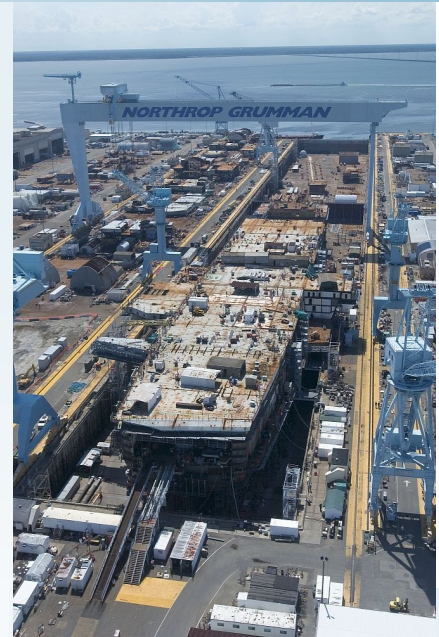




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GSBE's News to Use

Employer Fact Sheet—Caring for Injured Workers

If you have an employee injured on the job your first concern should be to get treatment for the employee immediately. It is advised that you or a site supervisor take the injured worker immediately to the physician/clinic selected from the State Fund Medical Provider Network. If you do not know about the Medical Provider Network, please contact your local State Fund District Office Claims Department or the State Fund website, www.scif.com where you will find information concerning the Medical Provider Network and how it can save claims cost to everyone. Go to the "Employer" tab on the website for detailed information.

Most workers who get injured do not know how the workers' comp. system works. It is the employer's responsibility to provide information to the injured worker. The more information you can provide them, the less fearful they will be. The injured employee needs assurance that medical help will be provided and everything is being done to get him/her healthy and back on the job.

An accident investigation/on-site safety survey should be conducted and documented as soon as possible to eliminate any potentially dangerous conditions and to comply with your Injury and Illness Prevention Program. Interviewing the injured worker and witnesses while the accident is fresh in their memory will help uncover most factors leading up to an accident.

As an employer, you should inform the injured employee that all they need worry about until he/she returns to work, is working with the medical provider, following the medical provider's recommendations, and keeping you up to date with their progress.

After the initial treatment, consider the reporting responsibilities associated with a work-related injury:

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1) A claims report must be filed with your Workers Compensation Insurance Carrier for any injury beyond first aid within 5 days of injury. You can fax the claim paperwork (DWC 1 and Employer's Report of Occupational Injury or Illness) to the local State Fund office or call the Claims Reporting Center at (888) 222-3211.

2) Any injury or illness requiring treatment beyond first aid or that results in lost time, must be reported on the OSHA 300 log (Employers with 10 employees or less are exempt from this requirement).

3) Any injury that (a) results in death, (b) requires hospitalization for more than 24 hours for other than medical observation, (c) involves the loss of any member of the body, or (d) results in permanent disfigurement, must be reported to the nearest office of Cal/OSHA within 8 hours of employer knowledge, by telephone or telegraph.

4) If an injured individual dies as a result of a previously reported injury or illness, the employer must file an amended report indicating death to Cal/OSHA within 5 days of knowledge. A failure to report often results in substantial penalties.

"Stay in the loop" during the period of treatment and recovery. It is important to take a proactive approach to your employee's medical care, follow-up, and status of their workers' comp. claim.

If the doctor determines that the injury is "first aid" in nature. You have the option to pay for first aid treatment. In doing so, you prevent the injury from affecting your Workers' Compensation Insurance premiums in the future and you curtail any requirements of recording the claim on the OSHA 300 log, as long as it remains first aid in nature. Only the doctor can determine whether the injury is first aid in nature. For non-first aid injuries the following methods can be used to manage the claim process:

1) **Maintain contact with the doctor** to ensure the employee is meeting their scheduled appointments for treatment.

2) **Maintain contact with the Claims Adjuster.** This will give you some idea of how soon the employee can

safely return to work. If you are willing to provide modified work, let the Adjuster know (See #4 below). This type of program has proven beneficial for all concerned.

3) **The most important key**, is to maintain contact with your injured employee. Determine what immediate concerns your employee may have as a result of the injury. The employer should be willing to assist and counsel the injured employee as much during their period of recovery. Be genuinely concerned so you are not perceived as the opposition. Check in with the injured worker periodically to make sure they are progressing, making it to their appointments, see if they need anything, etc.

Make certain that the employee knows who to contact within your organization if they are frustrated in dealing with the medical provider or the workers compensation claims unit. Help to eliminate the frustration or assist in the resolution of the misunderstanding. Helping an injured worker understand they are a valuable asset to your organization and you want them back as soon as physically possible, helps the injured worker's morale and can get them back to work sooner.

4) **A Return to Work Program** set up by the employer and sanctioned by the medical provider, is another method of cost savings to the employer. Studies indicate the injured employees recover faster when they return to work sooner. By implementing a Return to Work Program you can:

- Improve morale among all employees
- Increase potential for positive resolution of the claim
- Reduce or avoid permanent disability and reduce temporary disability payments.
- Reduce medical costs
- Reduce or avoid litigation
- Discourage fraudulent claims
- Avoid replacement and training cost of new hires
- Identify cross-training opportunities
- Increase awareness of safe work practices

For more information on developing a Return to Work Program, consult your State Fund Claims Adjuster.

Workplace injuries can affect an employer's future cost of conducting business. These costs may include:

- Increased workers compensation rates
- Increase in your California Experience Modification Rating Factor (EMR)
- Bad public image in instances of serious accidents
- Possible loss of future bids due to poor public image and high EMR
- Low employee morale
- Additional hiring and training costs for replacements
- Possible loss of workers compensation insurance merit discounts
- Possible loss of Group Insurance discounts due to losses
- Cost involved in not meeting production deadlines

- Production stoppage and possible fines/citations due to Cal/OSHA enforcement activities
- Costs related to legal representation
- And, in a worse case scenario, loss of business

These are just a few of the negatives associated with an injury, there are also, of course, the human factors involved. Employers can reduce accidents by utilizing an active safety program as outlined in the mandated Injury and Illness Prevention Program. Contact your local State Fund Loss Control Unit or your local Builders Exchange for assistance in setting up or enhancing your safety program.

The information contained herein is not intended to supersede any information provided by your insurance carrier, nor is it intended to be legal advice.

The Constitutionality of Mechanic's Liens, Stop Notices and Bonds

By Sam K. Abdulaziz
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For many years now, there have been articles, litigation, and even Supreme Court decisions dealing with the constitutional right to a mechanic's lien, stop notice or bond. Our office has been heavily involved in this issue, attended numerous meetings and hearings throughout, and have argued the matter extensively. I thought that it might be a good idea to give a shorthand discussion of what has transpired, and where we are today.

It began approximately seven years ago, when a lady in San Jose wanted to have her deck finished. She hired a contractor who did all the work in just one day. He got paid but he did not pay either a supplier or subcontractor. The supplier or subcontractor then recorded a mechanic's lien.

Anyone involved in mechanic's lien litigation will know that there is very little one can do to protect himself/herself from someone recording a lien other than obtaining a bond from the contractor. In this case, the lady did not obtain a bond. Therefore, because the transaction was all done in one day, including the

payment to the contractor, the homeowner could do nothing. We are not sure what transpired in that case but it is the factual situation that most recently started the "double payment" problem.

Somehow, the homeowner got to her Legislator in San Jose and the Legislator started to take up the owner's cause. The Legislator sought legislation that he thought would keep this from happening again. Unfortunately for the homeowner, this was not true because the Legislator thought normal legislation would be sufficient to protect owners. He found out that this was not true. He was told that it would take a "super majority" vote in the legislature to make the change. This started a disagreement as to whether it would take a super majority vote to do away with the mechanic's lien right. We had always stated that it was in fact constitutionally protected. The most important case of *Clarke v. Safeco* made the decision on June 26, 1997, and a rehearing was denied on September 3, 1997. This is a California Supreme Court case.

The *Clarke v. Safeco* case started off with prime contractors inserting "pay-if-paid" clauses into their contract. Essentially, the "pay-if-paid" clause would say that payment by the owner to the general contractor was a condition precedent to the general contractor's obligations to pay subcontractors. This "pay-if-paid"

clause also flowed down to lower tier subs. Other states had held that the “pay-if-paid” clause did not absolutely keep one from paying the amount, but that the subcontractor would have a right to payment within a reasonable period of time. The decisions of the courts would opine that the parties really did not mean that the “pay-if-paid” clause would be that strictly enforced. The court would say that they really did not mean that, but that they meant that payment would be delayed for some period of time. That theory was called a “pay-when-paid” clause rather than “pay-if-paid.” This went on for many years. Other courts, such as New York and Wisconsin, take a “pay-when-paid” clause as being a “pay-if-paid” clause. The “pay-if-paid” clauses have been declared void in such places as Illinois, North Carolina, and Wisconsin. This became the issue in the *Clarke v. Safeco* case. A “pay-if-paid” clause typically reads,

“Receipt of funds by contractor from owner is a condition precedent to the contractor’s obligation to pay subcontractor under this agreement, regardless of the reason for owners non-payment, whether attributable to the fault of the owner, contractor, subcontractor, or due to any other cause.”

In *Clarke v. Safeco*, the general contractor, Keller, obtained a labor and material payment bond from Safeco Insurance. This was to protect the owner from mechanic’s lien claims from subcontractors and material suppliers.

After substantial work had been completed on the project, the owner stopped making payments to Keller - apparently as a result of the owner’s insolvency. Keller then stopped payments to subcontractors who then recorded mechanic’s liens and filed separate actions against Safeco under the payment bond. The trial court granted a judgment in favor of the subcontractors and Safeco appealed. All of the cases were then consolidated and the Court of Appeal affirmed each judgment against Safeco.

The bonding company, Safeco, argued that the requirement for the payment bond never matured because the liability of a surety on a private works payment bond is no greater than that of its principal, Keller. Keller never incurred any obligation to pay

subcontractors for their work because of the “pay-if-paid” clause.

On the other side, the state constitution provides that, “Mechanics, persons furnishing materials, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide by law, for the speedy and efficient enforcement of such liens.”

The court stated that the “mechanic’s lien” is the only creditors remedy stemming from constitutional command and our courts have “uniformly” classified the mechanic’s lien laws as remedial legislation to be liberally construed for the protection of laborers and material men.

The decision goes on to state numerous other provisions that would protect mechanic’s lien rights. Four lien waivers (a Conditional Waiver and Release Upon Progress Payment, an Unconditional Waiver and Release Upon Progress Payment, a Conditional Waiver and Release Upon Final Payment, and an Unconditional Waiver and Release Upon Final Payment) were put into law.

The flip side of this is that *Civil Code* section 3140, limits a subcontractor’s recovery on mechanic’s lien claims to “such amount as may be due him according to the terms of his contract.” Safeco further argued that mechanic’s lien remedies are available only to subcontractors whose payment rights have vested under the terms of their contract. As you can see, Safeco is arguing contract rights. Absent a contractual right, no remedy would be available.

Typically, attorneys arguing before the California Supreme Court specialize in such matters. However, in this case, five attorneys, including our office, all argued in favor of the constitutional right of mechanic’s liens.

The response of the Supreme Court was that the legislature’s carefully articulated anti-waiver scheme would amount to little if the parties to construction contracts could circumvent it by means of the “pay-if-paid” clause.

There were other arguments by Safeco that the “pay-if-paid” subcontracts are void as against public policy. Most of those arguments dealt with “freedom of contract.”

At the end, the court concluded that a general contractor’s liability to a subcontractor for work performed cannot be made contingent on the owner’s payment to the general contractor. Therefore, Keller was liable to the subcontractors under their subcontract for the work that they performed and Safeco, as Keller’s surety, was likewise liable on the payment bond.

However, this was a four to three decision and could, in the future, change if the legislature changes it.

Immediately after the decision in the *Clarke v. Safeco* case, another decision came down from the Appellate Court (one level below the Supreme Court). This case was

waiting for the Supreme Court decision dealing with a public works project, because it dealt with the same issues. However, the major difference was that in public works, there is no **mechanic’s lien** right. Public works use stop notices. Therefore, one of the arguments is that there was not a mechanic’s lien and therefore no constitutional protection.

The Appellate Court, however, decided that the stop notice was merely a substitute and therefore, was also constitutionally protected.

Since that time, we have been involved in numerous pleadings dealing with the constitutional right to mechanic’s liens, stop notices, and bonds. To date, we have been successful in holding off any intrusion. As we sit here today, the right to mechanic’s liens, stop notices, and bonds are constitutionally protected.



Construction Photos of the PCU George H.W. Bush Aircraft Carrier Provided by Northrop Grumman Shipbuilding

