



State lawmakers add teeth to lien law

In what could have far-reaching implications for the construction industry, the Arizona Legislature in the waning hours of their last session passed a bill known in the building community as the Mechanics' and Materialmen's Liens.

Commonly referred to in construction circles as the "lien law," H.B. 2650 will assist contractors, subcontractors, materials suppliers, and laborer in getting paid for the work they do when they are having trouble collecting their fees. The law, which was sponsored by Republican state representative Dean Cooley, will also allow unpaid contractors and laborers in not only filing liens against property, but to go after owners and lenders for unspent money, another option in collecting money owed them.

Lean
& Mean

by Cynthia Scanlon

"Anytime labor helps to improve a piece of property, or material goes from the supplier into that property, or the contractor does his work on that property and doesn't get paid, it's not right, fair, or just," says Cooley. "And that's the justification for having this lien law, so that they have some recourse to get paid for the work they've done in improving that property."

Some are hailing the law a victory for the construction industry. Others are not so sure and are taking a more conservative, wait and see approach. According to Mark Minter, executive director for the Arizona Builders' Alliance, the lien law will finally simplify the definition of when a project is completed. In the past, he says, the state used five different definitions of completion. "It was difficult for people in construction and supply to understand when a project was completed and when their lien rights started to run because lien rights run from the date of completion," says Minter. "We are trying to get the owner to declare the project complete and then send everyone a notice."

Minter admits this tactic has not yet been tried, but he is hopeful that it will work. "We don't know how people are going to react," he says. "But it used to be kind of like tip toeing through land mines. A lot of the time you knew they were out there, but you didn't know where they were until you stepped on one."

Minter says the new law also extends the time to file a lien. As the former law was written, a contractor or subcontractor may have had only 35 days to file a lien and, to complicate matters, may have been unclear as to when the completion date was officially registered. Now, the new law allows filing up to 120 days if the owner takes no action to define the project as completed.

Just where a subcontractor fell in the filing hierarchy was also confusing before this new legislation, says Minter. But the new bill now changes that. "In the past, different contractors and subcontractors were allowed to file liens at different times, depending on where they fell in the project hierarchy," says Minter.

The problem with that, he says, centered around the confusion of just who was in charge of a project. "There are subcontractors working for people who may not know if that person is the owner or general contractor," says Minter. "[In the past], their lien period

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would change depending on whether they were working for the owner or general contractor. That's now eliminated. It doesn't matter who you're working for. Everybody in the construction sequence has the same time period."

California has had a good deal of success with their lien law, says Minter, and so much of Arizona's bill is based on California's laws, especially the "Stop Notice" provision of the bill. In filing a lien against an owner, the lien law allows you to file a notice against real property, says Minter. But in a Stop Notice, you are filing an encumbrance against unexpended funds. "If you are a drywall contractor and you haven't been paid, you may not have a good lien right to that project and, if you do, it may not be worth anything depending on circumstances," says Minter. "But if there is a lender or owner for the project who has money they haven't spent yet, through the Stop Notice, you can put a claim on that money."

In other words, say the economy is down and the construction project a subcontractor is working on goes sour. The sale price at a lien holder sale may be less than the banks' first mortgage, in which case, the lien right is useless. But if the lender or owner has money they are hanging onto, the subcontractor has, under the Stop Notice, the ability to go after that money.

"The Stop Notice is a new weapon for contractors for private commercial projects to secure payment rights," says Michael Holden, a partner with Lewis & Roca, who drafted parts of the bill. "This also gives suppliers a device to go after the money during the course of a project. Lien rights kick in only after a project is completed."

This Stop Notice provision is one of the more significant aspects of the bill. It is this provision, according to Minter, that most closely mimics California's law. "I was at the committee meeting where they flew a lawyer in from California who has practiced in this area and used these Stop Notices," says Patricia Ihnat, vice president/associate counsel for Fidelity National Title Insurance Company. "He touted how wonderful they were."

The meeting Ihnat is referring to is a study committee mandated by the legislature last year to gather 19 representatives from a variety of industries involved in the construction industry to raise issues and concerns about the bill. Some of those representatives included engineers, architects, commercial general

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contractors, material suppliers, residential builders, and subcontractors. "Our goal was to look at the current law and update it. In the process, it was proposed that we look at the California Stop Notice, which we did not have in Arizona law," says Cooley. "The Stop Notice gives everyone that works on a project a second option for obtaining payment." Cooley adds the Stop Notice does not stop work on the project, it just stops the money flow until payment problems are ironed out.

According to Minter, the work of the study committee was crucial in getting the bill passed. "If those of us in the construction industry had waltzed in and plunked down what we wanted in January [when the bill was introduced], we would have had a fight the whole

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session over the content of the legislation," he says.

Also impacted by the bill is the Arizona Banker's Association. Ellen Poole, executive vice president for the organization, says the association worked with the sponsor of the bill on the language to be included. "The whole point of the bill is placing a new responsibility on construction lenders in the advent of disputes raised by any subcontractors," she says.

While not overly enthusiastic about the bill, Poole says the association, "appreciated the way we're able to work with other interested parties in crafting it so that it took into account many of our concerns."

Ronald Carmichael, senior partner of Carmichael & Powell and general counsel to the Home Builder's Association of Central Arizona, agrees with Poole. He believes the new law may put lenders in an awkward position and burden them with additional



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responsibility.

"If all of a sudden lenders start to get more cautious and increase the amount of security that has to be there or they increase their costs as a result of being vulnerable, that will be another adversity," he says. "There are so many soft costs that go into construction these days, and this will be just another one that will add to the administrative, bureaucratic costs that make up so much of the regulatory costs of constructing any kind of project."

Carmichael sees the law as "another attempt for the government to collect bills for people," and feels it might create problems in some construction environments. "I don't think we are pleased with this kind of forced governmental intervention into the private marketplace," he says. "From time to time, it could possibly put people out of work, and if there are adverse effects as a result of this bill, I think it will be revisited at sometime."

Poole admits that H.B. 2650 covers an extremely complex subject. "There aren't a lot of people out there who understand all the ins and outs," she says. "Describing specific facets of it or describing how things are improved versus what things are bad requires a real knowledge of the lien law and the background of it."

She adds, "For me, it took a lot of working with it to understand its impact and what different provisions meant. It's one of those pieces of legislation where every word is extremely meaningful."

Holden agrees with Poole's assessment of the bill's complexity and the need to understand all the implications. "Everyone who relies on lien rights needs to get with their lawyer on this because there are significant changes," he says. To help clear some of the confusion, Lewis & Roca will be giving seminars all summer to explain the intricacies of the bill.

Overall though, Minter hopes the new bill will be a boost for commercial contractors and provide a better definition of their rights at the tail end of a project. He also hopes the bill will help contractors get paid on future projects when a project has financial difficulties.

"We are very pleased with this, and we are looking forward to it going into affect," says Minter.

The bill is expected to go into effect August 21. The bill will not apply to any projects started before that date.



Cynthia Scanlon is a Tempe free-lance writer.