

## **Resolving the Double Liability Problem: A Critique of California's Mechanics Lien Statute**

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### **ABSTRACT**

California's mechanics lien statute allows a sub-contractor to file a lien on a homeowner's property when a direct contractor, for whom the sub-contractor worked, has failed to pay the sub-contractor. The statute compels the homeowner to pay the sub-contractor even when the homeowner has paid the direct contractor in full. This Note argues that California's mechanics lien statute is too broad, because the statute does not provide any exception for a homeowner who has paid the direct contractor in full. Specifically, this Note argues that California's mechanics lien statute violates public policy, as well as constitutional, and contract principles. This Note proposes an amendment to the statute to protect ordinary homeowners from the risk of double liability.

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|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION TO CALIFORNIA’S DOUBLE LIABILITY PROBLEM.....                                    | 138 |
| II.  | CALIFORNIA’S MECHANICS LIEN RIGHT.....  | 139 |
| III. | REASONS FOR AN AMENDMENT TO THE STATUTE .....   | 141 |
| A.   | Legislature’s Duty to Balance Interests of All Stakeholders .....                             | 141 |
| B.   | The California Mechanics Lien Statute is Inconsistent with Public Policy .....                | 145 |
| C.   | The California Mechanics Lien Statute is Inconsistent with the Principle of Due Process ..... | 148 |
| D.   | The California Mechanics Lien Statute is Inconsistent with Contract Principles .....          | 150 |
| IV.  | PROPOSAL.....   | 153 |
| V.   | CONCLUSION .....  | 155 |

## I. INTRODUCTION TO CALIFORNIA'S DOUBLE LIABILITY PROBLEM

After years of saving, “Jim the Plumber” and his wife, a medical Assistant, buy their first home, a modest bungalow in northern California. They hire a direct contractor<sup>1</sup> to modernize the living room, add a new kitchen counter, and pave the driveway. They make three payments to the direct contractor totaling \$12,350.

Some months later, the couple receives service of process, a “Notice of Mechanics Lien.” They bring the document to an attorney and are shocked to learn they owe a paving company they have never heard of \$2,230 for their driveway. Although the couple had already paid the direct contractor in full, the direct contractor never paid the paving company. In the end, the couple pays the paving company to clear title on their home.

This scenario describes what the California Law Revision Commission (“Commission”) refers to as the “Double Liability Problem.” Currently, a California homeowner may be liable to a sub-contractor even after the homeowner has paid a direct contractor in full.<sup>2</sup>

This Note advocates for protection of ordinary homeowners.<sup>3</sup> Part II demonstrates that California’s legislature has failed to balance the interests of all stakeholders in enacting legislation to enforce the mechanics lien right. Part III argues that, at least within the context of small-scale home improvements, the current statute violates public

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<sup>1</sup> In the construction industry, the term “general contractor” is common. *See, e.g.*, RAY CZICZO, GENERAL CONTRACTING: A GUIDE TO HOME CONSTRUCTION 3–6 (2004). On June 1, 2012, California’s mechanics lien statute was reworded to use the term “direct contractor.” Press Release, *Department of Consumer Affairs: Contractors State License Board, Construction Lien Protection Laws Change July 1, 2012* (June 29, 2012), <http://www.cslb.ca.gov/GeneralInformation/Newsroom/PressReleases/PressReleases2012/News20120629.asp>. For the purposes of this Note, “direct contractor” will refer to parties in direct privity with a homeowner, and “sub-contractor” will refer to parties in direct privity with an entity other than the homeowner.

<sup>2</sup> *See The Double Liability Problem in Home Improvement Contracts*, 31 Cal. L. Revision Comm’n Reports 281, 283 (2001), <http://www.clrc.ca.gov/pub/Printed-Reports/REC-DoubleLiabilityHIC.pdf> [hereinafter *Double Liability*].

<sup>3</sup> The scope of this Note is limited to small-scale home improvements—improvements under \$15,000 such as projects in remodeling, plumbing, roofing, etc. For projects more than \$15,000, the Double Liability Problem is less likely to arise because the contracting parties are more likely to consult an attorney and obtain bonds or insurance.

policy, constitutional guarantees of due process, and contract principles. Finally, Part IV proposes an alternative means to implement the mechanics lien right that includes a hearing and other safeguards to prevent the Double Liability Problem.

## II. CALIFORNIA'S MECHANICS LIEN RIGHT

A mechanics lien is an interest in the title to land and structures a worker acquires to secure payment for improvements to real property.<sup>4</sup> In California, mechanics liens are recognized as both a statutory and constitutional right.<sup>5</sup> Because mechanics liens are guaranteed in California's Constitution, courts often strictly enforce the mechanics lien statute in favor of a sub-contractor regardless of the underlying facts in a case.<sup>6</sup>

To appreciate the strength of the California mechanics lien as a remedy, consider the application of restitution by the court system. Like the mechanics lien, restitution is historically equitable in nature.<sup>7</sup> Its purpose is to prevent unjust enrichment.<sup>8</sup> California courts sometimes grant restitution to a worker in the absence of privity between a homeowner and the worker.<sup>9</sup> Yet, courts doubt that

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<sup>4</sup> See SAMUEL LEWIS PHILLIPS, A TREATISE ON THE LAW OF MECHANICS' LIENS ON REAL AND PERSONAL PROPERTY 3 (2d ed. 1883).

<sup>5</sup> CAL. CIV. CODE § 8402 (2005) (granting the right to a lien to "a person that provides work authorized for a site improvement"); CAL. CONST. art. XIV, § 3 (granting a secured encumbrance right to a contractor or sub-contractor who provides labor or materials to private real property). See also MATTHEW E. MARSH & HARRY M. MARSH, CALIFORNIA MECHANICS' LIEN LAW AND CONSTRUCTION INDUSTRY PRACTICE § 1.3 (6th ed., LexisNexis 1996).

<sup>6</sup> MILLER & STARR, CALIFORNIA REAL ESTATE § 28:6 (3d ed. 2012).

<sup>7</sup> Schulte v. Buben, 215 Cal. 172, 174 (1932); see also Int'l Paper Co. v. Futhey, 788 S.W.2d 303 (Mo. Ct. App. 1990).

<sup>8</sup> See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 Yale L.J. 52, 54 (1936) ("The object here may be termed the prevention of gain by the defaulting promisor at the expense of the promise . . . . The interest protected may be called the *restitution* interest."). See generally *Int'l Paper Co.*, 788 S.W.2d 303.

<sup>9</sup> See, e.g., Rogers v. Whitson, 228 Cal. App. 2d 662, 673 (1964); Truestone, Inc. v. Simi West Indus. Park II, 163 Cal. App. 3d 715, 724 (1984) (a property owner, who had paid the contractor for the work before a sub-contractor brought the action, is not unjustly enriched).

restitution is an appropriate remedy for a sub-contractor—a party who is under contract but not in privity with the homeowner.<sup>10</sup>

Although the two concepts are fundamentally similar, California courts are inconsistent in applying restitution as opposed to awarding mechanics liens. While common law provided limitations to the mechanics lien,<sup>11</sup> California's statute does not provide any exception to protect a homeowner who has, in good-faith, paid the direct contractor in full.<sup>12</sup> Mechanics liens have effectively become an unconditional remedy for the sub-contractor.<sup>13</sup>

Homeowners who contract for home improvements are similar to consumers. Imagine a consumer purchases a television from a store. If the television did not function properly, the law would protect the consumer by forcing the manufacturer to refund the purchase price, or to replace the faulty television.<sup>14</sup> Common sense dictates that compelling the consumer to keep the faulty television and pay for repairs is absurd.

When a direct contractor fails to pay a sub-contractor, a homeowner is in this same absurd situation. The California mechanics lien statute compels the homeowner to pay additional money to resolve a problem that should never have existed.<sup>15</sup> Nevertheless, to avoid foreclosure, the homeowner is forced to pay twice.<sup>16</sup>

In 2001, fully aware of this injustice, the Commission proposed an amendment to the current mechanics lien statute.<sup>17</sup> The Commission recommended adopting a good-faith payment rule, which would protect a homeowner who has made a good-faith payment to a direct

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<sup>10</sup> See *Rogers*, 228 Cal. App. 2d at 673; *Truestone*, 163 Cal. App. 3d at 724.

<sup>11</sup> See John H. Barnard, *Limitations of Owners' Liability for Mechanics' Liens*, 16 HASTINGS L.J. 179, 180 (1964) (“[T]he courts’ position was that the right to contract was a constitutional right not to be abridged, that mechanics liens . . . are purely a creature of statute, and that legislation which would make the owner liable for more than his contract price was . . . therefore unconstitutional.”).

<sup>12</sup> See *Double Liability*, *supra* note 2, at 283.

<sup>13</sup> *Id.*

<sup>14</sup> See U.C.C. § 2-714 (2013) (Buyer’s Damages for Breach in Regard to Accepted Goods).

<sup>15</sup> In the context of a small-scale home improvement, the homeowner has already paid the direct contractor in full. See *Double Liability*, *supra* note 2, at 283.

<sup>16</sup> See *id.*

<sup>17</sup> *Id.* (referencing a letter from Joyce G. Cook, Chairperson of the California Law Revision Commission, to Gray Davis, Governor of California).

contractor<sup>18</sup> for whom the sub-contractor works. This exception would only apply to contracts for home improvements under \$15,000 between a homeowner and a direct contractor.<sup>19</sup>

Unfortunately, notwithstanding a detailed study by the Commission, the California legislature did not adopt the proposed amendment.<sup>20</sup> Some commentators have suggested that the Double Liability Problem happens too infrequently to justify amending the mechanics lien statute to protect homeowners;<sup>21</sup> however, the statistics that commentators used to arrive at their conclusion do not reflect the actual frequency of the Double Liability Problem with small scale home improvement contracts. To avoid foreclosure, homeowners often pay the sub-contractor to remove the lien.<sup>22</sup> Once the lien is removed, an aggrieved homeowner has few meaningful legal remedies. As a result, litigation related to the Double Liability Problem may not be accurately documented.<sup>23</sup>

### III. REASONS FOR AN AMENDMENT TO THE STATUTE

#### A. Legislature's Duty to Balance Interests of All Stakeholders

California's mechanics lien statute was originally enacted to protect a class of workers, of which the sub-contractor is a subset.<sup>24</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> None of the recommendations of the California Law Revision Commission were adopted. *See generally* CAL. CIV. CODE §§ 8000–8840, 9000–9566 (2005); *see also* Mark Jackson, *July 2012—Senate Bill 189: Substantial Makeover to Mechanics Lien*, BUSINESS ALERT, [http://www.greshamsavage.com/media/site\\_files/43\\_Statutory%20Law%20Update%20%20SB%20189%20Revisions%20to%20Mechanics%20Lien%20Law.pdf](http://www.greshamsavage.com/media/site_files/43_Statutory%20Law%20Update%20%20SB%20189%20Revisions%20to%20Mechanics%20Lien%20Law.pdf).

<sup>21</sup> *See, e.g.*, Gordon Hunt, *Report to Law Revision Commission Regarding Recommendations for Changes to the Mechanic's Lien Law*, CALIFORNIA LAW REVISION COMMISSION [Part 2] (February 2000) (attached to Commission Staff Memorandum 2000-9 (Jan. 31, 2000)), <http://www.clrc.ca.gov/pub/BKST/BKST-811-Hunt2MechLiens.pdf>.

<sup>22</sup> Jean M. Boylan, *Owner Beware: California Mechanics' Lien Law Is Constitutionally Biased*, 27 WHITTIER L. REV. 343, 344, 346 (2005).

<sup>23</sup> There is no incentive to sue when a homeowner does not have any meaningful legal remedies.

<sup>24</sup> Sub-contractors are among the class of construction workers protected by the statute. *See generally* CAL. CIV. CODE § 8400 (2005); *Connolly Dev., Inc. v. Super. Ct. of Merced County*, 553 P.2d 637, 653 (Cal. 1976) (“Indeed this state,

The statute was never intended to apply to modern homeowners undertaking a small-scale home improvement project.<sup>25</sup> Most early litigation concerning the mechanics lien involved construction projects for wealthy landowners who could afford legal counsel.<sup>26</sup>

California's early judicial history involving mechanics lien litigation reveals that the courts tried to balance conflicting interests.<sup>27</sup> Courts recognized that enforcing mechanics lien rights affected fundamental property rights of a landowner.<sup>28</sup> In *Stimson Mill Company v. Braun*, the California Supreme Court made the following observation:

[T]he provision in the constitution respecting mechanics liens (art. XX 20, sec. 15) is subordinate to the Declaration of Rights in the same instrument, which declares (art. I, sec. 1) that all men have the inalienable right of "acquiring, possessing and protecting property," and (in sec. 13) that no person shall be deprived of property "without due process of law." The right of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society.<sup>29</sup>

The *Stimson Mill* Court then stated that in carrying out this constitutional mandate of Article XX, section 15, California's legislature has the duty to balance the interests of lien claimants with those of property owners.<sup>30</sup>

While society has changed drastically in the past 153 years, the statutory definition of the mechanics lien has changed very little.<sup>31</sup> A

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from the earliest days, and consistently thereafter has asserted its interest in protecting the claims of laborers and materialmen.").

<sup>25</sup> See Barnard, *supra* note 11, at 182 ("In the past a man saved his money, bought his lot, and built his home . . . . Today, most of us buy completed homes from a subdivider and borrow money to do so.").

<sup>26</sup> See Boylan, *supra* note 22, at 343.

<sup>27</sup> See, e.g., Knowles v. Joost, 13 Cal. 620, 621 (1859); Frank Curran Lumber Co. v. Eleven Co., 271 Cal. App. 2d 175, 183 (1969); Renton v. Conley, 49 Cal. 185, 188 (1874); Borchers Bros. v. Buckeye Incubator Co., 59 Cal. 2d 234, 238–39 (1963); see also *Double Liability*, *supra* note 2, 298–308.

<sup>28</sup> *Stimson Mill Co. v. Braun*, 136 Cal. 122, 125 (1902).

<sup>29</sup> *Id.*

<sup>30</sup> *Borchers Bros.*, 59 Cal. 2d at 238–39.

<sup>31</sup> Craig Penner Bronstein, *Trivial(?) Imperfections: The California Mechanics' Lien Recording Statutes*, 27 LOY. L.A. L. REV. 735, 738 (1994).

survey of case law reveals that a majority of mechanics lien litigation involved sophisticated commercial parties.<sup>32</sup> The statute never was intended for litigation between ordinary homeowners and sub-contractors in the context of small-scale home improvements. However, the archaic mechanics lien statute was used as governing law for litigation involving ordinary homeowners<sup>33</sup> and sub-contractors. In a modern context, a homeowner will do whatever is necessary to avoid foreclosure of his or her home.<sup>34</sup> Additionally, the title of his or her home is clouded, whether the claimant files the foreclosure suit and prosecutes it successfully, or whether the claimant files the suit and fails to prosecute it. No matter the outcome, the homeowner suffers a detriment. It is a serious inequity that the statute subjects homeowners to, by forcing them to defend mechanics lien suits, and in the worst case, compels the homeowner to pay twice for the same work.<sup>35</sup>

In the context of small-scale home improvements, it is imperative that California's legislature balances the interests of all parties involved because modern homeowners are more vulnerable than landowners in earlier cases. Further, modern California law lends support to a balancing of interests because modern California law provides a number of special protections for homeowners.<sup>36</sup> These protections serve as proof of legislative concern for the homeowner's property interest in addition to the mechanics lien interest of sub-contractors.<sup>37</sup>

The mechanics lien amounts to a substantial cost in a small-scale home improvement project. First, though substantial, it is generally not

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<sup>32</sup> See Ethan Glass, *Old Statutes Never Die . . . Nor Do They Fade Away: A Proposal for Modernizing Mechanics' Lien Law by Federal Action*, 27 OHIO N.U. L. REV. 67, 69 (2000).

<sup>33</sup> See *Double Liability*, *supra* note 2, at 283.

<sup>34</sup> See *Mechanics Lien Law*, 37 Cal. Law Revision Comm'n Reports 527, 538 (2007); California Law Revision Commission, *Mechanics Lien Law* 553 (Feb. 2008), <http://clrc.ca.gov/pub/Printed-Reports/Pub230.pdf> [hereinafter *Mechanics Lien Law*].

<sup>35</sup> See *Double Liability*, *supra* note 2, at 288.

<sup>36</sup> See, e.g., CAL. BUS. & PROF. CODE § 10242.6 (2008) (prepayment penalties); CAL. CIV. CODE § 2924f (2005) (regulation of powers of sale); *id.* at § 2949 (limitation on due-on-encumbrance clause); *id.* at § 2954 (impound accounts); *id.* at § 2954.4 (late payment charges).

<sup>37</sup> See *Double Liability*, *supra* note 2, at 286.



so large that homeowners could not raise money from relatives or take money out of their savings to resolve the lien on their property. Homeowners may come up with the money to pay the lien one way or another to avoid foreclosure.<sup>38</sup> Second, it would be impractical for the aggrieved homeowner to hire a lawyer to defend a mechanics lien suit or to seek an indemnity suit against the direct contractor for failing to pay the sub-contractor. By hiring a lawyer, a homeowner would have to pay attorney's fees for a potential non-collectable judgment. Third, assuming that the homeowner wins the case and obtains a judgment against the direct contractor, the judgment would be useless if the direct contractor is insolvent.

Some commentators argue that the current mechanics lien statute need not be amended. These commentators argue that a homeowner's remedy is to defend the mechanics lien suit,<sup>39</sup> and if the suit is without merit, the homeowner can remove the lien. However, this argument fails to consider the financial constraints on an ordinary homeowner who is trying to pay for small-scale home improvements. Unlike sophisticated commercial parties, such as real estate developers, banks, and investment trusts, ordinary homeowners generally have limited disposable income.<sup>40</sup> In many cases, ordinary homeowners would have to save money over time in order to undertake home improvement projects.<sup>41</sup>

Further, the argument fails to consider that the homeowner still suffers a financial detriment if the sub-contractor files a lien incorrectly.<sup>42</sup> Notwithstanding the fact that the lien is unenforceable

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<sup>38</sup> Boylan, *supra* note 22, at 343.

<sup>39</sup> See *Double Liability*, *supra* note 2, at 288; see also Hunt, *supra* note 21.

<sup>40</sup> See discussion *infra* Part III.B. The 2011 per capita personal income in California was approximately \$43,647 before tax. See CALIFORNIA DEPARTMENT OF FINANCE, *Financial & Economic Data*, [http://www.dof.ca.gov/html/fs\\_data/latestecondata/FS\\_Income.htm](http://www.dof.ca.gov/html/fs_data/latestecondata/FS_Income.htm) (last visited Oct. 18, 2013).

<sup>41</sup> See discussion *infra* Part III.B.

<sup>42</sup> In order to be enforceable, the lien must be perfected. See CAL. CIV. CODE § 8414 (2005). There are generally three steps necessary to perfect and enforce a mechanics lien. First, the claimant must serve a 20-day preliminary notice, unless the claimant falls within certain statutory exceptions. Second, the claimant must record the mechanics lien. The timeliness of recording is typically determined either by the date of work improvement completion or by the date notice of completion was served or recorded. See MILLER & STARR, *supra* note 6, at §§ 28:40-28:64. Third, the mechanics lien claimant must file an action to foreclose on its mechanics lien. See *id.*

due to incorrect filing, the lien will nevertheless create a cloud on the homeowner's title and complicates future alienation.<sup>43</sup> The current mechanics lien statute is biased because the statute only protects the interests of sub-contractors,<sup>44</sup> and ignores the fundamental property interests of ordinary homeowners.

### **B. The California Mechanics Lien Statute is Inconsistent with Public Policy**

The current California mechanics lien statute is the culmination of various statutes,<sup>45</sup> which were drafted to enforce the mechanics lien right.<sup>46</sup> The mechanics lien statute implements a policy intended to protect sub-contractors<sup>47</sup> against the unjust enrichment of a homeowner.<sup>48</sup> This policy stems from a recognition that the construction industry, characterized by independent contractors, contributes to the project without having a direct contractual

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<sup>43</sup> See, e.g., *Connolly Dev., Inc. v. Superior Court*, 17 Cal. 3d 803, 839 (1976) (Richardson, J., dissenting) (“[A] mechanics’ lien most certainly intrudes, and in a major way, upon his incidents of ownership. Following imposition of the mechanics’ lien, the debtor may enjoy his fireplace but he may not sell his home. He may tend his garden, but he may not borrow on his property.”); Justin Sweet, *A View from the Tower*, 18 CONSTR. LAW. 47, 47 (1999) (“[F]iling of dubious liens . . . can act as a clog on any attempt the owner may make to sell his land and force him to ‘pay up.’”).

<sup>44</sup> E.g., *Connolly Dev.*, 17 Cal. 3d at 827.

<sup>45</sup> These statutes were drafted when a single contractor completed a construction project for a single employer. Today, courts apply these statutes to a radically altered industry. Although the contractors’ right superseded landowners’ rights, the statute must be amended to provide protection to a fully paying homeowner when the direct contractor fails to pay the sub-contractor.

<sup>46</sup> See, e.g., CAL. CONST. art. XIV, § 3; 2 KENT, COMMENTARIES \*634 (12th ed. 1873); PHILLIPS, MECHANICS’ LIENS \*16 (1883); *Connolly Dev.*, 17 Cal. 3d at 806.

<sup>47</sup> Sub-contractors are among the class of construction workers protected by the statute. See CAL. CIV. CODE § 8400.

<sup>48</sup> The philosophy behind the mechanics lien statute is to protect the working class. The statute is based on the principle of laissez faire economics and freedom to contract. Laborers during earlier eras did not have a means to retain counsel to collect debt through their improvement to an owner’s property. J. David Sackman, *Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds*, 20 BERKELEY J. EMP. & LAB. L. 254, 257 (1999).

relationship with the homeowner.<sup>49</sup> In addition, the statute protects the construction industry by promoting development of property.<sup>50</sup>

If the policy behind the statute was to prevent unjust enrichment and to protect the construction industry, these purposes have not been achieved. Under the current statute, a sub-contractor can file a lien on a homeowner's property if he does not want to sue the direct contractor for nonpayment. The most common scenario is that the homeowner has already paid the direct contractor in full, and the direct contractor then fails to pay the sub-contractor.<sup>51</sup> In such a situation, the statute unreasonably subjects the homeowner to a financial burden by commanding the homeowner to pay the sub-contractor.<sup>52</sup>

Further, the mechanics lien statute is remedial in nature and should be "liberally construed, with a view to effect its objects and to promote justice."<sup>53</sup> However, applying the current mechanics lien statute in the context of small-scale home improvements would not promote justice, thereby defeating the purpose of the statute. There is no justice when the statute essentially commands a homeowner to pay twice for the same work. From the perspective of a homeowner who has to pay twice, the sub-contractor is unjustly enriched by doing business with a business partner who is untrustworthy.

Homeowners likely do not possess knowledge of business and construction law. Therefore, it is unreasonable to expect them to navigate through the complexity of the mechanics lien law to avoid the Double Liability Problem. Seasoned attorneys specializing in construction law recognize that California's mechanics lien law is a complex area of law with many intricacies.<sup>54</sup> Even if homeowners were knowledgeable in construction law, the statute would make them hesitant to contract for home improvements. This fear would discourage small-scale home improvements and decrease the number of jobs in the construction industry.

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<sup>49</sup> *Mechanics Lien Law*, *supra* note 34, at 553.

<sup>50</sup> *See Double Liability*, *supra* note 2, at 283.

<sup>51</sup> *See id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Continental Bldg. & Loan Ass'n v. Hutton*, 144 Cal. 609, 611 (1904).

<sup>54</sup> *See* William "Fritz" Pahland, *Everything Old Is New Again: Impact of SB 189 on Mechanics' Lien Law*, 21 No. 4 MILLER & STARR, REAL ESTATE NEWSALERT 1 (Mar. 2011 Westlaw).

California's mechanics lien statute essentially treats ordinary homeowners as the people with the deepest pockets, who should be liable to the sub-contractor for non-payment regardless of their reasons. However, this assumption is unsupported because most modern homeowners do not have deep pockets. Applying an archaic mechanics lien statute that assumes all landowners have deep pockets is unfounded.

In 2011, per capita personal income in California was approximately \$43,647 per year or \$3,637.25 per month, before taxes.<sup>55</sup> For the same time period, the average housing price in California was approximately \$300,000, with a down payment of approximately \$50,000. A homeowner in California with good credit could have gotten a 30-year-fixed mortgage at an average interest rate of 5%. With this data, monthly mortgage payments would be calculated to be approximately \$1,700 per month.<sup>56</sup> With an average monthly income of \$3,637.25, the disposable income of an average person would be approximately \$1,937. This disposable income generally could be used for other necessities such as car payments, insurance, cell phones, or cable television. Accordingly, these calculations suggest that an ordinary homeowner's pockets are not as deep as they used to be. To afford a small-scale home improvement, like a kitchen remodeling, it is likely that an ordinary homeowner would have to save money for many months.

Another no-longer-valid assumption is the theory that a homeowner should be held liable because the homeowner has a duty to ensure the direct contractor pays the sub-contractor. Even if the homeowner undertakes such a duty, the actions of the homeowner do not necessarily affect the actions of a direct contractor. Checking a direct contractor's past records, such as his credit report and license status<sup>57</sup> does not reveal anything about how the contractor will act in a

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<sup>55</sup> Based on data from the California Department of Finance. See CALIFORNIA DEPARTMENT OF FINANCE, *Financial & Economic Data*, [http://www.dof.ca.gov/html/fs\\_data/latestecondata/FS\\_Income.htm](http://www.dof.ca.gov/html/fs_data/latestecondata/FS_Income.htm) (last visited Oct. 18, 2013).

<sup>56</sup> Monthly mortgage payments are calculated with a mortgage calculator. See MORTGAGE CALCULATOR, <http://www.mortgagecalculator.org/> (last visited Oct. 18, 2013).

<sup>57</sup> The California's Contractors State License Board provides a website where homeowners can look up contractors' license status. See CONTRACTORS STATE LICENSE BOARD, <https://www2.cslb.ca.gov/OnlineServices/CheckLicenseII/CheckLicense.aspx> (last visited Oct. 18, 2013).

particular occasion. The record would only be indicative, and is not a guarantee.<sup>58</sup> A direct contractor's insolvency would still expose a homeowner to double liability. Even the most diligent homeowner who secures a trustworthy contractor may encounter unanticipated circumstances such as the direct contractor declaring bankruptcy.<sup>59</sup>

### **C. The California Mechanics Lien Statute is Inconsistent with the Principle of Due Process**

California's mechanics lien statute raises significant due process questions<sup>60</sup> because the notice requirement appears insufficient to satisfy procedural due process requirements. In the context of prejudgment remedies, the United States Supreme Court invalidated a Wisconsin wage garnishment statute.<sup>61</sup> Similarly, the California Supreme Court has invalidated many statutes concerning prejudgment remedies on the grounds that due process was lacking.<sup>62</sup> Although similar to a prejudgment remedy, the mechanics lien statute has never been invalidated because the California legislature considers due process sufficient through the notice requirement.<sup>63</sup>

While the notice requirement gives a homeowner notice of the involvement of other parties in the improvement of the homeowner's property, the notice requirement is not useful in small-scale home improvement projects.<sup>64</sup> The identification of potential lien claimants does not lead to meaningful communication between the property owner and various parties involved with small-scale home improvements.<sup>65</sup> Consequently, a homeowner cannot ensure that the direct contractor will pay the sub-contractor.<sup>66</sup> It is just not practical

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<sup>58</sup> Boylan, *supra* note 22, at 343.

<sup>59</sup> For example, a contractor with an outstanding record may suddenly experience an unanticipated bankruptcy as a result of a marital dissolution.

<sup>60</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, *without due process of law* . . . .”) (emphasis added).

<sup>61</sup> *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (holding that taking wages without a prior hearing is a denial of due process under the fourteenth amendment).

<sup>62</sup> *Randone v. Appellate Dep’t*, 488 P.2d 13, 14-15 (Cal. 1971).

<sup>63</sup> Boylan, *supra* note 22, at 346.

<sup>64</sup> *See Double Liability*, *supra* note 2, at 283.

<sup>65</sup> *See Schrader Iron Works, Inc. v. Lee*, 26 Cal. App. 3d 621, 628 (1972).

<sup>66</sup> *See Double Liability*, *supra* note 2, at 287. *See also* CAL. CIV. CODE §§ 8400–9566 (2005).

and feasible. The claimed protection by the notice requirement under the current statute is illusory.

When an ordinary homeowner realizes the nature of the mechanics lien, it is usually too late for the homeowner to take appropriate action.<sup>67</sup> Further, the notice of completion requirement<sup>68</sup> is seldom helpful. While the notice of completion may shorten the allowable time during which a sub-contractor can file a mechanics lien, ordinary homeowners are often unaware of the significance of another legal filing when a project is complete.<sup>69</sup> Seasoned lawyers still have to familiarize themselves with procedures and law regarding mechanics liens;<sup>70</sup> it is unreasonable to expect ordinary homeowners to be able do so.<sup>71</sup>

Other homeowner remedies that help justify the sufficiency of the due process requirement include the waiver and release bond,<sup>72</sup> the payment bond,<sup>73</sup> and retention.<sup>74</sup> However, these remedies are not appropriate remedies for ordinary homeowners because they are neither practical nor feasible. For instance, a release and payment bond will increase transactional cost.<sup>75</sup> For a small-scale home improvement, it is neither practical nor feasible to make a homeowner purchase a payment bond or a release bond.<sup>76</sup>

A payment bond is used for contracts for private large-scale improvements<sup>77</sup> and contracts for public work.<sup>78</sup> In the unlikely event that a homeowner is able to negotiate a payment bond with a

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<sup>67</sup> See *Double Liability*, *supra* note 2, at 287.

<sup>68</sup> CAL. CIV. CODE § 8400.

<sup>69</sup> Boylan, *supra* note 22, at 343.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> CAL. CIV. CODE §§ 8120–38 (2005).

<sup>73</sup> *Id.* at §§ 8600–14.

<sup>74</sup> *Id.* at § 8470.

<sup>75</sup> See JEFFREY RUSSELL, SURETY BONDS FOR CONSTRUCTION CONTRACTS 103 (2000) (demonstrating how the costs of a payment bond are calculated).

<sup>76</sup> See Sal Alfano, *Remodeling Cost vs. Value Report: 2011-12*, REMODELING MAGAZINE (Nov. 4, 2011), <http://www.remodeling.hw.net/remodeling-market-data/about-the-report.aspx/> (noting already high remodeling costs throughout the Pacific region of the United States).

<sup>77</sup> CAL. CIV. CODE §§ 8600–14.

<sup>78</sup> *Id.* at §§ 9550–54, 9566.

contractor, the direct contractor would have to pay the cost of the bond. Consequently, the direct contractor will likely pass that transaction cost to the homeowner by means of a higher bill.

A homeowner can use retention to keep a portion of the payment for forty-five days after a completion notice is filed, assuming that the homeowner knows how to file one. Without filing the notice of completion, the homeowner would not be able to discover any potential lien that should be filed within a thirty-day period after completion. However, homeowners do not know the intricacies of these provisions unless they hire a lawyer specializing in construction law. Ordinary homeowners seldom take these legal precautions when undertaking a small-scale home improvement project.<sup>79</sup> Common sense would dictate that there is no reasonable expectation for a homeowner to take those extraordinary measures.<sup>80</sup>

The notice requirement may have provided some protection for landowners in 1850<sup>81</sup> because the legal counsel of landowners would know how to protect the landowners when liens were filed on the landowners' property. However, for ordinary homeowners in small-scale projects in 2013, the notice requirement may not provide any protection because they do not have the finances to afford legal counsel to protect their rights. Therefore, the current statute raises significant due process questions as applied.

#### **D. The California Mechanics Lien Statute is Inconsistent with Contract Principles**

A mechanics lien is a statutory remedy that gives a sub-contractor the right to file a lien, where the sub-contractor otherwise had no contract with a homeowner.<sup>82</sup> Restitution is a common law remedy giving relief to a sub-contractor where the sub-contractor otherwise would not have a contract with a homeowner.<sup>83</sup> The mechanics lien<sup>84</sup>

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<sup>79</sup> See *Double Liability*, *supra* note 2, at 286.

<sup>80</sup> See *id.* at 286–87.

<sup>81</sup> *Id.*

<sup>82</sup> *Forsgren Assocs., Inc. v. Pac. Golf Cmty. Dev. LLC*, 182 Cal. App. 4th 135, 149 (2010).

<sup>83</sup> *Int'l Paper Co. v. Futhey*, 788 S.W.2d 303, 306 (Mo. Ct. App. 1990).

<sup>84</sup> *Forsgren Assocs., Inc.*, 182 Cal. App. 4th at 149.

and restitution<sup>85</sup> have the same purpose: to prevent unjust enrichment.<sup>86</sup>

Under the common law, restitution recovery is fact-specific.<sup>87</sup> The standard is simply to prevent unjust enrichment.<sup>88</sup> Therefore, if courts do not find unjust enrichment, the courts will not grant restitution as a remedy.<sup>89</sup> Additionally, a sub-contractor may not recover under unjust enrichment for benefits conferred on a homeowner's property when the sub-contractor has no direct contract with the property owner.<sup>90</sup> In a small-scale home improvement context, a homeowner is not unjustly enriched when the homeowner has paid the direct contractor in full.<sup>91</sup>

In *Lee Brothers Contractors v. Christy Park Baptist Church*,<sup>92</sup> the Court examined the requirements for restitution when a homeowner pays a direct contractor, but the direct contractor fails to pay a sub-contractor.<sup>93</sup> The *Lee* Court stated that “[r]estitution is based primarily on the concept of unjust enrichment.”<sup>94</sup> The Court further stated that unjust enrichment occurs when a benefit is conferred and retained without payment.<sup>95</sup> Payment or nonpayment by the owner determines whether restitution should be granted to prevent unjust enrichment. The sub-contractor must plead and prove non-payment by the owner to establish a cause of action for restitution.<sup>96</sup>

Similarly, in *International Paper Company v. Futhey*,<sup>97</sup> the Court held that where a landowner has paid a direct contractor for the

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<sup>85</sup> *Int'l Paper Co.*, 788 S.W.2d at 306.

<sup>86</sup> *See id.*; *Forsgren Assocs., Inc.*, 182 Cal. App. 4th at 149–150; *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. Ct. App. 1984).

<sup>87</sup> *See, e.g.*, *Rogers v. Whitson*, 228 Cal. App. 2d 662, 673 (1964); *Lee Bros. Contractors v. Christy Park Baptist Church*, 706 S.W.2d 608, 609 (Mo. Ct. App. 1986); *Int'l Paper Co.*, 788 S.W.2d at 306.

<sup>88</sup> *Green Quarries, Inc.*, 676 S.W.2d at 264.

<sup>89</sup> *See, e.g.*, *Lee Bros. Contractors*, 706 S.W.2d at 608.

<sup>90</sup> *Rogers*, 228 Cal. App. 2d at 673.

<sup>91</sup> *See Double Liability*, *supra* note 2, at 330. *See also* *Truestone, Inc. v. Simi West Indus. Park II*, 163 Cal. App. 3d 715, 724 (1984).

<sup>92</sup> *See Lee Bros. Contractors*, 706 S.W.2d at 608.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 609.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Int'l Paper Co. v. Futhey*, 788 S.W.2d 303 (Mo. Ct. App. 1990).



materials by paying the contract price, the landowner is not unjustly enriched.<sup>98</sup> Although the sub-contractor remains unpaid and thus suffers a detriment, equity will not require the landowner to pay twice.<sup>99</sup>

In the context of small-scale home improvements, the effect of a mechanics lien and the effect of restitution are essentially the same.<sup>100</sup> Enforcing a mechanics lien forces a homeowner to pay restitution. In both circumstances, the homeowner receives the benefit of the labor provided by the sub-contractor. In both circumstances, notwithstanding the fact that the sub-contractor is not in privity with the homeowner, the homeowner is forced to reverse that benefit.<sup>101</sup> In the case of a mechanics lien, the homeowner is required by statute to pay the sub-contractor to clear a cloud on the homeowner's title or to avoid foreclosure.<sup>102</sup> In the case of restitution, the homeowner may be required to pay the sub-contractor for the benefit received from the sub-contractor's labor.<sup>103</sup>

California's mechanics lien statute is inconsistent with the contract principle against unjust enrichment. In the context of small-scale home improvements, the risk of loss is unfairly shifted to homeowners. If the purpose of restitution is to prevent unjust enrichment,<sup>104</sup> forcing a mechanics lien on a homeowner is unjust enrichment from the perspective of the homeowner. The sub-contractor is unjustly enriched because, instead of losing money for entering into a contract with an untrustworthy business partner, the sub-contractor can recoup his loss by forcing the homeowner to pay for the sub-contractor's poor business judgment.

In the context of small-scale home improvements, the statute violates substantive principles of contract law. The statute enforces the mechanics lien right by violating the principle of restitution,<sup>105</sup> the

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<sup>98</sup> *Id.* at 306.

<sup>99</sup> *Id.*

<sup>100</sup> *See, e.g.,* *Rogers v. Whitson*, 228 Cal. App. 2d 662, 673 (1964); *Lee Bros. Contractors*, 706 S.W.2d at 609; *Int'l Paper Co.*, 788 S.W.2d at 306-07.

<sup>101</sup> *See, e.g.,* *Forsgren Assocs., Inc. v. Pac. Golf Cmty Dev. LLC*, 182 Cal. App. 4th 135, 149-150 (2010); *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. Ct. App. 1984).

<sup>102</sup> *See Double Liability*, *supra* note 2, at 287.

<sup>103</sup> *Int'l Paper Co.*, 788 S.W.2d at 306.

<sup>104</sup> *Green Quarries, Inc.*, 676 S.W.2d at 264.

<sup>105</sup> *See Lee Bros. Contractors*, 706 S.W.2d at 608.

purpose of which is to prevent unjust enrichment. Application of the principle of restitution to determine whether a homeowner should pay a sub-contractor for improvement provided by the sub-contractor would lead to the conclusion that the sub-contractor is not entitled to payment.<sup>106</sup> Nevertheless, the statute grants the sub-contractor a remedy under the cloak of a mechanics lien. Thus, the California legislature allows a remedy<sup>107</sup> that would otherwise be impermissible under common law.<sup>108</sup>

The California legislature justifies the mechanics lien statute based on public policy.<sup>109</sup> However, the public policy reason for which the statute was enacted in the early eighteenth century no longer applies to the context of small-scale home improvements between ordinary homeowners and sub-contractors.

#### IV. PROPOSAL

The California legislature should treat such unfortunate instances where the direct contractor fails to fulfill his obligation to the sub-contractor as a foreseeable loss. This foreseeable loss should be considered as a reasonable cost of doing business. Instead of placing a burden on ordinary homeowners, the burden should be placed on sub-contractors to compel said sub-contractors to select business partners with due diligence. Under the current statute, sub-contractors do not have an incentive to check the trustworthiness of direct contractors because of the unconditional protection of the statute.<sup>110</sup> If not amended, the statute will continue to encourage sub-contractors to do business irresponsibly. For example, in small projects such as remodeling, plumbing, or roofing, a sub-contractor would not bother to

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<sup>106</sup> See, e.g., *Breckenridge Material Co. v. Allied Home Corp.*, 950 S.W.2d 340 (Mo. Ct. App. 1997).

<sup>107</sup> Compare CAL. CIV. CODE § 8400 (2005), with *Lee Bros. Contractors*, 706 S.W.2d at 608, and *Rogers v. Whitson*, 228 Cal. App. 2d 662, 673 (1964), and *Int'l Paper Co.*, 788 S.W.2d at 306.

<sup>108</sup> See, e.g., *Lee Bros. Contractors*, 706 S.W.2d at 608; *Rogers*, 228 Cal. App. 2d at 673; *Int'l Paper Co.*, 788 S.W.2d at 306–07.

<sup>109</sup> See, e.g., *Sackman*, *supra* note 48, at 254; *See Double Liability*, *supra* note 2, at 283; *Mechanics Lien Law*, *supra* note 34, at 553.

<sup>110</sup> CAL. CIV. CODE § 8400.

check on the creditworthiness of the direct contractor because of the protection of the mechanics lien statute.<sup>111</sup>

Procedurally, the mechanics lien statute should be amended to allow a preliminary hearing once the lien is recorded.<sup>112</sup> During the hearing, if the lien is found to be invalid, the lien must be removed immediately.<sup>113</sup> This small change in procedure would ensure that a homeowner is given sufficient due process, if the statute is to compel the homeowner to pay the sub-contractor when the sub-contractor cannot collect from the direct contractor.

Substantively, the statute should be amended to require money be placed in escrow<sup>114</sup> to prevent sub-contractor non-payment. The statute should only apply to cases where the homeowner has not paid the direct contractor in full.<sup>115</sup> The statute should limit the amount of money claimed by a sub-contractor to an amount less than the amount the sub-contractor would have been entitled to under the contract between the sub-contractor and the direct contractor. This should be limited to a reasonable amount, and only after considering the interests of all parties being affected by the lien. After all, the sub-contractor should be held liable for his poor business judgment and should bear some of the financial burden. The statute should not give the sub-contractor the absolute benefit of collecting from the homeowner when the sub-contractor could not collect from the real culprit, the direct contractor.

Such an amendment would not undermine the legislative intent behind the mechanics lien statute, and at the same time would provide some protection for ordinary homeowners. Many states have codified the doctrine of *bona-fide* purchaser<sup>116</sup> to protect the interests of a

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<sup>111</sup> See *id.*; *Double Liability*, *supra* note 2, at 286.

<sup>112</sup> Boylan, *supra* note 22, at 353–54.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *Double Liability*, *supra* note 2, at 283.

<sup>116</sup> The ordinary meaning of a ‘*bona-fide* purchaser’ is “[o]ne who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; *one who has in good faith paid valuable consideration for property without notice of prior advance claims.*” (quoting BLACK’S LAW DICTIONARY 1271 (8th ed.1999) (emphasis added); see also U.C.C. § 2-403 (2013) (Power to Transfer; Good Faith Purchase of Goods; “Entrusting”). Under both common

person who purchases in good faith. Ordinary homeowners are like *bona-fide* purchasers<sup>117</sup> of the service, and their interests should be considered as well. Leaving ordinary homeowners without any protection after they have made full and good-faith payment is inequitable and must be remedied.

## V. CONCLUSION

California's mechanics lien statute is problematic in the context of small-scale home improvement because it fails to consider the interests of ordinary homeowners. While sophisticated parties often avoid the pitfalls of the mechanics lien through insurance, more vulnerable homeowners can be exposed to double liability.<sup>118</sup> California's mechanics lien statute raises significant due process questions; it awards a property right to a third party without hearing, and places the onus on the homeowner to contest the lien. Even if the homeowner demonstrates that the direct contractor was paid, the homeowner can still be liable in violation of restitution principles. Therefore, California's mechanics lien statute should be amended.

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law and the U.C.C., a *bona-fide* purchaser is protected from prior claims of which the purchaser did not have knowledge.

<sup>117</sup> See U.C.C. § 2-403.

<sup>118</sup> See discussion *supra* Part III.B.