expunge *lis pendens*, and clear title (8480)

Stop payment notices

- Problems: Public works can't be liened.
Prior mortgages, or a demolition job, might leave no lien value
- Solution: “follow the [new] money”
- Stop payment notice: a demand from a claimant to the owner or construction lender to withhold sufficient funds to satisfy the amount owed the claimant. Same claimants, same preliminary notice, same [30/90] days
- If accompanied by a 125% bond, lender MUST withhold.
If not, lender MAY withhold (8536). Tell claimant what is elected (8538)
- Owner MUST withhold no matter what (8522) (Or run risk of double payment)
- Owner can bond against the stop notice, or require the DC to do so.
Again, claimant must file suit on the stop notice within 90 days

Other construction remedies

- Public works over \$25K: payment surety bonds (9550; federal Miller Act)
- Performance surety bonds
- Contractor's license surety bonds
- Bond to be furnished by small(er) owners on large(r) works (8700)
- Sue the party you contracted with for breach of contract, quasi-contract, unjust enrichment, common counts...
(privity still matters)
- Consensual security interests, guaranties, letters of credit, cash collateral
- Favorite remedy of all: setoff and recoupment!

Thanks!

Rob James

rob.james@pillsburylaw.com

+1.415.983.7215

WeChat *diogenes510*