NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

Contra Costa Chapter

New Mechanic's Lien Laws & Construction Collection Remedies

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I. **DRAFTING AND NEGOTIATING CONSTRUCTION CONTRACTS**
   - A. Submitting the Proper Proposal/Bid
   - B. Negotiating the Key Provisions

II. **CONSTRUCTION COLLECTION REMEDIES**
   - A. California Contractor's Licensing Requirements
   - B. Mechanic's Lien Rights
   - C. Stop Notice Rights
   - D. Bonds
   - E. Pre-Judgment Attachment

III. **ATTACHMENTS**
   1. Contract Proposal
   2. Short Form Standard Subcontract (AGCC Form)
   3. **NEW** Preliminary Notice (Use after July 1, 2012)
   4. Prompt Payment Statutes
   5. **NEW** Statutory Waiver Forms (Use after July 1, 2012)
      - Conditional Waiver and Release Upon Progress Payment
      - Unconditional Waiver and Release Upon Progress Payment
      - Conditional Waiver and Release Upon Final Payment
      - Unconditional Waiver and Release Upon Final Payment
   6. Mechanic's Lien
   7. Stop Payment Notice (Private Work Bonded) (Use after July 1, 2012)
   8. Stop Payment Notice (Public Work) (Use after July 1, 2012)
   9. Bond Claim Chart
   10. Miller Act (90-Day) Notice

In September 2010, Governor Brown signed into law SB 189, which made numerous changes to the existing mechanic's lien laws, including a mass overhaul of the current lien laws regarding public and private works of improvement. The changes amend the California Civil Code by repealing the current code sections and codifying an entirely new body of sections. This seminar will focus on the new Civil Code Sections which become effective **July 1, 2012.**

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I. DRAFTING AND NEGOTIATING CONSTRUCTION CONTRACTS

A. SUBMITTING THE PROPER PROPOSAL/BID

1. Key Proposal Terms

Most proposals are designed so that, upon their acceptance, they become binding contracts. Therefore, they must include a detailed description of the scope of work and the material terms of the agreement. They should also have provisions to provide certain flexibility to the contractor and to facilitate the contractor's collection efforts. Among the more important but often neglected provisions in proposals are the following:

a. Scope of Work. Scope of work should be detailed and any exclusions set forth in the proposal;

b. Assumptions. The basic assumptions upon which your bid is based should be listed if possible (see paragraph 11).

c. Concealed Conditions. The form should contain provisions requiring modification of price & time of performance in the event adverse concealed conditions are discovered after work starts;

d. Extinction Date. The form must contain a date after which the proposal terminates and cannot be accepted:

e. Integration Clause. Because there may be substantial discussions between the owner and contractor before the proposal is fully executed, the proposal should contain an integration clause which states that it supersedes all prior negotiations and sets forth the full agreement of the parties;

f. Late Charges. The form should contain provisions calling for late charges on late payments or interest on sums due & not paid;

g. Attorneys' Fees. To facilitate payment, the form should include a provision requiring the payment of attorneys' fees if collection efforts are necessary. Attached is a copy of a generic form proposal.

B. NEGOTIATING THE KEY PROVISIONS OF CONSTRUCTION CONTRACTS

1. Scope of Work

a. Is the scope of work clearly and concisely defined? It is critical that you and the owner/general understand your responsibilities and that the contract accurately reflects your understanding. Attach your proposal to define the scope of work.

b. Is there a broad "drag net" clause requiring the subcontractor to fill all gaps in the description of the work? Such provisions effectively make you responsible for all ambiguities as to the scope of work. Eliminate such provisions and make absolutely sure that the scope of work description is complete (with inclusions and exclusions).

c. Are scope of work duties defined items of the work or "performance" requirements? The latter may be much more difficult to meet. They may add design responsibility and potential liability.

d. Who is responsible for code compliance? Responsibility for code compliance should rest with the party with design responsibility.

2. Payment - General Concerns

a. Prompt Payment Laws (See Addendum)

Final Payments (CC §8812-8818): Retention proceeds withheld from payments by the owner to the direct contractor shall be released within 45 days after certificate of occupancy. If the owner and direct contractor have a dispute, the owner may withhold from the final payment an amount not to exceed 150% of the disputed amount (CC §8812). Within 10 days from the time the direct contractor receives the retention from the owner, the direct contractor must pay the subcontractor. The direct contractor may withhold 150% of any disputed amount (CC §8814). A penalty of 2% per month is charged for improperly withheld amounts. In any action to enforce payment of the wrongfully withhold amount the prevailing party is entitled to its fees and costs.

Progress payments (CC §8800-8802). An owner must pay the direct contractor within 30 days of billing or demand. A direct contractor or subcontractor shall pay a subcontract any progress payment with 7 days receipt of the payment from the owner. (B&P §7108.5) A penalty of 2% per month for improperly withheld amounts is chargeable. Owners or contractors may withhold 150% of disputed amounts.

Public Contract Code §10262.5. For public works, subcontractors shall be paid within 7 days of the direct contractor's receipt of the progress payment from the public entity. Same limitations & requirements on penalties & disputed amounts apply.

b. Is there a provision for interest if payments are not made within the agreed terms? Consider insertion of an interest rate, not to exceed the maximum legal rate, for payments not paid within 30 days of when due, or late charges. California rate for contracts is 10%.

c. Is there an attorney's fees provision?

i. In California, if either party is entitled to attorneys' fees pursuant to the terms of the agreement, by statute (CC §1717), both parties are entitled to recover them.

ii. Without an attorneys' fees provision, the owner/general can force the performing contractor to fight for its money, realizing that it will have to incur significant attorneys' fees to do so. This can serve as leverage to negotiate.

d. What types of releases are required?

i. CC §8122-8138 governs and sets forth the specific language in regard to four types of releases (conditional partial, unconditional partial, conditional final and unconditional final). Only these release forms are appropriate for progress payment releases of mechanic's lien, stop payment notice, and payment bond rights.

NOTE: **As of July 12, 2012, new waiver and release forms are required. The forms clarify the language of the previous forms and can be found in the addendum (Attachment 5).**

ii. Is a general release also required?

(a) These releases may require you to release the owner/general from all known and unknown claims of any type. The danger here is that a third party tort claim may be brought in the future for personal injury damages and you will have previously provided a general release to the general. Do not execute a general release without seeking legal advice.

(b) If asked at the end of the job to sign this type of release, determine whether it is required by the terms of the contract and whether legal.

iii. A waiver of lien rights is unenforceable!

CC §8126. Do not waive lien rights without reviewing carefully.

e. Does the contract provide that the owner/general can withhold amounts as set-offs or back charges?

i. As to set-offs, provide that the owner/general may attempt to set-off from progress payment. The idea here is that you cannot operate without cash flow and just as you are required (by most "disputes" clauses) to perform in the event of a dispute, the owner/general should be required to continue to pay for conforming work in the event of a dispute, with final resolution being achieved through arbitration or litigation.

ii. As to back charges, provide that they cannot be charged unless proper written notice of the intent to assert them, and an opportunity to cure, is given to the performing contractor.

3. Payment - Subcontractor Concerns

a. Does the subcontract contain "contingent payment" language?

i. Look out for language such as *"sub will get paid only if and when general gets paid and receipt of payment from the owner is an express condition precedent to the general's duty to pay sub."* If such language is in the payment provisions of the subcontract, attempt to delete it. The sub should not bear the risk of nonpayment due to lack of funding or owner's insolvency. This language is now unenforceable (see Clark S. Safeco).

b. Does the subcontract contain "pay when paid" language?

i. Look for language such as "sub will get paid within five days of when general is paid." The courts hold that this type of language only requires the sub to wait for a "reasonable" amount of time provided that the sub has not contributed to the delay in the general's receipt of payment.

ii. Try to insert language that provides that your money will be paid within "x" days from the general's receipt of payment, but not later than a fixed number of days (such as 45) after your invoice date, unless any delay in receipt of payment from the owner is your fault.

iii. As to final payment, try and have final payment tied to a specific future date. Ideally, this would be 30, 60 or 90 days after completion of your work. Realistically, it could be 30 days after the projected completion date. Remember that in most instances the project will be delayed and your final payment will also be delayed if it is tied to the general's receipt of final payment.

c. The subcontract should provide that retention will be held in the same

amount as is held against the general.

i. The same concerns relating to the timing of final payment should be dealt with in regard to retention in that it will be held up if the general has problems with the owner at the end of the job.

ii. If you are an early trade (e.x. excavation) attempt to bargain for payment of retention prior to the end of the entire job.

iii. If payment and performance bonds have been provided by the sub, challenge the necessity of retention.

iv. Consider offering a discount for early payment.

v. **NEW LAW – Retention on Public Works – SB 293 signed into law in October 2011, applies to contracts entered into after January 1, 2012 and limits retention on public works projects to 5%. This limit applies to direct contractors, subcontractors and any lower tier subcontractors or suppliers. The retention cap will remain in place until January 1, 2016.**

4. **Change Order Requirements**

a. Does the contract give the owner/general unilateral and unlimited power to require changes? Some monetary or percentage limit should be imposed and the performing contractor must agree to the change if its cost exceeds the limit before being obliged to perform the work.

b. What are the payment terms for changes?

i. Can you be locked into substantial additions or reductions to unit prices without variation?

ii. Are you to be paid on a force account basis?

c. What type of notice and authorization is required in order for the contractor to collect for changes?

i. Look at the for time deadlines, and requirements that notice of a claim be in writing, and requirements that authorization be obtained from a specific individual.

ii. Educate field personnel as to contract requirements for changes. Train field personnel to document work performed as change order work.

d. Does the contract provide for contingent payment such that you will only be paid for changes to the extent that the owner pays the general for them? Changes may be contractor generated, in which event the owner will not pay for them.

e. **NOTE:** Written changes may be included in mechanic's lien claims pursuant to CC §8430. The owner is required to notify prime contractor and construction lenders of any changes in the contract if price is increased by 5% or more.

5. Indemnity

a. Traditionally, we discussed indemnity under three general categories: "limited," "intermediate," or "broad" form?

i. "Limited" restricts your liability to damages arising from your own negligence.

ii. "Intermediate" i.e. Type 1, provides that you will be liable to the extent that you are wholly or partially at fault in causing damage. An example would be that if you are 10% at fault, you would pay 100% of the resulting damages.

iii. "Broad form" provides that you will pay for your own negligence, and for the sole negligence of another party, if it relates to your work. In California, pursuant to CC §2782, broad form indemnity provisions are unenforceable.

b. **Current Laws on Indemnity –** Over the course of the last several years, a series of statutes have been enacted which restrict a party's right to seek Type I indemnity from those that it contracts with. These changes have generally been enacted related to particular types of projects.

1. Residential Construction- Civil Code §2782 provides that residential construction contracts entered into after January 1, 2009, may not require a subcontractor to indemnify the builder, contractor or other independent contractors for (1) claims of personal injury or property damage or other loss to the extent that the claims relate to the active negligence or willful misconduct of the indemnified parties, (2) any defects in designs provided by the indemnified parties or (3) claims that do not arise out of the subcontractor's scope of work set forth in the subcontract. The statute allows the parties to mutually agree in their contract as to the timing and obligations of the subcontractor's defense of the general contractor/builder, however, the subcontractor has no obligation to defend or indemnify the general contractor or builder until it receives a written tender of defense which includes all of the information received from the claimant.

2. Non-Residential Construction- SB 474 signed into law in October 2011, creates Civil Code §2782.05, providing that construction contracts or amendments entered into after January 1, 2013, may not require a subcontractor to indemnity a general contractor, construction manager or other subcontractor for (1) claims (1) claims of personal injury or property damage or other loss to the extent that the claims relate to the active negligence or willful misconduct of the indemnified parties, (2) any defects in designs provided by the indemnified parties or (3) claims that do not arise out of the subcontractor's scope of work set forth in the subcontract. CC §2782.05 contains the same defense and tender obligations found in CC §2782 (above).

3. Direct contracts with Public Agency – Construction contracts entered into directly with a public agency after January 1, 2013, may not impose liability on any contractor, subcontractor or supplier for the public agency's active negligence.

4. Direct contracts with Owners of Privately Owned Real Property – Construction contracts entered into directly with the owner of privately owned real property after January 1, 2013, may not impose liability on any contractor, subcontractor or supplier for the owner's active negligence. Exceptions include: the owner acting as a contractor, construction manager or supplier, or a homeowner performing improvements on his or her own single-family dwelling.

c. Does the indemnity clause incorporate by reference the same indemnity obligations given by the general to the owner? They may be broader than what is in the subcontract.

d. Review with your insurance agent the scope of contractual liability coverage under your general liability policy. It is often less broad than the liability assumed under many indemnity provisions. "Contractual" liability coverage may be necessary.

6. Delay Impact Clauses

a. Allocation of the risk is different depending upon the form of contract. Under some forms, the subcontractor actually bears the burden for delays caused by the owner/general. Try to avoid provisions which limit your remedies for delays beyond your control.

b. Compare the following (from AGC Short Form Contract) and AIA A201:

AGC Short Form Standard Subcontract: Section 5. Delay: In the event that Subcontractor's work is delayed for any reason, including acts of the Contractor, Subcontractor's sole remedy shall be an extension of time equal to the period of delay, provided Subcontractor has given Contractor written notice of the commencement of time equal to the period of delay, provided Subcontractor has given Contractor written notice of the commencement of delay within 48 hours of its occurrence. In the event that Contractor, in its sole discretion, should seek compensation from the Owner as a result of any delay, Subcontractor shall be entitled to an equitable portion of any amount recovered by Contractor, minus an aliquot share of the costs of pursuing said claim. This provision shall not be construed to require the Contractor to pursue any delay claim against the Owner or any other party.

AIA A201 – Section 8.1 Delays and Extensions of Time:

> **Section 8.3.1** – If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

Section 8.3.2 – Claims relating to time shall be made in accordance with applicable provisions of Article 15.

Section 8.3.2. – This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

c. Public Contract Code §7102 precludes waiver of damages for delay if clause "is unreasonable and not within contemplation of the parties."

7. Insurance

a. Can you meet the insurance requirements set forth in the subcontract? Are there expensive or unobtainable requirements?

b. Are insurance requirements incorporated by reference so that you .

required to provide the same coverage as the general? Are you aware of what they are?

c. Must you name the general and/or owner as "additional named insured"? Are you familiar with the potential impact of this type of requirement? It requires that you get a specific endorsement.

d. Involve your insurance broker in the process before signing a contract.

8. Protection of Work

a. What is the scope of coverage in regard to how long you are responsible for protection of your work, i.e., until the project is complete, your work is complete, etc.

b. Must you repair damage to your work irrespective of cause, i.e., even if done by the general or other subs?

c. Do you have insurance coverage for such damage? Is the owner/general providing Builder's Risk insurance?

i. Example: Building destroyed by fire during the project.

9. Warranties

a. Beware of the distinction between a "guaranty" (i.e., return and repair within one year from substantial completion, final completion, etc.), and a "warranty" (i.e., a contractual representation that the work is free from defects). Incidental and consequential damages are available for breach of warranty.

i. Critical questions relating to guaranties are how long is the guaranty period and when does it begin to run. The length of the period could vary greatly depending upon whether it starts at "substantial completion", or "occupancy" in a project that sits vacant for several years.

ii. Try and define the guaranty period as tightly as possible.

b. Are there warranty or guaranty obligations in the general contract which a sub must, by incorporation of the general contract into the subcontract, comply with?

c. Watch out for separate warranty statements presented as a condition to final payment at the end of the job which state warranty and guaranty requirements broader than those required by the subcontract document.

d. Try to limit obligation to "repair" or "replacement" of defective work and eliminate liability for "incidental" and "consequential" damages.

10. Termination/Cancellation/Suspension

a. Can the owner/general declare a default if one exists at its "sole discretion" or "in its opinion"? Do not accept such provisions.

b. Is "any" (major or minor) breach of the contract give rise to termination/supervision rights? Try to provide that termination/suspension rights arise only if there is a major or material breach.

c. Is there a termination for convenience provision, and if so, what remedies does it provide in the event of your termination? *(may be illegal on public projects pursuant to the statutes related to substitutions of subcontractors – Public Contract Code §§, 4100, et. seq.).*

d. What are the owner/general's remedies in the event of default, and are they reasonable?

11. Disputes

a. Does the contract provide for arbitration or litigation? If arbitration, what form, AAA or other. Where will it be held? Since arbitration is quicker and less expensive, if you are seeking payment, it is normally better to have disputes resolved by arbitration. However, arbitration results may be less predictable.

b. In the event the owner has any involvement in the dispute, is the sub required to accept only what time and money recovery the general receives from the owner? Such provisions effectively make payments contingent. You should attempt to maintain separate rights against the general.

c. Is the contractor required to continue performance in spite of a dispute, including nonpayment? You too should have termination/suspension rights.

d. Is the prevailing party entitled to recover attorneys' fees? This is an important provision if you are trying to collect retention.

II. CONSTRUCTION COLLECTION REMEDIES

A. CALIFORNIA CONTRACT'S LICENSING REQUIREMENTS

1. Duties

a. Every contractor in California must have a license for the classification of work in which it engages. With very limited exception, if you are not properly licensed at all times during performance of your work, you cannot bring suit for payment. (Bus. & Prof. Code §7031).

Substantial Compliance With Licensing Law

The general rule is that an unlicensed contractor is barred by B&P §7031 from bringing suit for "compensation" under a contract. The contract is considered illegal and void. However, in 1992 the legislature enacted an amendment, which under limited circumstances, allows "substantial compliance."

Substantial compliance is now available as a defense if:

(1) the licensee had been previously licensed during a portion of ninety (90) days prior to performing the work; and (2) the noncompliance is not the fault of the licensee.

In all other cases strict compliance is mandated.

NOTE: A recent decision by the California Supreme Court holds that a contractor must keep their license in good standing at all times during performance of a contract. A contractor will lose its right to recover any money for its work if it loses its license for even one day. The contractor also loses its right to recover for work performed when it was properly licensed. (See MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works, Co., Inc., 36 Cal.4th 412(2005))

NOTE: A person who uses the services of an unlicensed contractor may sue to recover all compensation paid to the unlicensed contractor for performance of any work. If the contractor becomes unlicensed during the performance of the work, recovery of amounts paid includes amounts paid while the contractor was properly licensed. B&P §7031.

NOTE: An owner may bring a suit against an unlicensed contractor for defective work. (See Domach v. Spencer, 101 Cal.App.3d 308, 161 Cal.Rptr. 459)

b. Bus. & Prof. Code §7068.1:

This amendment limits a person who serves as a qualifier for a licensed contractor to no more than three (3) firms.

c. All monies received in regard to a project must be used to pay bills on that project, without diversion. (B&P Code §7108).

d. All monies received by the general contractor on a project must be distributed to sub-specialty contractors who are owed money, within 7days of receipt of the funds, unless there is a written agreement to the contrary or a good faith dispute, in which case 150% of the disputed amount can be withheld. (B&P Code §7108.5).

e. Willful and deliberate failure to pay monies due for labor or materials is a cause for disciplinary action. (B&P Code § 7120).

f. A person who utilizes the services of an unlicensed contractor may bring a civil action to recover all monies paid to the unlicensed contractor for the performance of the unlicensed activity, except in cases where a court has determined that

- the unlicensed contractor had been duly licensed prior to the performance,
- acted reasonably and in good faith in maintaining its proper licensure,
- did not know or reasonably should not have known that it was not licensed at the time of performance, and
- acted promptly and in good faith to reinstate its license upon learning it was invalid. (B&P Code §7031)

g. License Bond – B&P Code §7071.6 requires a contractor's license bond in the amount of $12,500.

h. Limited Liability Companies are now able to apply for California Contractors licenses. However, the requirements for an LLC license are onerous, including the requirement to obtain a $100,000 surety bond (the LLC licensee is also required to obtain the $12,500 license bond) and carry minimum general liability insurance in the amount of $1,000,000.

2. Traps for the Unwary

a. Joint ventures require a license, or face disciplinary action (however a joint venture is still entitled to payment, even if not licensed, as long as both venture partners are licensed) (B & P Code §7031).

b. Disciplinary or payment problems can arise if you work out of your license classification.

c. Workman's compensation liability can accrue to any contractor for injuries to employees of an unlicensed subcontractor or sub-subcontractor working for it. (Labor Code §2750.5).

d. The penalty for employing an unlicensed contractor is $200.00 per calendar day (Labor Code §1021.5).

e. If you employ an unlicensed contractor, you face liability exposure for the negligent acts of that contractor which you would not otherwise face if they were legally an "independent contractor."

B & P Code §7028.7 authorizes the Registrar of Contractors to issue a citation to the responsible officer or employee of a public entity who knowingly awards a contract, or issues a purchase order, to an unlicensed contractor. The civil penalty is not less than $200.00 and not greater than $15,000.00.

f. Entering into a contract with an unlicensed contractor is a cause for disciplinary action. (B & P Code §7118).

g. Pursuant to the Rules of Professional Conduct of the California State Bar, an attorney cannot threaten your adversary with criminal, disciplinary or administrative action solely in order to gain an advantage in a civil matter. However, you can get the same, or better result, by threatening or going to the license bond surety (as opposed to the Licensing Board) with a claim against the bond and alleging violation of the licensing law.

B. MECHANIC'S LIEN RIGHTS

1. Nature of a Mechanic's Lien: A security device for a provider of labor, services, equipment or material.

2. Classes of Claimants

a. Direct contractors, subcontractors, suppliers, equipment lessors, design professionals, all persons and laborers performing labor or bestowing skill or services upon a work of improvement.

b. **New Law – On July 1, 2012, the Civil Code Sections regarding mechanic's liens, stop notices and payment bond claims will be overhauled. The changes amend the California Civil Code by repealing the existing code section and codifying an entirely new body of sections. The following materials reference the code section that will go into effect on July 1, 2012.**

Included in the changes, the legislature has set forth the following new definitions:

i. Contractor – Includes a contractor, subcontractor or both.

ii. Direct Contractor – A contractor that has a direct contractual relationship with the owner. The new code also provides that any other statutory references to "prime contractor" shall mean a direct contractor.

iii. Direct Contract – A contract between an owner and a direct contractor that provides for all or part of a work of improvement. Note: this would include a specialty contractor only performing a portion of the work of improvement.

3. **Work of Improvement (Civil Code §8050)**

a. (1) Construction, alteration, repair, demolition or removal in whole or in part, or addition to, a building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road. (2) Seeding, sodding, or planting of real property for landscaping purposes. (3) Filling, leveling or grading of real property.

b. "Work of improvement" means the entire structure or scheme of improvement as a whole and includes site improvement.

c. **New Law – effective July 1, 2012 – "Work of Improvement" has been expanded to include demolition, removal and site improvement. The definition now refers to "real property" in lieu of "any lot or tract of land."**

4. **Set Up Record-Keeping Procedure**

a. Objective - To have a record from beginning of job showing value of your contribution to work of improvement.

5. **Establish Priority of Your Lien Rights**

a. Objective - To determine whether lien rights have priorities over encumbrances, such as the construction loan. Note: A foreclosure of the construction loan may eliminate the lien.

6. **Determine Whether You Must Give a Preliminary Notice (See Addendum)**

   a. Objective - To preserve your right to assert a Mechanic's Lien, Stop Payment Notice & a claim against a payment bond. (CC §§8200). All trade contractors should send as a matter of standard procedure. **Effective July 1, 2012, a "20-Day Preliminary Notice" will be referred to as a "Preliminary Notices."**

   b. Within 20 days after first furnishing services or materials.

   c. Serve by:

      i. Personal delivery (get name & address), or
      ii. Registered or certified mail (keep receipt), or
      iii. Express mail or overnight delivery by an express service carrier.

   d. Subcontractors serve upon owner, general contractor either directly or through one or more subcontractors, & construction lender (also a good idea to serve the County Recorder). If a subcontractor and/or material supplier is working with more than one contractor on a work of improvement, the claimant is required to give a separate preliminary notice with respect to its work provided under each contract.

   e. **Direct Contractors – Pursuant to CC §8200 (effective July 1, 2012), a claimant with a direct contractual relationship with the owner is required to serve a preliminary notice on the construction lender or reputed construction lender, only.**

   f. **Effective July 1, 2012, direct contracts and subcontracts must provide for the identification of any construction lenders.**

7. **Form of Notice**

   a. Notice is a prerequisite to recording a mechanic's lien, filing a stop notice (public and private works) and enforcing a claim against a payment bond.

   b. All parties receiving notice must receive (1) a general description of the work to be provided; (2) an estimate of the total price of the work provided or to be provided; (3) the following statement in boldface:

NOTICE TO PROPERTY OWNER

EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL, if the person or firm that has given you this notice is not paid in full for labor, service, equipment, or material provided or to be provided to your construction project, a lien may be placed on your property. Foreclosure of the lien may lead to loss or all or part of your property. You may wish to protect yourself against this by (1) requiring your contractor to provide a signed release by the person or firm that has given you this notice before making payment to your contractor, or (2) any other method that is appropriate under the circumstances.

This notice is required by law to be served by the undersigned as a statement of your legal rights. This notice is not intended to reflect upon the financial condition of the contractor or the person employed by you on the construction project.

If you record a notice of cessation or completion of your construction project, you must within 10 days after recording, send a copy of the notice of completion to your contractor and the person or firm that has given you this notice. The notice must be sent by registered or certified mail. Failure to send the notice will extend the deadline to record a claim of lien. You are not required to send the notice if you are a residential homeowner of a dwelling containing four or fewer units.

NOTE: The Notice set forth above is new language effective July 1, 2012. Claimants should confirm that their form preliminary notices comply with the new notice.

c. Private owners must notify the original contractor, construction lender and any lien claimant what who has provided the owner with a Preliminary Notice in compliance with CC §8202 that a notice of completion or notice of cessation was filed with 10 days of its recorded. Failure to notify the claimant will allow the statutory time to record a lien to remain 90 days. This law does not apply to residential homeowners of dwellings containing fewer than four units.

d. If the owner, contractor or subcontractor refuses to cooperate, make a record in your job file of when and who you spoke to and their refusal to give you information. Other sources for information are:

i. Construction signs
ii. Building permit
iii. Construction contract
iv. Tax assessor
iv. County Recorder

v. Title Company

8. **Note the Date on Which You Completed Your Contractual Obligations**

a. Objective - To establish a deadline for recording a claim of lien.

9. **Note the Date on Which the Work of Improvement is Completed**

a. Objective - To establish a deadline for recording a claim of lien; work of improvement is completed when all work ceases, not the work of claimant.

10. **Effect of Notice of Completion**

a. Owner Objective - Reduces deadline for recording a claim of lien from 90 days after completion to 30 days after recording of Notice of Completion.

b. County recorder will provide Notice if Preliminary Lien filed with recorder. (Note: You must still watch out. You cannot rely upon the County recorder.)

c. Civil Code §8182 provides that owners shall sign and verify notice of completion in compliance with §8100. An owner's failure to give notice may extend the period of time in which the lien claimant can record a mechanic's lien or stop notice. (Note: If you know that a project is completed do not wait to receive notice before recording mechanic's liens or serving stop notices.)

d. **As of July 1, 2012, notices of completion must be recorded on or within 15 days of actual completion. The law previously provided that they be recorded within 10 days of completion.**

e. Completion – Defined in Civil Code §8180. **New law effective July 1, 2012, on private works acceptance by owner is no longer the equivalent of completion. Completion will continue to mean "actual completion," occupation or use by owner accompanied by a cessation of labor, a cessation of labor for 60 continuous days or a recorded notice of cessation following a cessation of labor for 30 days. In regards to a public work of improvement, completion may continue to be achieved by the public entity's acceptance of the project.**

f. **New Law – CC §8186 – Where a work of improvement is made pursuant to two or more direct contracts, the owner may file a notice of completion as to the work performed under each direct contract.**

11. Record the Lien Claim

a. Proper County - Location of job site.

b. Deadline - Sooner of:

   i. 90 days after completion of work, or
   ii. 30 days (for subs) and 60 days (for generals) after Notice of Completion is recorded.

c. Civil Code §8430 includes change orders.

d. State your demand for balance due after all credits.

12. Calculating the Lien Claim

a. Lesser of the contract price or "reasonable value" of work provided

b. Oral or written modifications to the contract may be included in the lien claim.

c. Delay damages – Be careful!

d. Attorneys' Fees: Not recoverable.

e. Forfeiture may result if lien amount is erroneous and a court determines that either:
(1) The claim of lien was made with intent to slander title or defraud
(2) An innocent third party became bona fide owner of property and claim of lien was insufficient to provide inquiry notice. Civil Code §8422.

13. Mechanic's Lien Requirements

a. The requirements for a valid mechanic's lien are set forth in Civil Code §8416, which requires that a mechanic's lien consist of a written statement, signed and verified by the claimant, containing all of the following:

   i. The claimant's demand after deducting all credits and offsets, i.e., the amount of the claim.
   ii. The name of the owner or reputed owner, if known.
   iii. A general statement of the kind of work furnished by the claimant.

iv. The name of the person by whom the claimant was employed or to whom the claimant furnished work.

v. A description of the site sufficient for identification.

vi. The claimant's address.

vii. The following notice of mechanic's lien which must be in at least 10 point font, with the entire last sentence (excepting only the website) typed in upper case letters:

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 enclosed 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.

b. Proof of Service of the Mechanic's Lien. The mechanic's lien claimant must now serve the owner or reputed owner with the mechanic's lien and the mechanic's lien must contain a proof of service affidavit completed and signed by the person serving it. The proof of service must show the date, place and manner of service and the name and address of the person or persons upon whom the lien was served. Service on the owner must be made by either registered mail, certified mail, or first class mail evidenced by a certificate of mailing, postage prepaid and addressed to the owner or reputed owner at the owner's or reputed owner's residence or place of business or the address for the owner that is listed on the building permit.

CAUTION – The mechanic's lien statute was previously amended to include severe penalties for failure to comply with the new notice and service requirements. The failure to serve the mechanic's lien, including the Notice of Mechanic's Lien, shall cause the mechanic's lien to be unenforceable as a matter of law.

14. **File Legal Action to Foreclose a Mechanic's Lien**

a. Obtain title report to determine proper parties and legal description.

b. Evaluate lien claim priority- lien relates back to commencement of work of improvement.

c. Prepare Complaint to foreclose.

d. Complaint must be filed within 90 days from recording of a Mechanic's Lien (Civil Code §8460).

15. **Record a Lis Pendens (Notice of Pending Action)**

a. Objective: Puts potential purchasers of property on Notice of Action.

b. ***Effective January 1, 2011, the law requires a plaintiff to record with the appropriate county recorder's office a notice of pendency of action within 20 days of filing a mechanic's lien foreclosure action. (Civil Code §8461).***

16. **Bring Action to Trial**

a. Deadline: Two (2) years after filing action (however, discretionary with court).

17. **Simultaneous Remedies**

a. Breach of Contract or Common Counts

b. Enforcement of Stop Notice available

c. Action on Payment Bond

18. **Public Works Compared**

a. No Mechanic's Lien Rights on Public Works

b. Enforcement of Stop Notice available upon State and local but not Federal

c. Action on Bonds

i. Stop Notice Release Bond
ii. Payment Bond

19. Design Professionals

a. Civil Code §8302 provides lien rights where no actual work of improvement if the land owner who contracted with the design professional also owns the site at the time the lien is recorded.

b. Must record design professional lien no later than ninety (90) days after the design professional knows or has reason to know that the landowner is not commencing the work of improvement (Civ. Code §8312).

c. Not applicable to owner-occupied residence less than $100,000.

20. Tenant Improvements - Notice of Non Responsibility

a. Notice by owner which advises claimants that owner did not contract for the improvement.

b. Generally prepared by landlords where tenant is doing improvement.

c. Owner must prepare, execute, post in a conspicuous place on premises and record with County Recorder within 10 days of the owner learning of the work.

d. If done properly, will insulate owner from mechanic's liens.

e. Notice of non-responsibility will not protect landlord if work caused by landlord (Civil Code §8444).

21. Owner Protection

a. Failure to respond to demand from owner for stop notice may cause forfeiture of lien rights (Civil Code §8520).

C. STOP PAYMENT NOTICE RIGHTS

1. Mechanic's Liens Compared

NOTE: As part of the overhaul of the lien laws, effective July 1, 2012, a "stop notice" will be referred to as a "stop payment notice."

a. Mechanic's liens are preferred when no encumbrances or high level of property equity. When projects fail stop payment notice may be more valuable remedy.

2. **Separate and Exclusive Remedy from Mechanic's Liens**

   a. Stop payment notices are still enforceable after foreclosure of property, even if a mechanic's lien is wiped out.

   b. Available on both private and public works (not Federal).

   c. Not available to Prime Contractors against owners.

3. **Claimants** – Same as for Mechanic's Liens.

4. **Preliminary Notice**

   a. Same requirements as Mechanic's Liens & payment bond claims.

      i. Prior law precluded a claim on a stop payment notice if the Preliminary Notice was not given within the first 20 days of furnishing labor & material. New law allows Preliminary Notice to be given at any time; however, claim valid only as to labor & materials furnished within the 20 days prior to service of Preliminary Notice.

5. **Determine Whether Stop Payment Notice is Appropriate**

   a. Objective- Freeze unexpended construction funds of owner or construction lender.

   b. Prerequisite: Must serve a Preliminary Notice if required.

   c. When to serve - Stop payment notice – Same as for mechanic's liens; when your work is completed or within 90 days after completion or within 30 days of Notice of Completion.

   d. Who may serve - Any claimant, including Direct Contractors when against lender (Civil Code §8530).

   e. Bond Requirement - Bond of 125 percent of claim must be submitted with Stop Payment Notice to construction lender on private work. If Stop Payment Notice is to owner, no bond is required.

      Note: Lender may disregard if no bond.

6. **Preparing and Bonding the Stop payment notice**

   a. Include description of labor, services, equipment furnished including name of person to whom furnished.

   b. Include claimants name, address and verification.

   c. To be effective, must be served by:

      i. Personal delivery.
      ii. Certified or registered mail.

7. **Amount Recoverable**

   a. Reasonable value of work, materials or services provided.

   b. Subcontractor stop payment notice amounts reduce recovery.

   c. Pro-rata allocation of funds if insufficient to pay all stop payment notices.

   d. Attorneys fees recoverable on bonded stop payment notice (CC §8558).

8. **Effect of Release Bond**

   a. Objective: Owner or Direct Contractor files Release Bond of 125 percent to obtain release of funds pending litigation.

   b. File suit on the Release Bond within 3 years of bond execution.

9. **File Suit to Enforce Stop payment notice**

   a. Serve Notice of Commencement of Action to all persons served with Stop payment notice within five days of filing action.

   b. Service method is same as Stop payment notice.

10. **Private Work vs. Public Work**

   a. Stop payment notice on state and local public work need not be bonded.

   b. No Stop payment notice on Federal work.

D. BONDS

1. Claims on Federal Public Works Under the Miller Act

a. Purpose of the Miller Act

On federal public works, contractors and suppliers do not have the same remedies provided for collection of monies owed on private construction projects and public works financed by state agencies. United States Government property cannot be encumbered with a mechanic's lien. Stop payment notices cannot be used. However, the Miller Act, 40 U.S.C. §270(a)-270(e) requires the posting of a payment bond which is "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract." 40 U.S.C. §270(a)(2).

i. The bond must be posted on any job "for the construction, alteration or repair of any public building or public work of the United States . . ."

ii. Federal public works contracts under $25,000.00 are exempt.

iii. When a subcontract is not in excess of $1 million, the payment bond must be in a sum equal to one-half the total amount payable by the terms of the contract. If the total amount payable by the terms of the contract is more than $1 million but not more than $5 million, the bond must be in a sum equal to forty percent (40%) of the total amount payable by the terms of the contract. If the total amount payable by the terms of the contract is more than $5 million the payment bond must be for the flat sum of $2.5 million.

iv. The bond must be issued by a surety satisfactory to the officer awarding the contract.

v. The courts have liberally construed the Miller Act with a view to protecting the parties furnishing labor and materials in the performance of a contract for the construction of public works. See F.D. Rich Co. v. U.S. for Use of Industrial Lumber Company, 417 U.S. 116 (1974); United Bonding Insurance Co. v. Catalytic Construction Co., 533 F.2d 469 (9th Cir. 1976).

b. Work to Which Miller Act Applies

The words "public building or public work" in the Miller Act are broadly construed by the courts to protect those who provide labor and materials on such works. A work may be a "public work" even though not constructed on federal property; see U.S. for Use of Noland Company v. Irwin, 316 U.S. 23 (1942) [university library constructed under Congressionally authorized program considered to be a "public work"]; Fidelity and Deposit Co. of Maryland v. Harris, 360 F.2d 402 (9th Cir. 1966) [building constructed for use of federally-financed Jet Propulsion Laboratory is a public work].

A "public work" does not need to be a fixed structure. In United States for Use of Shlager v. MacNeil Brothers, 27 F.Supp. 180 (1939), the raising of a sunken tow boat from a canal under contract with a United States agency was held to be a "public work" subject to the requirements of the Miller Act.

c. Parties Entitled to Sue (See Addendum)

The two categories of parties entitled to bring suit to collect on Miller Act bonds are:

i. All subcontractors, laborers, or materialmen who deal directly with the prime contractor may bring an action.

ii. All subcontractors, laborers, or materialmen who have a direct contractual relationship with a first tier subcontractor may bring an action.

iii. Third-tier subcontractors have no right to recover on Miller Act bonds; see J.W. Bateson Company v. Board of Trustees, 434 U.S. 586 (1978).

The distinction between a "subcontractor" and a "materialman" can be important since a party not in direct contractual relationship with the prime contractor can only sue if it has a direct contractual relationship with a subcontractor. A materialman's materialman has no cause of action under the statute.

The distinction between a subcontractor and a laborer or materialman is found in the type of performance required. Normally, a subcontractor takes on a specific portion of the work set forth in the original contract; laborers and materialmen furnish material, equipment and services which the prime contractor and its subcontractors use in their work. See Clifford E. MacEvoy Co. v. U.S. for Use and Benefit of Calvin Tomkins Company, 322 U.S. 102 (1944); Travelers Indemnity Co. v. U.S. for Use and Benefit of Western Steel Co., 362 F.2d 896 (9th Cir. 1966).

Parties within a direct contractual relationship with the prime contractor must follow special notice requirements; see Section 5, below.

d. Requirement That Labor and Material Be Furnished

The Miller Act requires the claimant prove it "furnished labor or material in the prosecution of the work provided for in [the prime] contract . . ." Proof of actual use of labor and material in the project is not required, if the claimant has no actual or constructive knowledge that the labor and material were not used or were diverted to other projects; see United States for Use and Benefit of Carlson v. Continental Casualty Co., 414 F.2d 431 (9th Cir. 1969).

i. The labor and material must have been for use on a part of the original project. A Miller Act claim was rejected in a case where payment was sought for identification buttons for faucets supplied as replacements for those furnished during the original performance on the subcontract. The replacement buttons were furnished four months after the prime contractor had ceased working on the contract. The court held that the buttons were not furnished "in the prosecution of the work." U.S. for Use and Benefit of Laboratory Furniture Co. v. Reliance Insurance Co., 274 F.Supp. 377 (D.C. Mass. 1967).

ii. The validity of a Miller Act claim often turns on the particular facts of the case. In Fluor Corporation v. U.S. Ex Rel. Mosher Steel Co., 405 F.2d 823 (9th Cir. 1969), a steel supplier to a second tier subcontractor was held to have Miller Act rights, where the claimant showed that the second tier subcontractor had entered into a joint venture with a first tier subcontractor which had agreed to be directly obligated to pay for the material supplied.

iii. However, courts rarely permit a claimant to meet the requirement of a direct contractual relationship by claiming an "implied" contract. Fidelity & Deposit Company of MD v. Harris, 360 F.2d 402 (9th Cir. 1966).

e. Notice Requirements

i. A Miller Act claimant that does not have a direct contractual relationship with the prime contractor must give written notice of its claim within ninety (90) days after labor or material was last furnished under the contract; See 40 U.S.C. §270b(a).

ii. The notice requirement's purpose is to protect the prime contractor from unknown claims. Anyone in direct contract with the prime contractors is exempt from the notice requirement.

iii. The courts have liberally construed the notice requirements. In U.S. for Use of Greenwald-Supon v. Gramercy, 433 F.Supp. 156 (S.D.N.Y. 1977), an "implied" contractual relationship with the prime contractor was sufficient to relieve a claimant of the notice requirement.

iv. The Miller Act requires notice be served by registered mail on the prime contractor at any business or residence address; 40 U.S.C. §270b.

f. Time for Bringing Action

A suit to enforce a claim under the Miller Act must be brought within one year after material was furnished or supplied or labor was performed on the job by the claimant. Courts liberally construe the one-year time limit. If a claimant provides work but is required to re-do some portion, the statute will not run until such additional work is completed.

g. Filing Suit

i. Suit on a Miller Act claim should be filed in the U.S. District Court for the district in which the work of improvement was built; see 40 U.S.C. §270b(b).

ii. A Miller Act claim is not an exclusive remedy. A claimant may sue in U.S. District Court against the Miller Act bond and concurrently sue parties who contracted with them in state court.

iii. If there is no attorneys' fees clause in the contract the claimant may not recover its attorneys' fees in an action under the Miller Act. See United States v. H.R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977).

iv. In order to prepare the action to enforce Miller Act claims, one needs the following information:

i. The identity of the prime contractor.
ii. The identity of the federal agency that awarded the contract and the contract number.
iii. The date of award of the contract.
iv. The identity of the contract surety.
v. The date and penal sum of the surety bond.
vi. An accurate description of what the claimant supplied for the project or furnished to the project.
vii. The date notice to the prime contractor was given, if required.
viii. A calculation of the exact amount owed.

2. State and Local Projects - Cal. Little Miller Act

a. The requirements relating to California State and local projects are spelled out in the Cal. Civil Code at §§ 9550 through 9566.

b. 1999 Law Change: The requirements of amount of payment are changed as follows:

i. 100% of contract up to $5,000,000.
ii. 50% of contracts between $5,000,000 and $10,000,000.
iii. 25% of contracts greater than $10,000,000.

c. Any subcontractors should give a Preliminary Notice to enforce a claim on a payment bond. However, if such notice is not given, a claimant must give written notice to the surety and bond principal within:

i. 15 days after recordation of a Notice of Completion; or
ii. 75 days of completion, if no Notice of Completion is recorded.

NOTE: Law Change Effective January 1, 2012 and applying to contracts entered into after January 1, 2012 – CC §3252 (CC §9560 as of July 1, 2012) now provides that if the general contractor has made all of its undisputed progress payments to the first tier subcontractor, a lower tier subcontractor who would be a proper payment bond claimant cannot utilize a post work "second chance" provision to provide notice of a payment bond claim.

NOTE: This amendment makes it even more critical for claimants to send a preliminary notice at the inception of one's work or when one provides materials to a project.

d. Must bring suit within six (6) months after end of stop payment notice period (i.e., 210 days from notice of completion, or 270 days after completion or cessation if no Notice of Completion is recorded).

3. **Private Project Payment Bonds**

a. The rules are set forth at Civil Code §§ 8602 and 8604.

b. Frequently AIA bond forms are used - need to review the form to know what notice and suit requirements are.

c. Sureties are often less than treasury list quality.

d. The bond may contain a contractual statute of limitations to six months from completion.

e. Notice often must go to two of the following parties: owner, surety, general.

f. Any subcontractors should give a Preliminary Notice to enforce a claim on a payment bond. However, if such notice is not given, a claimant must give written notice to the surety and bond principal within:

i. 15 days after recordation of a Notice of Completion; or
ii. 75 days of completion, if no Notice of Completion is recorded.

g. Filing Suit: Must be brought within six (6) months after completion of the work of improvement, if bond was recorded. Civil Code §§ 8609-8610.

4. **Subcontractor Performance/Payment Bonds**

a. Frequently required by general contractors.

b. Must read the form to ascertain notice requirements, etc.

c. If you are in contract with a sub, ask the general for a copy of the sub's bond and make a claim against both the subcontractor's bond and the general contractor's bond.

5. **Stop Payment Notice or Mechanic's Lien Bonds**

a. Various parties can "bond off" a stop payment notice, bonded stop payment notice, or mechanic's lien.

b. This provides good security for the claimant. While the mechanic's lien or stop payment notice cannot be pursued, the claimant may sue an additional bonding company.

6. License Bond

a. Every contractor who obtains a license must post a license bond in the amount of $12,500. This bond can be claimed against if there is a willful and deliberate violation of a provision of the licensing law - the burden of proof is high. However, the penal sum of the bon for a non-homeowner claimant is limited to $7,500.

7. Insurance Code §790.03

a. California statutory requirements put a burden on all sureties to act in good faith in their investigation, evaluation and payment of claims.

b. This legal obligation creates a substantial amount of leverage in dealing with sureties - punitive damages are available for violation of this duty.

E. PRE-JUDGMENT ATTACHMENT

1. Definition

a. Remedy before trial allowing plaintiff (or cross-complainant) to levy on a defendant's (or cross-defendant's) property to insure sufficient property available to satisfy any judgment plaintiff obtains against that defendant.

b. Procedure available even if plaintiff seeks other relief.

c. Also available in federal court sitting in California to extent permitted under California law. Fed Rule Civil Procedure §64.

2. When Is It Available?

a. Client's claim is for money;

b. Client bases claim on an express or implied contract;

c. Client's claims aggregate at least $500, excluding costs, interest and attorneys' fees (CCP §483.010(a));

d. The amount is fixed or readily ascertainable;

e. Claim is unsecured, or if secured:

i. The security has become valueless, or decreased in value through no fault of client, to less than amount then owing on claim;

ii. By a nonconsensual possessory lien that has been relinquished by possession of the property being surrendered;

f. Claim has "probable validity". "Probable validity" means "more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." **Loeb and Loeb v. Beverly Glen Music Co.** (1985) 166 CA.3d 1110, 1118, 212 CR 830, 835.

g. Client's only purpose in seeking attachment is to recover on the underlying claim.

h. If defendant is a natural person, client's claim must be based on an obligation arising from defendant's conduct of a trade, business or profession.

i. "Engaged in business": interpreted to mean "business activity of a frequent or continuous nature."

ii. It is NOT necessary, however, that the defendant depend on the business for livelihood or even devote a substantial amount of time to it.

3. Non-Residents

a. You may not be able to obtain personal jurisdiction over NONRESIDENT debtor, but you can obtain quasi in rem jurisdiction by proceeding with attachment of defendant's property within California.

i. Nonresident debtor includes:

- Natural person not residing in California;
- Foreign corporation not qualified to do business in California; or
- Foreign partnership not having filed a designation under Corp Code §15800.

ii. You can attach nonresident defendant's property ONLY by proceeding ex parte.

iii. Statutory requirement of a minimum dollar amount, and an underlying contract, do not apply to nonresident defendants.

4. **Determine Type & Value of Defendant's Property You Can Attach**

a. Writ of attachment reaches California property for all defendants.

b. ALL property is subject to attachment, as long as a method of levy is prescribed under CCP §§488.300-488.485, as to corporations, partnerships and associates.

c. Attachable property for natural persons is limited.

i. Any interest in real property EXCEPT:

- Leasehold estates with unexpired terms of less than one year.
- If defendant's real property is subject to a homestead declaration, lien attaches only to the amount of any surplus over the total of:
  - All liens and encumbrances on the homestead at the time attachment lien created; PLUS,
  - The homestead exemption (regardless of whether and when it is recorded).

ii. Accounts receivable, chattel paper, and general intangibles arising out of the conduct by defendant of a trade, business, or profession EXCEPT claims with a principal balance of less than $150.

iii. Equipment.

iv. Farm products.

v. Inventory.

vi. Final money judgments arising out of defendant's conduct of a trade, business, or profession.

vii. Money on the premises where defendant conducts a trade, business, or profession.

viii. Except for the first $1000, money located elsewhere than on defendant's business premises.

The court may grant an application to levy on money and deposit accounts that exceed an aggregate amount of $1000 if defendant has either more than one deposit account or a combination of at least one deposit account and money located away from the premises. The order then will provide that an aggregate of $1000 remain free of levy.

ix. Negotiable documents of title.

x. Instruments.

xi. Securities.

xii. Minerals, oil, or gas to be extracted.

d. Only property owned by an individual and not involved in a fraudulent transfer can be "exempt property." Property exempt includes:

i. All property exempt from enforcement of a money judgment.

ii. Property necessary for support of defendant or defendant's family.

iii. "Earnings" – "Compensation payable by an employer to an employee for personal services performed by such employee, whether denominated as wages, salary, commission, bonus or otherwise."

iv. Property NOT subject to attachment (see Attachable Property, above).

e. Advantages of Seeking Writ include allowing plaintiff to obtain a secured position, which motivates defendant to settle and obtain discovery.

i. Attachment allows plaintiff as an unsecured creditor to "bootstrap" into secured position, thereby gaining priority over defendant's other unsecured creditors, ensuring that the judgment ultimately obtained will be enforceable as a judicial lien on attached property.

ii. Although you cannot seek attachment for any purpose other than recovery on the underlying claim, obtaining a writ may have the ancillary effect of giving defendant significant incentive to settle by creating financial burden, forcing defendant to analyze and evaluate the merits of your claim, and showing the opposition party that if you obtain a writ you probably will prevail at trial.

iii. You can obtain personal jurisdiction over nonresident defendant through quasi in rem jurisdiction.

iv. Hearing procedure provides opportunity to discover nature of defense and supporting facts.

f. The disadvantages of attachment are that it increases costs, exposes plaintiff to potential damages and may act as an election of remedy.

i. Time and cost of obtaining a writ of attachment outweigh advantages if the defendant is already judgment-proof or has assets that cannot be located; or the claim is too small. If claim warrants cost, consider having an investigative agency prepare a full financial report on defendant.

ii. If you assert both a contract and tort claim, your attachment application may be viewed as an election of the contract remedy.

iii. Plaintiff may risk a claim of wrongful attachment. If defendant proves claim, you would be liable for: (a) all damages proximately caused to defendant or any other person by wrongful attachment; AND (b) all costs and expenses, including legal fees, reasonably expended by defendant in defeating your attachment; LESS (c) amount still unsatisfied on any judgment you obtained (CCP §490.040).

iv. If defendant prevails, then defendant simultaneously can pursue wrongful attachment and common law remedies of malicious prosecution and abuse of process. CCP §490.060, 996,440(a).

v. Third parties whose property is wrongfully attached can pursue a remedy under CCP §§720.110-720.800.

g. Debtor's imminent bankruptcy may be a disadvantage or advantage.

i. The disadvantage is the attachment lien automatically terminates if within 90 days after the lien attaches, the defendant either (a) files for bankruptcy, or (b) makes a general assignment for the benefit of creditors, with or without a showing of insolvency.

ii. If no bankruptcy is filed within 90 days, you have effectively converted your unsecured claim to a secured claim having preference in bankruptcy.